United States Sentencing Commission

2024-2025 Amendment Cycle

Public Comment on Proposed Amendments for Supervised Release and Drug Offenses

90 FR 8968

UNITED STATES SENTENCING COMMISSION

2024-2025 PUBLIC COMMENT ON PROPOSED AMENDMENTS FOR SUPERVISED RELEASE AND DRUG OFFENSES

90 FR 8968

Proposed Amendments to the Sentencing Guidelines (Preliminary)

January 24, 2025

This document collects the proposed amendments to the sentencing guidelines, policy statements, and commentary, in the "reader-friendly" form in which they were made available at the public meeting on January 24, 2025. As with all proposed amendments on which a vote to publish for comment has been made but not yet officially submitted to the Federal Register for formal publication, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to the Federal Register, official text of the proposed amendments as submitted will be posted on the Commission's website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register. In addition, an updated "reader-friendly" version of the proposed amendments as submitted will be posted on the Commission's website at www.ussc.gov.

The proposed amendments and issues for comment will be subject to a public comment period running through **March 3, 2025**, and a reply comment period running through **March 18, 2025**. Comments during the reply phase are limited to issues raised in the original comment period. Public comment received after the close of the comment period may not be considered. Further information on the submission of public comment will be provided in the forthcoming edition of the Federal Register referred to above. Such information will also be available at www.ussc.gov.

PROPOSED AMENDMENTS

1. SUPERVISED RELEASE

2. DRUG OFFENSES

SUPPLEMENTARY INFORMATION

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* Rules 2.2 and 4.4 of the Commission's Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See* Rule 2.2; 28 U.S.C. § 994(p).

The proposed amendments in this document are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In addition to the issues for comment set forth in the proposed amendments, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this document should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

Proposed Amendment: SUPERVISED RELEASE

Synopsis of Proposed Amendment: The Sentencing Reform Act of 1984 establishes a framework for courts to order supervised release to be served after a term of imprisonment. *See* 18 U.S.C. § 3583. For certain offenses, the court is statutorily required to impose a term of supervised release. *See id.* This framework aims to "assure that [those] who will need post-release supervision will receive it" while "prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them." See S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983); *see also Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it.").

The length of the term of supervised release that a court may select depends on the class of the offense of conviction. The term may be not more than five years for a Class A or Class B felony, not more than three years for a Class C or Class D felony, and not more than one year for a Class E felony or a misdemeanor (other than a petty offense). *See* 18 U.S.C. § 3583(b). There is an exception for certain sex offenses and terrorism offenses, for which the term of supervised release may be up to life. *See* 18 U.S.C. § 3583(j) and (k).

If a court imposes a term of supervised release, the court must order certain conditions of supervised release, such as that the defendant not commit another crime or unlawfully possess a controlled substance during the term, and that the defendant make restitution. *See* 18 U.S.C. § 3583(d). The court may order other discretionary conditions it considers appropriate, as long as the condition meets certain criteria. *See id.* In determining whether to impose a term of supervised release and the length of the term and conditions of supervised release, the court must consider certain 18 U.S.C. § 3553 factors. *See* 18 U.S.C. § 3583(c).

Courts are authorized, under certain conditions, to extend or terminate a term of supervised release, or modify, enlarge or reduce the conditions thereof. *See* 18 U.S.C. § 3583(f). Before doing so, the court must consider the 18 U.S.C. § 3553 factors listed above. *See id.* For certain violations, courts are required to revoke supervised release. *See* 18 U.S.C. § 3583(g).

The Sentencing Commission's policies regarding supervised release are included in Part D of Chapter Five and Part B of Chapter Seven of the *Guidelines Manual*. This proposed amendment contains two parts revising those policies:

Part A would amend Part D of Chapter Five, which addresses the imposition of a term of supervised release. Issues for comment are also provided.

Part B would amend Chapter Seven, which addresses the procedures for handling a violation of the terms of probation and supervised release. Issues for comment are also provided.

The Commission is considering whether to implement one or both parts, as they are not mutually exclusive.

(A) Imposition of a Term of Supervised Release

Synopsis of Amendment: Chapter Five, Part D of the *Guidelines Manual* covers supervised release, including the imposition decision itself, the length of a term of supervised release, and the conditions of supervised release.

Section 5D1.1 (Imposition of a Term of Supervised Release) governs the imposition of a term of supervised release. Under §5D1.1(a), a court shall order a term of supervised release (1) when it is required by statute or (2) when a sentence of more than one year is imposed. In any other case, §5D1.1(b) treats the decision to impose a term of supervised release as discretionary. The commentary to §5D1.1 describes the factors to consider in determining whether to impose a term of supervised release: (1) certain 18 U.S.C. § 3553 factors, which the court is statutorily required to consider (*see* 18 U.S.C. § 3583(c)); (2) an individual's criminal history; (3) whether an individual is an abuser of controlled substances or alcohol; and (4) whether an offense involved domestic violence or stalking. USSG §5D1.1 comment. (n.3).

Subsection 5D1.1(c) provides an exception to the rule in §5D1.1(a), directing that "[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." However, Application Note 5 directs that a court should consider imposing a term of supervised release if "it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case."

Section 5D1.2 (Term of Supervised Release) governs the length of a term of supervised release. First, §5D1.2(a) sets forth the recommended terms of supervised release for each classification of offense: (1) two to five years for an individual convicted of a Class A or B felony; (2) one to three years for an individual convicted of a Class C or D felony; and (3) one year for an individual convicted of a Class E felony or a Class A misdemeanor. Second, for offenses involving terrorism or a sex offense, §5D1.2(b) provides for a term of supervised release up to life, and a policy statement further directs that for a sex offense, as defined in Application Note 1, the statutory maximum term of supervised release is recommended. Lastly, §5D1.2(c) instructs that the term of supervised release shall not be less than any statutorily required term of supervised release.
The Commentary to §5D1.2 provides further guidance for setting a term of supervised release. Application Note 4 directs that the factors to be considered in selecting the length of a term of supervised release are the same as those for determining whether to impose such a term. Application Note 5 states that courts have "authority to terminate or extend a term of supervised release" and encourages courts to "exercise this authority in appropriate cases."

Section 5D1.3 (Conditions of Supervised Release) sets forth the mandatory, "standard," "special," and additional conditions of supervised release. It provides a framework for courts to use when imposing the standard, special, and additional conditions—those considered "discretionary."

The Commission has received feedback from commenters that the Guidelines should provide courts with greater discretion to make determinations regarding the imposition of supervised release that are based on an individualized assessment of the defendant. Additionally, a bipartisan coalition in Congress has sought to address similar concerns. *See e.g.,* Safer Supervision Act of 2023, S.2681, 118th Cong. (2023) and H.R. 5005, 118th Cong. (1st Sess. 2023).

Part A of the proposed amendment seeks to revise Chapter Five, Part D to accomplish two goals. The first is to provide courts greater discretion to impose a term of supervised release in the manner it determines is most appropriate based on an individualized assessment of the defendant. The second is to ensure the provisions in Chapter Five "fulfill[] rehabilitative ends, distinct from those of incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000).

The proposed amendment would make a number of changes to the supervised release provisions in Chapters Five to serve these goals.

First, the proposed amendment would add introductory commentary to Part D of Chapter Five expressing the Commission's view that, when making determinations regarding supervised release, courts should assess a wide range of factors to ensure its decisions fulfill the rehabilitative needs of the defendant and protect the public from further crimes of the defendant .

Second, the proposed amendment would amend the provisions of §5D1.1 addressing the imposition of a term of supervised release. The proposed amendment would remove the requirement that a court impose a term of supervised release when a sentence of imprisonment of more than one year is imposed, so a court would be required to impose supervised release only when required by statute. For cases in which the decision whether to impose supervised release is discretionary, the court may order a term of supervised release when warranted by an individualized assessment of the need for supervision. Additionally, the court should state the reason for its decision on the record.

Third, the proposed amendment would amend §5D1.2, which addresses the length of the term of supervised release. The proposed amendment would remove the provisions requiring a minimum term of supervised release of two years for a Class A or B felony and one year for a Class C, D, or E felony or Class A misdemeanor. Instead, the proposed amendment would require the court to conduct an individualized assessment to determine the length of the term of supervised release, which must not exceed the maximum term allowed by statute. It would remove the policy statement recommending a supervised release term of life for sex offense cases and add a policy statement that the court should state on the record its reasons for selecting the length of the term of supervised release. Fourth, the proposed amendment would amend §5D1.3, which addresses the conditions of supervised release. It would add a provision stating that courts should conduct an individualized assessment to determine what discretionary conditions are warranted. It brackets the possibility of redesignating "standard" conditions as "examples of common conditions" and brackets either that such conditions may be warranted in some appropriate cases or may be modified, omitted, or expanded in appropriate cases. It would also add an example of a "special" condition that would require a defendant who has not obtained a high school or equivalent diploma to participate in a program to obtain such a diploma.

Finally, the proposed amendment would add a new policy statement at §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)) addressing a court's authority to extend or terminate a term of supervised release or modify the conditions thereof. It would encourage a court, as soon as practicable after a defendant's release from imprisonment, to conduct an individualized assessment to determine whether it is warranted to modify, reduce, or enlarge the conditions of supervised release. Additionally, any time after the expiration of one year of supervised release, it would encourage a court to terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and the interest of justice. The proposed amendment provides an option to list factors for a court to consider when determining whether to terminate supervised release. It would also provide that a court, any time before the expiration of a term of supervised release, may extend the term in a case in which the maximum term was not imposed.

Conforming changes are also made to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), the Commentary to §4B1.5 (Repeat and Dangerous Sex Offenders Against Minors), §5B1.3 (Conditions of Probation), §5H1.3 (Mental and Emotional Conditions (Policy Statement)), and §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement).

Issues for comment are also provided.

Proposed Amendment:

PART D — SUPERVISED RELEASE

Introductory Commentary

The Sentencing Reform Act of 1984 requires the court to assess a wide range of factors "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release." 18 U.S.C. § 3583(c). These determinations aim to make the imposition and scope of supervised release "dependent on the needs of the defendant for supervision." *See* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983). In conducting such an individualized assessment, the court can "assure that [those] who will need post-release supervision will receive it" while "prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them." *Id.* at 54; *see also Johnson v. United States,* 529 U.S. 694, 701 (2000) ("Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it. . . . Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most."). Supervised release "fulfills rehabilitative ends, distinct from those served by incarceration," *United States v. Johnson*, 529 U.S. 53, 59 (2000). Accordingly, a court should consider whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety. *See* 18 U.S.C. §§ 3583(c), 3553(a)(2)(C));

see also S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983) (indicating that a "primary goal of [a term of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release").

* * *

§5D1.1. Imposition of a Term of Supervised Release

(a) The court shall order a term of supervised release to follow imprisonment—

~~(1) —~~when required by statute (*see* 18 U.S.C. § 3583(a))~~; or~~

~~(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed~~.

(b) ~~The~~When a term of supervised release is not required by statute, the court ~~may~~should order a term of supervised release to follow imprisonment ~~in any other case~~when, and only when, warranted by an individualized assessment of the need for supervision. ~~*See* 18 U.S.C. § 3583(a).~~

(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

(d) The court should state on the record the reasons for imposing **[**or not imposing**]** a term of supervised release.

Commentary

Application Notes:

1. ~~**Application of Subsection (a).** Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.~~

2. ~~**Application of Subsection (b)**~~**Individualized Assessment**. ~~Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.~~

3. ~~**Factors to Be Considered.**~~

~~(A) **Statutory Factors.** —~~The statutory framework of supervised release aims to "assure that [those] who will need post-release supervision will receive it" while "prevent[ing] probation

system resources from being wasted on supervisory services for releasees who do not need them." *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983). To that end, 18 U.S.C. § 3583(c) requires the court to, "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release," consider the following:

(~~i~~A) the nature and circumstances of the offense and the history and characteristics of the defendant (18 U.S.C. § 3553(a)(1));

(~~ii~~B) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(B)–(D));

(C) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines (18 U.S.C. § 3553(a)(4));

(D) any pertinent policy statement issued by the Sentencing Commission (18 U.S.C. § 3553(a)(5));

(~~iii~~E) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (18 U.S.C. § 3553(a)(6)); and

(~~iv~~F) the need to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7)).

See 18 U.S.C. § 3583(c).

~~(B)~~2. **Criminal History.**—The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

~~(C)~~3. **Substance Abuse.**—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. *See* §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

~~(D)~~4. **Domestic Violence.**—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. *See* 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.

~~4~~5. **Community Confinement or Home Detention Following Imprisonment.**—A term of supervised release must be imposed if the court wishes to impose a "split sentence" under which the defendant serves a term of imprisonment followed by a period of community confinement or home detention pursuant to subsection (c)(2) or (d)(2) of §5C1.1 (Imposition of a Term of Imprisonment). In such a case, the period of community confinement or home detention is imposed as a condition of supervised release.

~~5~~6. **Application of Subsection (c).**—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

* * *

§5D1.2. Term of Supervised Release

(a) ~~Except as provided in subsections (b) and (c), if~~If a term of supervised release is ordered, ~~the length of the term shall be:~~the court shall conduct an individualized assessment to determine the length of the term, not to exceed the relevant statutory maximum term.

~~(1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. § 3583(b)(1).~~

~~(2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. § 3583(b)(2).~~

~~(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. *See* 18 U.S.C. § 3583(b)(3).~~

(b) ~~Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—~~

~~(1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or~~

~~(2) a sex offense.~~

~~(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.~~

~~(c)~~ The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

(c) The court should state on the record the reasons for the length of the term imposed.

Commentary

Application Notes:

1. ~~**Definitions.** For purposes of this guideline:~~

~~"***Sex offense***" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).~~

~~"***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.~~ **Safety Valve Cases.**—A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. *See* 18 U.S.C. § 3553(f). In such a case, the term of supervised release ~~shall be~~ is determined under subsection (a).

~~3~~2. **Substantial Assistance Cases.**—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute ~~or the guidelines~~. *See* 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

~~4~~3. ~~**Factors Considered**~~**Individualized Assessment.**—~~The~~When conducting an individualized assessment to determine the length of a term of supervised release, the factors to be considered ~~in determining the length of a term of supervised release~~ are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. § 3583(c); Application Note ~~3~~1 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is ~~long enough~~sufficient to address the purposes of imposing supervised release on the defendant.

~~5~~4. **Early Termination and Extension.**—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. § 3583(e)(1), (2); §5D1.4 (Modification and Termination of Supervised Release (Policy Statement)). ~~The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.~~

~~6. **Application of Subsection (c).** Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines.~~

~~For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.~~

~~The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum — a life term of supervised release — be imposed.~~

~~**Background:** This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.~~

* * *

§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 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)).

(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. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; 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) 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 (34 U.S.C. § 40702).

(b) DISCRETIONARY CONDITIONS

(1) IN GENERAL.—The court ~~may impose~~should conduct an individualized assessment to determine what, if any, other conditions of supervised release are warranted.

Such conditions are warranted to the extent that ~~such conditions~~ they (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. *See* 18 U.S.C. § 3583(d).

(e2) **[**"STANDARD"**]** **[**EXAMPLES OF COMMON**]** CONDITIONS (POLICY STATEMENT)

The following are **[**"standard" conditions of supervised release, which the court may modify, expand, or omit in appropriate cases**]** ~~are recommended for supervised release~~**[** examples of common conditions of supervised release that may be warranted in appropriate cases**]** **[**~~. Several of the conditions are expansions of the conditions required by statute~~**]**:

(~~1~~A) 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, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(~~2~~B) 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.

(~~3~~C) 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.

(~~4~~D) The defendant shall answer truthfully the questions asked by the probation officer.

(~~5~~E) 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.

(~~6~~F) 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.

(~~7~~G) 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.

(~~8~~H) 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.

(~~9~~I) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(~~10~~J) 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).

(~~11~~K) 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.

(~~12~~L) 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~~M) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(~~d~~3) "SPECIAL" CONDITIONS (POLICY STATEMENT)

~~The~~One or more conditions from the following non-exhaustive list of "special" conditions of supervised release ~~are recommended~~may be appropriate in a particular case, including in the circumstances

described ~~and, in addition, may otherwise be appropriate in particular cases~~:

(~~1~~A) SUPPORT OF DEPENDENTS

(~~A~~i) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(~~B~~ii) 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~~B) 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~~C) 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~~D) SUBSTANCE ABUSE

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (~~A~~i) 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~~ii) a condition specifying that the defendant shall not use or possess alcohol.

(~~5~~E) 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~~F) DEPORTATION

If (~~A~~i) 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~~ii) 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~~G) 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~~i) 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~~ii) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(~~C~~iii) 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~~H) 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.

(I) HIGH SCHOOL OR EQUIVALENT DIPLOMA

If the defendant has not obtained a high school or equivalent diploma, a condition requiring the defendant to participate in a program to obtain such a diploma.

~~(c) ADDITIONAL CONDITIONS (POLICY STATEMENT)~~

~~The following "special conditions" may be appropriate on a case-by-case basis:~~

(~~1~~J) 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~~K) 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~~L) COMMUNITY SERVICE

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

(~~4~~M) OCCUPATIONAL RESTRICTIONS

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

(~~5~~N) 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~~O) 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 Notes:

1. **Individualized Assessment.**—When conducting an individualized assessment under this section, the court must consider the same factors used to determine whether to impose a term of supervised release, and shall impose conditions of supervision not required by statute only to the extent such conditions meet the requirements listed at § 3583(d). *See* 18 U.S.C. § 3583(c), (d); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

2. **Application of Subsection ~~(e)(4)~~(b)(2)(D).**—Although the condition in subsection ~~(e)(4)~~(b)(2)(D) 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.

3. **Application of Subsection (b)(3)(G).**— For purposes of subsection (b)(3)(G):

"***Sex offense***" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

"***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.

* * *

§5D1.4. Modification, Early Termination, and Extension of Supervised Release (Policy Statement)

(a) MODIFICATION OF CONDITIONS.—At any time prior to the expiration or termination of the term of supervised release, the court **[**should**][**may**]** modify, reduce, or enlarge the conditions of supervised release whenever warranted by an individualized assessment of the appropriateness of existing conditions. *See* 18 U.S.C. § 3583(e)(2). The court is encouraged to conduct such an assessment as soon as practicable after the defendant's release from imprisonment.

(b) EARLY TERMINATION.—Any time after the expiration of one year of supervised release and after an individualized assessment of the need for ongoing supervision, the court **[**should**][**may**]** terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and the interest of justice. *See* 18 U.S.C. § 3583(e)(1).

[In determining whether termination is warranted, the court should consider the following non-exhaustive list of factors:

(1) any history of court-reported violations over the term of supervision;

(2) the ability of the defendant to lawfully self-manage beyond the period of supervision;

(3) the defendant's substantial compliance with all conditions of supervision;

(4) the defendant's engagement in appropriate prosocial activities and the existence or lack of prosocial support to remain lawful beyond the period of supervision;

(5) a demonstrated reduction in risk level over the period of supervision; and

(6) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's record while incarcerated, the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information provided by the victims of the offense, and other factors the court finds relevant.**]**

The court is encouraged to conduct such assessments upon the expiration of one year of supervision and periodically throughout the term of supervision thereafter.

(c) EXTENDING A TERM OF SUPERVISED RELEASE.—The court may, at any time prior to the expiration or termination of a term of supervised release, extend the term of supervised release if less than the maximum authorized term of supervised release was previously imposed and the extension is warranted by an individualized assessment of the need for further supervision. *See* 18 U.S.C. § 3583(e)(2).

Commentary

Application Notes:

1. **Individualized Assessment.**—When making an individualized assessment under this section, the factors to be considered are the same factors used to determine whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release). **[**In particular, the court is encouraged to consider (A) the defendant's needs and risks and the conditions of supervised release imposed at the original sentencing; and (B) the defendant's conduct in custody, post-release circumstances, and the availability of resources required for compliance with conditions (*e.g.*, the availability of treatment facilities).**]**

2. **Extension or Modification of Conditions.**—In a case involving an extension of the term or a modification of the conditions of supervised release, the court shall comply with Rule 32.1 of the Federal Rules of Criminal Procedure (Revoking or Modifying Probation or Supervised Release) and the provisions applicable to the initial setting of the terms and conditions of post-release supervision. *See* 18 U.S.C. § 3583(e)(2). In both situations, the Commission encourages the court to make its best effort to ensure that any victim of the offense **[**and of any violation of a condition of supervised release**]** is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

3. **Application of Subsection (c).**—Subsection (c) addresses a court's authority to extend a term of supervised release. In some cases, extending a term may be more appropriate than taking other measures, such as revoking the supervised release. For example, if a defendant violates a condition of supervised release, a court should determine whether extending the term would be more appropriate than revocation.

* * *

§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

* * *

Commentary

Application Notes:

* * *

8. **Supervised Release.—**

(A) **Exclusion Relating to Revocation.**—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) **Modification Relating to Early Termination.**—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of

imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). *See* §5D1.4 (Modification, Extension, and Early Termination of Supervised Release (Policy Statement)). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

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§4B1.5. Repeat and Dangerous Sex Offender Against Minors

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Commentary

Application Notes:

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[5. **Treatment and Monitoring.—**

~~(A) **Recommended Maximum Term of Supervised Release.**—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.~~

~~(B) **Recommended Conditions of Probation and Supervised Release.**—~~Treatment and monitoring are important tools for supervising offenders and ~~should~~may be considered as special conditions of any term of probation or supervised release that is imposed.**]**

[~~5. **Treatment and Monitoring.—**~~

~~(A) **Recommended Maximum Term of Supervised Release.**—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.~~

~~(B) **Recommended Conditions of Probation and Supervised Release.**—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.~~**]**

* * *

§5B1.3. Conditions of Probation

* * *

(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:

* * *

(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.

* * *

Commentary

Application Notes:

1. **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.

2. **Application of Subsection (d)(7).**—For purposes of subsection (d)(7):

"***Sex offense***" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

"***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.

* * *

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. *See also* Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; *e.g.*, participation in a mental health program (*see* §§5B1.3(d)(5) and 5D1.3~~(d)(5)~~(b)(3)(E)).

§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary physical impairment may be a reason to depart downward; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3~~(d)(4)~~ (b)(3)(D)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

Issues for Comment

1. The Commission has received feedback that courts should be afforded more discretion to tailor their supervised release decisions based on an individualized assessment of the defendant. At the same time, the Commission has received feedback that courts and probation officers would benefit from more guidance concerning the imposition, length, and conditions of supervised release.

    a. Part A of the proposed amendment would add language throughout Chapter Five, Part D (Supervised Release) directing courts that supervised release decisions should be based on an "individualized assessment" of the statutory factors listed in 18 U.S.C. § 3583(c)–(e) and remove recommended minimum terms of supervised release. The Commission seeks comment on whether the inclusion of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.

    b. The proposed amendment would maintain the Commentary to §5D1.1 (Imposition of a Term of Supervised Release) that directs courts to pay particular attention to a defendant's criminal or substance abuse history. In addition, new proposed guideline §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement))includes as a bracketed option a non-exhaustive list of factors that a court should consider in determining whether early termination of supervised release is warranted. The Commission seeks comment on whether such guidance should be retained or deleted and whether similar guidance should be included elsewhere. If the Commission provides further guidance, what should that guidance be?

    c. Is there any other approach the Commission should consider to provide courts with appropriate discretion while also including useful guidance, either throughout Chapter Five, Part D, or for certain guideline provisions?

2. Section 5D1.1(c) instructs that "[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." The Commission has received feedback that imposition of a term of supervised release in such cases varies substantially by jurisdiction, may be excessive, and may divert resources. Should the Commission amend §5D1.1(c) to further discourage the imposition of supervised release for individuals who are likely to be deported?

3. In §5D1.4, the proposed amendment provides an option to include a non-exhaustive list of factors for courts to consider when determining whether early termination is warranted. These factors are drawn from the Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* (Vol. 8E, Ch. 3, § 360.20, *available at* https://www.uscourts.gov/file/78805/download) and the Safer Supervision Act—a bipartisan bill introduced in the Senate and House of Representatives in the 118th Congress that would have amended 18 U.S.C. § 3583. *See* S. 2861, H.R. 5005. Are the listed factors appropriate? Should the Commission omit or amend any of the listed factors, or should it include other specific factors?

4. The First Step Act of 2018 (FSA), Pub. L. 115-391, allows individuals in custody who successfully complete evidence-based recidivism reduction programming or productive activities to earn time credits. *See* 18 U.S.C. § 3632(d)(4)(A). How those time credits are applied may depend on whether the defendant's sentence includes a term of supervised release. Specifically, the FSA provides "[i]f the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to [18 U.S.C. § 3583], the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under [18 U.S.C. § 3632]." 18 U.S.C. § 3624(g)(3).

   The Commission seeks comment on whether and how the proposed amendment's changes to supervised release may impact defendants' eligibility to benefit from the FSA earned time credits. Should the Commission make any additional or different changes to Chapter Five to avoid any unintended consequences that would impact a defendant's eligibility? If so, what changes should be made?

5. At §5D1.3 (Conditions of Supervised Release), the proposed amendment retains two general categories of discretionary conditions of supervised release without amending their substance—"standard" and "special" conditions. In doing so, the Commission brackets language that would alternatively refer to "standard" conditions as "examples of common conditions that may be warranted in appropriate cases." The proposed amendment also includes in its listing of "special" conditions those conditions that currently are labeled as "Additional Conditions." The Commission seeks comment on these proposals and on whether another approach is warranted.

6. The proposed amendment would establish a new policy statement at §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)), which, among other things, addresses a court's determination whether

to terminate a term of supervised release. The Commission seeks comment on whether it should provide that the completion of reentry programs (more information available at https://www.ussc.gov/education/problem-solving-court-resources), such as the Supervision to Aid Reentry Program in the Eastern District of Pennsylvania, should be considered by a court when determining whether to terminate the supervision.

4. Furthermore, the Commission seeks comment on whether the new policy statement at §5D1.4 should provide guidance to courts on the appropriate procedures to employ when determining whether to terminate a term of supervised release. For example, should the Commission recommend that courts make the determination pursuant to a full public proceeding, or is a more informal proceeding sufficient? In either case, should the Commission encourage courts to appoint counsel to represent the defendant? How might the Commission encourage courts to ensure that any victim of the offense (or of any violation of a condition of supervised release) is notified of the early termination consideration and afforded a reasonable opportunity to be heard? Are there other appropriate approached the Commission should recommend?

(B) Revocation of Supervised Release

Synopsis: Chapter Seven of the *Guidelines Manual* addresses violations of probation and supervised release by means of an introductory framework and a series of policy statements. The introduction to Chapter Seven, Part A explains the framework the *Guidelines Manual* uses to address violations of probation and supervised release. It describes the Commission's resolution of several issues. First, the Commission decided in 1990 to promulgate policy statements rather than guidelines because of the flexibility of this option. *See generally* USSG Ch.7, Pt.A. Next, "[a]fter lengthy consideration," the Commission adopted a "breach of trust" framework for violations of supervised release; the alternative option would have sanctioned individuals who committed new criminal conduct by applying the offense guidelines in Chapters Two and Three to the criminal conduct that formed the basis of the new violation, along with a recalculated criminal history score. *Id.* Under this approach, the "sentence imposed upon revocation [is] intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense." *Id.* Finally, despite some debate, the Commission opted to "develop a single set of policy statements for revocation of both probation and supervised release." *Id.* The Commission signaled that it intended ultimately to issue "revocation guidelines," but it has not done so. *Id.*

Section 7B1.1 (Classification of Violations (Policy Statement)) governs the classification of violations of supervised release. Grade A Violations consist of conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years. USSG §7B1.1(a)(1). Grade B Violations involve conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding on year. USSG §7B1.1(a)(2). Grade C Violations involve conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision. USSG §7B1.1(a)(3). In cases with more than one violation of the conditions of supervision, or a single violation with conduct constituting more than one offense, the grade of the violation is determined by the violation having the most serious grade. USSG §7B1.1(b).

Section 7B1.2 (Reporting of Violations of Probation and Supervised Release (Policy Statement)) concerns the reporting of violations of supervised release to the court. In cases of Grade A or B violations, §7B1.2(a) directs that the probation officer "shall" promptly report them to the court. For Grade C violations, the probation officer also "shall" promptly report them to the court unless the officer determines that (1) the violation is minor and not part of a continuing pattern, and (2) non-reporting will not present an undue risk to the individual or the public or be inconsistent with any directive of the court. USSG §7B1.2(b).

Section 7B1.3 (Revocation of Probation or Supervised Release (Policy Statement)) governs a court's options when it finds that a violation of the terms of supervised release have occurred. Upon the finding of a Grade A or B violation, the court shall revoke an individual's supervised release; upon the finding of a Grade C violation, the court may

either revoke supervised release, or it may extend the term of supervision and/or modify the conditions of supervision. USSG §7B1.3(a). When a court does revoke supervised release, §7B1.3(b) directs that the applicable range of imprisonment is the one set forth in §7B1.4. Subsection 7B1.3(c) provides that in the case of a Grade B or C violation, certain community confinement or home detention sentences are available to satisfy at least a portion of the sentence. Subsection 7B1.3(f) directs that any term of imprisonment imposed upon revocation shall be ordered to be served consecutively to any sentence of imprisonment the individual is serving, regardless of whether that other sentence resulted from the conduct that is the basis for the revocation. If supervised release is revoked, the court may also include an additional term of supervised release to be imposed upon release from imprisonment, but that term may not exceed statutory limits. USSG §7B1.3(g).

Section 7B1.4 (Term of Imprisonment (Policy Statement)) contains the revocation table, which sets forth recommended ranges of imprisonment based on the grade of violation and an individual's criminal history category. Increased sentencing ranges apply where the individual has committed a Grade A violation while also on supervised release following imprisonment for a Class A felony. USSG §7B1.4(a)(2). An asterisked note to the revocation table notes that the criminal history category to be applied is the one "applicable at the time the defendant originally was sentenced to a term of supervision." USSG §7B1.4(a)(2). Trumping mechanisms apply if the terms of imprisonment required by statute exceed or fall below the suggested range. USSG §7B1.4(b).

Subsection (b) of 7B1.5 (No Credit for Time Under Supervision (Policy Statement)) directs that upon revocation of supervised release, "no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision." An exception applies for individuals serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A. USSG §7B1.5(c).

Part B of the proposed amendment seeks to revise Chapter Seven to accomplish two goals. The first is to provide courts greater discretion to respond to a violation of a condition of probation or supervised release. The second is to ensure the provisions in Chapter Seven reflect the differences between probation and supervised release.

The proposed amendment revises the introductory commentary in Part A of Chapter Seven. It would add commentary explaining that the Commission has updated the policy statements addressing violations of supervised release in response to feedback from stakeholders identifying the need for more flexible, individualized responses to such violations. It would also add commentary highlighting the differences between probation and supervised release and how those differences have led the Commission to recommend different approaches to handling violations of probation, which serves a punitive function, and supervised release, a primary function of which is to "fulfill[] rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000).

The proposed amendment separates the provisions addressing violations of probation from those addressing violations of supervised release by removing all references to supervised release from Part B of Chapter Seven. It then duplicates the provisions of Part B as they pertain to supervised release in a new Part C.

The proposed amendment would create Part C of Chapter Seven to address supervised release violations. Part C would begin with introductory commentary explaining that – in responding to an allegation that a supervisee has violated the terms of supervision, addressing a violation found during revocation proceedings, or imposing a sentence upon revocation – the court should conduct the same kind of individualized assessment used throughout the process of imposing a term of supervised release. It would also express the Commission's view that courts should consider a wide array of options to address violations of supervised release.

The specific policy statements of Part C would duplicate the provisions of Part B as they pertain to supervised release, with a number of changes. Under the new §7C1.1 (Classification of Violations (Policy Statement)), which duplicates §7B1.1, there would be a fourth classification of violation: Grade D, which would include "a violation of any other condition of supervised release," which is currently classified as a Grade C violation.

The proposed amendment would duplicate §7B1.2, which addresses a probation officer's duty to report violations, in the new §7C1.2.

The proposed amendment would create §7C1.3 (Responses to Violations of Supervised Release (Policy Statement)), establishing the actions a court may take in response to an allegation of non-compliance with supervised release. Under the policy statement, upon an allegation of non-compliance, the court would be instructed to conduct an individualized assessment to determine the appropriate response. The proposed amendment brackets the possibility of creating in the guideline a non-exhaustive list of possible responses and brackets the possibility of including an list of other possible responses in an Application Note. The proposed amendment provides two options for addressing a court's response to a finding of a violation. Under Option 1, upon a finding of a violation for which revocation is not required, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release. Upon a finding of a violation for which revocation is required by statute, the court would be required to revoke supervised release. Under Option 2, the court would be required to revoke supervised release upon a finding of a violation for which revocation is required by statute or for a Grade A or B violation. Upon a finding of any other violation, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release.

Section 7C1.4 (Revocation of Supervised Release (Policy Statement)) would address instances of revocation. In such a case, the court would be required to conduct an individualized assessment to determine the appropriate length of the term of imprisonment. The amendment provides two options, Option 1 and Option 2, for addressing whether such a term should be served concurrently or consecutively to any sentence of imprisonment the defendant is serving. Under Option 1, the court would be instructed to conduct an individualized assessment to determine whether that term should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment the defendant is serving. Option 2 would maintain the current provision requiring the term to be served consecutively. The amendment would also continue to recognize the court's

authority to include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment.

Section 7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)), which duplicates §7B1.4, would set forth the Supervised Release Revocation Table. The Supervised Release Revocation Table would include recommended ranges of imprisonment, which would be subject to an individualized assessment conducted by the court. The Table would also include recommended ranges for Grade D violations. It would also remove the guidance addressing statutory maximum and minimum terms of imprisonment.

Finally, §7C1.6 (No Credit for Time Under Supervision (Policy Statement)) would duplicate §7B1.5, which provides that, upon revocation of supervised release, no credit shall be given for time previously served on post-release supervision.

Issues for comment are also provided.

Proposed Amendment:

Part A — Introduction to Chapter Seven

1. Authority

Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. ~~At this time~~Initially, the Commission ~~has chosen~~chose to promulgate policy statements only. These policy statements ~~will~~were intended to provide guidance ~~while allowing~~and allow for the identification of any substantive or procedural issues that require further review. The Commission ~~views~~viewed these policy statements as evolutionary and ~~will~~intended to review relevant data and materials concerning revocation determinations under these policy statements. ~~Revocation guidelines will~~Updated policies would be issued after federal judges, probation officers, practitioners, and others ~~have~~had the opportunity to evaluate and comment on these policy statements.

2. Background

(a) Probation.

Prior to the implementation of the federal sentencing guidelines, a court could stay the imposition or execution of sentence and place a defendant on probation. When a court found that a defendant violated a condition of probation, the court could continue probation, with or without extending the term or modifying the conditions, or revoke probation and either impose the term of imprisonment previously stayed, or, where no term of imprisonment had

originally been imposed, impose any term of imprisonment that was available at the initial sentencing.

The statutory authority to "suspend" the imposition or execution of sentence in order to impose a term of probation was abolished upon implementation of the sentencing guidelines. Instead, the Sentencing Reform Act recognized probation as a sentence in itself. 18 U.S.C. § 3561. Under current law, if the court finds that a defendant violated a condition of probation, the court may continue probation, with or without extending the term or modifying the conditions, or revoke probation and impose any other sentence that initially could have been imposed. 18 U.S.C. § 3565. For certain violations, revocation is required by statute.

(b) Supervised Release.

Supervised release, a new form of post-imprisonment supervision created by the Sentencing Reform Act, accompanied implementation of the guidelines. A term of supervised release may be imposed by the court as a part of the sentence of imprisonment at the time of initial sentencing. 18 U.S.C. § 3583(a). Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court. Accordingly, supervised release is more analogous to the additional "special parole term" previously authorized for certain drug offenses.

The conditions of supervised release authorized by statute are the same as those for a sentence of probation, except for intermittent confinement. (Intermittent confinement is available for a sentence of probation, but is available as a condition of supervised release only for a violation of a condition of supervised release.) When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation. 18 U.S.C. § 3583(e)(3).

3. Resolution of Major Issues

(a) Guidelines versus Policy Statements.

At the outset, the Commission faced a choice between promulgating guidelines or issuing advisory policy statements for the revocation of probation and supervised release. After considered debate and input from judges, probation officers, and prosecuting and defense attorneys, the Commission decided, for a variety of reasons, initially to issue policy statements. Not only was the policy statement option expressly authorized by statute, but this approach provided greater flexibility to both the Commission and the courts. Unlike guidelines, policy statements are not subject to the May 1 statutory deadline for submission to Congress, and the Commission believed that it would benefit from the additional time to consider complex issues relating to revocation guidelines provided by the policy statement option.

Moreover, the Commission ~~anticipates~~anticipated that, because of its greater flexibility, the policy statement option ~~will~~would provide better opportunities for evaluation by the courts and the Commission. This flexibility is important, given that supervised release as a method of post-incarceration supervision and transformation of probation from a suspension of sentence to a sentence in itself ~~represent~~represented recent changes in federal sentencing practices. After an adequate period of evaluation, the Commission ~~intends~~intended to promulgate updated revocation ~~guidelines~~policies.

(b) Choice Between Theories.

The Commission initially debated two different approaches to sanctioning violations of probation and supervised release.

The first option considered a violation resulting from a defendant's failure to follow the court-imposed conditions of probation or supervised release as a "breach of trust." While the nature of the conduct leading to the revocation would be considered in measuring the extent of the breach of trust, imposition of an appropriate punishment for any new criminal conduct would not be the primary goal of a revocation sentence. Instead, the sentence imposed upon revocation would be intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense.

The second option considered by the Commission sought to sanction violators for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct. Under this approach, offense guidelines in Chapters Two and Three of the Guidelines Manual would be applied to any criminal conduct that formed the basis of the violation, after which the criminal history in Chapter Four of the Guidelines Manual would be recalculated to determine the appropriate revocation sentence. This option would also address a violation not constituting a criminal offense.

After lengthy consideration, the Commission initially adopted an approach that is consistent with the theory of the first option; *i.e.*, at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.

The Commission adopted this approach for a variety of reasons. First, although the Commission found desirable several aspects of the second option that provided for a detailed revocation guideline system similar to that applied at the initial sentencing, extensive testing proved it to be impractical. In particular, with regard to new criminal conduct that constituted a violation of state or local law, working groups expert in the functioning of federal criminal law noted that it would be difficult in many instances for the court or the parties to obtain the information necessary to apply properly the guidelines to this new conduct. The potential unavailability of information and witnesses necessary for a determination of specific offense characteristics or other guideline adjustments could create questions about the accuracy of factual findings concerning the existence of those factors.

In addition, the Commission rejected the second option because that option was inconsistent with its views that the court with jurisdiction over the criminal conduct leading

to revocation is the more appropriate body to impose punishment for that new criminal conduct, and that, as a breach of trust inherent in the conditions of supervision, the sanction for the violation of trust should be in addition, or consecutive, to any sentence imposed for the new conduct. In contrast, the second option would have the revocation court substantially duplicate the sanctioning role of the court with jurisdiction over a defendant's new criminal conduct and would provide for the punishment imposed upon revocation to run concurrently with, and thus generally be subsumed in, any sentence imposed for that new criminal conduct.

Further, the sanctions available to the courts upon revocation are, in many cases, more significantly restrained by statute. Specifically, the term of imprisonment that may be imposed upon revocation of supervised release is limited by statute to not more than five years for persons convicted of Class A felonies, except for certain title 21 drug offenses; not more than three years for Class B felonies; not more than two years for Class C or D felonies; and not more than one year for Class E felonies. 18 U.S.C. § 3583(e)(3).

Given the relatively narrow ranges of incarceration available in many cases, combined with the potential difficulty in obtaining information necessary to determine specific offense characteristics, the Commission initially felt that it was undesirable at this time to develop guidelines that attempt to distinguish, in detail, the wide variety of behavior that can lead to revocation. Indeed, with the relatively low ceilings set by statute, revocation policy statements that attempted to delineate with great particularity the gradations of conduct leading to revocation would frequently result in a sentence at the statutory maximum penalty.

Accordingly, the Commission initially determined that revocation policy statements that provided for three broad grades of violations would permit proportionally longer terms for more serious violations and thereby would address adequately concerns about proportionality, without creating the problems inherent in the second option.

4. The Basic Approach

The revocation policy statements ~~categorize~~initially categorized violations of probation and supervised release in three broad classifications ranging from serious new felonious criminal conduct to less serious criminal conduct and technical violations. The grade of the violation, together with the violator's criminal history category calculated at the time of the initial sentencing, ~~fix~~fixed the applicable sentencing range.

The Commission ~~has~~initially elected to develop a single set of policy statements for revocation of both probation and supervised release. In reviewing the relevant literature, the Commission had determined that the purpose of supervision for probation and supervised release should focus on the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct. Although there was considerable debate as to whether the sanction imposed upon revocation of probation should be different from that imposed upon revocation of supervised release, the Commission ~~has~~ initially concluded that a single set of policy statements is appropriate.

5. ~~A Concluding Note~~Updating the Approach

The Commission ~~views these~~viewed the original policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission ~~expects~~intended to ~~issue revocation guidelines~~revise its approach after judges, probation officers, and practitioners ~~have~~ had an opportunity to apply and comment on the policy statements. In the three decades since the promulgation of those policy statements, a broad array of stakeholders has identified the need for more flexible, individualized responses to violations of supervised release.

~~In developing these policy statements, the Commission assembled two outside working groups of experienced probation officers representing every circuit in the nation, officials from the Probation Division of the Administrative Office of the U.S. Courts, the General Counsel's office at the Administrative Office of the U.S. Courts, and the U.S. Parole Commission. In addition, a number of federal judges, members of the Criminal Law and Probation Administration Committee of the Judicial Conference, and representatives from the Department of Justice and federal and community defenders provided considerable input into this effort.~~

In response, the Commission updated the policy statements in this Chapter to ensure judges have the discretion necessary to properly manage supervised release. The revised policy statements encourage judges to take an individualized approach in: (1) responding to allegations of non-compliance before initiating revocation proceedings; (2) addressing violations found during revocation proceedings; and (3) imposing a sentence of imprisonment upon revocation. These changes are intended to better allocate taxpayer dollars and probation resources, encourage compliance and improve public safety, and facilitate the reentry and rehabilitation of defendants.

This Chapter proceeds in two parts: Part B addresses violations of probation, and Part C addresses violations of supervised release. Both parts maintain an approach in which the court addresses primarily the defendant's failure to comply with court-ordered conditions, while reflecting, to a limited degree, the seriousness of the underlying violation and the criminal history of the individual. The Commission determined that violations of probation and supervised release should be addressed separately to reflect their different purposes. While probation serves a punitive function, supervised release "fulfills rehabilitative ends, distinct from those served by incarceration," *United States v. Johnson*, 529 U.S. 53, 59 (2000).. In light of these differences, Part B continues to recommend revocation for most probation violations. Part C encourages courts to consider a graduated response to a violation of supervised release, including considering all available options focused on facilitating a defendant's transition into the community and promoting public safety. Parts B and C both recognize the important role of the court, which is best situated to consider the individual defendant's risks and needs and respond accordingly within its broad discretion.

* * *

PART B — Probation ~~and Supervised Release~~ Violations

Introductory Commentary

The policy statements in this ~~chapter~~part seek to prescribe penalties only for the violation of the judicial order imposing ~~supervision~~probation. Where a defendant is convicted of a criminal charge that also is a basis of the violation, these policy statements do not purport to provide the appropriate sanction for the criminal charge itself. The Commission has concluded that the determination of the appropriate sentence on any new criminal conviction should be a separate determination for the court having jurisdiction over such conviction.

~~Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.~~

Under 18 U.S.C. § 3584, the court, upon consideration of the factors set forth in 18 U.S.C. § 3553(a), including applicable guidelines and policy statements issued by the Sentencing Commission, may order a term of imprisonment to be served consecutively or concurrently to an undischarged term of imprisonment. It is the policy of the Commission that the sanction imposed upon revocation is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation.

This ~~chapter~~part is applicable in the case of a defendant ~~under supervision~~on probation for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this ~~chapter~~part does not apply in the case of a defendant ~~under supervision~~on probation for a Class B or C misdemeanor or an infraction.

* * *

§7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation ~~and supervised release~~ violations:

(1) GRADE A VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) GRADE B VIOLATIONS — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) GRADE C VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of ~~supervision~~probation.

(b) Where there is more than one violation of the conditions of ~~supervision~~probation, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. §§ 3563(a)(1)~~ and 3583(d)~~, a mandatory condition of probation ~~and supervised release~~ is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

2. "***Crime of violence***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

3. "***Controlled substance offense***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.

4. A "***firearm or destructive device of a type described in 26 U.S.C. § 5845(a)***" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is ~~under supervision~~on probation in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term "generally" is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). *See, e.g.*, 18 U.S.C. § 925(c).

* * *

§7B1.2. Reporting of Violations of Probation ~~and Supervised Release~~ (Policy Statement)

(a) The probation officer shall promptly report to the court any alleged Grade A or B violation.

(b) The probation officer shall promptly report to the court any alleged Grade C violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

1. Under subsection (b), a Grade C violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not require reporting.

* * *

§7B1.3. Revocation of Probation ~~or Supervised Release~~ (Policy Statement)

(a) (1) Upon a finding of a Grade A or B violation, the court shall revoke probation~~ or supervised release~~.

(2) Upon a finding of a Grade C violation, the court may (A) revoke probation~~ or supervised release~~; or (B) extend the term of probation ~~or supervised release~~ and/or modify the conditions of ~~supervision~~thereof.

(b) In the case of a revocation of probation~~ or supervised release~~, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).

(c) In the case of a Grade B or C violation—

(1) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) 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 §5C1.1(e) for any portion of the minimum term; and

(2) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) 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 §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

(d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

(e) Where the court revokes probation ~~or supervised release~~ and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.

(f) Any term of imprisonment imposed upon the revocation of probation ~~or supervised release~~ shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation ~~or supervised release~~.

(g) ~~(1)~~ If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.

~~(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).~~

Commentary

Application Notes:

1. Revocation of probation ~~or supervised release~~ generally is the appropriate disposition in the case of a Grade C violation by a defendant who, having been continued on ~~supervision~~probation after a finding of violation, again violates the conditions of his ~~supervision~~probation.

~~2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g) (i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.~~

~~3~~2. Subsection (e) is designed to ensure that the revocation penalty is not decreased by credit for time in official detention other than time in official detention resulting from the federal probation ~~or supervised release~~ violation warrant or proceeding. **Example**: A defendant, who was in pre-trial detention for three months, is placed on probation, and subsequently violates that probation. The court finds the violation to be a Grade C violation, determines that the applicable range of imprisonment is 4–10 months, and determines that revocation of probation and imposition of a term of imprisonment of four months is appropriate. Under subsection (e), a sentence of seven months imprisonment would be required because the Federal Bureau of Prisons, under 18 U.S.C. § 3585(b), will allow the defendant three months' credit toward the term of imprisonment imposed upon revocation.

~~4~~3. Subsection (f) provides that any term of imprisonment imposed upon the revocation of probation ~~or supervised release~~ shall run consecutively to any sentence of imprisonment being served by the defendant. Similarly, it is the Commission's recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation ~~or supervised release~~ be run consecutively to any term of imprisonment imposed upon revocation.

~~5~~4. Intermittent confinement is authorized as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10)~~. Intermittent confinement is authorized 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~~; *see also* §5F1.8 (Intermittent Confinement).

* * *

§7B1.4. Term of Imprisonment—Probation (Policy Statement)

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

Probation Revocation Table
(in months of imprisonment)

Grade of Violation	Criminal History Category* I	II	III	IV	V	VI
Grade C	3–9	4–10	5–11	6–12	7–13	8–14
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A ~~**(1)** Except as provided in subdivision (2) below:~~	12–18	15–21	18–24	24–30	30–37	33–41
~~**(2)** Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:~~	~~24–30~~	~~27–33~~	~~30–37~~	~~37–46~~	~~46–57~~	~~51–63~~.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of ~~supervision~~probation.

(b) *Provided*, that—

(1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and

(2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.

(3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence—

(A) is not greater than the maximum term of imprisonment authorized by statute; and

(B) is not less than any minimum term of imprisonment required by statute.

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of ~~supervision~~probation. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated ~~supervision~~probation. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of ~~supervision~~probation being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of ~~supervision~~probation. (*See* the criminal history provisions of §§4A1.1–4B1.4.)

2. Departure from the applicable range of imprisonment in the Probation Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in ~~supervision~~probation. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in ~~supervision~~probation, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, ~~under supervision~~on probation for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.

5. Upon a finding that a defendant violated a condition of probation ~~or supervised release~~ by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke probation ~~or supervised release~~ and impose a sentence that includes a term of imprisonment. 18 U.S.C. §§ 3565(b), 3583(g).

6. In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §§ 3565(b) and 3583(g). 18 U.S.C. §§ 3563(a), 3583(d).

* * *

§7B1.5. No Credit for Time ~~Under Supervision~~on Probation (Policy Statement)

~~(a)~~ Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

~~(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.~~

~~(c) *Provided*, that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.~~

Commentary

~~**Application Note:**~~

~~1. Subsection (c) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.~~

Background: This section provides that time served on probation ~~or supervised release~~ is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with ~~supervision~~probation conditions and adjustment while ~~under supervision~~on probation, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range.

* * *

Part C — Supervised Release Violations

[The proposed amendment would create this new Part C to address violations of supervised release. To highlight how these new policy statements differ from the current policy statements addressing supervised release violations in Part B, the policy statements of Part B are duplicated below into this new Part C, with the changes noted.]

Introductory Commentary

~~The policy statements in this chapter seek to prescribe penalties only for the violation of the judicial order imposing supervision. Where a defendant is convicted of a criminal charge that also is a basis of the violation, these policy statements do not purport to provide the appropriate sanction for the criminal charge itself. The Commission has concluded that the determination of the appropriate sentence on any new criminal conviction should be a separate determination for the court having jurisdiction over such conviction.~~

~~Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.~~

~~Under 18 U.S.C. § 3584, the court, upon consideration of the factors set forth in 18 U.S.C. § 3553(a), including applicable guidelines and policy statements issued by the Sentencing Commission, may order a term of imprisonment to be served consecutively or concurrently to an undischarged term of imprisonment. It is the policy of the Commission that the sanction imposed upon revocation is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation.~~

~~This chapter is applicable in the case of a defendant under supervision for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this chapter does not apply in the case of a defendant under supervision for a Class B or C misdemeanor or an infraction.~~

At the time of original sentencing, the court may impose a term of supervised release to follow the sentence of imprisonment. *See* 18 U.S.C. § 3583(a). During that term, the court may receive allegations that the supervisee has violated a term of supervision. In responding to such allegations, addressing a violation found during revocation proceedings, and imposing a sentence upon revocation, the court should conduct the same kind of individualized assessment used "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release." *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

If the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release under existing conditions, modify the conditions, extend the term, or revoke supervised release and impose a term of imprisonment. *See* 18 U.S.C. § 3583(e)(3). The court also has authority to terminate a term of supervised release and discharge the defendant at any time after the expiration of one year of supervised release if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice. 18 U.S.C. § 3583(e)(1).

Because supervised release is intended to promote rehabilitation and ease the defendant's transition back into the community, the Commission encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety. If revocation is mandated by statute or the court otherwise determines revocation to be necessary, the sentence imposed upon revocation should be tailored to address the failure to abide by the conditions of the court-ordered supervision; imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence. The determination of the appropriate sentence on any new criminal conviction that is also a basis of the violation should be a separate determination for the court having jurisdiction over such conviction.

* * *

§~~7B1.1~~7C1.1. Classification of Violations (Policy Statement)

(a) There are ~~three~~ four grades of ~~probation and~~ supervised release violations:

(1) GRADE A VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or

local offense punishable by a term of imprisonment exceeding twenty years;

(2) GRADE B VIOLATIONS — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) GRADE C VIOLATIONS — conduct constituting ~~(A)~~ a federal, state, or local offense punishable by a term of imprisonment of one year or less; ~~or (B)~~

(4) GRADE D VIOLATIONS — a violation of any other condition of ~~supervision~~supervised release.

(b) Where there is more than one violation of the conditions of ~~supervision~~supervised release, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. §~~§ 3563(a)(1) and~~ 3583(d), a mandatory condition of ~~probation and~~ supervised release is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

2. "***Crime of violence***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

3. "***Controlled substance offense***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.

4. A "***firearm or destructive device of a type described in 26 U.S.C. § 5845(a)***" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is ~~under supervision~~on supervised release in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term "generally" is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). *See, e.g.*, 18 U.S.C. § 925(c).

* * *

§~~7B1.2~~7C1.2. Reporting of Violations of ~~Probation and~~ Supervised Release (Policy Statement)

(a) The probation officer shall promptly report to the court any alleged Grade A or B violation.

(b) The probation officer shall promptly report to the court any alleged Grade C or D violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

1. Under subsection (b), a Grade C or D violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not require reporting.

* * *

§7C1.3 Responses to Violations of Supervised Release (Policy Statement)

(a) ALLEGATION OF NON-COMPLIANCE.—Upon receiving an allegation that the defendant is in non-compliance with a condition of supervised release, the court should conduct an individualized assessment to determine what response, if any, is appropriate. **[**When warranted by an individualized assessment, the court may, for example:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Initiate revocation proceedings.**]**

[Option 1 (Mandatory Revocation only when Statutorily Required):

(b) FINDING OF A VIOLATION.—Upon a finding of a violation for which revocation is not required by statute, the court should conduct an individualized assessment to determine what response, if any, is appropriate. When warranted by an individualized assessment, the court may:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Revoke supervised release.

(c) Upon a finding of a violation for which revocation is required by statute, the court shall revoke supervised release. *See* 18 U.S.C. § 3583(g).**]**

[Option 2 (Mandatory Revocation when Statutorily Required and for Grade A and B Violations):

(b) FINDING OF A VIOLATION.—Upon a finding of a violation for which revocation is required by statute (*see* 18 U.S.C. § 3583(g)) or a Grade A or B violation, the court shall revoke supervised release.

(c) Upon a finding of any other violation, the court should conduct an individualized assessment to determine what response, if any, is appropriate. When warranted by an individualized assessment, the court may:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Revoke supervised release.**]**

Commentary

Application Notes:

1. **Individualized Assessment.—**When making an individualized assessment under this section, the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 2 to §5D1.1 (Imposition of a Term of Supervised Release).

[2. **Application of Subsection (a).—**Examples of responses to an allegation of non-compliance with a condition of supervised release include continuing a violation hearing to provide the

defendant time to come into compliance or directing the defendant to additional resources needed to come into compliance.]

* * *

§~~7B1.3~~7C1.4. Revocation of ~~Probation or~~ Supervised Release (Policy Statement)

~~(a) (1) Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.~~

~~(2) Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision.~~

~~(b) In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).~~

~~(c) In the case of a Grade B or C violation —~~

~~(1) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) 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 §5C1.1(e) for any portion of the minimum term; and~~

~~(2) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) 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 §5C1.1(e), provided that at least one half of the minimum term is satisfied by imprisonment.~~

~~(3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.~~

~~(d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition~~

~~to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.~~

~~(e) Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.~~

[Option 1 (Concurrent or Consecutive Sentences):

(a) In the case of a revocation of supervised release, the court shall conduct an individualized assessment to determine:

(1) the appropriate length of the term of imprisonment, given the recommended range of imprisonment set forth in §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)); and

(2) whether that term should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release.

~~(f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.~~**]**

[Option 2 (Consecutive Sentences Only):

[(a) In the case of a revocation of supervised release, the court shall conduct an individualized assessment to determine the appropriate length of the term of imprisonment, given the recommended range of imprisonment set forth in §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)).

(~~f~~b) Any term of imprisonment imposed upon the revocation of ~~probation or~~ supervised release ~~shall~~should be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of ~~probation or~~ supervised release.**]**

~~(g) (1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.~~

(~~2~~**[**b**]** **[**c**]**) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).

Commentary

Application Notes:

1. ~~Revocation of probation or supervised release generally is the appropriate disposition in the case of a Grade C violation by a defendant who, having been continued on supervision after a finding of violation, again violates the conditions of his supervision.~~**Individualized Assessment.**—When making an individualized assessment under subsection (a), the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g)–(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.

3. ~~Subsection (e) is designed to ensure that the revocation penalty is not decreased by credit for time in official detention other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.~~ ~~**Example**: A defendant, who was in pre-trial detention for three months, is placed on probation, and subsequently violates that probation. The court finds the violation to be a Grade C violation, determines that the applicable range of imprisonment is 4–10 months, and determines that revocation of probation and imposition of a term of imprisonment of four months is appropriate. Under subsection (e), a sentence of seven months imprisonment would be required because the Bureau of Prisons, under 18 U.S.C. § 3585(b), will allow the defendant three months' credit toward the term of imprisonment imposed upon revocation.~~ In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

4. ~~Subsection (f) provides that any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant. Similarly, it is the Commission's recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation or supervised release be run consecutively to any term of imprisonment imposed upon revocation.~~ Any restitution, fine, community confinement, home detention, or intermittent confinement

previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7C1.5 (Term of Imprisonment—Supervised Release), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

~~5. Intermittent confinement is authorized as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10). Intermittent confinement is authorized 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).~~

* * *

§~~7B1.4~~7C1.5. Term of Imprisonment—Supervised Release (Policy Statement)

~~(a)~~ ~~The~~ Unless otherwise required by statute, and subject to an individualized assessment, the recommended range of imprisonment applicable upon revocation is set forth in the following table:

Supervised Release Revocation Table
(in months of imprisonment)

Grade of Violation	Criminal History Category* I	II	III	IV	V	VI
Grade D	Up to 7	2–8	3–9	4–10	5–11	6–12
Grade C	3–9	4–10	5–11	6–12	7–13	8–14
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A **(1)** Except as provided in subdivision (2) below:	12–18	15–21	18–24	24–30	30–37	33–41
(2) Where the defendant was on ~~probation or~~ supervised release as a result of a sentence for a Class A felony:	24–30	27–33	30–37	37–46	46–57	51–63.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of ~~supervision~~supervised release.

~~(b) *Provided*, that —~~

~~(1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and~~

~~(2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.~~

~~(3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence—~~

~~(A) is not greater than the maximum term of imprisonment authorized by statute; and~~

~~(B) is not less than any minimum term of imprisonment required by statute.~~

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Supervised Release Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Supervised Release Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (*See* the criminal history provisions of §§4A1.1–4B1.4.)

2. In the case of a Grade D violation and a criminal history category of I, the recommended range of imprisonment in the Supervised Release Revocation Table is up to 7 months. This range allows for a sentence of less than 1 month.

3. Departure from the applicable range of imprisonment in the Supervised Release Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in ~~supervision~~supervised release. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in ~~supervision~~supervised release, has been sentenced for an offense that is not the basis of the violation proceeding.

~~3~~4. In the case of a Grade C or D violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, under ~~supervision~~supervised release for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

~~4~~5. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.

~~5~~6. Upon a finding that a defendant violated a condition of ~~probation or~~ supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke ~~probation or~~ supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. §~~§ 3565(b),~~ 3583(g).

~~6. In the case of a defendant who fails a drug test, the court shall consider whether the~~The availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, ~~warrants~~may warrant an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §~~§ 3565(b) and~~ 3583(g). 18 U.S.C. §~~§ 3563(a),~~ 3583(d).

* * *

§~~7B1.5~~7C1.6. No Credit for Time Under Supervision (Policy Statement)

(a) ~~Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.~~

(~~b~~) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision. *See* 18 U.S.C. § 3583(e)(3).

(~~e~~b) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.

Commentary

Application Note:

1. Subsection (~~e~~b) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.

Background: This section provides that time served on ~~probation or~~ supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with supervision conditions and adjustment while under supervision, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range.

* * *

Issues for Comment

1. Part B of the proposed amendment adds language to address feedback indicating both that courts and probation officers should be afforded more discretion in their ability to address a defendant's non-compliant behavior while on supervised release and that they would benefit from more guidance concerning revocations of supervised release.

   a. Part B would include throughout Chapter Seven, Part C (Supervised Release Violations) a recommendation that courts use an "individualized assessment" based on the statutory factors listed in 18 U.S.C. § 3583(e) when addressing non-compliant behavior. The Commission seeks comment on whether the recommendation of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.

   b. New guideline §7C1.3 (Responses to Violations of Supervised Release (Policy Statement)) includes in the Commentary examples of how a court might address allegations of non-compliant behavior short of the more formal options listed in 18 U.S.C. § 3583(e). In addition, Part B maintains instructions on violations related to community confinement conditions in the Commentary to new guideline §7C1.4 (Revocation of Supervised Release (Policy Statement)). The Commission seeks comment on whether such guidance should be retained or deleted and whether similar guidance should be included elsewhere. If the Commission provides further guidance, what should that guidance be?

   c. Is there any other approach the Commission should consider to provide courts with appropriate discretion while also providing useful guidance, either throughout Chapter Seven, Part C, or for certain guideline provisions?

2. The proposed amendment includes two options to address when revocation is required or appropriate under new §7C1.3 (Responses to Violations of Supervised Release (Policy Statement)). Option 1 would remove the language indicating that revocation is mandatory in all cases of Grade A or B violations and provide that the court should conduct an individualized assessment to determine whether to revoke in any cases that revocation is not required by statute. Option 2 would duplicate the language in §7B1.3(a) that provides that "the court shall revoke" supervised release upon a finding of a Grade A or B violation and may revoke in other cases. Should the Commission continue to provide guidance tying whether revocation is required to the grade of the violation, or should the Commission remove this instruction and permit courts to make revocation determinations based on an individualized assessment in all cases? If the latter, should the Commission provide further guidance about when revocation is appropriate?

3. Given the proposed amendment's goal of promoting judicial discretion at revocation, the Commission seeks comment on whether it should replace the Supervised Release Revocation Table set forth in proposed §7C1.4 (Term of Imprisonment—Supervised Release) with guidance indicating that courts abide by the statutory limits regarding maximum and minimum terms. If the Commission decides to retain the Revocation

Table, would any further changes beyond those set forth in the proposed amendment be appropriate? For example, should the Commission recommend a sentence range that begins at less than one month in all cases, not just those involving Grade D violations for individuals in Criminal History Category I? Should it eliminate the higher set of ranges for cases in which the defendant is on supervised release as a result of a sentence for a Class A felony?

4. The Commission further seeks comment on whether and how a retained Supervised Release Revocation Table should make recommendations to courts regarding their consideration of criminal history. Should the defendant's criminal history category be recalculated at the time of revocation for a violation of supervised release? For example, should a court recalculate a defendant's criminal history score to exclude prior sentences that are no longer countable under the rules in §4A1.2 (Definitions and Instructions for Computing Criminal History) or to account for new offenses a defendant may have been sentenced for after commission of the offense for which probation or supervised release is being revoked?

5. The Commission seeks comment on whether it should issue more specific guidance on the appropriate response to Grade D violations. Should the Commission state that revocation is not ordinarily appropriate for such violations, unless revocation is required under 18 U.S.C. § 3583(g)? Should the Commission further state that revocation may be appropriate for Grade D violations if there have been multiple violations or if the court determines that revocation is necessary for protection of the public? Would such statements imply that revocation is ordinarily appropriate for Grade A, B, and C violations?

6. The recommended ranges of imprisonment set forth in the Revocation Tables at §7B1.4 (Term of Imprisonment—Probation) and §7C1.4 (Term of Imprisonment—Supervised Release) are determined, in part, by the defendant's criminal history category. For both tables, the criminal history category "is the category applicable at the time the defendant originally was sentenced" to a term of probation or supervised release. The Commission seeks comment on whether a defendant's criminal history score should be recalculated at the time of revocation to reflect changes made by amendments listed in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) if one or more of those amendments have the effect of lowering the defendant's criminal history category. For example, Part A of Amendment 821, which is applied retroactively, limits the overall criminal history impact of "status points," potentially resulting in a defendant's criminal history being lowered (*e.g.*, a defendant assigned criminal history category IV at the time of original sentencing may have that category reduced to III). Should the Revocation Tables at §7B1.4 (Term of Imprisonment—Probation) and §7C1.4 (Term of Imprisonment—Supervised Release) allow for a defendant to benefit from these types of retroactive changes? Should these changes apply equally to both tables or, given the different purposes of probation and supervised release, should the Commission adopt different rules for each table?

PROPOSED AMENDMENT: DRUG OFFENSES

Synopsis of Proposed Amendment: This proposed amendment contains five parts (Parts A through E). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment includes two subparts to address concerns that the Drug Quantity Table at subsection (c) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing. Subpart 1 sets forth three options for amending §2D1.1 to set the highest base offense level in the Drug Quantity Table at a lower base offense level. Subpart 2 sets forth two options for amending §2D1.1 to add a new specific offense characteristic providing for a reduction relating to low-level trafficking functions. Both subparts include issues for comment.

Part B of the proposed amendment includes two subparts. Subpart 1 would amend §2D1.1 to address offenses involving "Ice." Subpart 2 sets forth two options for amending §2D1.1 to address the purity distinction in §2D1.1 between methamphetamine in "actual" form and methamphetamine as part of a mixture. Both subparts include issues for comment.

Part C of the proposed amendment would amend §2D1.1 to revise the enhancement for fentanyl and fentanyl analogue misrepresentation at subsection (b)(13). Issues for comment are also provided.

Part D of the proposed amendment addresses the application of §2D1.1(b)(1) to machineguns. An issue for comment is also provided.

Part E of the proposed amendment would amend §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to address the manner by which a defendant may satisfy §5C1.2(a)(5)'s requirement of providing truthful information and evidence to the Government. An issue for comment is also provided.

(A) Recalibrating the Use of Drug Weight in §2D1.1

Synopsis of Proposed Amendment: Part A of the proposed amendment contains two subparts (Subpart 1 and Subpart 2). The Commission is considering whether to promulgate one or both of these subparts, as they are not mutually exclusive.

Subpart 1 sets forth three options for amending §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the highest base offense level in the Drug Quantity Table at subsection (c) at a lower base offense level.

Subpart 2 sets forth two options for amending §2D1.1 to add a new specific offense characteristic providing for a reduction relating to low-level trafficking functions.

Drug Penalties in General

The most commonly prosecuted federal drug statutes prohibit the manufacture, distribution, importation, and exportation of controlled substances. The statutory penalties for these offenses vary based on (1) the quantity of the drug, (2) the defendant's prior commission of certain felony offenses, and (3) any serious bodily injury or death that resulted from using the drug. Section 2D1.1 applies to violations of 21 U.S.C. §§ 841 and 960, among other drug statutes. This guideline provides five alternative base offense levels, 18 specific offense characteristics, and two cross references.

The first four base offense levels, set out in §2D1.1(a)(1)–(a)(4), apply when the defendant was convicted of an offense under 21 U.S.C. § 841(b) or § 960(b) to which the applicable enhanced statutory minimum or maximum term of imprisonment applies or when the parties have stipulated to such an offense or such base offense level. The fifth base offense level, at §2D1.1(a)(5), applies in any other case and sets forth as the base offense level "the offense level specified in the Drug Quantity Table," subject to special provisions that apply when a defendant receives a mitigating role adjustment under §3B1.2 (Mitigating Role).

The Drug Quantity Table at §2D1.1(c) applies in the overwhelming majority of drug cases. The penalty structure of the Drug Quantity Table is based on the penalty structure of federal drug laws for most major drug types. That penalty structure generally establishes several tiers of penalties for manufacturing and trafficking in controlled substances, each based on the type and quantity of controlled substances involved. *See generally* 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). Thus, the offense levels set forth in the Drug Quantity Table depend primarily on drug type and drug quantity. For most drugs listed in the Drug Quantity Table, quantity is determined by the drug's weight. The Drug Quantity Table also includes "Converted Drug Weight," which is used to determine the base offense level in two circumstances: (1) when the defendant's relevant conduct involves two or more controlled substances (and not merely a single mixture of two substances); and (2) when the defendant's relevant conduct involves a controlled substance not specifically listed on the Drug Quantity Table. In either situation, the weight of the controlled substances is converted into a Converted Drug Weight using the Drug Conversion Tables set forth in Application Note 8(D) of the Commentary to §2D1.1.

Section 2D1.1 generally incorporates the statutory mandatory minimum sentences into the guidelines and extrapolates upward and downward to set offense levels for all drug quantities. Under the original guidelines, the quantity thresholds in the Drug Quantity Table were set to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that triggered a five-year statutory minimum were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that triggered a ten-year statutory minimum were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month).

In 2014, the Commission determined that setting the base offense levels slightly above the mandatory minimum penalties was no longer necessary and instead set the base offense levels to straddle the mandatory minimum penalties. *See* USSG App. C, amend. 782 (effective Nov. 1, 2014). Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24, corresponding to a sentencing guideline range of 51 to 63 months for a defendant in Criminal History Category I (a guideline range that straddles the five-year statutory minimum). Similarly, offenses that trigger a ten-year statutory minimum are assigned a base offense level of 30, corresponding to a sentencing guideline range of 97 to 121 months for a defendant in Criminal History Category I (a guideline range that straddles the ten-year statutory minimum).

Feedback from Stakeholders

The Commission has received comment over the years indicating that §2D1.1 overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing. Some commenters have suggested that the Commission should again lower penalties in §2D1.1, citing Commission data indicating that judges impose sentences below the guideline range in most drug trafficking cases. Commission data reflects that the difference between the average guideline minimum and average sentence imposed varies depending on the base offense level, with the greatest difference occurring at the highest offense levels on the Drug Quantity Table. In addition, commenters have raised concerns that the mitigating role adjustment from Chapter Three, Part B (Role in the Offense) is applied inconsistently in drug trafficking cases and does not adequately reflect individuals' roles in drug trafficking offenses.

Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table)

Subpart 1 of Part A of the proposed amendment sets forth three options for amending §2D1.1 to set the highest base offense level in the Drug Quantity Table at subsection (c) at a lower base offense level.

Option 1 would set the highest base offense level in the Drug Quantity Table at level 34. Accordingly, it would delete subsections (c)(1) and (c)(2) of the table, redesignate

subsection (c)(3) as subsection (c)(1), and renumber the remainder of the provisions of the table accordingly.

Option 2 would set the highest base offense level in the Drug Quantity Table at level 32. Accordingly, it would delete subsections (c)(1) through (c)(3) of the table, redesignate subsection (c)(4) as subsection (c)(1), and renumber the remainder of the provisions of the table accordingly.

Option 3 would set the highest base offense level in the Drug Quantity Table at level 30. Accordingly, it would delete subsections (c)(1) through (c)(4) of the table, redesignate subsection (c)(5) as subsection (c)(1), and renumber the remainder of the provisions of the table accordingly.

Subpart 1 brackets §2D1.1(a)(5) to indicate that all three options would require changes to the special provisions that apply when a defendant receives a mitigating role adjustment under §3B1.2. The third issue for comment below provides some background information on §2D1.1(a)(5) and sets forth a request for comment on the changes that should be made to this provision in light of the revisions proposed by the three options described above.

Additional issues for comment are also provided.

Subpart 2 (New Trafficking Functions Adjustment)

Subpart 2 of Part A of the proposed amendment would add a new specific offense characteristic providing for a [2][4][6]-level reduction relating to low-level trafficking functions. It provides two options for this new reduction.

Option 1 would make the reduction applicable if §2D1.1(b)(2) (relating to use of violence) does not apply, [the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense,] and [the defendant's most serious conduct in the offense was limited to][the defendant's primary function in the offense was] performing any of the low-level trafficking functions listed in the new provision.

Option 2, like Option 1, would make the reduction applicable if §2D1.1(b)(2) does not apply, [the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense,] and [the defendant's most serious conduct in the offense was limited to][the defendant's primary function in the offense was] a low-level trafficking function. However, unlike Option 1, Option 2 would not list low-level trafficking functions to which the reduction would necessarily apply. Instead, Option 2 would list functions that may qualify for the reduction as examples.

Both options would include a provision indicating that the reduction at proposed §2D1.1(b)(17) shall apply regardless of whether the defendant acted alone or in concert with others. In addition, Options 1 and 2 would add a special instruction to §2D1.1 providing that §3B1.2 does not apply to cases where the defendant's offense level is determined under §2D1.1. It would also include a new application note in the Commentary to §2D1.1 relating to the new low-level trafficking functions adjustment. The new application note would provide guidance taken from the Commentary to §3B1.2. Options 1 and 2 would also make

conforming changes in §2D1.1 to replace all references to §3B1.2 with references to the new low-level trafficking functions reduction. These conforming changes include tying the additional decreases and mitigating role cap at §2D1.1(a)(5) to the application of the proposed reduction at new §2D1.1(b)(17) for low-level trafficking functions.

Issues for comment are also provided.

Proposed Amendment:

Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table)

§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 (A) the defendant is convicted of an offense 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), to which the mandatory statutory term of life imprisonment applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(2) **38**, if (A) the defendant is convicted of an offense 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), to which the statutory term of imprisonment of not less than 20 years to life applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(3) **30**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(4) **26**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

[Options 1, 2, and 3 would require changes to §2D1.1(a)(5) (see issue for comment 3):

(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**.**]**

* * *

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL

[Option 1 (Highest Base Offense Level at Level 34):

~~(1) ● 90 KG or more of Heroin;~~ ~~**Level 38**~~
~~● 450 KG or more of Cocaine;~~
~~● 25.2 KG or more of Cocaine Base;~~
~~● 90 KG or more of PCP, or 9 KG or more of PCP (actual);~~
~~● 45 KG or more of Methamphetamine, or~~
~~4.5 KG or more of Methamphetamine (actual), or~~
~~4.5 KG or more of "Ice";~~
~~● 45 KG or more of Amphetamine, or~~
~~4.5 KG or more of Amphetamine (actual);~~
~~● 900 G or more of LSD;~~
~~● 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);~~
~~● 9 KG or more of a Fentanyl Analogue;~~
~~● 90,000 KG or more of Marihuana;~~
~~● 18,000 KG or more of Hashish;~~
~~● 1,800 KG or more of Hashish Oil;~~
~~● 90,000,000 units or more of Ketamine;~~
~~● 90,000,000 units or more of Schedule I or II Depressants;~~
~~● 5,625,000 units or more of Flunitrazepam;~~
~~● 90,000 KG or more of ***Converted Drug Weight***.~~

~~(2) ● At least 30 KG but less than 90 KG of Heroin;~~ ~~**Level 36**~~
~~● 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);~~
~~● 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~~1) ● ~~At least~~ 10 KG ~~but less than 30 KG~~or more of Heroin; **Level 34**
● ~~At least~~ 50 KG ~~but less than 150 KG~~or more of Cocaine;
● ~~At least~~ 2.8 KG ~~but less than 8.4 KG~~or more of Cocaine Base;
● ~~At least~~ 10 KG ~~but less than 30 KG~~or more of PCP, or
~~at least~~ 1 KG ~~but less than 3 KG~~or more of PCP (actual);
● ~~At least~~ 5 KG ~~but less than 15 KG~~or more of Methamphetamine, or
~~at least~~ 500 G ~~but less than 1.5 KG~~or more of Methamphetamine (actual), or
~~at least~~ 500 G ~~but less than 1.5 KG~~or more of "Ice";
● ~~At least~~ 5 KG ~~but less than 15 KG~~or more of Amphetamine, or
~~at least~~ 500 G ~~but less than 1.5 KG~~or more of Amphetamine (actual);
● ~~At least~~ 100 G ~~but less than 300 G~~or more of LSD;
● ~~At least~~ 4 KG ~~but less than 12 KG~~or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
● ~~At least~~ 1 KG ~~but less than 3 KG~~or more of a Fentanyl Analogue;
● ~~At least~~ 10,000 KG ~~but less than 30,000 KG~~or more of Marihuana;
● ~~At least~~ 2,000 KG ~~but less than 6,000 KG~~or more of Hashish;
● ~~At least~~ 200 KG ~~but less than 600 KG~~or more of Hashish Oil;
● ~~At least~~ 10,000,000 ~~but less than 30,000,000~~ units or more of Ketamine;
● ~~At least~~ 10,000,000 ~~but less than 30,000,000~~ units or more of Schedule I or II Depressants;
● ~~At least~~ 625,000 ~~but less than 1,875,000~~ units or more of Flunitrazepam;
● ~~At least~~ 10,000 KG ~~but less than 30,000 KG~~or more of ***Converted Drug Weight***.**]**

[Option 2 (Highest Base Offense Level at Level 32) (which would also delete §2D1.1(a)(1) through (a)(3)):

(~~4~~1) ● ~~At least~~ 3 KG ~~but less than 10 KG~~or more of Heroin; **Level 32**
● ~~At least~~ 15 KG ~~but less than 50 KG~~or more of Cocaine;
● ~~At least~~ 840 G ~~but less than 2.8 KG~~or more of Cocaine Base;
● ~~At least~~ 3 KG ~~but less than 10 KG~~or more of PCP, or
~~at least~~ 300 G ~~but less than 1 KG~~or more of PCP (actual);
● ~~At least~~ 1.5 KG ~~but less than 5 KG~~or more of Methamphetamine, or
~~at least~~ 150 G ~~but less than 500 G~~or more of Methamphetamine (actual), or
~~at least~~ 150 G ~~but less than 500 G~~or more of "Ice";
● ~~At least~~ 1.5 KG ~~but less than 5 KG~~or more of Amphetamine, or
~~at least~~ 150 G ~~but less than 500 G~~or more of Amphetamine (actual);
● ~~At least~~ 30 G ~~but less than 100 G~~or more of LSD;
● ~~At least~~ 1.2 KG ~~but less than 4 KG~~or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
● ~~At least~~ 300 G ~~but less than 1 KG~~or more of a Fentanyl Analogue;
● ~~At least~~ 3,000 KG ~~but less than 10,000 KG~~or more of Marihuana;
● ~~At least~~ 600 KG ~~but less than 2,000 KG~~or more of Hashish;
● ~~At least~~ 60 KG ~~but less than 200 KG~~or more of Hashish Oil;
● ~~At least~~ 3,000,000 ~~but less than 10,000,000~~ units or more of Ketamine;
● ~~At least~~ 3,000,000 ~~but less than 10,000,000~~ units or more of Schedule I or II Depressants;

- ~~At least~~ 187,500 ~~but less than 625,000~~ units or more of Flunitrazepam;
- ~~At least~~ 3,000 KG ~~but less than 10,000 KG~~or more of ***Converted Drug Weight***.**]**

[Option 3 (Highest Base Offense Level of Drug Quantity Table at Level 30) (which would also delete §2D1.1(a)(1) through (a)(4)):

(~~5~~1) **Level 30**
- ~~At least~~ 1 KG ~~but less than 3 KG~~or more of Heroin;
- ~~At least~~ 5 KG ~~but less than 15 KG~~or more of Cocaine;
- ~~At least~~ 280 G ~~but less than 840 G~~or more of Cocaine Base;
- ~~At least~~ 1 KG ~~but less than 3 KG~~or more of PCP, or
  ~~at least~~ 100 G ~~but less than 300 G~~or more of PCP (actual);
- ~~At least~~ 500 G ~~but less than 1.5 KG~~or more of Methamphetamine, or
  ~~at least~~ 50 G ~~but less than 150 G~~or more of Methamphetamine (actual), or
  ~~at least~~ 50 G ~~but less than 150 G~~or more of "Ice";
- ~~At least~~ 500 G ~~but less than 1.5 KG~~or more of Amphetamine, or
  ~~at least~~ 50 G ~~but less than 150 G~~or more of Amphetamine (actual);
- ~~At least~~ 10 G ~~but less than 30 G~~or more of LSD;
- ~~At least~~ 400 G ~~but less than 1.2 KG~~or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- ~~At least~~ 100 G ~~but less than 300 G~~or more of a Fentanyl Analogue;
- ~~At least~~ 1,000 KG ~~but less than 3,000 KG~~or more of Marihuana;
- ~~At least~~ 200 KG ~~but less than 600 KG~~or more of Hashish;
- ~~At least~~ 20 KG ~~but less than 60 KG~~or more of Hashish Oil;
- ~~At least~~ 1,000,000 ~~but less than 3,000,000~~ units or more of Ketamine;
- ~~At least~~ 1,000,000 ~~but less than 3,000,000~~ units or more of Schedule I or II Depressants;
- ~~At least~~ 62,500 ~~but less than 187,500~~ units or more of Flunitrazepam;
- ~~At least~~ 1,000 KG ~~but less than 3,000 KG~~or more of ***Converted Drug Weight***.**]**

[All three options would renumber the remaining provisions of the Drug Quantity Table accordingly]

(6) **Level 28**
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 140 KG but less than 200 KG of Hashish;
- 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) **Level 26**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 24**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 22**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 20**
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 18**
- At least 40 G but less than 60 G of Heroin;
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 40 KG but less than 60 KG of ***Converted Drug Weight***.

(12) **Level 16**

- At least 20 G but less than 40 G of Heroin;
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 14**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 10 KG but less than 20 KG of ***Converted Drug Weight***.

(14) **Level 12**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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; **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; **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; **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***.

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* * *

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:

* * *

[All three options would make appropriate conforming changes to Application Note 27]

27. **Departure Considerations.—**

* * *

(B) **Upward Departure Based on Drug Quantity.—**In an extraordinary case, an upward departure above offense level ~~38~~**[**34**][**32**][**30**]** 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~~**[**34**][**32**][**30**]**. Similarly, in the case of a controlled substance for which the maximum offense level is less than level ~~38~~**[**34**][**32**][**30**]**, 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.

* * *

Issues for Comment:

1. Commission data reflects that the difference between the average guideline minimum and average sentence imposed varies depending on the base offense level, with the greatest difference occurring at the highest base offense levels. Subpart 1 sets forth three options for amending the Drug Quantity Table at subsection (c) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the highest base offense level at [34][32][30]. Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?

2. Subpart 1 would amend §2D1.1 to reduce the highest base offense level in the Drug Quantity Table. The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?

3. The mitigating role cap at §2D1.1(a)(5) provides a decrease for base offense levels of 32 or greater when the mitigating role adjustment at §3B1.2 applies. The mitigating role cap also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). Subpart 1 sets forth three options to decrease the highest base offense level of the Drug Quantity Table to level [34][32][30]. If the Commission adopts any of these options, it will require changes to the mitigating role cap. The Commission seeks comment on how it should address the interaction between the options set forth in Subpart 1 and the mitigating role cap. Specifically, should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?

4. Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) includes two chemical quantity tables at subsections (d) and (e). Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the same substance. If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?

5. Subpart 1 sets forth three options to decrease the highest base offense level of the Drug Quantity Table from level 38 to level [34][32][30]. Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine, which is the most common drug type in federal drug trafficking offenses. The Commission seeks comment on the interaction between these parts of the proposed amendment. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?

Subpart 2 (New Trafficking Functions Adjustment)

§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 (A) the defendant is convicted of an offense 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), to which the mandatory statutory term of life imprisonment applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(2) **38**, if (A) the defendant is convicted of an offense 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), to which the statutory term of imprisonment of not less than 20 years to life applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(3) **30**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(4) **26**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; 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)~~a reduction under subsection (b)(17); 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)~~a reduction under subsection (b)(17), decrease to level **32**.

(b) Specific Offense Characteristics

* * *

(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, 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)~~a reduction under subsection (b)(17), increase by **2** levels.

* * *

(16) 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.

[Option 1 (Specifying functions that trigger reduction):

(17) If—

(A) subsection (b)(2) does not apply;

[(B) the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;**]** and

(C) **[**the defendant's most serious conduct in the offense was limited to performing any of the following low-level trafficking functions**][**the defendant's primary function in the offense was performing any of the following low-level trafficking functions**]**—

(i) carried one or more controlled substances (regardless of the quantity of the controlled substance involved) on their person, vehicle, vessel, or aircraft for purposes of transporting the controlled substance, without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense;

(ii) performed any low-level function in the offense other than the selling of controlled substances (such as running errands, sending or receiving phone calls or messages, scouting, receiving packages, packaging controlled substances, acting as a lookout, storing controlled substances, or acting as a deckhand or crew member on a vessel or aircraft used to transport controlled substances), without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense; or

(iii) distributed retail or user-level quantities of controlled substances to end users **[**or similarly situated distributors**]** and **[**one or more of the following factors is**][**two or more of the following factors are**]** present: (I) 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; (II) the defendant was motivated primarily by a substance abuse disorder; (III) the defendant was engaged in the distribution of controlled substances infrequently or for brief duration; (IV) the defendant received little or no compensation from the distribution of the controlled substance involved in the offense; **[**or (V) the defendant had limited knowledge of the

distribution network and an additional factor similar to any of the factors described in subclauses (I) through (IV) is present**]**;

decrease by **[2][4][6]** levels. This reduction shall apply regardless of whether the defendant acted alone or in concert with others.**]**

[Option 2 (Functions listed as examples):

(17) If—

(A) subsection (b)(2) does not apply;

[(B) the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;**]** and

(C) **[**the defendant's most serious conduct in the offense was limited to performing a low-level trafficking function**][**the defendant's primary function in the offense was performing a low-level trafficking function**]**; decrease by **[2][4][6]** levels. This reduction shall apply regardless of whether the defendant acted alone or in concert with others.

Examples:

Functions that may qualify as low-level trafficking functions, depending on the scope and structure of the criminal activity, include where the defendant:

(A) carried one or more controlled substances (regardless of the quantity of the controlled substance involved) on their person, vehicle, vessel, or aircraft for purposes of transporting the controlled substance, without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense;

(B) performed any low-level function in the offense other than the selling of controlled substances (such as running errands, sending or receiving phone calls or messages, scouting, receiving packages, packaging controlled substances, acting as a lookout, storing controlled substances, or acting as a deckhand or crew member on a vessel or aircraft used to transport controlled substances), without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense; or

(C) distributed retail or user-level quantities of controlled substances to end users **[**or similarly situated distributors**]** and **[**one or more of the following factors is**][**two or more of the following factors are**]** present: (i) 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; (ii) the defendant was motivated primarily by a substance abuse disorder; (iii) the defendant was engaged in the distribution of controlled substances infrequently or for brief duration; (iv) the defendant received little or no compensation from the distribution of the controlled substance involved in the offense; **[**or (v) the defendant had limited knowledge of the distribution network and an additional factor similar to any of the factors described in clauses (i) through (iv) is present**].]**

(~~17~~18) If the defendant receives ~~the 4-level ("minimal participant") reduction in §3B1.2(a)~~a reduction under subsection (b)(17) 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.

(~~18~~19) If the defendant meets the criteria set forth in paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

* * *

(e) Special ~~Instruction~~Instructions

(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.

(2) If the defendant's offense level is determined under this guideline, do not apply §3B1.2 (Mitigating Role).

* * *

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:

* * *

21. **Application of Subsection (b)(17).—**

(A) A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a low-level trafficking function may receive an adjustment under subsection (b)(17). For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs, and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under subsection (b)(17).

(B) If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by the defendant's actual criminal conduct, a reduction under subsection (b)(17) ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense.

~~21~~22. **Applicability of Subsection (b)(~~18~~19).**—The applicability of subsection (b)(~~18~~19) 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 that the applicable guideline range shall not be less than 24 to 30 months of imprisonment, is not pertinent to the determination of whether subsection (b)(18) applies.

[Subpart 2 would renumber the rest of the application notes accordingly]

* * *

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.

* * *

Subsection (b)(~~17~~18) implements the directive to the Commission in section 7(2) of Public Law 111–220.

* * *

§2D1.14. Narco-Terrorism

(a) Base Offense Level:

(1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(5)(A), (a)(5)(B), and (b)(~~18~~19) shall not apply.

* * *

§3B1.2. Mitigating Role

* * *

Commentary

Application Notes:

* * *

3. **Applicability of Adjustment.—**

(A) **Substantially Less Culpable than Average Participant.**—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, ~~a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.~~

~~Likewise,~~ a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.

(B) **Conviction of Significantly Less Serious Offense.**—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1

(Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

* * *

6. **~~Application~~Non-Applicability of Role Adjustment ~~in Certain Drug Cases~~to Cases Where Offense Level is Determined under §2D1.1.—~~.~~** ~~In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.~~In accordance with subsection (e)(2) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)), §3B1.2 does not apply to a defendant whose offense level is determined under §2D1.1.

* * *

Issues for Comment:

1. Subpart 2 of Part A of the proposed amendment would add a new specific offense characteristic at §2D1.1(b) relating to low-level trafficking functions in drug offenses. The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?

2. The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions. Are there other factors that this provision should capture? Are there factors included in the proposed amendment that should not be included?

3. One of the low-level trafficking functions listed in proposed §2D1.1(b)(17) is the distribution of retail or user-level quantities of controlled substances when certain mitigating circumstances are present. The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?

4. Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?

5. Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should

the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?

6. Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.

7. Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline, which generally refers to the entire offense guideline (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions). This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.

8. Subpart 2 would add Commentary to §2D1.1 that closely tracks certain provisions currently contained in Application Note 3 of the Commentary to §3B1.2. The proposed Commentary would provide that a low-level trafficking functions reduction applies even when the defendant's relevant conduct is limited to conduct in which the defendant was personally involved. Additionally, the proposed commentary would state that a reduction ordinarily is not warranted when the defendant received a lower offense level by virtue of being convicted of a significantly less serious offense than warranted by the defendant's actual criminal conduct. The Commission seeks comment on whether including this guidance in the Commentary to §2D1.1 is appropriate. Is the guidance provided in these provisions applicable in the context of the new low-level trafficking functions adjustment at §2D1.1? If appropriate, should the Commission alternatively consider incorporating the prohibition and guidance by reference to the Commentary to §3B1.2?

(B) Methamphetamine

Synopsis of Proposed Amendment: Part B of the proposed amendment contains two subparts (Subpart 1 and Subpart 2). The Commission is considering whether to promulgate one or both of these subparts, as they are not mutually exclusive.

Subpart 1 addresses offenses involving "Ice" under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

Subpart 2 addresses the purity distinction in §2D1.1 between methamphetamine in "actual" form and methamphetamine as part of a mixture.

Methamphetamine in General

The statutory provisions and penalties associated with the trafficking of methamphetamine are found at 21 U.S.C. §§ 841 and 960. While the statutory penalties for most drug types are based solely on drug quantity, the statutory penalties for methamphetamine are also based on the purity of the substance involved in the offense. Sections 841 and 960 contain quantity threshold triggers for five- and ten-year mandatory minimums for methamphetamine (actual) (*i.e.*, "pure" methamphetamine) and methamphetamine (mixture) (*i.e.*, "a mixture or substance containing a detectable amount of methamphetamine"). *See* 21 U.S.C. §§ 841(b)(1)(A)(viii), (B)(viii), 960(b)(1)(H), & 960(b)(2)(H). Two different 10-to-1 quantity ratios set the mandatory minimum penalties for methamphetamine trafficking offenses. First, the quantity of substance triggering the ten-year minimum is ten times the quantity triggering the five-year minimum. Second, the quantity of methamphetamine mixture triggering each mandatory minimum is set at ten times the quantity of methamphetamine actual triggering the same statutory minimum penalty.

Under §2D1.1, the base offense level for offenses involving methamphetamine varies based on the purity of the substance. Specifically, the Drug Quantity Table at §2D1.1(c) contains three different entries relating to methamphetamine: (1) "Methamphetamine," which refers to the entire weight of a mixture or substance containing a detectable amount of methamphetamine; (2) "Methamphetamine (actual)," which refers to the weight of methamphetamine itself contained in a mixture or substance; and (3) "Ice," which is defined as "a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity" (*see* USSG §2D1.1(c) (Note C)). The Drug Quantity Table sets base offense levels for methamphetamine mixture and methamphetamine (actual) in a manner that reflects the 10:1 quantity ratio of the applicable statutory provisions, such that it takes ten times more methamphetamine mixture than methamphetamine (actual) to trigger the same base offense level.

Although "Ice" is included in the guidelines, the term "Ice" does not appear in the statutory provisions setting penalties for methamphetamine offenses. "Ice" was added to the guidelines in response to the 1990 Crime Control Act, which directed the Commission to amend the guidelines "for offenses involving smokable crystal methamphetamine . . . so that convictions for [such offenses] will be assigned an offense level . . . two levels above

that which would have been assigned to the same offense involving other forms of methamphetamine." *See* Pub. L. No. 101–67, §2701 (1990). The Crime Control Act did not, however, define "smokable crystal methamphetamine," and the Commission and commenters struggled to determine its meaning. Ultimately, the Commission responded to the Act by adding "Ice" to the Drug Quantity Table—even though the 1990 Crime Control Act did not use that term—and developed a definition of "Ice" based on the type and purity of methamphetamine. *See* USSG App. C, amend. 370 (effective Nov. 1, 1991). The Commission set the base offense levels for quantities of "Ice" equal to the base offense levels for the same quantities of methamphetamine (actual).

Commission Data

Commission data shows that, since fiscal year 2002, the number of offenses involving methamphetamine mixture has remained relatively steady, but the number of offenses involving methamphetamine (actual) and "Ice" has risen substantially. Offenses involving methamphetamine (actual) increased 299 percent from 910 offenses in fiscal year 2002 to 3,634 offenses in fiscal year 2022. As a result, in fiscal year 2022, methamphetamine (actual) accounted for more than half (52.2%) of all methamphetamine cases. Offenses involving "Ice" also have risen during the past 20 years. In fiscal year 2002, there were 88 offenses involving "Ice" in the federal case load; that number rose by 881 percent to 863 offenses in fiscal year 2022. Offenses involving "Ice" now make up more than ten percent (12.4%) of all methamphetamine cases. Offenses involving methamphetamine mixture comprise roughly a third (35.4%) of all methamphetamine cases.

In addition, data published by the Commission in a recent report shows that methamphetamine today is highly and uniformly pure, with an average purity of 93.2 percent and a median purity of 98.0 percent. The methamphetamine tested in fiscal year 2022 was uniformly highly pure regardless of whether it was sentenced as methamphetamine mixture (91.0% pure on average), methamphetamine actual (92.6%), or "Ice" (97.6%). *See* U.S. SENT'G COMM'N, METHAMPHETAMINE TRAFFICKING OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (June 2024) at https://www.ussc.gov/research/research-reports/methamphetamine-trafficking-offenses-federal-criminal-justice-system.

Feedback from Stakeholders

The Commission has received significant comment regarding §2D1.1's methamphetamine purity distinction. Some commenters suggest that the Commission should revisit or eliminate the disparity in §2D1.1's treatment of methamphetamine mixture, on the one hand, and methamphetamine (actual) and "Ice," on the other. Most of these commenters state that purity is no longer an accurate measure of offense culpability because methamphetamine today is highly and uniformly pure and that "Ice" cases do not involve a higher level of purity than other forms of methamphetamine. Some of these commenters also point to disparities in testing practices across judicial districts, which, in turn, have yielded disparate sentences.

Subpart 1 ("Ice")

Subpart 1 of Part B of the proposed amendment would amend the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to

§2D1.1 to delete all references to "Ice." In addition, it brackets the possibility of adding a new specific offense characteristic at subsection (b)(19) that would provide a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form, which would continue to ensure that "convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level under the guidelines which is two levels above" other forms of methamphetamine.

Issues for comment are also provided.

Subpart 2 (Methamphetamine Purity Distinction)

Subpart 2 of Part B of the proposed amendment would address the 10:1 quantity ratio for methamphetamine mixture and methamphetamine (actual) by deleting all references to "methamphetamine (actual)" from the Drug Quantity Table at §2D1.1(c) and the Drug Conversion Tables at Application Note 8(D). The weight of methamphetamine in the tables would then be the entire weight of any mixture or substance containing a detectable amount of methamphetamine. Subpart 2 of Part B of the proposed amendment provides two options for setting the quantity thresholds applicable to methamphetamine.

Option 1 would set the quantity thresholds for methamphetamine at the current level for methamphetamine mixture.

Option 2 would set the quantity thresholds for methamphetamine at the current level of methamphetamine (actual).

Issues for comment are also provided.

Proposed Amendment:

Subpart 1 ("Ice")

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(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.

* * *

(14) (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 subparagraph (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**.

* * *

(18) If the defendant meets the criteria set forth in paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[(19) If the offense involved methamphetamine in a non-smokable, non-crystalline form, decrease by **[2]** levels.**]**

* * *

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL

(1) **Level 38**

- 90 KG or more of Heroin;
- 450 KG or more of Cocaine;
- 25.2 KG or more of Cocaine Base;
- 90 KG or more of PCP, or 9 KG or more of PCP (actual);
- 45 KG or more of Methamphetamine, or
  4.5 KG or more of Methamphetamine (actual)~~, or~~
  ~~4.5 KG or more of "Ice"~~;
- 45 KG or more of Amphetamine, or
  4.5 KG or more of Amphetamine (actual);
- 900 G or more of LSD;
- 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 9 KG or more of a Fentanyl Analogue;
- 90,000 KG or more of Marihuana;
- 18,000 KG or more of Hashish;
- 1,800 KG or more of Hashish Oil;
- 90,000,000 units or more of Ketamine;
- 90,000,000 units or more of Schedule I or II Depressants;
- 5,625,000 units or more of Flunitrazepam;
- 90,000 KG or more of ***Converted Drug Weight***.

(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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 34**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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; **Level 32**
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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; **Level 30**
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam;
- At least 1,000 KG but less than 3,000 KG of ***Converted Drug Weight***.

(6) **Level 28**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 140 KG but less than 200 KG of Hashish;
- 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) **Level 26**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 24**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 22**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 20**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 18**

- At least 40 G but less than 60 G of Heroin;
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 40 KG but less than 60 KG of ***Converted Drug Weight***.

(12) **Level 16**

- At least 20 G but less than 40 G of Heroin;
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 14**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 10 KG but less than 20 KG of ***Converted Drug Weight***.

(14) **Level 12**

- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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***.

* * *

***Notes to Drug Quantity Table:**

* * *

(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.

(C) 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.~~

* * *

Commentary

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Application Notes:

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8. **Use of Drug Conversion Tables.—**

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(D) **Drug Conversion Tables.—**

* * *

COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm
1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base ("Crack") =	3,571 gm
1 gm of Fenethylline =	40 gm
~~1 gm of "Ice" =~~	~~20 kg~~

1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P_2P) (in any other case) =	75 gm

**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.

* * *

Issues for Comment

1. Subpart 1 of Part B of the proposed amendment would amend the Drug Quantity Table at §2D1.1(c) and the Drug Conversion Tables at Application Note 8(D) of the Commentary to §2D1.1 to delete all references to "Ice." The Commission invites comment on whether deleting all references to "Ice" in §2D1.1 is consistent with the 1990 congressional directive (Pub. L. No. 101–67, § 2701 (1990)) and other provisions of federal law.

2. Subpart 1 of Part B of the proposed amendment brackets the possibility of adding a new specific offense characteristic at §2D1.1(b)(19) that provides a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form. The Commission invites comment on whether deleting all references to "Ice," while adding a new specific offense characteristic addressing methamphetamine in a non-smokable, non-crystalline form, is consistent with the 1990 congressional directive (Pub. L. No. 101–67, § 2701 (1990)) and other provisions of federal law.

   In addition, the Commission invites general comment on methamphetamine in a non-smokable, non-crystalline form, particularly on its pharmacological effects, potential for addiction and abuse, the patterns of abuse and harms associated with their abuse, and the patterns of trafficking and harms associated with its trafficking. How is non-smokable, non-crystalline methamphetamine manufactured, distributed, possessed, and used? What are the characteristics of the individuals involved in these various criminal activities? What harms are posed by these activities? How do these harms differ from those associated with other forms of methamphetamine?

Subpart 2 (Methamphetamine Purity Distinction)

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL

(1)
- 90 KG or more of Heroin;
- 450 KG or more of Cocaine;
- 25.2 KG or more of Cocaine Base;
- 90 KG or more of PCP, or 9 KG or more of PCP (actual);

Level 38

[Option 1 (Using methamphetamine mixture quantity thresholds):
- 45 KG or more of Methamphetamine, or
  ~~4.5 KG or more of Methamphetamine (actual), or~~
  4.5 KG or more of "Ice";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):
- ~~45~~4.5 KG or more of Methamphetamine, or
  ~~4.5 KG or more of Methamphetamine (actual), or~~
  4.5 KG or more of "Ice";**]**

- 45 KG or more of Amphetamine, or
  4.5 KG or more of Amphetamine (actual);
- 900 G or more of LSD;
- 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 9 KG or more of a Fentanyl Analogue;
- 90,000 KG or more of Marihuana;
- 18,000 KG or more of Hashish;
- 1,800 KG or more of Hashish Oil;
- 90,000,000 units or more of Ketamine;
- 90,000,000 units or more of Schedule I or II Depressants;
- 5,625,000 units or more of Flunitrazepam;
- 90,000 KG or more of ***Converted Drug Weight***.

(2)
- 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);

Level 36

[Option 1 (Using methamphetamine mixture quantity thresholds):
- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~15~~1.5 KG but less than ~~45~~4.5 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 34**

- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~5 KG~~500 G but less than ~~15~~1.5 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 32**

- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~1.5 KG~~150 G but less than ~~5 KG~~500 G 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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) **Level 30**

- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~500~~50 G but less than ~~1.5 KG~~150 G 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam;
- At least 1,000 KG but less than 3,000 KG of ***Converted Drug Weight***.

(6) **Level 28**

- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- At least 350 G but less than 500 G of Methamphetamine, or
  ~~at least 35 but less than 50 G of Methamphetamine (actual), or~~
  at least 35 G but less than 50 G of "Ice";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~350~~35 G but less than ~~500~~50 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 140 KG but less than 200 KG of Hashish;
- 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) **Level 26**

- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~200~~20 G but less than ~~350~~35 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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; **Level 24**
- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):
- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):
- At least ~~50~~5 G but less than ~~200~~20 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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; **Level 22**
- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):
- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~40~~4 G but less than ~~50~~5 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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; **Level 20**
- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):

- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- At least ~~30~~3 G but less than ~~40~~4 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):
● 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):
● At least ~~20~~2 G but less than ~~30~~3 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
● 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 40 KG but less than 60 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):
● 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):
● At least ~~10~~1 G but less than ~~20~~2 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);

- 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; **Level 14**
- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):
- 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";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):
- At least ~~5 G~~500 MG but less than ~~10~~1 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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 10 KG but less than 20 KG of ***Converted Drug Weight***.

(14) - Less than 10 G of Heroin; **Level 12**
- 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);

[Option 1 (Using methamphetamine mixture quantity thresholds):
- Less than 5 G of Methamphetamine, or
  ~~less than 500 MG of Methamphetamine (actual), or~~
  less than 500 MG of "Ice";**]**

[Option 2 (Using methamphetamine (actual) quantity thresholds):

- Less than ~~5 G~~500 MG 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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***.

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***Notes to Drug Quantity Table:**

* * *

[Both options would make the following changes to Note B:

(B) The terms "***PCP (actual)***"~~,~~ and "***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~~,~~ or 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)~~,~~ or 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.**]**

* * *

Commentary

* * *

Application Notes:

* * *

8. **Use of Drug Conversion Tables.—**

* * *

(D) **Drug Conversion Tables.—**

* * *

COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm
1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base ("Crack") =	3,571 gm
1 gm of Fenethylline =	40 gm
[Option 1 (Using methamphetamine mixture quantity thresholds):	
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
~~1 gm of Methamphetamine (actual) =~~	~~20 kg~~**]**
[Option 2 (Using methamphetamine (actual) quantity thresholds):	
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	~~2~~20 kg
~~1 gm of Methamphetamine (actual) =~~	~~20 kg~~**]**
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P_2P) (in any other case) =	75 gm

**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.

* * *

[Both options would make the following changes to Application Note 27(C):

27. **Departure Considerations.—**

* * *

(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.**]**

* * *

Issues for Comment:

1. The Commission seeks comment on how, if at all, the guidelines should be amended to address the 10:1 quantity ratio between methamphetamine mixture and methamphetamine (actual). Should the Commission adopt either of the above options or neither? Should the Commission equalize the treatment of methamphetamine mixture and methamphetamine (actual) but at some level other than the current quantity thresholds for methamphetamine mixture or methamphetamine (actual)? Should the Commission retain references to both methamphetamine mixture and methamphetamine (actual) and set a quantity ratio between these substances but at some level other than the current 10:1 ratio? If so, what ratio should the Commission establish, and what is the basis for such ratio?

2. Option 2 would amend §2D1.1 to establish a 1:1 quantity ratio for methamphetamine (actual) and methamphetamine mixture by setting the quantity thresholds for all methamphetamine at the level of methamphetamine (actual). However, this change may result in an increased offense level for some cases involving methamphetamine (actual). For example, under the current §2D1.1, 5 grams of a mixture or substance containing 80 percent methamphetamine is treated as 4 grams of methamphetamine (actual), which triggers a base offense level of 22. By contrast, under Option 2, 5 grams of a mixture or substance containing 80 percent methamphetamine would be treated as 5 grams of methamphetamine, which would trigger a base offense level of 24. Is this an appropriate outcome? Why or why not? If not, how should the Commission revise §2D1.1 to avoid this outcome?

3. Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) includes a chemical quantity table specifically for ephedrine, pseudoephedrine, and phenylpropanolamine at subsection (d). The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in §2D1.1, assuming a 50 percent actual yield of the controlled substance from the chemicals.

   As provided above, Option 1 would amend the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to §2D1.1 to set the quantity thresholds for methamphetamine (actual) at the same level as methamphetamine mixture. If the Commission were to promulgate Option 1, should the Commission amend the table at §2D1.11(d) and make conforming changes to the quantity thresholds? Should the Commission revise the quantity thresholds in §2D1.11(d) in a different way? If so, what quantity thresholds should the Commission set and on what basis?

4. Subpart 2 of Part B of the proposed amendment addresses the quantity ratio between methamphetamine mixture and methamphetamine (actual) in §2D1.1. In

addition to comment on the methamphetamine purity distinction, the Commission has received comment suggesting that the Commission should reconsider the different treatment between cocaine (*i.e.*, "powder cocaine") and cocaine base (*i.e.*, "crack cocaine") in the Drug Quantity Table at §2D1.1(c). Section 2D1.1 provides base offense levels for offenses involving powder cocaine and crack cocaine that reflect an 18:1 quantity ratio, which tracks the statutory penalty structure for those substances. *See* 21 U.S.C. §§ 841(b)(1)(A) & (B); 960(b)(1) & (2). The Commission has examined this issue for many years and seeks comment on whether to take action in a future amendment cycle. If so, what action should the Commission take?

(C) Misrepresentation of Fentanyl and Fentanyl Analogues

Synopsis of Proposed Amendment: In 2018, the Commission amended §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to add a new specific offense characteristic at subsection (b)(13) providing a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. *See* USSG, App. C. amend. 807 (effective Nov. 1, 2018). To address the increase in cases involving the distribution of fentanyl and fentanyl analogues and the seizure of fake prescription pills containing fentanyl, the Commission revised §2D1.1(b)(13) in 2023 to add a new subparagraph (B) with an alternative 2-level enhancement for offenses where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug. *See* USSG, App. C. amend. 818 (effective Nov. 1, 2023). In doing so, the Commission cited data showing that, of the fake pills seized containing fentanyl, most contained a potentially lethal dose of the substance. *Id.*

The Commission has received some comment urging the Commission to revise §2D1.1(b)(13) because courts rarely apply this enhancement. According to those commenters, the enhancement is vague and has led to disagreement on when it should be applied. Some commenters suggested that the Commission lower the *mens rea* requirement in §2D1.1(b)(13) to solve the application issues with the enhancement and to address the dangerous nature of substances containing fentanyl or fentanyl analogues.

Part C of the proposed amendment would revise the enhancement at §2D1.1(b)(13) to address these concerns. Three options are provided.

Option 1 would set forth an offense-based enhancement with no *mens rea* requirement at §2D1.1(b)(13). The revised enhancement would provide a [2][4]-level enhancement if the offense involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance.

Option 2 would set forth a defendant-based enhancement with a *mens rea* requirement at §2D1.1(b)(13). The revised enhancement would provide for a [2][4]-level enhancement if the defendant represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, with two bracketed alternatives for the *mens rea* requirement. The first bracketed alternative would require that the defendant had knowledge or reason to believe that the mixture or substance contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue. The second bracketed alternative would require that the defendant acted with knowledge of or reckless disregard as to the actual content of the mixture or substance.

Option 3 would set forth a tiered alternative enhancement at §2D1.1(b)(13). Subparagraph (A) would provide for a [4]-level increase if the defendant represented or

marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, with two bracketed alternatives for the *mens rea* requirement. The first bracketed alternative would require that the defendant had knowledge or reason to believe that the mixture or substance contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue. The second bracketed alternative would require that the defendant acted with knowledge of or reckless disregard as to the actual content of the mixture or substance. Subparagraph (B) would provide for a [2]-level increase if the offense otherwise involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance. Subparagraph (B) would not contain a *mens rea* requirement.

Issues for comment are also provided.

Proposed Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

* * *

[Option 1 (Offense-based enhancement with no *mens rea* requirement)

(13) If the ~~defendant (A) knowingly misrepresented or knowingly marketed as another substance~~offense involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, increase by **[2]**[**4]** levels~~; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug, increase by **2** levels. The term "***drug***," as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).~~

* * ***]**

[Option 2 (Defendant-based enhancement with *mens rea* requirement)

(13) **[**If the defendant ~~(A) knowingly misrepresented or knowingly marketed as another substance~~represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-

piperidinyl] propanamide) or a fentanyl analogue as any other substance, **[**with knowledge or reason to believe that it contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue**][**with knowledge of or reckless disregard as to the actual content of the mixture or substance**]**, increase by **[2][4]** levels~~; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug, increase by **2** levels. The term "***drug***," as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).~~

* * ***]**

[Option 3 (Tiered alternative provision with a defendant-based enhancement with *mens rea* requirement and an offense-based enhancement with no *mens rea* requirement):

(13) If ~~the defendant~~ (A) ~~knowingly misrepresented or knowingly marketed as another substance~~the defendant represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, **[**with knowledge or reason to believe that it contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue**][**with knowledge of or reckless disregard as to the actual content of the mixture or substance**]**, increase by **[4]** levels; or (B) ~~represented or marketed as a legitimately manufactured drug another~~the offense otherwise involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance~~, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug~~, increase by **[2]** levels. ~~The term "***drug***," as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).~~

* * ***]**

Issues for Comment

1. Part C of the proposed amendment would amend §2D1.1(b)(13) to address some concerns relating to application issues with the enhancement. The Commission seeks comment on whether any of the three options set forth above is appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider? Should the Commission provide a different

mens rea requirement for §2D1.1(b)(13)? If so, what *mens rea* requirement should the Commission provide?

2. The Commission enacted §2D1.1(b)(13) to address cases where individuals purchasing a mixture or substance containing fentanyl or a fentanyl analogue may believe they are purchasing a different substance. The Commission invites general comment on whether the proposed revisions to §2D1.1(b)(13) are appropriate to address this harm and the culpability of the defendants in these cases. Is the use of terms such as "representing" and "marketing" sufficient to achieve this purpose? If not, should the Commission use different terminology to appropriately reflect the criminal conduct in these cases? What terms should the Commission use? Should the Commission consider any other changes to §2D1.1(b)(13) to address the harm in these cases?

(D) Machineguns

Synopsis of Proposed Amendment: Subsection (b)(1) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) provides a 2-level enhancement for cases in which a "dangerous weapon (including a firearm)" is possessed. Section 2D1.1(b)(1) does not distinguish between different types of dangerous weapons involved in the offense, which is different from some statutory enhancements. For example, greater statutory penalties are imposed for possession of a machinegun in furtherance of a drug trafficking crime than possession of other firearms. *See* 18 U.S.C. § 924(c).

The Department of Justice expressed concern that §2D1.1(b)(1) fails to differentiate between machineguns and other weapons. The Department of Justice and other commenters have also noted the increased prevalence of machinegun conversion devices ("MCDs") (*i.e.*, devices designed to convert weapons into fully automatic firearms), pointing out that weapons equipped with MCDs pose an increased danger because they can fire more quickly and are more difficult to control.

Part D of the proposed amendment would amend the enhancement at §2D1.1(b)(1) for cases involving the possession of a weapon. It would create a tiered enhancement based on whether the weapon possessed was a machinegun (as defined in 26 U.S.C. § 5845(b)) or some other dangerous weapon. Courts would be instructed to apply the greater of either a 4-level enhancement if a machinegun was possessed or a 2-level enhancement if a dangerous weapon was possessed.

An issue for comment is also provided.

Proposed Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

(1) (Apply the greater):

(A) If a machinegun (as defined in 26 U.S.C. § 5845(b)) was possessed, increase by **4** levels;

(B) 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.

* * *

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:

* * *

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.

* * *

Issue for Comment:

1. Subsection (b)(1) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applies if "a dangerous weapon . . . was possessed" as part of the offense and does not require that the defendant possessed the weapon. In addition, the Commentary to §2D1.1 provides that the enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *See* USSG §2D1.1, comment. (n.11(A)). Therefore, §2D1.1(b)(1) may apply more broadly than other weapons-related provisions elsewhere in the guidelines. The Commission seeks comment on whether the changes set forth in Part D of the proposed amendment are appropriate in light of these factors. Should the Commission consider additional changes to §2D1.1(b)(1) to address these considerations? What changes, if any, should the Commission consider?

(E) Safety Valve

Synopsis of Proposed Amendment: Section 3553(f) of title 18, United States Code, allows a court to impose a sentence without regard to any statutory minimum penalty if it finds that a defendant meets certain criteria. The safety valve applies only to offenses under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, or 46 U.S.C. § 70503 or § 70506, and to defendants who, among other things, "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." *See* 18 U.S.C. § 3553(f). When it first enacted the safety valve, Congress directed the Commission to promulgate or amend guidelines and policy statements to "carry out the purposes of [section 3553(f)]." *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 80001(b). The Commission implemented the directive by incorporating the statutory text of section 3553(f) into the guidelines at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Section 5C1.2(a)(5) does not prescribe any particular manner by which a defendant must satisfy the requirement of providing truthful information and evidence to the Government. The Commission has heard concerns, however, that this requirement has been understood to require that the defendant meet directly with the Government. Due to safety concerns, defendants otherwise eligible for the safety valve may forego that benefit due to the requirement of an in-person meeting.

Part E of the proposed amendment would address these concerns by amending the Commentary to §5C1.2 to add a provision stating that subsection (a)(5) does not specify how the defendant should provide such information and evidence to the Government. It would also provide that the specific manner by which the defendant has disclosed the information—whether by written disclosure or in-person meeting—should not preclude a determination by the court that the defendant has complied with the requirement of disclosing information about the offense, provided that the disclosure satisfies the requirements of completeness and truthfulness. It would state that the fact that the defendant provided the information as a written disclosure shall not by itself render the disclosure—if otherwise found complete and truthful—insufficient.

An issue for comment is also provided.

Proposed Amendment:

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, or 46 U.S.C. § 70503 or § 70506, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)–(5) as follows:

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the applicable guideline range shall not be less than 24 to 30 months of imprisonment.

Commentary

Application Notes:

* * *

4. **Application of Subsection (a)(5).—**

(A) Disclosure of Information by the Defendant.—Under subsection (a)(5), the defendant is required, not later than the time of the sentencing hearing, to truthfully provide to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. Subsection (a)(5) does not specify how the defendant should provide such information and evidence to the Government. The specific manner by which the defendant has disclosed the information—whether by written disclosure or in-person meeting—should not preclude a determination by the court that the defendant has complied with this requirement, provided that the disclosure satisfies the requirements of completeness and truthfulness. The fact that the defendant provided the information as a written disclosure shall not by itself render the disclosure—if otherwise found complete and truthful—insufficient.

(B) **Use of Information Disclosed ~~under Subsection (a).~~**—Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).

* * *

Issue for Comment

1. The Commission seeks comment on whether the changes set forth in Part E of the proposed amendment are appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider?

Congress of the United States

Washington, DC 20515

March 3, 2025

To the United States Sentencing Commission:

We write as authors and cosponsors of the *Safer Supervision Act*, a bipartisan, bicameral bill to better ensure that the federal supervised release system is directing its resources to most effectively reduce recidivism and promote public safety, rehabilitation, and reintegration. We greatly appreciate the United States Sentencing Commission's leadership in setting forth its supervised release proposal, and we encourage the Commission to finalize an amendment that robustly implements the letter and spirit of the bill to the extent it can do so within its authority.

As the U.S. Supreme Court has explained, federal supervised release was originally designed to serve "rehabilitative ends, distinct from those served by incarceration" and to be used "for those, and only those, who need[] it." Currently, however, supervised release is imposed in nearly every case, overburdening law enforcement and resulting in a system that does not provide appropriate supervision to the high-risk individuals who most need it. This, in turn, creates counterproductive burdens on low-risk individuals, thus inhibiting reintegration. Although Congress created a system permitting courts to terminate supervision early whenever doing so is "in the interest of justice," many jurisdictions do not sufficiently utilize this authority and reserve it only for extraordinary cases, limiting its ability to ensure resources are allocated to best promote public safety.

The *Safer Supervision Act* would restore supervised release to the system that Congress originally intended. The bill would ensure that courts impose supervision (including its length and conditions) based on the individual facts of the case, promote positive incentives to encourage rehabilitation through improvements to the early termination process, and provide courts greater discretion regarding certain revocations. It would provide notice to individuals about their ability to seek early termination, it would provide guidance to courts regarding early termination through a presumption that requires key public safety findings, and it would expressly incorporate victims' rights and discretionary appointment of counsel in those proceedings. The bill received endorsements from numerous conservative organizations, law enforcement groups, faith groups, and civil rights groups because it is smart, commonsense policy: it shows how we can at the same time improve public safety, support law enforcement, use taxpayer dollars more responsibly, and better position people to succeed after they have served their time in prison.

The Commission's proposal advances the goals of our bill by encouraging courts to apply greater discretion at imposition of supervision and at revocation, and by encouraging use of early termination when in the interest of justice. We particularly appreciate how the Commission drew from the bill in developing its introductory commentary, its individualized assessment requirement, and its proposed factors for early termination. We would encourage the Commission to consider how it could go further to implement the letter and spirit of the bill. Additional guidance, including a presumption along the lines of the bill, could better instruct courts on the interest-of-justice standard and ensure that they use early termination when supervision is no longer necessary for the purposes it was imposed, rather than

just in the most extraordinary of cases. With appropriate notice, supervisees will then have actionable positive incentives to rehabilitate and reintegrate, to the benefit of public safety.

Although there is no substitute for statutory changes, and we will continue to press for enactment of this important legislation, the Commission has an opportunity to make significant progress on this issue now. We appreciate your efforts to advance our shared goals. Please let us know if we can be of assistance.

Sincerely,

Christopher A. Coons
United States Senator

Wesley P. Hunt
Member of Congress

Mike Lee
United States Senator

Thom Tillis
United States Senator

Kevin Cramer
United States Senator

Roger F. Wicker
United States Senator

Sylvester Turner
Member of Congress

Barry Moore
Member of Congress

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 3, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

I write in response to the Sentencing Commission's request for comment on its Proposed 2025 Amendment to the *Guidelines Manual* for Supervised Release.

Proposed Amendment: Supervised Release

I encourage the Commission to modify the Sentencing Guidelines governing imposition, termination, and revocation of supervised release to better ensure that a supervision term and any conditions thereof are properly tailored to the individualized rehabilitative needs of the defendant.

In 1984, as part of the Comprehensive Crime Control Act,[1] Congress enacted the Sentencing Reform Act, which among other things, implemented the federal supervised release system.[2] Replacing federal parole, this new system authorized district courts to impose upon criminal defendants a term of supervision—"a form of postconfinement monitoring overseen by the sentencing court" that requires adherence to certain conditions and may be subject to revocation or modification.[3] As Congress made abundantly clear, supervised release is not a punitive measure. Rather, "the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense," and to rehabilitate "a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release."[4]

Given the significant number of individuals subject to federal supervision, ensuring that term lengths and attendant conditions are appropriately tailored to effectively assist with reentry and rehabilitative efforts is of paramount importance. According to the most recent data available, nearly 110,000 people are serving a term of supervised release.[5] And, of individuals

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[1] Pub. L. 98-473, Tit. II, 98 Stat.1976.
[2] *Gozlon-Peretz v. United States*, 498 U.S. 395, 397 (1991).
[3] *Johnson v. United States*, 529 U.S. 694, 697 (2000).
[4] S. Rep. No. 98–225, at 124 (1983).
[5] *Statistical Tables for the Federal Judiciary*, Admin. Off. of the U.S. Courts (June 30, 2024), https://www.uscourts.gov/data-news/data-tables/2024/06/30/statistical-tables-federal-judiciary/e-2.

still incarcerated in the Bureau of Prisons for federal convictions, 98.2 percent will serve a term of supervision upon release.[6]

Of course, individuals will "vary in the degree of help needed for successful reintegration."[7] Indeed, "excessive correctional intervention for low-risk defendants may increase the probability of recidivism by disrupting prosocial activities and exposing defendants to antisocial associates."[8] A recent study released by the Administrative Office of the U.S. Courts found that early termination of supervision terms did not endanger community safety; in fact, individuals who had been released early from supervision had "post-supervision arrest rates that were two percentage points lower for any offenses than those of their regular-termed counterparts."[9] Expending supervision resources on those with fewer rehabilitative needs or lower recidivism risk is not only counterproductive to successful reentry, but it detracts from probation officers' ability to provide the level of supervision needed to those with greater needs or higher risk. To avoid excessive supervision, district courts have the discretion to determine whether imposing a term of supervision is appropriate at all; and if so, the proper length and intensity of such term. But courts must also be encouraged to meaningfully exercise that discretion to ensure that sentences are tailored to most effectively and efficiently achieve the rehabilitative goals of supervision.

These basic understandings motivated the bipartisan coalition that introduced the *Safer Supervision Act* in the 117th and 118th Congresses.[10] I applaud the Commission's recognition of this legislation in promulgating the proposed supervised release amendment, and urge the swift adoption of Part A. In particular, I believe the guidance as to individualized assessments when considering a term of supervision during the defendant's initial sentencing will prove helpful to district courts in exercising their discretion.

While I strongly favor increased judicial discretion in supervised release determinations, I caution the Commission to ensure that defendants are not inadvertently discouraged from participating while incarcerated in programs and activities designed to reduce recidivism risk under the *First Step Act* (FSA).[11] As the Commission notes in Issue for Comment #4, while in custody, certain eligible individuals may receive and apply earned time credits (ETC) for successful participation in FSA programming. How that ETC applies, however, depends upon whether the individual has a term of supervised release imposed as part of his or her sentence. If subject to supervision, the Bureau of Prisons (BOP) may transfer the individual to supervised release up to 12 months early based on the application of ETC.[12] If not subject to supervision, BOP may transfer the individual to prerelease custody (a residential reentry center or home

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[6] *QuickFacts, Federal Offenders in Prison*, U.S. Sent. Comm. (Jan. 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2024.pdf.
[7] *Johnson*, 529 U.S. at 709.
[8] *Overview of Probation and Supervised Release Conditions*, Admin. Off. of the U.S. Courts at 10 (updated July 2024), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf.
[9] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5098803 at 22.
[10] *Safer Supervision Act of 2023* (S. 2681); *Safer Supervision Act of 2022* (S. 5040).
[11] Pub. L. 115-391.
[12] 18 U.S.C. § 3624(g)(3).

confinement), also based upon application of ETC.[13] Given the differences in custodial outcomes, the Commission may want to consider inclusion in the amendment of language encouraging courts to consider imposing a minimal term of supervised release only if, based on an individualized assessment, doing so would promote the relevant and applicable goals under 18 U.S.C. § 3553(a) by encouraging participation in recidivism-reducing programs and activities.

As to termination of supervision, I urge adoption of language directing that courts "should," rather than "may," terminate supervision early if the standard is met. An enumerated list of factors to be considered for early termination is not necessary, as a court's inquiry into the defendant's conduct and the interest of justice is necessarily broad, and the non-bracketed proposed language properly references the relevant and well-known considerations under 18 U.S.C. § 3583(e). Nonetheless, the Commission may consider including language clarifying that extraordinary circumstances are not required to meet the interest of justice standard . To aid courts in this inquiry, I believe the Commission should include language encouraging district courts to appoint counsel for defendants in early termination proceedings, as counsel will be able to efficiently assist the court in consideration of relevant facts and circumstances.

Additionally, I agree with the Commission's proposal to relabel "standard" and "special" conditions as "examples of common conditions that may be warranted in appropriate cases" and "additional conditions," respectively. Aside from mandatory conditions, all other supervision conditions are discretionary, and I believe their appellation should reflect this status to reinforce the intended individualized nature of their imposition. Finally, I agree that the Commission should further discourage imposition of supervised release for individuals who are likely to be deported—such sentences divert much-needed resources from other individuals who will be subject to active supervision post-incarceration. And, to the extent that removed individuals may consider unlawfully returning to the United States, deterrence is provided by criminal statute.[14]

I further urge the Commission to implement Part B of the proposal. As with imposing or terminating supervised release, district courts should possess and exercise discretion in determining the appropriate response to a supervision violation based upon an individualized assessment. I believe that reference to the statutory factors listed in 18 U.S.C. § 3583(e) will provide helpful guidance to a court when addressing allegations of noncompliance with supervision conditions.

The Sentencing Guidelines should employ language promoting the exercise of this discretion in all cases. To that end, I encourage the Commission to adopt § 7C1.3 with Option 1, mandating revocation only when statutorily required. Critically, under Option 1, a court would retain the discretion to revoke supervision for violations, but, in contrast with Option 2, would not be *required* to do so for all Grade A or B violations, which it might determine to be unwarranted based on an individualized assessment. Similarly, I encourage the Commission to adopt § 7C1.4 Option 1, permitting a court to determine whether, if revoking supervised release and imposing a term of imprisonment, the carceral term shall be served concurrently or consecutively to any other sentence of imprisonment that the defendant is serving. While retaining authority to order the imprisonment to be served consecutively if appropriate, unlike

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[13] 18 U.S.C. § 3624(g)(1).
[14] *See, e.g.,* 8 U.S.C. § 1326.

Option 2, a court would not be *required* to do so in all cases, which it might determine to be unwarranted based on an individualized assessment.

To the extent that the Commission retains the Supervised Release Revocation Table, I urge the Commission to (1) recommend a sentence range that begins at less than one month in all cases, and (2) eliminate the higher set of ranges for cases in which the defendant is on supervised release as the result of a Class A felony. As the Supreme Court has repeatedly recognized, "[s]upervised release fulfills rehabilitative ends, distinct from those served by incarceration."[15] Supervision, in other words, is not imposed for punitive purposes. Accordingly, when a defendant violates a condition of supervised release, the resulting consequences "are first and foremost considered sanctions for the defendant's 'breach of trust'—his 'failure to follow the court-imposed conditions' that followed his initial conviction—not 'for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct.'"[16] But elevated Guidelines ranges for imprisonment in the Revocation Table suggest punishment—and indeed, may serve to undermine eventual reentry by subjecting a defendant to additional, excessive criminal custody in lieu of refocused rehabilitative efforts. The Commission should, therefore, modify the Revocation Table to discourage overreliance on lengthier terms of imprisonment in response to violations of supervised release.

Finally, the Commission should amend the Guidelines to direct the recalculation of a defendant's criminal history score at the time of revocation to reflect changes made by amendments listed in §1B1.10(d) (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) if one or more of those amendments would lower the criminal history category. Section 1B1.10 recognizes that certain amendments affecting a defendant's Guidelines range may support an application for a reduced term of incarceration. As a matter of policy, there is no sound reason to deny either a probationer or a supervisee the benefit of such an amendment and retain an arbitrarily inflated criminal history category.

Thank you for considering my views.

Sincerely,

Richard J. Durbin
Ranking Member
United States Senate Committee on the Judiciary

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[15] *United States v. Johnson*, 529 U.S. 53, 59 (2000).

[16] *United States v. Haymond*, 588 U.S. 634, 658 (2019) (plurality opinion) (Breyer, J., concurring) (quoting United States Sentencing Commission, Guidelines Manual ch. 7, pt. A, intro. 3(b) (Nov. 2018)).

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March 3, 2025

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chairman Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, we appreciate the opportunity to offer comment on the proposed Guideline amendments for the 2024-2025 amendment cycle.

The Committee's jurisdiction within the Judicial Conference includes overseeing the federal probation and pretrial services system and reviewing issues related to the administration of criminal law. The Committee provides comments about amendments proposed by the Sentencing Commission as part of its monitoring role over the workload and operation of probation offices and as part of its ongoing role in examining the fair administration of criminal law. The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase

the flexibility of the Guidelines."[1] The Judicial Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2] In the past, the Committee has presented testimony and submitted comments supporting Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

These comments address the proposed amendments promulgated on January 24, 2025, regarding supervised release and drug offenses.

Discussion

The second set of amendments being considered by the Commission in its 2024-25 cycle relate to supervised release and drug offenses. The Committee's thoughts on those amendments are included below.[3]

I. Supervised Release Amendment

Part A. Imposition of a Term of Supervised Release

In the Committee's July 2024 letter responding to the Commission's proposed priorities, we encouraged the Commission to amend USSG § 5D1.2 to explicitly reference the factors set forth in 18 U.S.C. § 3583(c), which courts must consider in imposing a term of supervised release. We also encouraged the Commission to "revisit and examine" the minimum terms of supervised release set forth in Chapter 5, Part D. The Committee urged the Commission to conduct a study and determine whether there are evidence-based reasons to require minimum terms of supervised release. Part A of the proposed amendment sets out a number of changes to Chapter 5, Part D.

Introductory Commentary. The proposed amendment adds introductory commentary to Chapter 5, Part D. The commentary helpfully highlights that supervised release decisions are based on 18 U.S.C. § 3583(c) and that supervised release is primarily directed at rehabilitative ends and ensuring public safety. The Committee recognizes that the Supreme Court's upcoming decision in *Esteras v. United States*, S. Ct. No. 23-7483 (examining the scope of § 3583(e) for revocation decisions), may require some adjustment to the introductory commentary (as well as other provisions).

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[1] JCUS-SEP 1990, p.69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." *See* 28 U.S.C. § 994(o).

[2] JCUS-MAR 2005, p. 15.

[3] The Committee's views on the first set of amendments were conveyed in a letter dated February 3, 2025, and through my testimony on February 12, 2025.

Individualized Assessment. Several provisions within the amendment suggest or require courts to conduct an "individualized assessment" regarding supervised release. In the current proposals, "individualized assessment" is defined in each Guideline as consideration of the required statutory factors in 18 U.S.C. § 3583(c). *See* Proposed § 5D1.1, comment. (n.1); § 5D1.2, comment. (n.3); § 5D1.3, comment. (n.1); § 5D1.4, comment. (n.1); § 7C1.3, comment. (n.1). The Committee supports this statutory-equivalent definition of "individualized assessment," and would oppose any expansion of the definition beyond that. Without the statutory anchor, defining the term "individual assessment" could generate litigation, including over whether the term requires the consideration of actuarial instruments or, at the other end of the spectrum, subjective appraisals of defendants beyond what is required by statute. If "individualized assessment" is unmoored from § 3583(c), then the Committee is concerned that a modified proposal would place undue burdens on courts and on probation officers. The Committee notes again that the Supreme Court's decision in *Esteras v. United States* may affect the scope of § 3583(c) (and, by analogous extension, the scope of § 3583(e) on terminations, modifications, and revocations).

***Imposition of Supervised Release* (§ 5D1.1).** The proposed amendment would change § 5D1.1 in several ways. First, it would remove the requirement that supervised release be imposed whenever the defendant is sentenced to more than a year of imprisonment (in cases not subject to a statutorily required term of supervised release). The Committee generally supports this change, because it allows for appropriate judicial discretion in applying the factors in § 3583(c). The Committee recommends, however, that the Commission consider alerting judges and parties to the interplay between imposition of supervised release (or the non-imposition of supervised release) and the applicability of credits under the First Step Act. Under 18 U.S.C. § 3624(g)(3), the Bureau of Prisons (BOP) may grant early release (up to a maximum of 12 months) to a prisoner based on programming-time credits. But it appears that *some* term of supervised release is required before those credits apply. The Committee is aware that these time credits often present a complex issue, and suggests that the Commission confer with the BOP and then provide any appropriate explanation in the Guidelines Manual, perhaps in the form of an Application Note.

Next, the amendment explicitly sets forth, in Application Note 1, the factors required by 18 U.S.C. § 3583(c), and defines "individualized assessment" as equivalent to those factors. As discussed earlier, the Committee supports this change and believes it will provide clarity to judges and parties regarding the appropriate considerations in imposing a term of supervised release, and at the same time would oppose any expansion of the term "individualized assessment" beyond the statutory factors.

Lastly, the amendment would also require courts to "state on the record the reasons for imposing [or not imposing] a term of supervised release." Given the requirement in § 3553(c) to "state in open court the reasons for its imposition of the particular sentence," as well as the overall goal of reasoned decision-making, the Committee supports this requirement. However, the Committee requests that the Commission revise § 5D1.1(d) to

explicitly confine the requirement to a statement "in open court." That limitation is consistent with § 3553(c) and would clarify that courts need not make additional *written* findings.

***Term of Supervised Release* (§ 5D1.2).** Part A would amend § 5D1.2(a) to require an individualized assessment to determine the length of the term of supervised release. Again, the Committee emphasizes the importance of equating (as the current proposal does) "individualized assessment" with the § 3583(c) factors—and no more.

Next, the proposal would amend § 5D1.2(a) to remove the minimum terms of supervised release, which are currently based on the classification of the offense (which in turn means that the current minima are based purely on the statutory maxima of the offense). The Committee generally supports uncoupling minimum terms from classification of the offense, because classification alone often bears little relation to the need for supervision. For example, bank fraud has a 30-year statutory maximum, 18 U.S.C. § 1344, whereas bank robbery generally has a 20-year maximum, 18 U.S.C. § 2113(A).

Having said that, although the removal of *minimum* lengths (especially tied just to statutory maxima) is appropriate, the Committee is concerned about the complete removal of even *recommended* term lengths. It is not unreasonable to expect that a defendant who is sentenced to a substantial period of imprisonment would require some period of supervision to assist in the safe and effective transition back to the community. Indeed, because the § 3583(c) factors overlap many of the § 3553(a) factors (depending on the holding in *Esteras v. United States*), the length of an imprisonment term may generally be relevant to the appropriate length of supervised release. The Committee suggests that the Commission examine, if practicable, any available data to inform what recommended lengths should be. For example, if defendants who are sentenced to a certain length of imprisonment (or longer) are more likely to recidivate at a certain point during supervision, that could be relevant in establishing recommended lengths. In any event, recommended lengths would serve an important purpose.

The proposal would also amend § 5D1.2(b) to remove the recommendation that the statutory maximum term of supervised release be imposed in sex offense cases. Although a life term of supervised release is warranted in some cases, the Committee does not oppose removing the across-the-board recommendation for the statutory maximum term of supervised release (which often is life in sex offense cases). As set forth in the Committee's July 2024 priorities-comment letter, the Committee urges the Commission to further study terms of supervised release and refine its policy guidance for terms of supervised release.

Lastly, the proposed amendment would require a court to "state on the record" its reason for selecting the length of supervised release. As with the similar proposal for § 5D1.1, the Committee requests the insertion of "in open court" to clarify that written findings are not required.

***Conditions of Supervised Release* (§ 5D1.3).** Part A would amend § 5D1.3 to require an individualized assessment for imposition of conditions of supervised release. Again, the Committee reiterates that "individualized assessment" should be defined (as the proposal currently does) as the consideration of factors in § 3583(c) (and, as relevant here, § 3583(d)).

One version of the amendment would also amend current § 5D1.3(c) to recast the Standard Conditions of supervised release as "Examples of Common Conditions." It is true that courts must consider the factors in § 3583(c) and § 3583(d) when setting the conditions of supervised release, and not just rotely set conditions. To that end, the proposed amendment helpfully contains an option that would add that "the court may modify, expand, or omit in appropriate cases" the Standard Conditions. But the Committee believes that there is value in having a basic set of Standard Conditions that are generally applicable across jurisdictions and that set a minimum standard of conduct for those on supervised release. In circumstances where a particular standard condition is not advisable, or is contrary to circuit case law, judges are aware of their ability to alter or strike the condition.

In a new proposed Special Condition, the amendment would require that a defendant obtain a high school or equivalent diploma completion (if the defendant does not already have one). Although completion of a diploma program is a worthwhile (and potentially recidivism-reducing) goal for supervisees, the Committee does have some concerns about requiring completion as a condition of supervised release simply for the sake of obtaining a diploma. Academic requirements for completion of these programs vary from state to state, and it can be inordinately difficult for some individuals to meet them. Additionally, where a defendant is gainfully employed despite the lack of a diploma, requiring educational participation may actually hinder their near-term ability to maintain employment. Given that the obtaining of a diploma is most valuable as a means for obtaining employment, the Committee suggests adding a phrase along the lines of "unless gainfully employed" at the end of the condition.

***Modification, Early Termination, and Extension of Supervised Release* (§ 5D1.4).** Part A of the amendment would add an entirely new provision, § 5D1.4. On modification of supervised release, § 5D1.4(a), the Committee supports generally highlighting the availability of modification. But the Committee opposes the proposed language encouraging a post-release assessment of supervised release conditions. Probation officers already evaluate the need for modifications to conditions during the pre-release process and during the initial supervision period. A Sentencing Guideline provision of this type could create unnecessary additional work for courts and probation officers. If the Commission moves forward with this amendment, the Committee prefers the word "may" over "should" in the bracketed language, because that would best preserve judicial discretion.

On proposed § 5D1.4(b), which would address early termination of supervised release, the Committee generally supports the Commission's efforts to explicitly address early termination in the Guidelines. The Committee supports adding language to remind courts of their statutory authority to terminate supervised release in felony cases after the

expiration of one year of supervision, provided the court is satisfied that it is warranted by the conduct of the defendant and in the interest of justice, as required by 18 U.S.C. § 3583(e)(1). Section 5D1.4(b) should also cite § 3583(e), which sets forth the factors from § 3553(a) that are to be considered in deciding whether to terminate supervised release (again, the decision in *Esteras v. United States* may affect the list of factors).

Having said that, the Committee cautions that the bracketed proposal on the non-exhaustive list of factors likely warrants further study. Since 2023, the Committee has been studying the appropriate use of early termination to support successful outcomes and efficiencies in supervision. The Administrative Office (AO) recently published research showing that defendants whose supervision was terminated early had better outcomes than their full-term counterparts, that is, the early-terminated defendants had lower recidivism rates compared to persons serving full terms – even when matched for recidivism risk factors.[4] This research also showed significant variety in the use of early termination across districts that do not appear to be explained by factors like risk scores, type of case, or length of supervision. Given this, the Committee recently requested that the Federal Judicial Center (FJC) conduct a qualitative study on the differences in the use of early termination across the country. The FJC's work is just beginning, and the results of the study likely will assist in the formulation of policies on early termination.

In the Issues for Comment, the Commission notes that the non-exhaustive list of factors bearing on early termination was drawn from the *Guide to Judiciary Policy,* Vol. 8E, Ch. 3, § 360.20, as well as a bill introduced in Congress. The Committee appreciates that the Commission looked to existing Probation Office policies in drafting the list of factors. But as part of the Committee's work on early termination, the Committee asked the AO's Post-Conviction Supervision Working Group to propose amendments to this *Guide* section. Specifically, the Working Group has been using the AO research described above, along with previous research into the association of recidivism rates and time on supervision,[5] to better apply the risk principle in the consideration of early termination. Thus, the Committee cautions against using the *Guide* as a model, when significant, evidence-based improvements to that language could be forthcoming. Finally, if the Commission decides to move forward with this proposal, the Committee prefers the word "may" among the bracketed language options, which appropriately emphasizes judicial discretion.

Lastly, proposed Application Note 2, titled "Extension or Modification of Conditions," would "encourage[] the court to make its best effort to ensure that any victim of the offense" is notified of proposed extensions or modifications of supervised release. Although the Committee appreciates the need for appropriate notice to victims, the Department of Justice is in the best position to provide notice to victims, because it

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[4] Cohen, Thomas H., *Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety* (January 15, 2025) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5098803).

[5] AO research shows that recidivism rates are associated with risk levels, and that likelihood of recidivism declines the longer someone is on supervision. Johnson, James L., *Federal Post-Conviction Supervision Outcomes: Rearrests and Revocations*, Federal Probation Journal, Vol. 87:2 at 20 (Sept. 2023).

maintains the Victim Notification System. The government is also in the best position to know whether the victim previously requested not to be notified about court proceedings. The Committee suggests that the victim-notification language be modified to encourage the government to comply with any statutory victim-notice requirements. Finally, if the application note does address victim notification, then it seems that a victim's interest would also be implicated (perhaps even more intensely than extension or modification) by early termination of supervision.

Conforming Changes. Part A of the amendment notes a proposed change to § 4B1.5 (Repeat and Dangerous Sex Offenders Against Minors) consisting of a change from "should" to "may" on whether courts should impose special conditions for treatment and monitoring for these defendants. Although the Committee generally supports more expansive judicial discretion, this is an instance when virtually all defendants falling under § 4B1.5 will need special conditions for treatment and monitoring.

Part B. Revocation of Supervised Release

Part B of the Supervised Release amendment makes several changes to Chapter 7, separating out violations of probation and violations of supervised release, retaining existing procedures for probation violations, and setting forth new procedures for supervised release violations.

Given the distinction between probation and supervised release, the Committee supports separating the provisions on revocation of probation from revocation of supervised release. On the revocation of supervised release, the Committee again notes that "individualized assessment" should be defined (as currently proposed in Application Note 1) as the statutory factors in § 3583(c) and § 3583(e).

On proposed § 7C1.1, which would create a new Grade D for supervised-release violations that do not constitute a criminal offense, the Committee supports this separate Grade to distinguish new crimes from other violations of supervised release. Having said that, some Grade D violations that do not by themselves constitute new offenses can involve underlying conduct that poses serious risks of re-offense or other dangers. So, the Committee supports as essential proposed Application Note 4 of § 7C1.5, which provides for an upward departure for Grade C or D violations that are "associated with a high risk of new felonious conduct."

For the proposed new provision § 7C1.3 governing revocation, the Committee prefers Option 1 (mandatory revocation only when statutorily required), because it provides courts with appropriate flexibility in responding to violations. In contrast, Option 2 would refer to the Grade of the violation, which could introduce jurisdictional disparities arising from differences in how underlying conduct may be charged in state court (because the Grade of the violation depends on statutory maxima for offenses). Similarly, the Committee supports Option 1 for § 7C1.4, which would allow courts the greatest flexibility

in deciding whether to run the revocation sentence concurrently or consecutively to any other sentence.

Lastly, the Commission requested comment on whether it should make recommendations to courts regarding consideration of criminal history at revocation, raising the possibility of requiring courts to recalculate the criminal history at the time of revocation. In the absence of empirical support, the Committee is concerned that this will unnecessarily add to the workload of courts and probation officers. The Committee is not aware of data in the supervised-release context showing, on the one hand, that criminal history categories over-represent the risk of recidivism (by still counting sentences that would otherwise no longer be countable) or, on the other hand, that criminal history categories under-represent the risk of recidivism (by not recalculating criminal history categories to include post-sentencing offenses). Courts already may consider the mitigation of aged offenses or the aggravation of newer offenses under § 3583(e), so there does not seem to be a need to recalculate criminal history points (and introduce the potential for litigation).

II. Drug Offense Amendment

Part A. Base Offense Levels and Reduction for Low-Level Trafficking Functions

Part A of the proposed amendment states that it intends to address concerns that the Drug Quantity Table at § 2D1.1(c) overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing. Although the guideline range may be greater than necessary in a number of drug-trafficking cases, the Committee has a few concerns and questions about how the Commission proposes to address this issue.

Subpart 1: Setting a New Highest Base Offense Level in Drug Quantity Table

Subpart 1 of Part A sets forth three options for amending § 2D1.1 to reduce the highest base offense level in the Drug Quantity Table down to a lower base offense level. Although the guideline ranges may be too high in some instances, especially for some lower-culpability drug defendants, reducing the highest base offense level across-the-board may not be the best way to accomplish the Commission's goals and serve the purposes of sentencing. The Committee is concerned that an across-the-board reduction of Base Offense Level (BOL) 38 – whether to Level 34 (Option 1), 32 (Option 2), or 30 (Option 3) – may result in reductions that are too substantial and not warranted for the highest-level manufacturers and traffickers. The reduction also would conflate the sentencing ranges for the most culpable drug traffickers – that is, those deserving of the most punishment and deterrence – with those for less culpable defendants.

The current BOL of 38 applies, for example, to defendants responsible for more than 90 kilograms of heroin or 450 kilograms of cocaine, which are enormous quantities that comprise hundreds of thousands of individual-use doses of those drugs. Lowering the

highest base offense level for drug defendants across the board by even four levels (Option 1) would give a significant reduction to the most culpable high-level traffickers responsible for huge quantities of drugs. At the same time, Subpart 1 would have the effect of compressing the ranges for the most culpable defendants with those less culpable, blurring the distinction between suppliers responsible for multi-dozens of kilos of drugs with defendants responsible for substantially lower drug quantities. For example, currently, the 90-kilogram-plus heroin supplier is assigned 4 more offense levels than the 10-kilogram distributor, whereas the proposed reduction would treat them the same.

For those reasons, the Committee is reluctant to support Subpart 1 without data examining which of the three options, if any, is consistent with current sentencing practices for drug trafficking defendants at the highest levels, that is, levels 34, 36, and 38. It would be helpful to know which of the three options (if any) most closely reflects the data on current sentencing practices. An analysis of the data might also reveal that some other option, such as setting the highest base offense level at 36 (rather than 34, 32, or 30) might more accurately reflect what sentencing judges are imposing in these types of cases. Alternatively, rather than adjusting the Drug Quantity Table, the Commission could consider further refining the BOL "caps" for mitigating-role defendants in § 2D1.1(a)(5). Again, an analysis of data of sentences for mitigating-role defendants could inform the Commission on the appropriate BOL caps for this narrower, less-culpable cohort of defendants.

If undertaking this analysis is not practicable, then it might be helpful to consider the impact of the three Options on the guidelines ranges expressed in months and percentages. For example, the guideline ranges for a defendant who is at a current BOL 38 would be lowered anywhere from 35% (under Option 1) to 58% (under Option 3). Consider a mid-level trafficker (that is, someone who does not receive either a mitigating or aggravating role adjustment) subject to a BOL of 38, with no other Specific Offense Characteristics under § 2D1.1, but who pleaded guilty and received a 3-level reduction under § 3E1.1. That defendant would have a Total Offense Level of 35. This results in a guideline range of 168-210 months for Criminal History Category (CHC) I, all the way up to a guideline range of 292-365 months for CHC VI. Option 1 would reduce these guideline ranges to 108-135 months for CHC I and to 188-235 months for CHC VI, constituting a reduction of between 5 and just over 8½ years at the low end of the ranges (approximately a 35% reduction). Option 2 would result in reductions of 6¾ years to 11¾ years at the low end of the ranges (approximately 48% reduction). Option 3 would result in reductions of just over 8 years to 13½ years at the low end of the guideline ranges (approximately 55% to 58% reduction).

Subpart 2: New Trafficking Functions Adjustment

Subpart 2 of Part A of the proposed amendment provides two options for adding a new Specific Offense Characteristic providing for a new reduction relating to low-level "trafficking functions," replacing the § 3B1.2 mitigating role adjustment for these cases. The Committee agrees with the Commission that an individual's role in the drug trafficking offense is important and appreciates the Commission's creative ideas on how better to

capture that role. However, the Committee does not support adopting Subpart 2 or replacing the well-established mitigating-role adjustment in drug trafficking cases.

First, introducing a completely new reduction only for drug-trafficking defendants, independent of § 3B1.2, unnecessarily complicates the guidelines and introduces new concepts that are likely to invite litigation, while losing the benefit of what has become well-settled law. In addition, rather than increasing the number of reductions for lower-level defendants, replacing the mitigating-role adjustment with this new reduction may disqualify certain defendants from receiving a reduction who would otherwise have qualified for a mitigating role reduction under §3B1.2. For example, some low-level traffickers possess firearms, whether of their own volition or at the direction of those directing their activities, including defendants whose sole function is to store drugs. These low-level defendants, who may have qualified for a reduction under § 3B1.2, would be precluded from the new proposed reduction.

Instead of introducing an entirely new specific offense category and scrapping part of Chapter 3 for drug trafficking cases, perhaps the Commission should consider further expanding the scope of the role provisions in § 3B1.1 and § 3B1.2 to allow for a range of 2 to 6 levels up for aggravating role and 2 to 6 levels down for mitigating role in drug cases. This role expansion would allow courts to more adequately measure criminal culpability by an individual's role in the offense and provide courts with the ability to finetune for the varying roles of culpability observed in drug offenses. At the same time, the Commission could provide some of the useful examples set out in Option 2 in the commentary to § 3B1.2.

Although the Committee does not support Subpart 2, if the Commission moves forward with some version of it, the Committee suggests providing for a range of reductions, instead of a fixed 2, 4, or 6 levels. The fixed levels would not allow for the nuanced role considerations that the Commission seems to be contemplating. In fact, if a fixed 2-level reduction were adopted, defendants who would presently qualify for a 3-level or 4-level reduction under § 3B1.2 would not qualify for the greater reduction. In addition, the Commission may want to consider omitting extremely large-scale couriers using special skills (e.g., the captain of a vessel or pilot of an aircraft) from the benefits of this provision. The Commission also may wish to clarify how the new provision would apply to a defendant who performs multiple low-level trafficking functions within an organization rather than just one of the low-level functions listed.

Part B. Methamphetamine

Part B of the proposed amendment includes two subparts. Subpart 1 would amend § 2D1.1 to remove references to the "Ice" form of methamphetamine. Because Committee members have not presided over a substantial number of cases involving methamphetamine classified as "Ice" or the relevant congressional directive, the Committee is not commenting on this subpart.

Subpart 2 of the proposed methamphetamine amendment sets forth two options for amending § 2D1.1 to address the purity distinction between methamphetamine in "actual" form and methamphetamine as part of a mixture. The Committee appreciates the Commission's efforts to address this issue, but believes that more research is necessary before the Commission resets the relative offense levels. In its July 2024 letter, the Committee noted the problems with the current distinction – in essence, that the offense level determination often turns on the timing of a plea and the jurisdiction's laboratory testing practices or availability rather than on the true composition of the methamphetamine. In that letter, the Committee asked the Commission to "consider whether higher-purity methamphetamine has greater adverse physiological effects and, if so, whether that would provide a basis for retaining some ratio between actual methamphetamine and methamphetamine mixture." In addition to the physiological effects, the Commission should consider studying how drug users commonly ingest methamphetamine to determine the difference in dosage units. That is, does higher purity equate to a need to use less meth per dose, which would mean that a quantity of highly pure methamphetamine comprises more doses – and thus more harm – than the same quantity of less-pure methamphetamine? Or does the purity of the methamphetamine not correlate to dosage but just to quality in the eyes of the end user? The Commission also should consider reviewing any available research on distribution patterns to determine if purity is linked to role of the defendant and to resulting violence or harm. If pure methamphetamine causes more harm than an equal amount of methamphetamine mixture, then the guidelines should reflect the relative harms caused.

Option 1 of the proposed amendment would set the offense levels for all methamphetamine at the current levels for a methamphetamine mixture, while Option 2 would set the levels for all methamphetamine at the current levels for methamphetamine (actual). Although the higher offense levels set out in Option 2 may be more consistent with the Commission's data report, which shows that nearly all methamphetamine in federal cases is highly pure, further research is needed before the Commission can accurately set new empirically based offense levels for methamphetamine. Because the methamphetamine guideline was originally promulgated with the idea that purity was associated with more culpable, higher-level defendants, the Commission should consider taking a fresh look at what the appropriate quantity thresholds should be. Without that examination, elevating all meth sentences to the meth-actual levels or reducing all meth sentences to the meth-mixture levels poses the risk of over-correcting in one direction or the other. Also, after conducting the examination, the Commission should consider providing a report to Congress for possible reassessment of the statutory distinction between methamphetamine mixture and methamphetamine (actual).

Part C. Fentanyl

Part C of the proposed amendment provides three options to revise the enhancement for fentanyl and fentanyl-analogue misrepresentation at subsection § 2D1.1(b)(13). The Committee supports revising the enhancement to solve the current application issues and to address the critical dangers of trafficking a substance that buyers do not know contain

fentanyl or a fentanyl analogue. Specifically, the Committee favors Option 3, a tiered-alternative provision with a defendant-based enhancement requiring *mens rea* and an offense-based enhancement without a *mens rea* requirement. Option 3 seems to strike the right balance between an individual defendant's level of knowledge (or culpable state of mind) and the danger of fentanyl-laced drugs resulting in overdoses and deaths.

On the bracketed language in Option 3, without definitions distinguishing the standards (that is, "knowledge or reason to believe" or "knowledge of or reckless disregard"), the Committee would recommend whichever standard requires a less culpable state of mind, given the dangers of fentanyl. If "reason to believe" is the equivalent of a negligent state of mind, then presumably that would be the less culpable state of mind. If it is unclear which is the less culpable state of mind, then the Committee would favor an amendment that includes all of those terms—"with knowledge, reckless disregard, or reason to believe."

Part D. Machinegun Enhancement

Part D of the proposed amendment would amend the enhancement at § 2D1.1(b)(1) for cases involving the possession of a weapon, creating a tiered enhancement based on whether the weapon possessed was a machinegun (as defined in 26 U.S.C. § 5845(b)) (4 levels) or some other dangerous weapon (2 levels). The Committee supports the tiered enhancement, which reflects the elevated statutory penalties imposed for possession of a machinegun in furtherance of a drug trafficking crime.[6] Given the increased danger posed by fully automatic weapons that can fire more quickly and continuously, the Committee supports the 4-level enhancement for machineguns as well as for all machinegun conversion devices and Glock switches. Also, given the increased prevalence of homemade guns or "ghost guns," which are essentially untraceable, the Committee recommends that the Commission consider including them in the § 2D1.1(b)(1) enhancement as well.

Part E. Safety Valve

Part E of the proposed amendment would amend the safety valve at § 5C1.2 to address the specific manner by which a defendant may satisfy the requirement of providing truthful information and evidence to the government at § 5C1.2(a)(5). Essentially, Part E would amend the Commentary to § 5C1.2 to state that a defendant need not meet with the government to satisfy the requirement in subsection (a)(5) to provide information and that providing a written disclosure may be sufficient, provided that the disclosure is found complete and truthful. For several reasons, the Committee opposes this proposal. Whether or not the Commission is authorized to address this issue, Part E is problematic for several reasons.

Specifically, adding Part E will likely discourage in-person meetings and encourage written disclosures, which in turn would almost certainly invite wasteful litigation and

[6] *See* 18 U.S.C. § 924(c).

disruption to the sentencing process. In the Committee's experience, written disclosures of safety-valve proffers are rarely attempted because of the sheer improbability that a written disclosure will provide all of the information and evidence that the defendant has concerning the offense and relevant conduct. A complete account of drug trafficking typically requires information on suppliers, joint participants, and buyers, with all the corresponding information on names and descriptions, contact information, dates and time periods, quantities, locations, addresses, phone numbers, vehicles, and so on. Moreover, presumably written disclosures will be written with the assistance of defense counsel, but it is the government that typically is in a better position to connect dots and to formulate follow-up questions to obtain the complete accounting. For example, if the defendant's phone records show frequent calls with a phone number that government agents know is used by a drug supplier and surveillance shows that the defendant frequently visited the supplier's stash house, but defense counsel does not understand the significance of those facts, then the written proffer will not address that information. Furthermore, because the defendant is permitted to provide the safety-valve information at the sentencing hearing itself, then the sentencing could be disrupted by a back-and-forth, extemporaneous proffer. The Committee understands the safety concerns that might arise from an in-person meeting. But given the likelihood of litigation over a written proffer, the proffer presumably would be filed on the docket or made part of the record. It is thus not clear to the Committee that a written proffer, which could be downloaded from the docket and circulated, is superior from a safety standpoint to an in-person meeting that does not generate a docketed statement. For these reasons, the Committee opposes this proposal.

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on this set of proposed amendments for the 2024–25 amendment cycle. The Committee members look forward to working with the Commission to improve the overall effectiveness of the sentencing guidelines and the fair administration of justice. We remain available to assist in any way we can.

Respectfully submitted,

Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

MEMORANDUM

February 18, 2025

To: United States Sentencing Commission

From: Paul A. Engelmayer, PAE
Chair, Criminal Law and Probation Committee
Southern District of New York Board of Judges

Thank you for the invitation to comment on the January 24, 2025 proposed revisions to the Sentencing Guidelines. This memorandum addresses changes proposed with respect to supervised release. I write on behalf of the criminal law and probation committee of the board of judges of the Southern District of New York. The committee consists of 13 judges (11 district and 2 magistrate judges). Relevant here, it is broadly responsible for the work of our Probation Department and for evaluating issues and practices that affect the criminal docket in this District.

Our committee opposes three proposed revisions with respect to supervised release.

First, we oppose the presumption that supervised release should end after one year. Our experience is that longer periods of supervision are often highly productive. They provide a means for our superb Probation Department to secure employment for supervisees, they enable the Probation Department to secure necessary treatment options (e.g., for mental health issues and drug addiction) for supervisees, they may deter recidivism, and they provide a mechanism to support restitution obligations. In recent years in our District, the supervised release framework has also provided a means of public protection in the area of domestic violence. Violation specifications have been increasingly brought and established in cases of domestic assaults that (often due to uncooperative victims) could not be established by state prosecutors but can be established by a preponderance as a VOSR. The sentences imposed for such violations have protected victims and stand to specifically deter recidivism. A one-year presumption wrongly presumes that these benefits are apt to lapse after one year of supervised release. The present practice, under which a district court can terminate supervision early – on the application of the Probation Department or a motion of the defendant – is flexible and works well.

Second, we oppose the guidance that judges conduct a reassessment of the special conditions imposed at sentencing promptly upon the defendant's release from prison. Realistically, a judge is unlikely at that point to have the information in hand to enable an informed reassessment of whether these conditions are merited. Any such reassessment is better undertaken later, with the input of the Probation Department, based on its experience supervising the defendant. Although a judge may elect to have a conference shortly upon release, a requirement of such a reassessment will needlessly burden busy courts.

Third, we oppose the proposal to convert certain standard conditions into special conditions. Doing so will burden judges by requiring them to make a record at sentencing of the factual basis for each such condition. It will also potentially invite litigation on this point. We are unaware of any problem in supervision caused by the present standard conditions.

Separately, with respect to other amendments under review, it is not the practice of our committee to review the substance of proposed USSG amendments generally, and our silence with respect to the other proposed amendments should not be taken as an endorsement of them. That said, our committee is in agreement that if the Commission adopts these, it should not make them retroactive. Such imposes a substantial administrative burden on judges, Probation Departments, and Clerks offices.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
JANE B. STRANCH
CIRCUIT JUDGE

February 24, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed 2025 Amendments to the Federal Sentencing Guidelines Published January 2025

Dear Judge Reeves and Members of the Sentencing Commission,

Thank you for your invitation to comment on the 2025 proposed revisions to the Guidelines. I well understand the importance of continually striving to improve our sentencing system and appreciate the Commission's central role in realizing this goal.

I write in support of the proposed drug sentencing amendments. In particular, I am in favor of the proposed amendment to reduce the highest base offense level on the Drug Quantity Table. Of the three options proposed—reducing the highest base offense level to 34, 32, or 30—I favor a reduction to 30 because that level is supported by empirical evidence and the practical experience of sentencing judges. Above a base offense level of 30, Commission data suggests that more than 75% of offenders are sentenced to a below guidelines sentence. Receiving a minimum guidelines sentence should not place an offender in the seventy-fifth percentile of offenders or higher.

Per the Commission's request for comment on page 68 of the proposed amendments, I also suggest that lower drug quantities have their base offense levels correspondingly reduced. I do not, however, recommend maintaining the current higher tiers of drug quantities and simply scaling down all the recommended sentences. The current tiers are anchored to the mandatory minimum sentences in the Anti-Drug Abuse Act of 1986 (ADAA). The ADAA's severe mandatory minimum sentences aimed to punish managers, organizers, and leaders of drug-trafficking enterprises by setting the penalties to correlate with the quantity of drugs trafficked. District courts across the country have expressed concern that this framework is a poor proxy for culpability or dangerousness of an offense because it is unsupported by empirical research. I, therefore, laud the Commission's current efforts to flatten the drug sentencing regime above the threshold currently set at a base offense level of 30.

For similar reasons, I am in favor of the proposed Trafficking Functions Adjustment. It continues to move our courts toward a system which recognizes that the quantity of drugs a person is involved with may not accurately capture that individual's culpability in the conduct of a much larger organization. I think the Trafficking Functions Adjustment must be a four or six level adjustment—my preference would be six. This is both because I believe it will serve as an important safety valve to a harsh drug sentencing scheme and because of the interaction between the drug Trafficking Functions Adjustment and the Mitigating Role Adjustment. The proposed Trafficking Functions Adjustment, if applied, precludes the application of the Mitigating Role Adjustment. The Mitigating Role Adjustment provides for a potential decrease of up to four levels. Thus, if the Trafficking Function Adjustment provides only a decrease of two levels, an individual who would previously have been eligible for a four-level decrease under the Mitigating Role Adjustment could now be eligible for only a two-level adjustment under the Trafficking Functions Adjustment.

Within the Trafficking Functions Adjustment, I am in favor of the "primary function" language rather than the "limited to performing" language. The "limited to performing" language runs the risk of excluding an individual who performed two of the listed minor roles within a drug organization (e.g., acted as a courier and ran an errand). Because the language asserts that the defendant's conduct must be "limited to performing a low-level trafficking function," it is susceptible to a reading that requires the defendant to have engaged only in a single one of the listed functions. In the Commission's admirable efforts to be thorough in listing the different functions that might constitute low level trafficking functions, the Commission has listed enough differentiated functions that an individual who has completed one function is likely to have also completed a second. Thus, the "primary function" language is preferable to avoid this issue.

Finally, with regard to the proposed changes in sentencing for methamphetamine, I support the Commission's proposal to cease using methamphetamine purity as a proxy for culpability. The Commission's research reflects that most methamphetamine on the market is now "methamphetamine (actual)"—regardless of whether the defendant is a high-level kingpin or a low-level user. Of the two proposals, I favor the one that would set the quantity thresholds at the current level for methamphetamine mixture. First, given the current overwhelming trend toward sentencing below guidelines in methamphetamine cases, reducing the guidelines for methamphetamine seems appropriate. Second, as Judge Bailey pointed out in his public comments, those involved in dealing low purity methamphetamine are often individuals who are, themselves addicted to methamphetamine and are producing it in home setups. In the Commission's efforts to fairly punish individuals selling high purity "methamphetamine (actual)" or "Ice," the Commission should not raise the penalties for individuals dealing in low purity methamphetamine.

Thank you for your hard work to make the guidelines more effective and fair and for inviting people involved in the justice system to participate in your efforts.

Sincerely,

Jane B. Stranch

Jane B. Stranch

JBS:sl

From: [redacted]
To:
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, January 29, 2025 5:12:40 PM

Thank you, Judge Reeves. I am grateful for the Commission's good work and your excellent leadership. After 40 years as a district court judge, I can tell you that one of the major deficiencies in our criminal justice system is the shortage of sentencing options for inmates who do not need a term of imprisonment. There is a critical shortage of half-way houses, treatment centers, re-entry programs, detention centers that allow for children to stay with their mothers, etc. Until the sentencing laws allowed judges discretion in fashioning sentences, these intermediate options were not relevant. In addition, the resources vested in the BOP for psychiatric help and other kinds of educational and social and therapeutic advancement are too few given the demand.

I hope this informal method of responding to your invitation to comment is acceptable.

With appreciation, Sarah Evans Barker, Judge, SD/IN

From: [redacted]
To: [redacted]
Subject: Supervised Release
Date: Wednesday, January 29, 2025 5:18:53 PM
Attachments: [redacted]

Dear Chairman Reeves,

In response to your email regarding pending Commission proposals, I am enclosing a 2024 report on our supervised release project and study.

I hope you find it helpful.

Richard M. Berman
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007
[redacted]

Court Involved Supervised Release

June 10, 2024

Table of Contents

Executive Summary

In this report, we provide data-based results from our court involved supervised release project. We conclude unequivocally that the proactive involvement of the sentencing judge in supervision is indispensable and appreciably improves community reentry following incarceration.[1] **By re-focusing their attention upon criminal case supervision, judges will make an enormous positive impact upon recidivism (re-offending).** *See, e.g.*, Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release*, 28 Fed Sent'g Rep. 231, 233 (2016) ("Interaction with the judge . . . is a crucial ingredient . . . and of special importance to the individual under supervision."); Melissa Aubin, *The District of Oregon Reentry Court: An Evidence Based Model*, 22 Fed. Sent'g Rep. 39, 41 (2010) ("Judicial authority alone can motivate the participant to make progress in building recovery capital. . . . [J]udicial involvement corresponds with, and works to accomplish, the sentencing goals of rehabilitation, accountability, and protection of public safety."). "[J]udges who become actively involved in supervision can provide impactful support to supervisees to facilitate a safe transition home."[2] Emilia McManus, *Beyond Bars: Rethinking Substance Use Criminalization in Federal Supervised Release*, 51 Fordham Urb. L. J. 1181, 1212 (2024).

[1] **We are very grateful to the AO, the U.S. Sentencing Commission, and the U.S. Probation Office for providing us with helpful data and statistics.**

[2] *See also* Christopher Salvatore et al., *Reentry Court Judges: The Key to the Court*, 59 J. Offender Rehabilitation 198, 214–15 (2022) ("While the efforts of all members of the [] court team are vital to program success, studies have found the judge's role is especially vital in the success of . . . court program participants."); Edward Latessa, Shelley L. Johnson & Deborah Koetzle, *What Works (and Doesn't) in Reducing Recidivism*, at 166–67 (2d ed. 2020) ("[I]nteractions between the judge and participants . . . allow[] time for the judge to inquire about progress, give meaningful feedback, and address concerns that may arise.").

We have had these significant results:

(i) As of today, **201** supervisees actively participated in our court involved supervised release program. 152 supervisees are part of our Study Population; and 49 additional supervisees joined after the Study Population was defined.

(ii) **86.6%** successful completion of supervision. This includes **48.5%** of supervisees who completed supervision upon expiration of the term of supervision plus **38.1%** of supervisees who completed supervision through early termination.

By contrast, nationwide, **64.0%** of supervisees studied by the Administrative Office of the U.S. Courts ("AO") completed supervision, including **48.2%** who completed supervision upon expiration of the term of supervision plus **15.8%** who completed supervision through early termination.

(iii) **78.6**% of our Study Population found employment.

The nationwide employment percentage, by contrast, is **75.8%**; the SDNY employment percentage is **73.0%**; and the EDNY employment percentage is **72.6%**.

(iv) **82.2%** of our Study Population actively participated in drug treatment and mental health counseling.[3]

(v) **17.1%** of our Study Population were rearrested over the first three years of supervision; **20.4%** were rearrested over the first five years of supervision. (Note: **45.3%** of rearrest charges were dismissed.)

Nationwide, the rearrest percentages were **20.8%** over three years and **27.7%** over 5 years. The AO also publishes an adjusted 3-year rearrest rate to account for "risky" supervisees. The adjustment reduces the 3-year rearrest rate from **20.8%** to **16.3%**.

If our Study Population 3-year rearrest rate were to be reduced by the same (AO) percentage, our rearrest rate would be 13.4% over 3 years rather than 17.1%.

(vi) **13.8%** of our Study Population supervisees returned to state or Federal prison. Return to prison is said to be one of the "most important" and reliable measures of recidivism. Gerald J. Stahler et al., *Predicting*

[3] We have not located comparable data from other studies.

Recidivism for Release State Prison Offenders, Crim. Justice Behav. (Feb. 2013).

Nationwide, by contrast, **31.6%** of supervisees returned to prison, according to the U.S. Department of Justice, Bureau of Justice Statistics ("Bureau of Justice Statistics").

(vii) **24.6%** of our Study Population were charged with one or more violations of supervised release. **77.5%** were Grade C violations (the least serious grade); **13.6%** were Grade B violations; and **8.9%** were Grade A violations (the most serious grade).

Nationwide, the AO found, by contrast, that **60.4%** of supervisees were charged with one or more violations. The U.S. Sentencing Commission reports that, nationwide, **54.9%** of violations were Grade C, **31.5%** of violations were Grade B, and **13.6%** were Grade A violations.

Three additional features of our Supervised Release Program are especially noteworthy. First, **every** supervisee on our criminal docket participates in court involved supervision. The signature premise of our Program is that no one is excluded. Second, because court involved supervised release relies upon our very talented SDNY Probation Department professionals, supervision does not require significant additional expenditures. The main difference is that the judge is called upon to undertake a more active role in supervision than historically has been the case. Third, while we include several comparisons of our Study Population with other studies, we recognize that such comparisons are at best imprecise. It is difficult to compare outcomes because adequate data and statistics are not always collected and/or analyzed, and because studies vary widely in methodology, size, and eligibility.

The court involved supervised release process is not complicated and yet it is enormously rewarding. Judges are encouraged to apply their own (individual) experience and approach. *See* "Getting Started," September 2021 Supervised Release Report Update (pages 6–8). The first order of business is usually to schedule an initial conference or hearing—**preferably during the first thirty days following incarceration**—in order to introduce the supervisee and the supervision

team, and to ensure that the supervisee has begun to fulfill any conditions of supervised release, including, for example, participation in mental health or drug programs. The court may also want to set early goals and objectives regarding housing and employment.

Court involvement in supervision entails conducting a series of hearings and conferences **proactively** throughout each supervisee's term of supervision. The actual number of proceedings is determined by the court (and the supervisee) but it is likely to range from at least 6 to 10 hearings per supervisee per year. This is in contrast to the historical norm of conducting a hearing only when the supervisee has been arrested and/or has violated the terms of supervision. *See* Joan Petersilla & Richard Rosenfeld, Co-Chairs, Committee on Community Supervision, *Parole, Desistance from Crime, and Community Integration*, at 63 (Nat'l Acad. Press. 2008).

Without doubt, the judge's proactive involvement helps to ensure that supervision and reentry are timely, successful, and safe. "The possibility of scaling up court involvement in supervised release is promising to make sure that supervisees are accessing critical support, leading to a safe return home. Implementing programs similar to [this one] across the country can ensure that supervisees are closer to succeeding rather than ultimately ending up back in prison." McManus, *supra* page 1, at 1214.

* * *

I. Court Involvement in Supervised Release

Since 2016, our chambers has been deeply involved in supervision (and related data collection) of all those persons we sentenced to incarceration and to supervised release. To measure the impact of court involvement—and to assess the potential for universal court involved supervision—we relied upon a Study Population of 152 supervisees. No supervisee was excluded, i.e., no matter the crime of conviction, family history, risk assessment, age, addiction, and/or health and mental health issues. We documented our results in written reports dated April 6, 2021, September 2, 2021, April 20, 2022, and October 12, 2022. This is our fifth detailed report.

Charts 1–7 below provide an overview of the Study Population:

Chart 1: Age

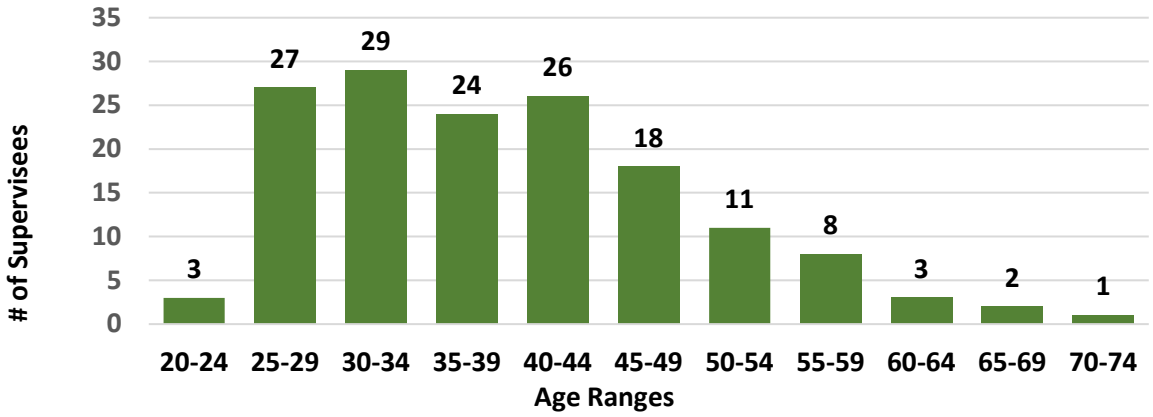


Chart 2: Level of Education

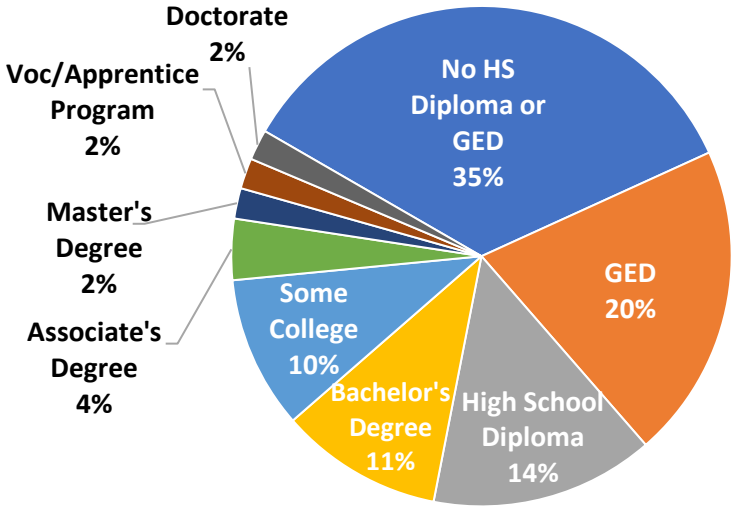


Chart 3: Criminal History Category

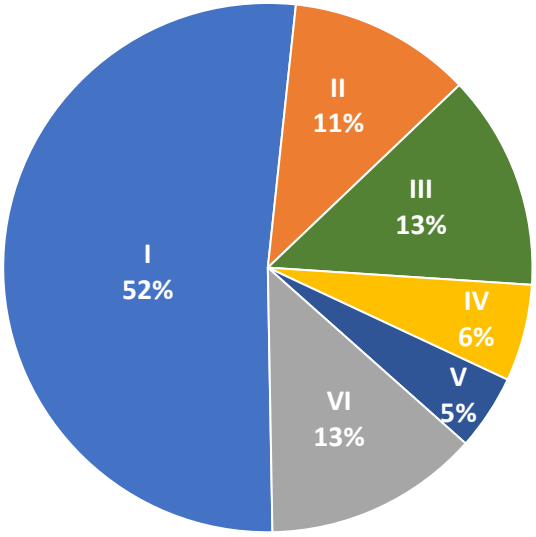


Chart 4: U.S. Probation Department PCRA ("Risk") Categories

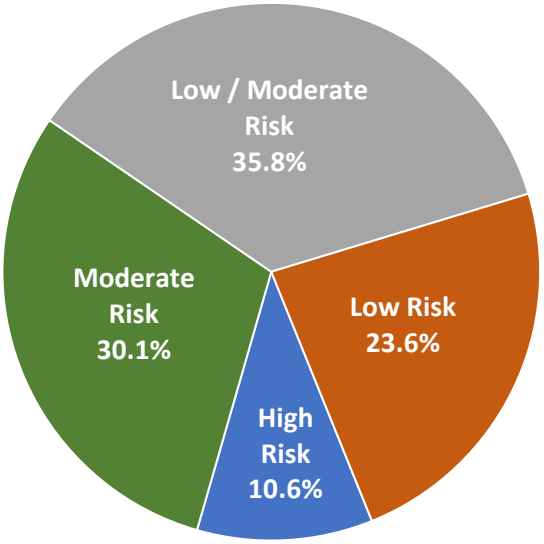


Chart 5: Crime of Conviction

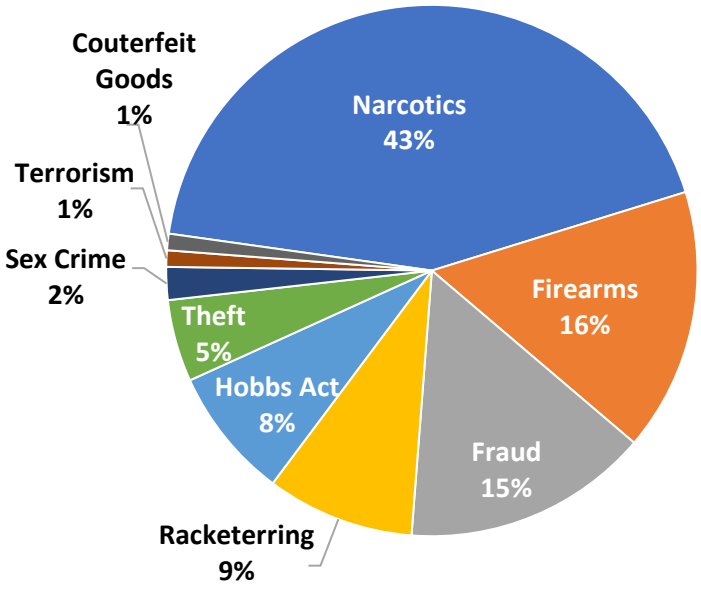


Chart 6: Term of Incarceration

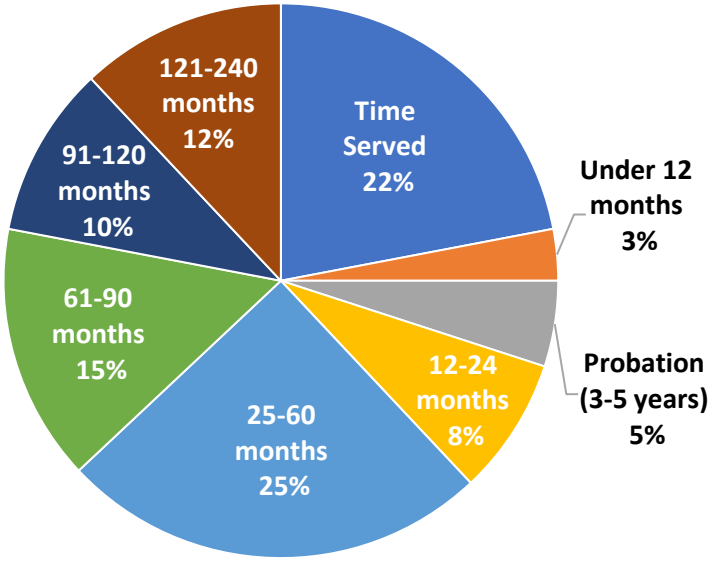
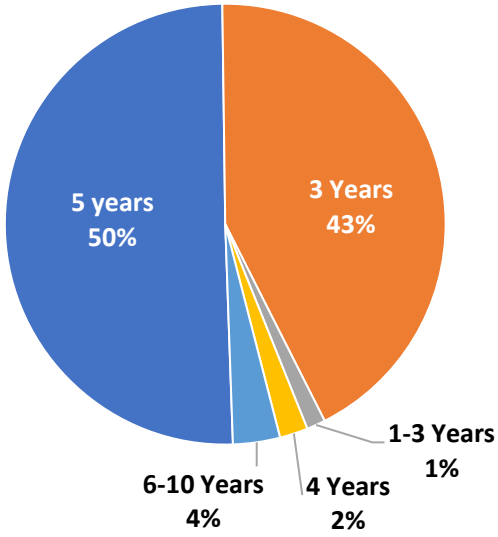


Chart 7: Term of Supervised Release



Court involved supervision includes a series of proactive individual hearings and conferences presided over by the sentencing judge. Participants (and supervised release team members) include the judge, the supervisee, the probation officer, defense counsel, the AUSA, and the treatment providers, including mental health and drug counselors. Hearings and conferences are transcribed and are public.

It is very helpful (and important) to hold the first hearing within 30 days of the supervisee's release from prison in order to get everyone "on board" early. SDNY Probation Department's assistance is vital in this process, and in our Court Involved Supervised Release Program, and they are requested to inform the Court immediately when a supervisee has been released from incarceration. At the first hearing, we describe the purpose of court involved supervision and seek to ensure that the supervisee understands the goals and conditions of supervision.[4] Among other

[4] Appellate courts have also increasingly focused upon supervised release, including implementation of "special conditions." *See United States v. Sims*, 92 F.4th 115, 123 (2d Cir. 2024).

things, we inquire about where the supervisee is living and with whom; whether the supervisee has been enrolled in mental health and/or drug counselling; and whether the supervisee is pursuing employment.

We make clear that supervised release is **not** intended to be about punishment. It is, rather, to help the supervisee—in a positive way—to reintegrate into the community, safely and successfully. Nearly all supervisees grasp the purpose of court involved supervision almost immediately. Often, the supervisee will be informed that the Court has the authority, after a minimum of one year of supervision, to shorten the length of supervision if and when the Court finds that early termination is warranted. *See* 18 U.S.C. § 3583(e).

Case Study #1

The supervisee had been sentenced to 168 months of incarceration and 10 years of supervised release for conspiracy to distribute and possess with intent to distribute drugs, including methamphetamine. The Sentencing Guidelines range was 262 to 327 months of incarceration. Special conditions of supervision included weekly mental health counseling and drug treatment.

> **Court:** This is our first supervised release hearing. . . . [We will] be involved in supervision on a . . . regular basis in the hopes that provides some additional assistance . . . in reentry. . . .
>
> **Probation Officer:** At this early point, . . . [supervisee is] very resourceful, . . . and as far as pro-social activities, he's [especially] involved. . . . As long he maintains his level of motivation and continues to work on himself, I see him thriving . . . . As far as substance abuse and mental health treatment, he's going to [a treatment provider], which is where he has [received treatment] before. . . . So far, he has been attending actively. . . .
>
> **Supervisee:** I'm really getting myself back in the groove. I'm doing very well. Physically, mentally, I feel better than I did [before sentencing]. . . .
>
> **Court:** I have to say, you're in pretty good shape. You got yourself off to a good start. [Our goal] is to make this a positive experience and for you to succeed. . . . As we discussed, [you] have a ten year [term of] supervised release. There's a minimum of one year that, by law, has to be completed. Thereafter, I have discretion to reduce the term of supervised release according to the suggestions of [the supervised release team].

The frequency and agenda of hearings is up to the judge and the issues faced by the supervisee. There are usually at least 6 to 10 hearings per year per supervisee. The frequency will vary depending upon the challenges faced by the supervisee which may have to do with a wide range of issues such as employment, family, mental health and drug abuse treatment, physical health conditions, among others.

Occasionally, our hearings include collaboration with state court proceedings. If, for example, a supervisee is charged with a state crime during supervision, the Court will need to navigate the complexities of the supervisee's obligations to the state courts while simultaneously working out any Federal court issues.

Case Study #2

The supervisee was sentenced to 68 months of incarceration and 3 years of supervised release for robbery and attempted robbery (of fast-food shops). The Sentencing Guidelines range was 151 to 188 months plus one to three years of supervised release. Special conditions of supervised release included weekly mental health counseling (to deal with paranoid schizophrenia) and drug treatment (for alcohol and cocaine).

During his term of supervised release, the supervisee committed a state crime (robbery in the third degree) for which he pled guilty in state court. As a consequence, he was also charged with several (Federal) violations of supervised release (3 Grade A violations, 2 Grade B violations, and 4 Grade C violations). *See* 18 U.S.C. § 3583(d) ("The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision."). The state court ultimately agreed that if the supervisee successfully completed an inpatient treatment program, it would vacate his state felony guilty plea and accept a guilty plea to a misdemeanor.

Court: How are things going? If I recall from our last hearing . . . at least with respect to the state proceedings, there were three, four months to go and then on to the next phase [of rehabilitation and reentry]. . . .

State Defense Attorney: [Supervisee] is in the final phase of what's going on with the state case. He had a glowing update on the last court date. . . . So that's really great . . . because if all goes according to plan . . . , on his next court date, . . . the plea to his felony, which was a robbery in the third degree, will be vacated and he will be sentenced to a misdemeanor petit larceny. . . .

Court: What would be the next steps? I gather that's a key step at the state level . . . .

Federal Defense Attorney: Yes. So, I think that once he successfully completes that [state] program and . . . [the state] vacate[s] the plea to the felony [and] he gets sentenced on the misdemeanor, then we are probably in a position where we can then resolve our [Federal supervised release violation] proceeding [] in consultation with all the parties . . . .

Court: Does [supervisee] get to remain at [his current inpatient facility]? How would he get from there to . . . independent living or some sort of group living? . . . .

State Defense Attorney: It is my understanding that. . . they can stay and are encouraged to stay on until housing gets set up. . . . I believe that he is encouraged to stay until they can transition him directly into supportive housing. . . .

Supervisee: I have been approved for housing. . . . I start orientation for [training] for custodial maintenance. . . . Once I complete the training phase, I'm able to gain a job coach . . . to get permanent work. . . .

Court: That's very impressive to me. The entire team is responsible, and it's fantastic. But particularly, [supervisee], I'm amazed [how you are] on top of every aspect.

Supervisee: I couldn't do it without [everyone's] support. [Everyone's] support has been a benevolent blessing to me. You patiently allow me to go through my struggles and kept me in the program. I can't be more grateful—I'm very grateful.

During the COVID-19 pandemic, we conducted multiple (i.e., four to five) daily Zoom supervised release hearings. We have resumed in-person hearings post-pandemic but we also have, at the urging and consent of all the participants, continued to conduct at least some supervised release hearings virtually. *See* National Center for State Courts, *National Research Shows Support for Virtual Court Hearings* (Feb. 2, 2022) ("Most participants . . . noted various benefits to participating in court . . . virtually, including reduced barriers (e.g., transportation, time off from

work), reduced health risks, reduced anxiety, and increased comfort with court proceedings and treatment."). Our experience is that "virtual" supervision is often most efficient and effective. It allows supervisees (more easily) to be able to go to work and to attend to family and supervision responsibilities without having to travel sometimes from outer boroughs to the court. Surprisingly perhaps, in addition to the substantial cost and time savings and the reduced wear and tear, virtual hearings seem to be at least as genuine as in-person proceedings. *See* Jaqueline Thompson, *Virtual Court Hearings Are Here to Stay Post-Pandemic, Survey Finds*, Nat'l L.J. (Aug. 18, 2021) ("[M]any of the pivots made [including virtual appearances] will far outlive the pandemic."). **Treatment providers, in particular, almost always express a preference for virtual proceedings as they would be unable to travel to the courthouse to attend an in-person hearing.**

Each hearing presents an opportunity for meaningful dialogue among the judge, the supervisee, and the other members of the supervised release team. *See* McManus, *supra* page 1, at 1213 ("The supervised release hearings allow the supervisees a chance to express their needs to the court and enables the court an opportunity to understand the complexities of an individual's case—a novel feature of supervised release procedures."). The objective is to engage with the supervisee toward the common goal of safe and successful reentry—and ultimately, to assist the supervisee in becoming untangled from the criminal justice system. *See* Jacob Schuman, *Revocation and Retribution,* 96 Wash. L. Rev. 881, 904 ("[T]he purpose of supervised release is to safely transition prisoners back to the community, not punish them for misconduct."); Salvatore et al., *supra* page 1, at 214–15 ("[J]udges . . . have a significant opportunity to positively affect the lives of formerly incarcerated people who would have been previously abandoned to the criminal justice system with significant personal, community and taxpayer cost."); *see* Aubin, *supra* page

1, at 42 ("The reentry court judge interacts with released individuals at a vulnerable moment, when access to prosocial networks and services aimed at reducing barriers to reentry is most critical . . . . [This enables the supervisee] to learn the lesson of avoiding future criminal behavior . . . . Judicial involvement in the reentry court context corresponds with, and works to accomplish, the sentencing goals of rehabilitation, accountability, and protection of public safety.").

Case Study #3

The supervisee was sentenced to time served (23 months) and 5 years of supervised release for "conspiracy to distribute and possess with intent to distribute" drugs, including heroin, cocaine, fentanyl, and MDMA/ecstasy. The Sentencing Guidelines range was 188 to 235 months of incarceration plus 5 years of supervised release. Special conditions of supervision included weekly mental health counseling and participation in an inpatient substance abuse treatment program followed by residential "sober housing."

> **Counselor**: [Supervisee] continues to be compliant in all capacities [at the inpatient facility]. He continues to make progress with working on himself and attending all . . . groups. He's completed Anger Management, Thinking for a Change, [and] Relapse Prevention, which are key groups here. . . .
>
> **Court**: And what does it mean to complete, for example, anger management?
>
> **Counselor**: Anger management is really to help a person to have more self-control and be able to manage their anger. . . . We all get angry. . . .What do we do with that anger? . . . There's different things we can do that are appropriate and healthy . . . which is usually the opposite of how some of us, especially clients here, have reacted to their anger in the past . . . A lot of times, their reaction to that feeling has gotten them arrested, locked up. . . .
>
> **Court**: I remember from the last session that [supervisee] actually had a very insightful perspective. . . . He said he does well in [inpatient treatment] environments . . . . His challenge . . . is the reentry phase. That is to say, coming back into the community, how does one do that [successfully]? . . .
>
> **Counselor**: He's got to be actively pursuing transitioning back into society and becoming an asset to society . . . . So, he's got to find a job, . . . go to NA or AA meetings, build his sober support network. . . .

> **Court**: How does this all sound to you . . . ? Are we going in the right direction?
>
> **Psychiatrist**: Yes, I think we are. . . . I will speak with [Probation Officer] to . . . make sure that . . . we have the mental health component in place because he'll need ongoing abstinence-based treatment, as well as a specific psychiatric or addiction medicine intervention to make sure that his opiate addiction and his ADD conditions are well managed. . . .
>
> **Court**: [Probation Officer], what role will you be playing in these various phases of recovery and reentry? . . .
>
> **Probation Officer**: I have had conference calls with the counselor and [supervisee] to discuss adjustment to treatment and it seems like everything is going very well. . . . There are resources out there. We can . . . be there for him to support his reentry and ensure that he has a successful reentry.
>
> **Court**: So, if I could turn to [supervisee] for a moment and to ask how you think everything is going . . . . Are you optimistic?
>
> **Supervisee**: Yeah, I'm pretty optimistic at this time. I feel that this was a good placement and that I got a lot out of here. . . . The next phase of trying to go from the transitional housing to the community . . . seems like that'll be very helpful too with [resources]. . . . The housing piece is going to be my main challenge— . . . finding stable housing so I don't have to put myself into bad environments like shelters. . . .
>
> **Court**: It looks like we're going in the right direction. We'll take it one . . . step at a time.

It cannot be overstated how much court involved supervision relies upon the already-in-place and talented professionals, structures, and resources, particularly of the SDNY Probation Department and the agencies they contract with. We recognize that Probation, in turn, is "an integral part of the judiciary; everything that probation does it does as an arm of the judiciary." *Newton v. New Jersey*, No. 15-CV-6481, 2017 WL 27457 at *4 (D.N.J. Jan. 2, 2017).

We believe that district (and magistrate) judges will find it very rewarding if they become more involved in supervision. *See, e.g.*, discussion in *Court Involved Supervised Release* at 48 (October 12, 2022). We contend that supervised release is no less a court responsibility than is an arraignment, a plea, a trial, or a sentence. And, given that supervised release is often the "last best chance" to assist supervisees in safely and successfully reentering the community, supervised

release is as crucial and significant as any other phase of a criminal case. Professor Tina Maschi of Fordham University's Graduate School of Social Service (whose work focuses on reentry and who is also familiar with our study) stated that judicial involvement in supervised release "incorporates a much-needed holistic portrait of the perspectives of the supervisee, the parole or probation officer, and other associated professionals . . . to foster successful reintegration into society. It also has the serendipitous effect of reducing crime and recidivism."

II. Significant Outcomes

The Study Population has achieved significant positive outcomes in several important categories, including: (A) successful completion of supervision; (B) employment; (C) drug treatment and mental health counseling; and (D) re-offending ("recidivism").

A. 86.6% Completion Rate

Our goal in supervision is to help supervisees reenter the community safely and successfully. Completion of one's supervised release responsibilities is one of the best indicators of achieving that goal. *See, e.g.*, Laura M. Baber, *Inroads to Reducing Federal Recidivism*, 79 Fed. Prob. 3, 5 (Dec. 2015) ("successful completion" occurs when a supervisee's term expires **or** supervision ended because the court granted early termination).

That **86.6%** of Study Population supervisees completed supervised release successfully is a huge achievement. Chart 8 below reflects the Study Population completions which includes **48.5%** who completed supervision in the at the expiration of the term, and **38.1%** who received early termination. The remaining Study Population completions (13.4%) include **9.7%** who had a revocation and no additional supervision imposed, and **3.7%** who were deported or are deceased.

Chart 8: Completion of Supervision

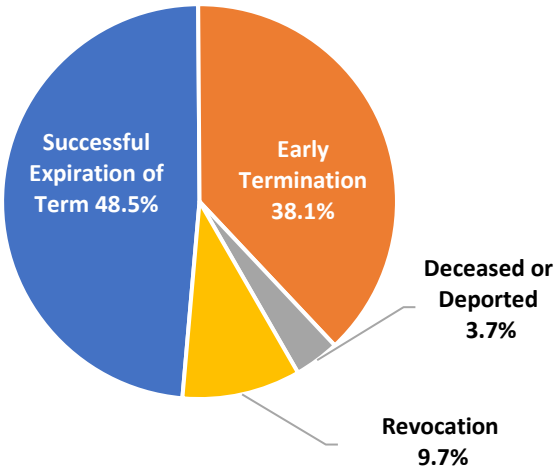
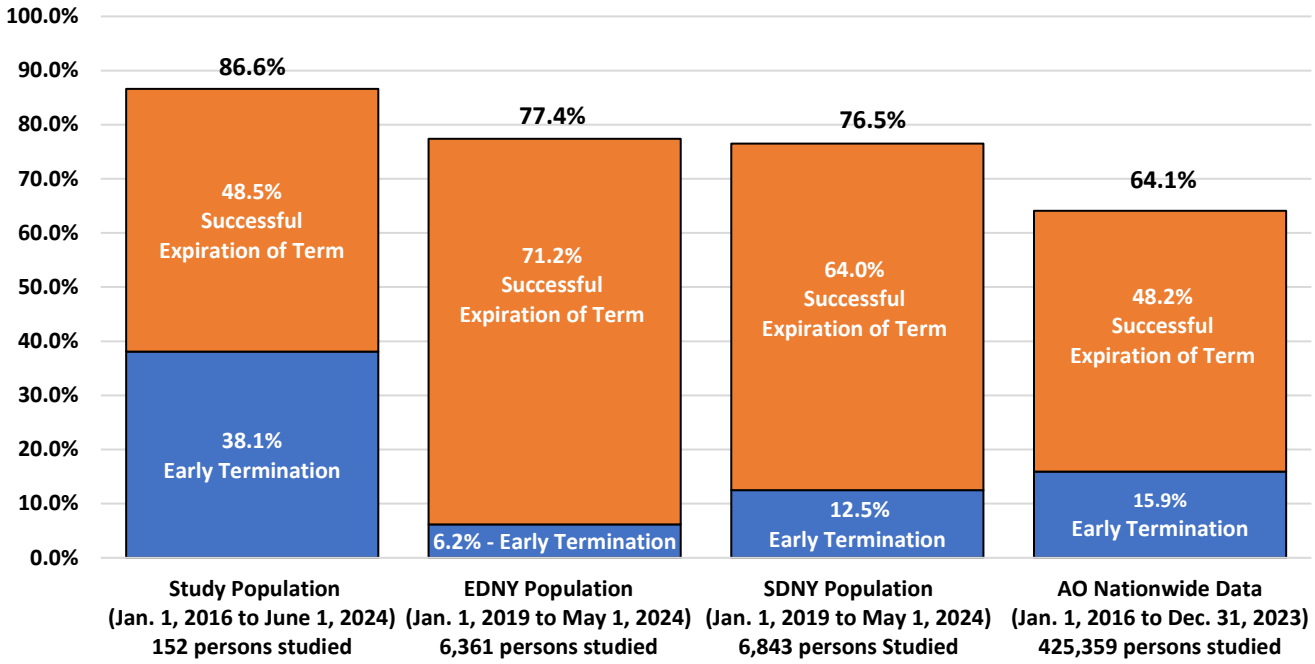


Chart 9 below reflects (i) the Study Population successful completions, (ii) Eastern District of New York successful completions, (iii) Southern District of New York successful completions, and (iv) nationwide successful completions as reported by the AO.[5] *See e.g.*, AO Table, *Post-Conviction Supervision Cases Closed With and Without Revocation, by Type* (Jan. 1, 2016 to Dec. 31, 2023).

Chart 9: Successful Completion of Supervision



Extension of Supervision

Four supervisees successfully completed supervision after the Court had extended their term of supervision by two, seven, seventeen, and twenty-one additional months, respectively, pursuant to 18 U.S.C. § 3583(e) (district courts may "extend," "terminate," or "revoke" a term of supervised release "after considering the factors set forth in section 3553"). *See also United States v. Morales*, 45 F.3d 392, 697–98 (2nd Cir. 1995) ("[T]he district court ultimately decided not to

[5] The SDNY and EDNY data was provided by the U.S. Probation Office.

revoke supervised release. Instead, the court concluded . . . that it was more appropriate to extend the term of [the supervisee's] supervised release by 22 months and add various release conditions regarding his education, employment, drug testing and association with gang members."); Schuman, *Revocation and Retribution*, *supra* page 11, at 925 (2021) (A judge choosing to extend supervision must consider the rehabilitation of a supervisee, whereas a judge choosing to revoke supervised release must consider only "deterrence and incapacitation") (citing *United States v. Lifshitz*, 714 F.3d 146, 150 (2d Cir. 2013)). Each of the four extensions was ordered by the Court with the support of the supervised release team.

Early Termination

The (late) Hon. Jack B. Weinstein, Eastern District of New York District, was very well versed in all aspects of supervised release, including early termination about which he stated: "I, like other trial judges, have in many cases imposed longer periods of supervised release than needed, and I, like other trial judges, have failed to terminate supervised release early in many cases." *United States v. Trotter*, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018); *see also* Pew, *Policy Reforms Can Strengthen Community Supervision*, at 30 (Apr. 2020). Our approach is to acknowledge and reward supervisees with early termination so long as they meet the requirements of early termination.[6]

[6] The SDNY Probation Department's early termination policy states as follows:

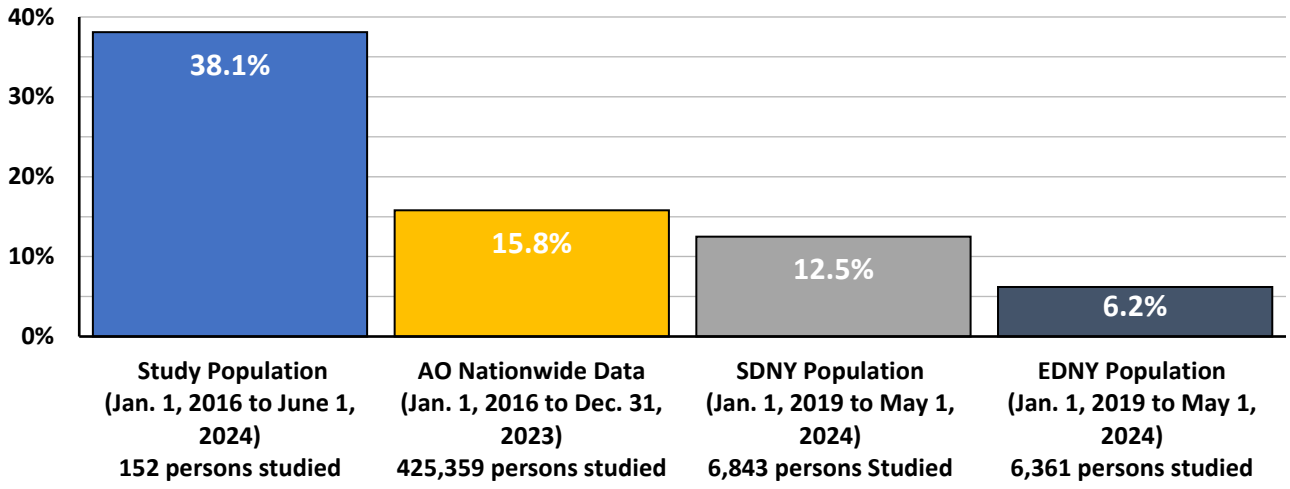
> The appropriateness of early termination should be based on the releasee's compliance with all conditions of supervision and overall progress in meeting supervision objectives or making progressive strides toward supervision objective**s** specific to the releasee that exhibit stable community reintegration (*e.g.*, residence, family, employment, health, social networks) during the period of supervision and beyond.

SDNY Probation Office Policy re: Early Termination from Probation and Supervised Release (March 5, 2018).

Early termination is an important incentive for supervisees. The court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release," assuming that early termination is "warranted by the conduct of the defendant released and in the interest of justice." 18 U.S.C. § 3583(e); *see also Goal Based Supervision*, University of Minnesota, at 2 (July 2020). The Court reviews early termination applications—most often submitted in writing by the Probation Department—following a case-by-case analysis and (only) after considering the factors set forth at 18 U.S.C. § 3553(a).

Chart 10 below reflects the Study Population's early termination rate of **38.1%**. It also includes the AO nationwide rate which is **15.8%**; the Southern District of New York rate which is **12.5%**; and the Eastern District of New York's rate which is **6.2%**.[7] *See* AO, Table, *Post-Conviction Supervision Cases Closed With and Without Revocation, by Type* (Jan. 1, 2016 to Dec. 31, 2023).

Chart 10: Early Termination Rates



After having reviewed the supervised release hearing transcripts, among other things, we estimate that in **over 90%** of Study Population cases where early termination was granted, early

[7] The SDNY and EDNY data was provided by the U.S. Probation Office.

termination was supported by the "unanimous consent" of the supervised release team. In other words, in nearly all cases where the Court grants early termination, it is obvious to the (entire) supervised release team that the supervisee deserves to conclude supervision.

Case Study #4

The supervisee was sentenced to 120 months of incarceration and 5 years of supervised release for conspiracy to distribute and possess with intent to distribute drugs, including methamphetamine. The Sentencing Guidelines range was 151 to 188 months of incarceration plus 5 years of supervised release. Special conditions included weekly mental health counseling and drug treatment.

The Probation Department submitted a written recommendation describing the supervisee as "an ideal candidate for early termination." Prob. Memo., dated May 18, 2021, at 3. He was compliant with the terms of supervision; he maintained full-time employment; and he was "progressing well in substance use treatment and . . . demonstrated sobriety." In granting early termination, the Court reduced his 5-year supervised release term by 11 months.

> **Counselor**: Things are going great. [Supervisee] is really consistent with his sessions. He maintains excellent attendance . . . . He's very much open and cooperative in sharing anything that's going on . . . . He's continually reinforcing coping skills. . . . There's no concern with any relapses or any kind of substance abuse, and it seems like every other area of his progress is currently stable. . . .
>
> **Court**: I had mentioned the last time that I was anticipating if I got an application for early termination of supervision, that I would look favorably upon it, and . . . I did receive such an application from the Probation Department . . . .
>
> **Probation Officer**: As I stated . . . , [supervisee] has been doing extremely well. His behavior and compliance have been consistent over the last several hearings that we've had in the past. He is working full-time. . . . We support . . . the early termination. . . .
>
> **Court** [to supervisee]: I wanted to get your take . . . [about] what you've been [doing] for the last couple of years.
>
> **Supervisee**: My supervision was very, very helpful due to . . . the programs that I went to, to the Probation Officer that I had, that we had great communication. Yourself as well, Your Honor, that never gave up on me, . . . that was very helpful . . . . Having a great counselor as well, going over there to continue to speak with her, everything has

just been working out pretty well. So, I really appreciate it. This has been actually a good supervising team, and . . . believe me, it's going to help me to other bigger and better things in the future in my life. Thank you so much. . . .

Court: Does anybody else, the Government, for example, want to comment?. . .

Government: I personally have been involved in this case with [supervisee] for about over the last two years, and each time, as the Court has mentioned, during those status conferences we've had, [supervisee] has done wonderfully, has been not only compliant but has taken advantage of the several opportunities and the services provided by the Probation Office, and [he] seems to be doing extraordinarily well, and . . . I wish nothing but the best for [him]. . . .

Defense Attorney: I feel so confident, Judge, that with your overseeing his transition to a member of society, I firmly believe he is going to continue to be a productive member of society . . .

Probation Officer: **We believe [supervisee] has done a great job and has shown us that anyone given the right support can turn things around.** He has definitely done that. (Emphasis added.)

Case Study #5

The supervisee was sentenced to 68 months of incarceration and 3 years of supervised release for being a felon in possession of ammunition. The Sentencing Guidelines range was 57 to 71 months of incarceration plus 1 to 3 years of supervised release. Special conditions of supervised release included weekly mental health counseling and drug treatment.

The Probation Department submitted a written recommendation for early termination which stated that the supervisee was living in "a stable residence," maintaining "full-time employment as a plumber," yielding "negative results for the use of illegal substances," and "successfully complet[ing]" his mental health treatment sessions. In granting early termination, the Court reduced the 3-year term of supervised release by 12 months.

Court (District Judge): The most important issue for us to consider today is the application for early termination of . . . supervision . . . . I should point out that in considering supervised release and particularly early termination, it is our objective and our goal to grant early termination when the parties reach consensus. It's not a decision just by defense counsel or by the Court or by Probation, but rather—**in some 90% of our cases**—when we reach and achieve early termination, it's usually a unanimous decision . . . . (Emphasis added.)

> The Probation Department has recommended that . . . supervision be terminated early. . . . Probation states that supervisee [] has made an excellent adjustment to the community and that, . . . there is no reasonably . . . foreseeable risk of physical or financial harm to the public. . . .
>
> **Court (Magistrate Judge)**: I can't say it much better. . . . I've been speaking to [supervisee] over the last two years, and it really was remarkable how every single session there was more and more good news to report, more personal growth, more maturity. . . . I sincerely appreciate how hard [supervisee] has worked at his personal growth [and] how committed he's been to communicating with Probation . . . . So, I continue to support the application that has been made for early termination.. . .
>
> **Supervisee:** I just want to say, thank you, Your Honor. I feel very relieved right now. Thank you so much. . . .
>
> **Probation Officer**: Probation wants to congratulate [supervisee] for being a productive member of the community and remaining in compliance with his conditions of supervision. Probation . . . support[s] this application. . . .

Early termination saves taxpayer money in addition to incentivizing successful re-entry. *See* Laura Baber & James Johnson, *Early Termination of Supervision: No Compromise to Community Safety*, 7 Fed. Prob. 17, 17 (Sep. 2013) (Early termination serves as "a measure to contain costs in the judiciary without compromising the mission of public safety."). In August 2017, the AO reported that the average cost of supervision by probation officers was $4,392 per supervisee per year (or $5,551.31 in today's dollars). *See* Memorandum, Cost of Community Supervision, Detention, and Imprisonment, Administrative Office of the United States Courts (Aug. 17, 2017). We estimate that early terminations in the Study Population have saved the judiciary over $311,000.[8]

[8] The savings were calculated by (i) multiplying the number of Study Population supervisees who received early termination (51) by (ii) the length of time that their term of supervision was reduced (on average, 13.2 months or 1.1 years) by (iii) $5,551.31 (51 x 1.1 x $5,551.31).

B. 78.6% Employment

There is universal agreement that securing employment is a mainstay of successful supervision—and it is often part and parcel of avoiding recidivism. *See* Nathan W. Link et al., *Consequences of Mental and Physical Health for Reentry and Recidivism: Toward a Health-Based Model of Desistance*, 57 Criminology 544, 545 (2019). "Stable employment confers adult status and supports the achievement of . . . pro-social goals." *Id.* at 548. Employment also "allows a returning [from prison] person to contribute to and develop social ties with their community." David B. Muhlhausen, National Institute of Justice, *An Overview of Offender Reentry*, at 4 (Apr. 2018).

One of our Study Population supervisees recently put it this way:

> I got work, [and] I feel like I'm doing something positive . . . . In the past, I've worked before, but I never had a [regular] job. . . . This is my first year filing a W-2. . . . I've never filed tax a day in my life, and in this year since I came out of jail, I'm able to file taxes now. . . . It feels good to actually feel like I'm doing something. I have a credit score now. Since I've came out of jail, I've changed myself and I feel like I'm doing well.

Our Supervised Release Program emphasizes employment, and, as reflected in the supervisee's quote, supervisees are often enthusiastic about work. Between 2016 to 2023, on average, **78.6%** of the Study Population supervisees obtained employment. By "employed," we mean: "People [who] did any work at all for pay or profit . . . includ[ing] all part-time and temporary work, as well as regular full-time year-round employment." U.S. Bureau of Labor Statistics, *How the Government Measures Unemployment* at 4 (June 2014). If a supervisee is employed at the outset of a calendar year or obtained employment during a calendar year, the supervisee is considered employed. *See id.*

Chart 11 (below) reflects that the highest average rate of employment—among the Study Population, Southern District of New York supervisees, Eastern District of New York supervisees, and supervisees nationwide—was achieved by the Study Population.[9]

Chart 11: Employment

Year	Study Population	SDNY	EDNY	Nationwide
2023	77%	74%	72%	77%
2022	76%	73%	72%	77%
2021	67%	70%	69%	74%
2020	78%	72%	71%	74%
2019	79%	76%	75%	77%
2018	81%	75%	76%	76%
2017	86%	73%	75%	76%
2016	85%	71%	71%	75%
Average	**78.6%**	**73.0%**	**72.6%**	**75.8%**

Case Study #6

The supervisee was sentenced to 36 months of incarceration and 3 years of supervised release for conspiracy to manufacture and possess a destructive device. The Sentencing Guidelines range was 30 to 37 months of incarceration plus 1 to 3 years of supervised release. Special conditions of supervised release included weekly mental health counseling and drug treatment.

> **Probation Officer:** As far as employment, that seems to be [supervisee's] biggest motivation. . . . He started on the bottom, and he's received two promotions. At this point, he holds a position as a research coordinator and project manager where he has been provided with more responsibilities. . . . At work they trust him to be able to handle [things] and oversee projects and ensure that they are followed through. . . .
>
> **Supervisee:** I was an HVAC technician [when I was incarcerated]. When I was released, I partook in some courses at Columbia University. There was a business entrepreneurship course which led me to my initial interest into coding. [The next phase] was . . . boot camp. I excelled at that boot camp course and, the following semester, became a teaching assistant in the same course. I was then connected to . . . [a] data collection and tool company. . . . I feel very passionate about the work I do. . . . I'm very much happy to report.

[9] The data was provided by the U.S. Probation Office.

At the same time, finding employment can present hurdles for supervisees because of their criminal records. And, for some, a lack of significant work history (and sometimes illegal income) prior to incarceration may be impediments. *See* Nat'l Inst. of Just., *An Overview of Offender Reentry*, at 4 (2018). Nationwide, people on supervision who obtain employment often work at several different jobs within short time periods, suggesting perhaps that supervisees sometimes find jobs that do not offer security or upward mobility. *See* E. Ann. Carson et al., *Employment of Persons Released from Federal Prison in 2010*, Bureau of Justice Statistics, (Dec. 2021) (supervisees held an average of 3.4 jobs within four years after their release from prison). Ensuring that supervisees find appropriate employment "requires a high level of coordination and collaboration between . . . practitioners and service providers." *Id.*

Case Study #7

The supervisee was sentenced to 60 months of incarceration (the statutory mandatory minimum) and 5 years of supervised release for possession of a firearm during and in relation to a drug trafficking offense and a Hobbs Act Robbery. The Sentencing Guidelines range was 60 months of incarceration plus 5 years of supervised release. The supervisee had a limited employment history prior to his arrest and incarceration. While on supervised release, he enrolled in Commercial Driver's License ("CDL") training.

> **Counselor:** [Supervisee] has been . . . interested in a CDL training which would allow him to get employment. . . . The CDL is a wonderful credential that could open up all kind of doors for him and eventually could lead to him opening up his own business.
>
> **Probation Officer:** This seems like a good employment opportunity. . . . If all of that works out, I don't see why we could not work with [him] so that he can obtain employment in his area of interest and supervise him effectively. . . .
>
> **Court** [to supervisee]**:** What's your goal here? . . .
>
> **Supervisee:** My goal is to stay focused on my development, my career . . . get my CDL, and start working as soon as possible so I could provide for my kid, my family, secur[e] a residence, and be[] productive to society. . . .

C. 82.2% Drug Treatment and Mental Health Counseling

One of the most critical objectives of court-involved supervision is to ensure that mental health counseling and/or drug treatment are provided for supervisees who need these services.[10] People exiting prison "often identify drug use as the primary cause of many of their past and current problems including family, relationship, employment, legal, or financial problems." Richard Rosenfeld et al., *The Limits of Recidivism: Measuring Success After Prison* at 90 (Nat'l Academy Sciences 2022). **"[S]ubstance abuse treatment in a court supervised program can be expected to foster recovery and reduce recidivism."** Sara Gordon, *About a Revolution: Toward Integrated Treatment in Drug and Mental Health Courts*, 97 N.C. L. Rev. 355, 388–89 (2019) (emphasis added); *see also* John H. Bowman, IV et al., *Responding to Substance-Use-Relation Probation and Parole Violations*, 32 Crim. Justice Stud. 356, 357 (Sept. 2019) ("[E]ffective drug treatment is key to breaking the cycle of offending.").

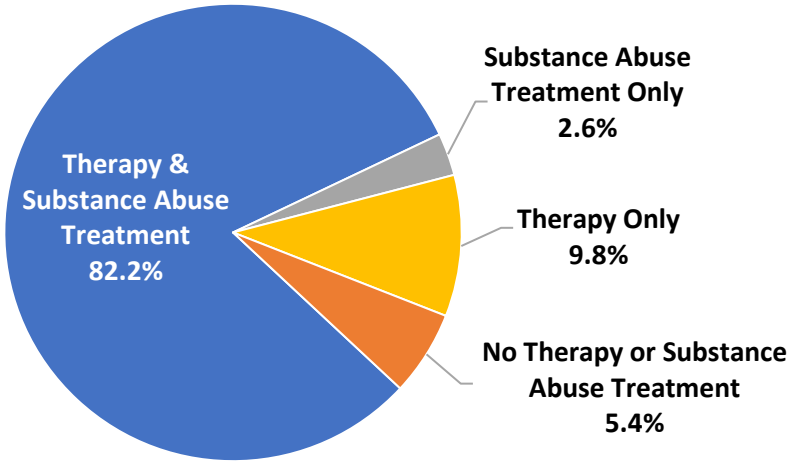
Similarly, people exiting prison with mental illness—who most often are not adequately treated while in prison—"are at heightened exposure to other risk factors such as substance abuse, homelessness, and other problems such as strained relationships that may in turn increase offending." Nathan W. Link et al., *Consequences of Mental and Physical Health for Reentry and Recidivism*, 57 Criminology 544, 549 (2019). Thus, **"[a]ny long-term sustainable approach to public safety . . . must confront and address the role of mental illness and addiction."** Craig Haney et al., *Justice That Heals: Promoting Behavioral Health, Safeguarding the Public, and*

[10] *See United States v. Sims*, 92 F.4th 115, 120 (2d Cir. 2024) ("When a court imposes a term of supervised release, it also determines what conditions or restrictions are appropriate for that defendant. Courts are given broad latitude to design their own "special conditions," so long as the courts, among other things, consider the goals of sentencing, including the need for the sentence to provide adequate deterrence, protect the public, and provide the defendant with needed services."); *see also* 18 U.S.C. § 3583(c), (d).

Ending Our Overreliance on Jails at 15 (June 15, 2016) (emphasis added). Failure to address these issues in supervision may create "devastating effects to individuals, families, and society." *Leading Change: Improving the Court and Community's Response to Mental Health and Co-Occurring Disorders*, Nat'l Ctr. St. Ct., at 4 (Feb. 2021). **The lack of accessible mental health care in prisons only heightens the need to provide adequate mental health care during supervision.** *See* Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, The Marshall Project (Nov. 21, 2018) ("The number of federal prisoners receiving regular treatment for mental illness fell 35% [since May 2014] . . . [even though] the combined number of suicides, suicide attempts and self-inflicted injuries have increased 18 percent from 2015 . . . through 2017.").

As shown in Chart 12 below, some **82.2%** of the Study Population participated in both drug treatment and mental health counseling; **9.8%** participated in mental health counseling only; and **2.6%** participated in drug treatment only. **5.4%** of the Study Population did not participate in drug treatment or mental health counseling.

Chart 12: Therapeutic Counseling and/or Substance Abuse Treatment



"Untreated substance use disorders among [supervisees] can lead to relapse and a path toward continued criminal behavior, which can lead to probation[] violations and an increased risk of reincarceration." Rachel N. Lipari & Joseph C. Gfroerer, *Trends in Substance Use Disorders Among Males Aged 18 to 49 on Probation or Parole*, at 1 (Mar. 6, 2014). And, chronic use of drugs or alcohol "may lead to long-term neurological deficits that are also associated with decreased self-control and increased risk for violence. Moreover, drugs may serve as a direct motive for a crime." Denis Yukhnenko et al., *Risk Factors for Recidivism in Individuals Receiving Community Sentences*, 25 CBS Spectr. 252, 254 (Apr. 2019).

Case Study #8

The supervisee was sentenced to 95 months of incarceration followed by 5 years of supervised release for "marijuana trafficking, extortion, conspiracy and illegal gambling" and "attempted assault in aid of racketeering." Sent. Tr. at 3:20–24. The Sentencing Guidelines range was 78 to 97 months of incarceration plus 2 to 5 years of supervised release. Drug treatment was included as a special condition because the supervisee had been addicted to ketamine for the five years prior to his arrest.

> **Probation Officer**: [Supervisee] tested . . . positive for Ketamine. . . . [He] admit[ted] to using the Ketamine due to stress. . . . [Supervisee] has been dealing with a lot of things. But he was previously attending substance abuse and mental health three times a week. . . .
>
> **Court** [to supervisee]: What's your take on how things are going? . . .
>
> **Supervisee:** I went through a lot in the last couple weeks. . . . I made excuses before for my [relapses] . . . . but . . . I honestly didn't know how to deal with [everything]. . . .
>
> **Court:** I understand. That is a rough time for anybody when that happens [death of a parent]. Are you feeling better about the [counseling]? . . .
>
> **Supervisee:** Of course, a hundred percent. . . . [My counselor] got me through it. . . . I don't talk about anything with anybody else. . . .
>
> **Court:** You've put in a lot of work and it's going to pay off. It probably already has. . . . My point of view is . . . you're doing very well.

> **Supervisee:** Yes. Totally different relationships than before I got sentenced, right, Judge? I was kind of nervous coming home and then running into you again. I didn't know. . . . Now I understand about the drug treatment you put me in. . . . [I]t's kind of good that I . . . didn't just [come] home and no treatment was done, and that would have been more of a problem with my relapse.

The research is crystal clear that supervised release programs which include a counseling component are "effective in supporting successful reentry." National Institute of Justice, *Five Things about Reentry*, at 2 (Apr. 2023). Counseling can "restore self-esteem, impart tools and strategies for making more positive life choices, and help clients improve their decision making, social skills, moral reasoning, self-control, and impulse management." *Id.* Mental health counseling is effective even for high-risk offenders, and some of the greatest effects were among those convicted of the most serious offenses. *See* Patrick Clark, *Preventing Future Crime with Cognitive Behavioral Therapy*, 265 NIL J. 22, 23 (Apr. 2010).

Treatment providers often participate directly in our supervised release hearings—**and their participation has been an enormous asset.** Treatment providers "serve a key role" in supervision by providing individualized care to best meet each supervisee's needs. Tina Maschi & Dhweeja Dasarathy, *Aging with Mental Disorders in the Criminal Justice System: A Content Analysis of the Empirical Literature,* 63 Int'l J. Offender Therapy Compar. Criminology 2103, 2131 (2019). Their insights and suggestions are invaluable. *See* J. Steven Lamberti, *Preventing Criminal Recidivism Through Mental Health*, 67 Psych. Serv. 1201, 1209 (2016) (Collaboration among the court, probation, and treatment providers leads to "actively discuss[ing] their opinions and ideas in the interest of preventing recidivism."). In addition to their clinical work with supervisees, treatment providers serve as another pair of educated eyes.

Case Study #9

The supervisee was sentenced to 60 months of incarceration followed by 5 years of supervised release for participating in a conspiracy to distribute and possess with intent to distribute drugs, including cocaine. The Sentencing Guidelines range was 151 to 188 months of incarceration plus 5 years of supervised release. Special conditions of supervision included weekly mental health counseling and drug treatment.

> **Court**: [At] the last hearing . . . we had [supervisee's drug and mental health counselor bring us up to date], and I understand she's present with us again today. And she was . . . [conducting] weekly counseling sessions, including anger management and substance abuse treatment. . . . .
>
> **Counselor**: We've discussed some of the triggers in his environment and discussed with him . . . managing those triggers and alternatives to . . . medicating his feelings. . . . We've gone through anger management . . . and he's very aware of techniques to be able to manage his anger. . . .
>
> **Supervise**e: [E]very time I talk to my [counselor], I feel better. So I don't want to give that up and get off track; you know what I'm saying? I want to keep [the] structure going.
>
> **Counselor**: I agree. . . . I think that [counseling] has been beneficial . . . . [T]he focus would be on . . . his environmental issues, his daily living, managing his emotions or anything that comes up . . . .

D. Re-Offending

Repeat offending is often referred to as "recidivism." *See* James L. Johnson, *Comparison of Recidivism Studies, AOUSC, USSC, and* BJS, 81 Fed. Prob. 52, 53 (June 2017) (The AO "has routinely defined recidivism as a return to crime." The U.S. Sentencing Commission "has used the term recidivism to refer to a person's relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime.").

A common measurement of re-offending is "rearrest," which typically includes Federal and state arrests. We examine rearrest data here, but we caution that many professionals believe that rearrest alone is too narrow (and misleading) a concept. *See* Rosenfeld et al. (2022) at 30–31, 43–44. Therefore, we also include dispositions of rearrests (particularly dismissals) and return to prison following a rearrest. *See Return to Prison*, *infra* page 37.

We also consider the concept of "desistance." "Desistance refers to why and how people stop committing crime. The key distinction between recidivism and desistance is that recidivism focuses on a "negative outcome, while desistance tracks positive outcomes that may result in reduced involvement in offending over time . . . ." *Id.* at 69. Desistance is "neither a quick nor easy process . . . . It can take considerable time, potentially many years, to change entrenched behaviours and the underlying problems." *Id.*; *see also* Jeffrey Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, 11 Crime & Just. 377, 420 (1989) ("Desistance may be a process as complex and lengthy as the processes of initial [criminal] involvement."). While "[t]he historical emphasis on recidivism . . . reflects, in part, a desire by researchers and institutions to establish a common 'success rate' indicator," it is sometimes said that recidivism "fail[s] to capture the real changes that people returning from incarceration experience." Rosenfeld et al. (2022) at 79.

Repeat offending is understandably a major concern of our communities and of our criminal justice system, especially when it entails violence. *See* Matt Dummermuth, *Reducing*

Recidivism in Release Offenders Improves Public Safety, Office of Justice Programs (June 10, 2019) ("High rates of recidivism greatly impact public safety and the victims affected by those new crimes, as well as the lives of offenders who are unable to break out of the cycle of repeat offending."). According to Scott Anders, Deputy Chief Probation Officer of the Eastern District of Missouri, and Jay Whetzel, Probation Administrator, Administrative Office, as of June 2022, **"the men and women exiting federal prisons continue to be rearrested at an unacceptable rate."** Scott Anders & Jay Whetzel, *The Reconstruction of Federal Reentry*, 34 Fed. Sentencing Rep. 282, 282 (June 2022) (emphasis added) (citing the U.S. Sentencing Commission's rearrest rate of **49.3%** (over a period of eight years)—which broadly includes felonies and misdemeanors. It also includes violations of supervised release, probation, or state parole).

Rearrest Studies

The AO, the U.S. Sentencing Commission, and the Bureau of Justice Statistics contend that rearrest is "the most valid measure of frequency of offending that can be gained from official data sources." David Weisburd & Chester Britt, *Statistics in Crim. Justice* at 24 (3d ed. 2007); *see also* U.S. Sentencing Commission, *Recidivism of Federal Offenders Released in 2010* at 6 (Sept. 30, 2021) ("2021 Sentencing Commission Study"); Laura M. Baber, *Inroads to Reducing Federal Recidivism*, 79 Fed. Prob. 3, 5 (Dec. 2015) ("2015 AO Study"); U.S. Department of Justice Bureau of Justice Statistics, *Recidivism of Offenders Placed on Federal Community Supervision in 2005: Patters from 2005 to 2010* at 1 (June 2016) ("2016 BJS Study"). "Rearrest" refers to the first arrest that occurs during the term of supervised release measured over a span of time (often three and five years of supervision) because "persons in the early years of their supervision terms are more likely to fail than those who have survived to the latter years." 2015 AO Study at 8.

U.S. Sentencing Commission Study

The U.S. Sentencing Commission Study, dated September 30, 2021, examined 32,135 Federal offenders who, following release from incarceration, began supervised release in 2010. The U.S. Sentencing Commission Study considers arrests for felonies and misdemeanors as well as arrests for "alleged violations" of supervised release, probation or state parole. 2021 Sentencing Commission Study at 6. Using this broad definition, the U.S. Sentencing Commission found that **35.4%** of supervisees were rearrested within three years of commencing supervision and that **43.1%** of supervisees were rearrested within five years. *See id.* at 21 The U.S. Sentencing Commission Study also provides an 8-year rearrest rate. **"Nearly half (49.3%) of [Federal] offenders released in 2010 were rearrested within the eight-year follow-up period."** *Id.* at 20 (emphasis added).[11] The 8-year rearrest rate is "identical to the rearrest rate (49.3%) for federal offenders released in 2005." *Id.* at 20.

Bureau of Justice Statistics Study

The Bureau of Justice Statistics Study, dated June 2016, examined 42,977 Federal offenders who, following release from incarceration, began supervised release in 2005. The Bureau of Justice Statistics Study considers arrests for felonies, misdemeanors, and violations of supervision. *See* 2016 BJS Study at 12–13. The Bureau of Justice Statistics found that **35.0%** of supervisees were rearrested within three years of commencing supervision, and that **43.0%** of supervisees were rearrested within five years. *See id.* at 3.

[11] Because the Sentencing Commission and the Bureau of Justice Statistics' definitions of rearrest is broad, the Sentencing Commission and the Bureau of Justice Statistics "always show a higher level of recidivism than the AO," thus making direct comparisons among these three agencies difficult. *See* Nora Demleitner, *The U.S. Sentencing Commission's Recidivism Studies: Myopic, Misleading, and Doubling Down on Imprisonment*, 33 Fed. Sent'g Rep. 11, 15 (2020).

Administrative Office of the U.S. Courts Study

The AO Study, dated December 2015, examined 454,223 Federal offenders who, following release from incarceration, began supervised release between the years 2004 and 2014. The AO Study considers arrests **only** for felony offenses, as does our Study Population. *See* 2015 AO Study at 4–5 ("[A]rrests are defined as the first arrest for a serious offense [felony] that occurs for a supervisee. Minor offenses are excluded from the statistics."). The AO found that **20.8**% of supervisees were rearrested within three years of commencing supervision, and that **27.7%** of supervisees were rearrested within five years. *Id.* at 5.

The 2015 AO Study also included (for the first time) "adjusted rearrest rates," which are intended to reflect the "inherent risk of the offender population." *Id.* at 4. According to the AO, adjustments are appropriate because "persons who enter federal supervision each year are at increased risk to recidivate," i.e., such persons are causing a "**gradual upward pressure on rearrest and revocation rates**." *Id.* at 5, 7 (emphasis added). The AO also found that "[t]he federal supervision population **is increasing in risk**, due in part to more extensive criminal histories of those convicted of federal crimes. As an illustration, the criminal history score of defendants who began supervision in FY 2005 increased from 4.61 to 5.62 in FY 2015." *Id.* at 5 (emphasis added). Accordingly, the AO has adjusted downward the three-year rearrest rate from 20.8% to 16.3%. *See id.* at 7. The AO did **not** report any adjusted five-year rearrest rate. And, the AO concluded, after adjusting for "inherent risk of the offender population," that "**recidivism . . . is decreasing**." *Id.* at 4 (emphasis added).

Court Involved Supervision Study Population

Our Study Population rearrest rates, as reflected in Chart 13 on page 35 below, are based upon felony arrests (as was done in the AO study). We found that **17.1%** of supervisees were

rearrested over three years; and that **20.4%** were rearrested over five years.[12] The Court Involved Supervision Program felony rearrest rate includes arrests for Federal and state felonies. We do not include misdemeanors or violations of supervision principally because: (i) "states vary their practices regarding the extent to which misdemeanor and petty offenses are reported"; and (ii) "[a]rrests for technical violations are not indicative of new criminal behavior, but rather reflect an offender's failure to comply with certain conditions of his or her supervision, such as testing positive for illegal drugs, failing to complete substance abuse treatment, or traveling outside of the area without prior permission." Johnson, *Comparison of Recidivism Studies*, *supra* page 30, at 53. We do not utilize an adjusted rate.[13]

79.6% of Study Population supervisees were not rearrested during supervision. And, it also is noteworthy that 12 supervisees in the Study Population accounted for **60.0%** of all rearrests.[14]

Chart 13 on page 35 includes four different rearrest rates, namely our Study Population, the Administrative Office of the U.S. Courts study, the U.S. Sentencing Commission study, and the Bureau of Justice Statistics study. It is also important to note that arrests are cumulative over time. That is, if a person were arrested two years into his term of supervision, that arrest is included in both the three-year and five-year rates. "[T]he annual arrest percentage among released prisoners declines" each year after release. Matthew R. Durose & Leonardo Antenangeli,

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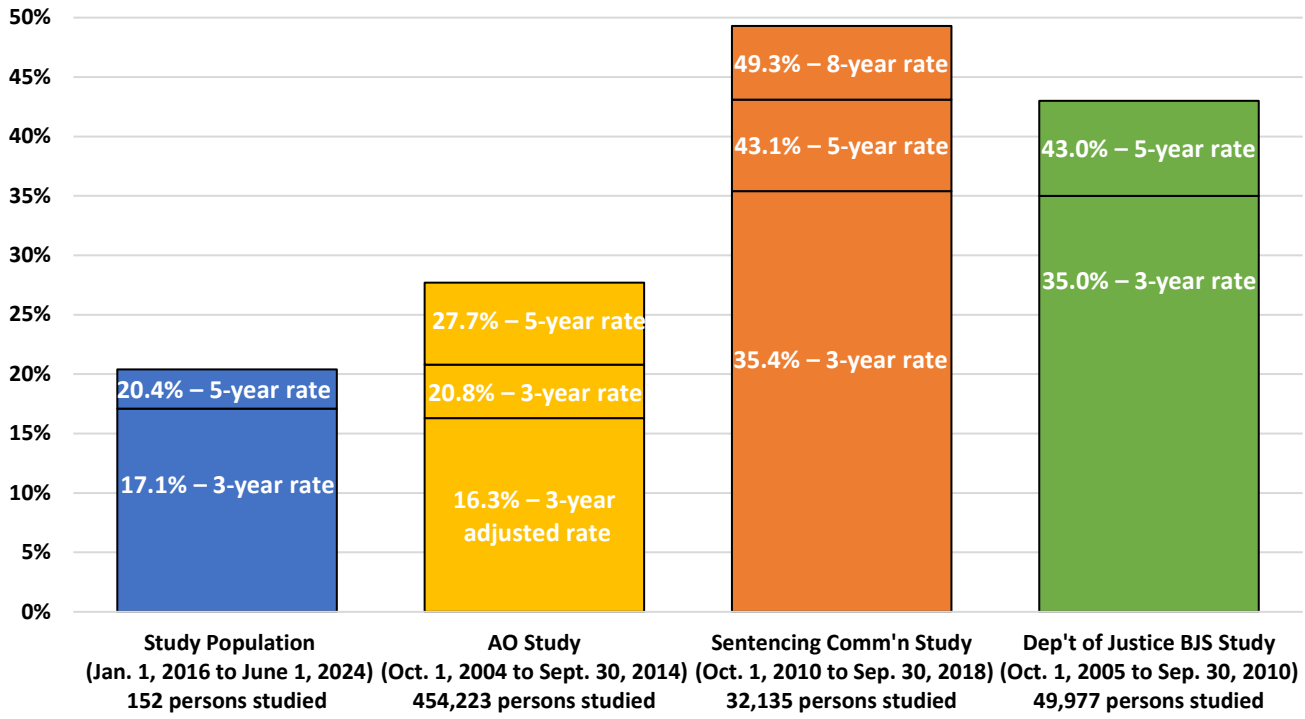
[12] To identify felony rearrests, we reviewed our case files for each supervisee and, as a cross check, we reviewed data generated by the U.S. Probation & Pretrial Services Automated Case Tracking System ("PACTS").

[13] As noted at page 33 *supra*, the AO adjusts its 3-year rearrest rate downward from 20.8% to 16.3%. If the Study Population's 3-year rearrest rate were similarly to be reduced by the same percentage as the AO, our rearrest rate would be 13.4% over 3 years rather than 17.1%.

[14] **It is important to reiterate that, because the U.S. Sentencing Commission and Bureau of Justice Statistics studies include misdemeanors and violations of supervision in their rearrest rates, Study Population and AO rates are not directly comparable to those more inclusive studies.**

Recidivism of Prisoners Released in 34 States in 2012, U.S. Bureau of Justice Statistics (July 2012); *see also* 2021 Sentencing Commission Study at 4 ("The largest proportion (18.2%) of offenders were rearrested for the first time during the first year following release. In each subsequent year, fewer offenders were rearrested for the first time than in previous years.").

Chart 13: Rearrests



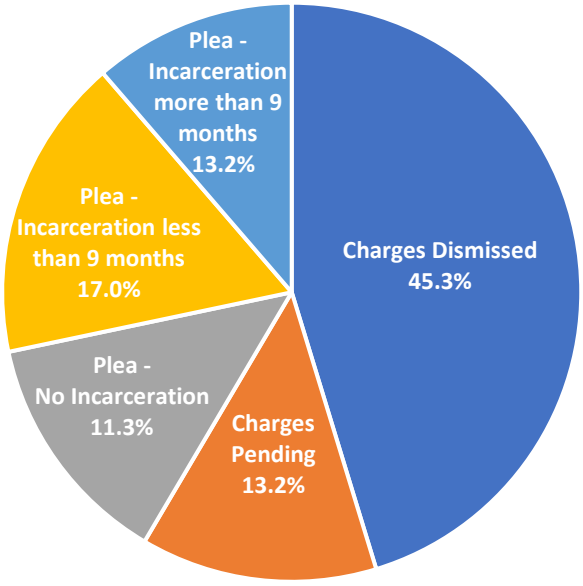
Rearrest Outcomes

We believe, as noted at page 30, that rearrests do not (alone) tell the whole story of re-offending. Rearrests do not, for example, reveal either rearrest dispositions or returns to prison. Rearrest is an imperfect measure and clearly "rearrests can overstate recidivism." 2021 Sentencing Commission Study at 6; *see also* 2016 BJS Study at 1 ("[O]f those persons arrested, a smaller percentage are charged, and an even smaller percentage are imprisoned."). Focusing on rearrests "presents the risk of counting events in which a crime did not occur or that did not result in a conviction." Rosenfeld et al. (2022) at 45. Re-conviction, on the other hand, may "provide clear

evidence [whether] new criminal activity has been committed by someone with prior involvement in the criminal justice system." Bureau of Justice Statistics, *Building Second Chances: Tools for Local Reentry Coalitions*, at 14 (Apr. 1, 2022). However, there "are trade-offs in using reconviction and rearrest data in measuring recidivism." Rosenfeld et al. (2022) at 45. "A conviction offense reflects the 'bargained' or convicted offense behavior and not necessarily the behaviors that an individual engaged in. This bargained offense may be more or less serious than the underlying offense behavior." *Id.*

Chart 14 below shows that **45.3%** of our Study Population rearrests resulted in dismissal and **13.2%** of rearrests are still pending. At the same time, **41.5%** resulted in guilty pleas (i.e., **11.3%** of rearrests resulted in a guilty plea with no incarceration, **17.0%** of rearrests resulted in a guilty plea and a sentence of less than 9 months of incarceration, and **13.2%** of rearrests resulted in a guilty plea and a sentence of between 9 to 97 months of incarceration).

Chart 14: Felony Rearrest Outcomes (Study Population)

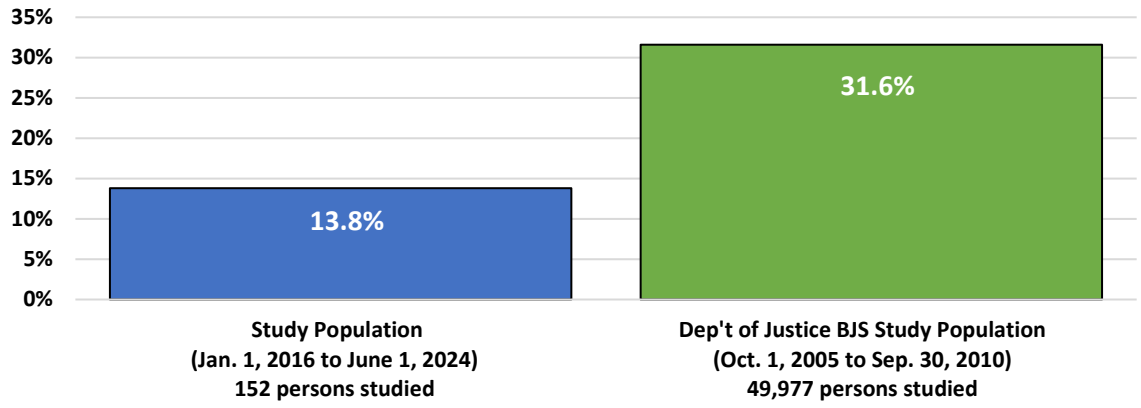


Return to Prison

A very important metric in the analysis of reoffending is whether supervisees "return to prison." Return to prison "is an important indicator of recidivism to track because it generates a significant financial burden for local jurisdictions, which often are responsible for incarcerating people who have been revoked from community supervision. This measure also represents a significant burden to the individual who is reincarcerated, as time in a correctional facility disrupts engagement with treatment, employment, family, and more." Bureau of Justice Statistics, *Building Second Chances, supra* page 36, at 14. In fact, "returning to prison represents arguably the worst and most costly outcome for a released offender." Stahler et al., *Predicting Recidivism for Release State Prison Offenders*, *supra* page 2.

A return to prison is "the result of both criminal and noncriminal behavior (e.g., incarceration for certain supervision violations)." Bureau of Justice Statistics, *Building Second Chances, supra* page 36, at 14. The Bureau of Justice Statistics study shows that **31.6%** of supervisees nationwide return to prison within five years of the start of supervision. By contrast, **13.8%** of the Study Population returned to prison within five years of the start of supervision. In calculating the Study Population return to prison rate, we used the same definition used by the Bureau of Justice Statistics, namely, "an arrest for a new crime or a technical violation of a condition of release."

Chart 15: Return to Prison



Violation of Supervised Release

Violations are "a critical issue in supervision law and policy." *See* Jacob Schuman, *Criminal Violations*, 108 Virginia L. Rev. 1817, 1823 (Feb. 2022). A violation occurs when a supervisee fails to comply with a condition of supervised release.[15] *See* U.S. Sentencing Commission, *Supervised Release*, at 5 (Mar. 2020). The Sentencing Guidelines classify three degrees of violations "based on the offender's conduct and the punishment applicable to the offense underlying the violation."[16] Sentencing Commission, *Federal Probation and Supervised Release Violations*, at 31 (July 2020).

When a probation officer believes that a supervisee has violated a condition of supervision, the officer speaks with the supervisee and also (typically) informs the court. *See* 18 U.S.C. § 3603(8)(B); *see also* U.S.S.G. § 7B1.2 ("The probation officer shall promptly report to the court any alleged . . . violation," unless such violation is "minor" and "non-reporting will not present an undue risk to an individual or the public . . . ."). A report to the court includes a description of the

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[15] There are three categories of conditions, namely mandatory, standard, and special conditions. An example of a mandatory condition is that the supervisee must "not commit another Federal, State, or local crime." 18 U.S.C. § 3583(d). Standard conditions include reporting as directed to the probation office and gaining employment. U.S.S.G. § 5D1.3(c). Special conditions are discretionary with the court and include, among others, substance abuse and mental health treatment. U.S.S.G. § 5D1.3(d)(4).

[16] (1) **Grade A Violation** (the most serious grade) "is conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); **or** (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;"
(2) **Grade B Violation "**is conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;"
(3) **Grade C Violation** (the least serious grade) "is conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; **or** (B) a violation of any other condition of supervision."

U.S. Sentencing Commission, § 7B1.1 *Guidelines Manual* (Nov. 2023) (emphasis added).

violation. *See id.* Once a probation officer notifies the court that a supervisee is alleged to have violated, the court assesses whether there is a legal basis for the violation and whether the supervisee intends to challenge the alleged violation. *See* 18 U.S.C § 3583(e)(3). In practice, a substantial number of Study Population violations were dismissed, withdrawn, or deferred. *See also* Hon. Stefan R. Underhill, D. Conn., *Closing the Back Door to Federal Prison*, The Champion, at 26 (May 2024) ("The drafters of the Constitution did not want to make it easy for the government to imprison American citizens. . . . Yet the imposition of prison sentences for supervised release violations provides an expedient way to reincarcerate persons for even minor conduct.").

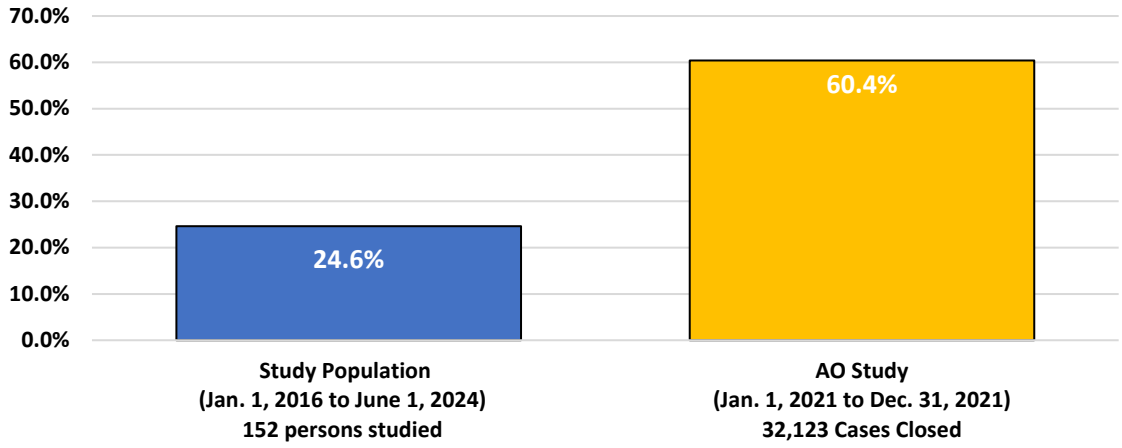
The Court's objective in supervision is to help supervisees achieve successful reentry most often even when violations have been alleged. As Jacob Schuman points out, "perfect compliance with the conditions of supervision is difficult, if not impossible, and penalizing minor infractions may encourage recidivism rather than reintegration." Schuman, *Criminal Violations*, *supra* page 38, at 1821; *see also* Reagan Daly et al., *Pathways to Success on Probation: Lessons Learned from the First Phase of the Reducing Revocations Challenge*, at 15 (2021) ("[P]eople with a history of substance use had violations filed at higher rates than those without these histories, and individuals who lacked housing or employment were far more likely to experience a [ ] revocation [of supervision]. Such needs elevate the risk of receiving a probation violation and/or revocation by making it difficult for people to adhere to conditions of probation.").

When a supervisee incurs a violation, the Court will often seek to address the underlying cause as, for example, by modifying supervision conditions to include, for example, inpatient drug treatment or mental health counseling, if those modifications would help to treat the underlying issue(s). *See* ACLU Hum. Rts. Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the U.S.*, at 4 (2020); *see also* S. Rep. No. 98-225, at 38 (1983), ("[A]lmost

everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting.")

A study conducted by the AO which analyzed the behavior of 32,123 supervisees, found that **60.4%** of supervisees were charged with a violation. *See* AO, *Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes* (June 14, 2022). By contrast, **24.6%** of the Study Population supervisees were charged with a violation.

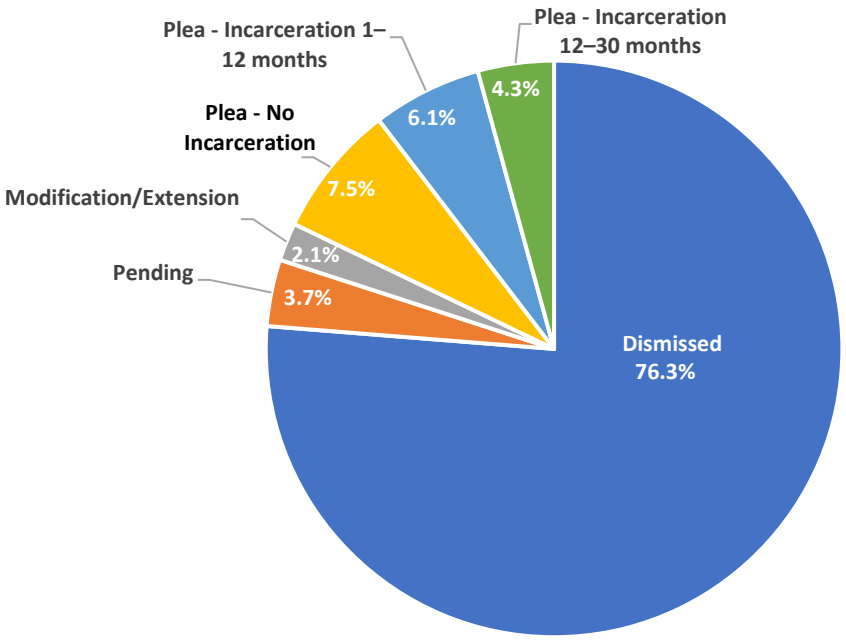
Chart 16: Violations



With respect to violations outcomes, Chart 17 below (on page 41) shows that **76.3%** of Study Population violations were dismissed; **7.5%** were resolved by a plea with no term of incarceration; **6.1%** were resolved by a plea with a term of incarceration between 1 and 12 months; **4.3%** were resolved by a plea with a term of incarceration between 12 and 30 months; **2.1%** were resolved by a plea and a modification of conditions of supervision or an extension of the term of supervision; and **3.7%** of violations are still pending.[17]

[17] We have not located comparable data from other studies.

Chart 17: Study Population Violation Outcomes



In a study dated July 2020, the U.S. Sentencing Commission analyzed "108,115 violation hearings associated with 82,384 offenders" during the period 2013 to 2017. *See* United States Sentencing Commission, *Federal Probation and Supervised Release Violations*, at 2 (July 2020). The study found that **13.6%** of violations nationwide were Grade A violations (the most serious), **31.5%** were Grade B violations, and **54.9%** were Grade C violations (the least serious). *See id.* at 31. SDNY and EDNY violations were quite similar to each other and to our Study Population, but Study Population violations were significantly less serious overall. In SDNY, **15.8%** of violations were Grade A, **14.8%** of violations were Grade B, and **69.4%** were Grade C violations. In EDNY, **15.4%** of violations were Grade A, **14.5%** of violations were Grade B, and **70.1%** of violations were Grade C. Study Population results were that **8.9%** were Grade A violations, **16.6%** were Grade B violations, and **77.5%** were Grade C violations.

Revocation

Revocation of supervision means "canceling the supervision in response to the offender violating the terms of supervision **and** imposing a term of incarceration." Glossary of Sentencing Terms, U.S. Sentencing Commission website (last visited Sept. 8, 2022) (emphasis added). "The term 'revoke' appears to be somewhat of a misnomer," *United States v. Trotter*, 321 F. Supp. 3d 337, 346 (E.D.N.Y. 2018), and the Supreme Court has acknowledged that "Congress had used 'revoke' in an unconventional way," *Johnson*, 529 U.S. at 695.

Revocation is not often necessary in our practice because we have been able (so far) to resolve most violations by adjusting or supplementing supervised release conditions rather than resorting to reincarceration. We do as best we can to work collectively with the supervisee, his probation officer, and his treatment providers, even if that means additional supervision, to avoid sending supervisees back to jail. *See* Hon. Stefan R. Underhill, *Closing the Back Door to Federal Prison*, The Champion, at 26 (May 2024) ("Supervised release revocation sentences create a back door to federal prison. Too often that back door is a revolving door that traps defendants in a cycle of imprisonment, release, violation, imprisonment, release."). We firmly believe that revocation "leave[s] open the possibility of further supervised release." *Johnson v. United States*, 529 U.S. 694, 695 (2000), and we have found that supervisees who have faced revocation have been able, nevertheless, to successfully complete supervised release. *See* 2015 AO Study at 4 (Revocations "may not be a failure—in the truest sense of the word—at all.").

Revocations were not (initially) included in the Sentencing Reform Act of 1984 ("SRA"), when the Federal government abolished its parole system and replaced it with "supervised release." *See* S. REP. 98-225 at 3307; 18 U.S.C. § 3583(c); Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, 81 Fed. Prob. 18, 19 (Sept. 2017) ("To the

drafters of the SRA, abolition of parole seemed a sensible and simple way to help create clearer and more certain and consistent federal sentencing decision-making."). The Senate Report on the SRA confirmed that the primary goal of supervised release is to:

> ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.

S. REP. 98-225 at 3307.

In 1986, the SRA was amended to authorize courts to "revoke a term of supervised release." Anti-Drug Abuse Act ("ADAA") of 1986, P.L. 99-570, § 1006 (1986); *see also* 18 U.S.C. § 3583(e)(3). "Procedurally, the ADAA grafted the revocation mechanism for parole onto supervised release, ignoring the different theoretical roots of those systems." Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U.L. Rev. 958, 1001 (2013).

> Parole was based on early release from prison—by the grace of the parole board a person was conditionally released from prison, and the leniency could be "revoked." [By contrast,] a person on supervised release has completed his or her prison term and is serving an independent term of supervision separately ordered by the court. **Supervised release is not being "revoked"; rather, a supervisee is being punished for violating conditions [of supervision].**

United States v. Trotter, 321 F. Supp. 3d 337, 346 (E.D.N.Y. 2018) (Weinstein, D.J.) (internal citation omitted) (emphasis added).

Revocation of supervision often appear harsh and even self-defeating. Revocation has been criticized as "a major driver of mass incarceration." Schuman, *Revocation and Retribution*, *supra* page 11, at 885; *see also* Demleitner, *supra* page 1, at 232. Mandatory revocations were introduced by amendment to the SRA in 1988 and are "widely condemned provision[s] of federal law." Aliza Hochman Bloom & Jacob Schuman, *It is Time to Reform Federal Supervised Release*, ACS Law

(Nov. 30, 2022). "[M]andatory revocations often create unfair and unwise results. . . . [A] credible argument can be made that Congress did not intend the current results of the revocation statutes." George P. Kazen, U.S.D.J. for the Southern District of Texas, *Mandatory Revocation for Drug Use: A Plea for Reconsideration*, 6 Fed. Sent. Rep. 202, 202 (1994); *see also* United States Sentencing Commission, *Results of 2014 Survey of United States District Judges Modification and Revocation of Probation and Supervised Release* (2015).

Our approach to potential revocations is, wherever possible, to assess supervised release violations along with the supervisee's capabilities to succeed through supervision and implementation of relevant and helpful conditions, such as further counseling.

> [S]upervised release hearings . . . encourage stakeholders to work together. It upholds the mandate of the SRA by recognizing that the utility of revocations is doubtful because revocations terminate access to treatment, social support networks, and employment. The focus then moves away from the punitive operations of supervised release revocations that harm the supervisee and towards developing a team of practitioners concentrating on an individual's success.

McManus, *supra* page 1, at 1213. When we opt for a longer view, our supervisees invariably demonstrate that they can succeed in supervision and achieve successful and safe reintegration into the community even where they may have slipped. "Current conceptions of recidivism tend to treat any return to crime as a failure, without distinguishing between failure as an end state or as part of a desistance process." Rosenfeld et al. (2022) at 5.

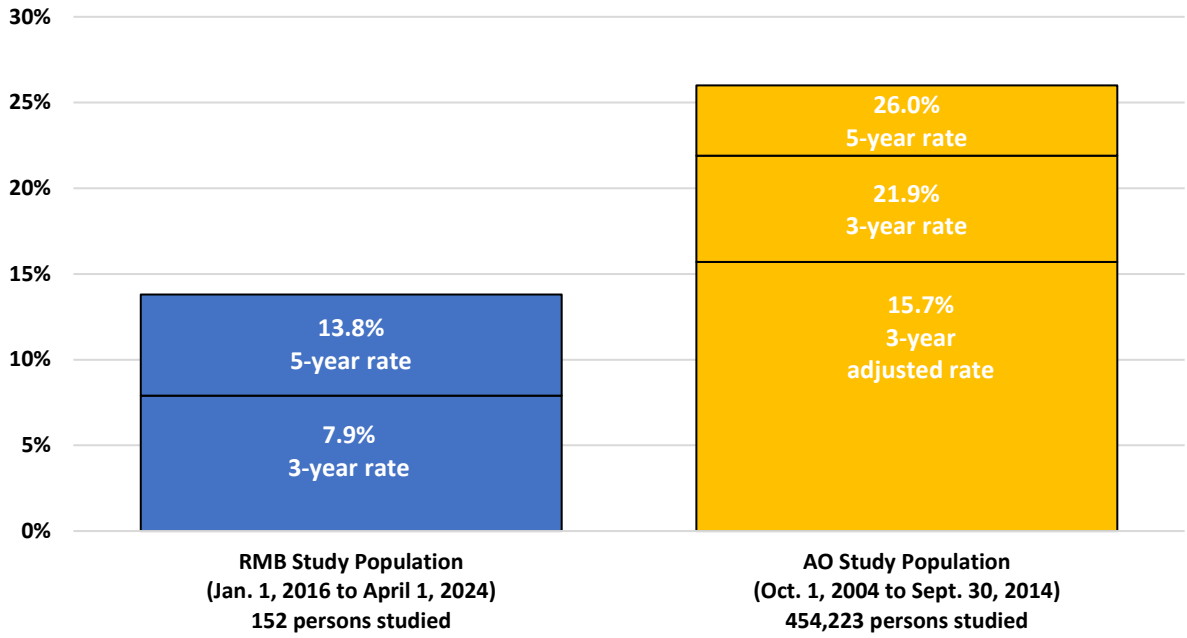
The 2015 AO Study found that **21.9%** of supervisees had their supervision revoked within three years of commencing supervision. It also found that **26.0%** of supervisees had their supervision revoked within five years. *See* 2015 AO Study at 6. The AO also adjusted 3-year revocations downward from **21.9%** to **15.7%**.[18]

[18] The AO did not provide a five-year adjusted revocation rate.

By contrast, our Study Population revocation rates are **7.9%** over three years and **13.8%** over five years. If the Study Population 3-year revocation rate were to be adjusted and reduced by the same percentage as the AO, our 3-year revocation rate would be **5.7%** rather than **7.9%**.

Chart 19 below reflects the revocation rates of the AO and the Study Population.

Chart 19: Revocations



The outcomes of the Study Population supervisees who had their supervision revoked between 2016 and 2024 were as follows: ten supervisees completed an additional period of supervised release; six supervisees are still under supervision; three supervisees were re-sentenced to incarceration without any additional term of supervision; one supervisee transferred to another jurisdiction; and one supervisee passed away.

Case Study #10

The following colloquy reflects a supervisee's success even after revocation.

The supervisee was sentenced to time served and 3 years of supervised release for "conspiracy to distribute and possess with intent to distribute cocaine." The Sentencing Guidelines range was 46 to 57 months of incarceration plus 3 years of supervised release. Special conditions

included participation in weekly mental health counseling and drug treatment. Supervision was revoked for "leaving the judicial district without permission." The supervisee was re-sentenced to time served followed by an additional 24 months of supervised release.

> **Probation Officer**: [Supervisee] continues to do very well. . . . He continues to be employed . . . as a supervisor and he also started working as an Uber delivery driver just to supplement his income. . . . He continues to attend . . . weekly therapeutic counseling . . . which speaks to his continued focus to . . . getting back to his normal life and being a productive person in society and taking a strong father figure role for his younger son. . . . He's doing very well, . . . and he's scheduled to terminate supervision [next month]. . . .
>
> **Court**: Just on that point, . . . a termination at the end of supervised release is a very positive event. In this case, it would mean that [supervisee] will have successfully completed . . . 5 year[s] of supervision . . . , so that's really positive. . . . [Supervisee], I have a question for you. Overall, what has your experience on supervised release been like? . . .
>
> **Supervisee**: It has helped me a lot in terms of straightening out my life. . . . I am in a better space. . . . I think that . . . all the good work that I have done, I am seeing the results now. I am happy. . . . Things are going well for me, better than any other time in my life that I can think of. . . .
>
> **Court**: That's great. . . . You have your whole life ahead of you. . . . Did you find that counseling and drug treatment was valuable? . . .
>
> **Supervisee**: Yes, the treatment helped me a lot. . . . I think it has helped me avoid many things and it has also helped me with stress. It has helped me deal with things that could affect me [negatively].
>
> **Probation Officer**: He's very stable. . . . He has a very good understand of what it is he has to do to continue to do well, so I'm confident he can make those decisions on his own.

III. Conclusion

The data collected and presented in this report, coupled with our experience with the Study Population, support the conclusion that court involved supervision significantly improves outcomes for supervisees reentering the community. It also enhances the safety of the community. In summary, our Court Involved Supervised Release Program has achieved an **86.6%** supervision completion rate, including **38.1%** early terminations; **78.6%** employment; **82.2%** drug and mental health treatment; and comparatively fewer rearrests, fewer returns to prison, fewer revocations, and fewer (and less) serious violations. These achievements are there for the taking in exchange for a judicial presence throughout the term of supervision.

What is required is that judges fill a void of supervised release by proactively holding hearings and conferences on a regular basis with each supervisee. The work is not difficult but it is different from what happens historically and currently. We must re-focus our attention upon supervised release. The reward for improving reentry outcomes will be no less than safer communities. *See also* Jeffrey Fagan, *Legitimacy and Criminal Justice: Introduction to the Symposium,* Ohio State J. of Crim. L. 123, 136 (2008) ("[B]uilding the legitimacy of legal processes requires that actors with moral authority be part of the process."). The fair and obvious conclusion is that judges who become actively involved in supervision—working hand in hand with dedicated and skillful probation officers and other professionals—absolutely will help to bring about safer communities.

* * *

Richard M. Berman
June 10, 2024

February 4, 2025

Sentencing Guidelines Amendments:

January 24, 2025 Proposal for Supervised Release

Thank you for this opportunity to comment on the January 24, 2025 proposed revisions to the Sentencing Guidelines. This memo addresses proposed amendments to supervised release Guidelines.

I oppose the adoption of the proposed changes discussed below. The only reason given for these proposed changes is to give judges additional discretion. These changes do not advance that goal. If adopted, these changes would significantly undercut the purpose and utility of supervised release.

Judges have sufficient discretion currently to impose an appropriate term of supervised release with conditions that fit the individual defendant. These changes impose a burden on judges and invite litigation over whether judges have complied with this altered regime. As troubling, the proposed changes would undermine the mission of supervised release to reduce recidivism, promote a successful reentry into society, and protect public safety.

In most instances, the need for a specific condition is perfectly clear from the record and obvious to the defendant and his counsel. Requiring the court to state the obvious serves no purpose except to lengthen the sentencing proceedings and invite litigation. Defense counsel can already object to any special conditions recommended in the PSR or proposed by the court at the sentencing, including by arguing that the condition is not needed for rehabilitation or the protection of the community.

The standard conditions should not be converted into suggestions for special conditions. Their elimination as standard conditions adds to the court's workload and does not serve the goals of rehabilitation or safety. Again, the elimination of a condition as a "standard" condition invites litigation over whether they should be imposed. I am unaware of any study suggesting that the standard conditions have created a problem in supervision.

While individual judges may wish to conduct a re-assessment at the beginning of supervision of the conditions of supervised release they imposed at sentence, it infringes on judicial discretion in case management to add the re-assessment recommendation as a policy statement to the Guidelines and is, I expect, beyond the proper scope of the Guidelines. Moreover, there is usually very little pertinent information available at the commencement of supervision to suggest a change in the previously imposed conditions. The Probation Department is authorized to seek changes in imposed conditions at any time during supervision, and of course, the defendant may seek changes too. If a judge chooses to conduct conferences with supervisees at an early point in supervision it is often for other purposes and may be restricted to conferences with those who have higher PCRA scores.

I strongly oppose any statement of a presumption that supervision should end after one year. It undermines the importance of supervision in assisting supervisees in a successful reentry and in protecting society. There is a significant incidence of recidivism among federal defendants, and if I remember correctly, the Commission has found that about 50% of the recidivism occurs within the first 18 months or so of supervision. Creating this presumption will add unnecessarily to the workload of the judiciary without any identified offsetting benefit. If judges had believed at the time of sentence that a shorter term of supervision was appropriate, they could have imposed a shorter term. There is already a mechanism in place for defendants for whom supervision no longer serves a purpose to obtain early termination of supervision.

Thank you for considering my views.

District Judge Denise Cote, S.D.N.Y.

From: Colleen McMahon [redacted]
Sent: Tuesday, February 18, 2025 10:37 AM
To: Chair [redacted]
Cc: Paul Engelmayer [redacted]
Subject: Proposed amendments to Sentencing Guidelines relating to supervised release

Dear Judge Reeves:

I understand that my colleague Paul Engelmayer, Chair of the Souther District of New York's Committee on Criminal Law and Probation, has sent to your attention a memorandum outlining that Committee's opposition to three proposed changes to the Sentencing Guidelines relating to supervised release. As the former Chief Judge of my district, which position gave me intimate familiarity with both the practices of judges in this district and the work of our superb Probation Department, I heartily concur in the positions taken in Judge Engelmayer's memorandum, and I encourage your Committee not to adopt the proposed changes discussed therein. It does little good to amend the guidelines in ways that will be routinely rejected by sentencing judges; and I assure you that this sentencing judge would rarely if ever concur with any presumption that a single year's post-incarceration supervision is sufficient, or conclude that it was possible to reassess the need for previously imposed special conditions in an informed manner at the time of release.

Colleen McMahon
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
U.S. COURTHOUSE
700 STEWART STREET, ROOM 14229
SEATTLE, WASHINGTON 98101

MARSHA J. PECHMAN
SENIOR JUDGE

[redacted]

The Honorable Carlton W. Reeves
501 East Court Street, Suite 5.500
Jackson, Mississippi 39201

VIA EMAIL

March 3, 2025

Dear Judge Reeves:

I want to thank you and the members of the Sentencing Commission for drafting the Proposed Amendments to the Sentencing Guidelines (dated January 24, 2025).

I write to support the amendments on supervised release. We should not use our resources for those who are not in need of supervision, thus ensuring that our resources are used for those who can truly benefit from supervision. Each person released from custody has a unique set of needs, and these amendments ensure we treat each individual's needs specifically. One size does not fit all.

Thank you again for your hard work and thoughtfulness.

Sincerely,

Marsha J. Pechman
U.S. Senior District Judge,
Western District of Washington

THE DISCRETION TO SENTENCE

28 Fed.Sent.R. 161 • Vera Inst.Just. • February 1, 2016 • 28 Fed.Sent.R. 161 (Approx. 14 pages)

2016 WL 1417764

Federal **Sentencing** Reporter

Volume 28, Number 3

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THE DISCRETION TO SENTENCE

February 1, 2016

Robert

Pratt

United States

District Judge for

the Southern

District of Iowa

*161 Of the many complicated tasks federal district court judges must undertake, **sentencing** is indisputably one of the most important and, in my opinion, the most difficult. In each case, the law requires the judge to consider a variety of factors in an effort to arrive at a **sentence** that is "sufficient but not greater than necessary" to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence, to protect the public, and to provide the defendant with needed educational training, medical care, and correctional treatment. [1] Factors a judge must consider in fashioning this "sufficient but not greater than necessary" **sentence** include the nature and circumstances of the offense, the history and characteristics of the offender, the need for the **sentence** imposed, the types of **sentences** available, the **sentencing** range established by the United States **Sentencing** Guidelines, pertinent policy statements, the need to avoid unwarranted **sentencing** disparities among similarly situated offenders, and the need to provide restitution to victims. [2] Moreover, a judge must never forget that his **sentencing** decision will, more often than not, deprive another human being of his liberty for at least some period of time. This loss of liberty, in turn, will have a profound and lasting impact not only on the individual being **sentenced**, but often on that individual's family, friends, and

community. Despite having a checklist of factors to consider, there is not necessarily a "correct" **sentence** in a given case. Instead, the entire **sentencing** process relies on the district court judge's "**discretion**" to impose a **sentence** that is appropriate under the circumstances. Indeed, most **sentencing** decisions are reviewed by appellate courts using an "abuse of **discretion**" standard.

But what is "**discretion**"? Though fundamental to the judicial system, ""**discretion**" is as amorphous a term as there ever was. A colleague of mine once told me that defining **discretion** is impossible; indeed, she said "to define it is to destroy it." Nonetheless, since the exercise of **discretion** is an integral part of a judge's job, there have been numerous attempts to define it, or at least clarify it, over the years. For instance, over a hundred years ago, the Supreme Court told us in *The Steamship Styria v. Morgan:*

> The term "**discretion**" implies the absence of a hard-and-fast-rule. The establishment of a clearly defined rule of action would be the end of ***discretion***, and yet **discretion** should not be a word for arbitrary will or inconsiderate action. "**Discretion** means the equitable decision of what is just and proper under the circumstances." Bouvier, Law Diet. "**Discretion** means the liberty or power of acting without other control than one's own judgment." Webster, Dict. [3]
>
> Though *Morgan's* definition of **discretion** arose in the context of defining a master's duty to his ship, it applies in the criminal context as well. In *Burns v. United States,* Chief Justice Hughes cited *Morgan* in concluding that "abuse of **discretion**" was the standard applicable to reviewing a revocation of probation, writing that **discretion** "implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result.'" [4]

So the answer to the question is that there is no single defining answer; **discretion** is something that is fact-based and not arbitrary, yet it lacks a fixed rule. Thus, it is not surprising that the "abuse of **discretion**" standard applied by appellate courts has shifted over time. In *Koon v. United States,* the Supreme Court recognized that prior to 1984, "**sentencing** judges enjoyed broad **discretion** in determining whether and how long an offender should be incarcerated." [5] Indeed, "a federal criminal **sentence** within statutory limits was, for all practical purposes, not reviewable on appeal." [6] This broad **discretion** "led to perceptions that 'federal judges mete out an unjustifiably wide range of **sentences** to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.'" [7] In response, Congress implemented the **Sentencing** Reform Act of 1984 ("the SRA"), which created the United States **Sentencing** Commission and charged it with developing a comprehensive set of mandatory **Sentencing** Guidelines that would: (1) assure that the purposes of **sentencing** outlined in 18 U.S.C. § 3553(a)(2) are satisfied; (2) provide "certainty and fairness in meeting the purposes of **sentencing**" by avoiding "unwarranted **sentencing** disparities" among similarly situated defendants and still providing flexibility to **sentencing** judges to "permit individualized **sentences** when warranted by mitigating or aggravating factors" not taken into account or present to a degree not contemplated by the **Sentencing** Commission in fashioning the Guidelines; and (3) "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." [8] The first set of **Sentencing** Guidelines became effective on November 1, 1987. Because they were ""binding," it quickly became *162 apparent that the historical "broad **discretion**" afforded judges in **sentencing** had been severely circumscribed, replaced by the harsh and mechanical application of the **Sentencing** Guidelines' determinate **sentencing** regime. [9] Judges and defendants alike were largely dissatisfied with the system. Judge Lynn Adelman of the Eastern District of Wisconsin, for instance,

once stated that the "mandatory Guidelines made no sense to the public or to the defendant" because they flatly prohibited judges from considering many important **sentencing** factors, such as "what kind of person the defendant was or the motive for the crime …. **Sentencing** under the mandatory Guidelines was a rote process … the grid was God." [10]

Despite the broad dissatisfaction with the mandatory **Sentencing** Guidelines system, little changed until the 2005 landmark decision in *Booker v. United States*, which excised portions of the SRA as unconstitutional, rendering the "Guidelines effectively advisory." [11] As modified, the Court held, the SRA "requires a **sentencing** court to consider Guidelines ranges, but it permits the court to tailor the **sentencing** in light of other [§ 3553(a)] statutory concerns as well." [12] Though much **discretion** was returned to federal judges as a result of *Booker*, its mandate that appellate courts review **sentencing** decisions for "unreasonableness" ultimately led many appellate courts to apply differing standards of review to **sentences** depending on whether they fell within or outside of the applicable **Sentencing** Guidelines range. For instance, my circuit, the Eighth Circuit Court of Appeals, held that when there is no dispute as to the calculation of the Guidelines range, the **sentence** imposed is reviewed for "reasonableness, a standard akin to our traditional review for abuse of **discretion**." [13] It further held, however, that a "**sentence** imposed within the guidelines range is presumptively reasonable," whereas a **sentence** imposed outside the advisory range required a "justification [that is] proportional to the extent of the difference between the advisory range and the **sentence** imposed." [14] Applying varying iterations of this test, the Eighth Circuit reversed my own **sentencing** judgments nine times between 2006 and 2007, finding in most instances that I gave improper weight to various **sentencing** factors. [15]

In December 2007, the Supreme Court held in *Gall v. United States* that the Eighth Circuit's "requir[ement for] 'proportional' justification for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker*." [16] It then provided significant clarification to the standard of review applicable to **sentencing** decisions, and more importantly, to the amount of **discretion** that must be afforded **sentencing** judges in making **sentencing** decisions in a post-*Booker* world. Justice Stevens wrote for the majority:

> Regardless of whether the **sentence** imposed is inside or outside the Guidelines range, the appellate court must review the **sentence** under an abuse-of-**discretion** standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a **sentence** based on clearly erroneous facts, or failing to adequately explain the chosen **sentence**—including an explanation for any deviation from the Guidelines range. Assuming that the district court's **sentencing** decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the **sentence** imposed under an abuse-of-**discretion** standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the **sentence** is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the **sentence** is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the §

> 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different **sentence** was appropriate is insufficient to justify reversal of the district court. [17]

I have had appellate judges tell me since *Gall* that they believe the message of the Supreme Court regarding *Booker* and its progeny is that the "Court of Appeals is out of the **sentencing** business," and this sentiment has certainly been borne out in my own Circuit. Since *Gall*, the Eighth Circuit has applied a "deferential abuse-of-**discretion** standard" to **sentencing** decisions; it has further provided guidance in an en banc decision in *United States v. Feemster* that a district court abuses its **discretion** when it: (1) "fails to consider a relevant factor that should have received significant weight"; (2) "gives significant weight to an improper or irrelevant factor"; or (3) "considers only the appropriate factors but in weighing those factors commits a clear error of judgment." [18] Since *Gall*, the Eighth Circuit has found that a **sentencing** judge abused his or her **discretion** only twice, in *United States v. Kane* [19] and *United States v. Dautovic*. [20] In each of these cases, the Circuit provided detailed factual recitations of conduct that could best be described as "conscience shocking," [21] concluding that the district courts' decisions to impose relatively low **sentences** were substantively unreasonable. Although it is not clear that the facts of a given case must rise to the level of "conscience shocking" to warrant a finding that a district court abused its **discretion**, *Kane* and *Dautovic* at least serve to evidence that judicial **discretion** in **sentencing** decisions is more robust than it has been in decades. This conclusion is further emphasized by the Eighth Circuit's repeated refrain, "It will be the unusual case when we reverse a district court **sentence**—whether within, above, or below the applicable Guidelines range—as substantively unreasonable." [22] Indeed, this particular phrase has been cited at least 76 *163 times in the Eighth Circuit since *Feemster* was decided in July 2009.

I have presided over many many (too many) **sentencing** proceedings in my seventeen-plus years on the bench, both pre- and post-*Booker*. I don't know the precise number, but Eighth Circuit Judge Myron Bright noted in a dissenting opinion in 2006 that "in his tenure as a federal district judge, Judge **Pratt** has **sentenced** approximately nine hundred ninety offenders." [23] Regardless, I like to think that I have learned a few things from my experience. First, I have learned that knowledge of the facts is key in any **sentencing** decision not restricted by a mandatory **sentencing** statute. To this end, I believe it is incumbent on district court judges to obtain as much input about the offender and the case as possible before imposing a **sentence**, whether from the Probation Office, the Government, defense counsel, the offender, or his family or friends. Second, I have learned that "**discretion**," as it has been defined post-*Booker*, means that I have full authority to decide the weight to be given any particular **sentencing** factor without three judges later telling me that I was incorrect, at least so long as my weighing does not somehow shock the conscience or otherwise violate the three abuse-of-**discretion** considerations identified in *Feemster*. Finally, I have learned that it is imperative that district judges have a high level of **discretion** to effectively do justice in any individual case, and further, that they have the **discretion** to consider *all* facts and information in fashioning a **sentence** that is "sufficient but not greater than necessary," not only that information which Congress or the **Sentencing** Commission thinks is most pertinent. Although the mandatory **Sentencing** Guidelines regime was undoubtedly well-intentioned, it failed in large part because it attempted to eliminate much of the human element from the **sentencing** equation. But humanity is inherently a part of any just **sentencing** system. Listening to and observing an offender's allocution

or a victim's statement is far different from reading it on paper, and in this regard, Congress, the **Sentencing** Commission, and appellate judges are at a clear disadvantage to district court judges. It is the district judge who has "had the experience, which [appellate judges] have not, to decide the fate of … real people, all of whom he has looked in the eye when imposing a **sentence**." [24] Judge Bright recounted in *Likens* learning precisely this lesson from a highly distinguished Supreme Court justice:

> In the Summer of 1969, as a new judge, I attended educational sessions for appellate judges at New York University Law School. Warren Burger, who then had been appointed Chief Justice of the United States, served as a faculty member. In a conversation with him, which I remember well, I suggested that perhaps appellate judges should have the power to review criminal **sentences** in the federal courts. He responded with a strong negative answer and in substance said that appellate judges know very little about **sentencing**. I considered his comment right at that time and it is applicable today in close cases such as this one. [25]

Perhaps my favorite quote regarding the importance of the human element, and in turn, the necessity of true **discretion** in **sentencing**, however, is from District of Maine Judge Brock Hornby, who wrote: "Federal judges **sentence** offenders face-to-face. The proceedings showcase official power vividly and, sometimes individual recalcitrance, repentance, outrage, compassion, sorry, occasionally forgiveness—profound human dimensions that cannot be captured in mere transcripts or statistics." [26]

As Justice Kennedy aptly stated in *Koon v. United States:*

> The goal of the **Sentencing** Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the **sentencing** judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. [27]

Ultimately, the post-*Booker* system we now enjoy is far superior to both the pre-SRA system and the mandatory **Sentencing** Guidelines system. And although there is still much work to be done to create a truly fair and just system, I firmly believe that today's combination of an *advisory* **Sentencing** Guidelines system and the return of true **sentencing discretion** to district court judges has brought us a great deal closer to that ideal.

Footnotes

1 *See* 18 U.S.C. § 3553(a).

2 *Id.*

3 *The Steamship Styria*, 186 U.S. 1, 9, 22 S. Ct. 731, 46 L.Ed. 1027 (1902).

4 *Burns v. United States*, 287 U.S. 216, 223, 53 S.Ct. 154, 77 L.Ed. 266 (1932) (quoting Langnes v. Green, 282 U.S.

531, 541, 51 S.Ct. 243, 75 L.Ed. 520 (1931)).

5 Koon v. United States, 518 U.S. 81, 92, 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996).

6 *Id.* at 96.

7 *Id.* at 92 (quoting S. Rep. No. 98-225, p. 38 (1983)).

8 *Id.* (quoting U.S.S.G. ch. 1, pt. A (Nov. 1995)).

9 Congress's implementation of mandatory minimum drug **sentences** pursuant to the Anti-Drug Abuse Act of 1986 further reduced judges' **sentencing discretion**. *See* 21 U.S.C. § 841(b).

10 *See Federal* ***Sentencing*** *Under "Advisory" Guidelines: Observations by District Judges*, 75 Fordham L. Rev. 1 (October 2006).

11 United States v. Booker, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed. 621 (2005).

12 *Id.* (internal citations omitted).

13 United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006), *rev'd*, 552 U.S. 38 (2007).

14 *Id.* (citations omitted).

15 *See* United States v. Myers, 439 F.3d 415 (8th Cir. 2006); United States v. Goody, 442 F.3d 1132 (8th Cir. 2006); *Gall*, 446 F.3d at 884; United States v. McDonald, 461 F.3d 948 (8th Cir. 2006); United States v. Likens, 464 F.3d 823 (8th Cir. 2006); United States v. Morales-Uribe, 470 F.3d 1282 (8th Cir. 2006); United States v. Rene Plaza, 471 F.3d 876 (8th Cir. 2006); United States v. Cassandra Plaza, 471 F.3d 928 (8th Cir. 2006); United States v. Garate, 482 F.3d 1013 (8th Cir. 2007).

16 Gall v. United States, 552 U.S. 38, 46, 128 S.Ct. 586, 169 L.Ed. 445 (2007).

17 *Id.* at 51.

18 United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (quoting United States v. Kane, 552 F.3d 748, 752 (8th Cir. 2009).

19 United States v. Kane, 639 F.3d 1121 (8th Cir. 2011), *cert denied*, 132 S. Ct. 1590.

20 United States v. Dautovic, 763 F.3d 927 (8th Cir. 2014), *cert denied*, 135 S. Ct. 1441.

21 I elected to use the phrase "conscience shocking" based on Judge Colloton's concurring opinion in *Feemster*, where he stated that "[s]ubstantive reasonableness review endures, so there must be at least a "shocks the conscience' sort of constraint on district judges." *Feemster*, 572 F.3d at 468 (Colloton, J., concurring).

22 *Feemster*, 572 F.3d at 464 (quoting United States v. Gardellini, 545 F.3d 1089, 1090 (D.C. Cir. 2008)).

23 *Likens*, 464 F.3d at 827 n.1 (Bright, J., dissenting).

24 *Id.*

25 *Id.* at n.2.

26 Brock Hornby, *Speaking in* ***Sentences***, 14 The Green Bag 147 (Winter 2011).

27 Koon v. United States, 518 U.S. 81, 113, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

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United States District Court

DISTRICT OF CONNECTICUT

Chambers of
Stefan R. Underhill
United States District Judge

915 Lafayette Boulevard
Bridgeport, Connecticut 06604
(203) 579-5714

February 26, 2025

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Washington, D.C.

Re: Comments on 2025 Proposed Amendments Regarding Supervised Release

Dear Chairman Reeves,

I commend the Sentencing Commission for its thoughtful proposed amendments relating to supervised release. The amendments reflect a huge step forward in revising the Commission's approach to an area of sentencing that has lain dormant for too long. The imposition of supervised release and the response to violations of conditions of supervised release have become mechanical and reflexive in practice. The proposed amendments recognize that the decisions to impose supervised release, to set the term and conditions, and to address violations of those conditions should be made with individualized attention to the background and characteristics of the defendant. The amendments also recognize the discretion of judges, which is essential to fair and just sentencing. The focus on rehabilitation that underlies the amendments is a breath of fresh air. Some of the following comments reflect areas that can be further improved, but overall the proposed amendments represent a fabulous start to the changes needed in this area. I applaud the Commission's efforts.

Chapter 5

The Introductory Commentary correctly emphasizes the rehabilitative role of supervised release. It notes that not every defendant needs a term of supervised release, a point often overlooked by judges, including myself.

Section 5D1.1

The emphasis on individualized assessment is excellent. Judges should state on the record the reasons for imposing or not imposing a term of supervised release. Requiring that statement will help ensure that the judge has actually undertaken an individualized assessment. In addition, removal of the requirement to impose a term of supervised release whenever a sentence of more than one year is imposed improves the section.

I suggest adding an application note regarding dual supervision by state and federal probation offices. If a supervisee is being adequately supervised by state probation, there may be no need for a term of federal supervised release. Indeed, double supervision imposes significant hardships on some individuals through duplicative reporting requirements and availability for home visits. Violations of state probation inevitably result in violations of federal supervision. Therefore, requirements to miss work in order to show up in court are doubled, thus jeopardizing employment.

Section 5D1.2

I was pleased to see that the proposed amendment eliminates the suggested minimum terms of supervised release for various classes of crimes. But in new application note 3, the term "sufficient" should be replaced with "sufficient, but not greater than necessary." That language will discourage judges from imposing supervised release as further punishment for the underlying offense.

Section 5D1.3

Regarding subsection (b)(2), the amendment is certainly an improvement. Too often the standard conditions of supervised release are imposed automatically. However, I believe that the standard conditions should be split into two groups: those essential to permit the Probation Office to supervise any person adequately and those that reflect discretionary decisions regarding a particular individual. The former should remain as "standard" conditions, while the remainder should be identified as commonly imposed conditions. It may make sense to combine the "common" conditions with the "special" conditions. All should be discretionary and separating them suggests that the two classes of conditions should be treated differently.

The conditions essential to adequate supervision, in my view, are current standard conditions 1, 2, 4, 5, 6, 7, and 13. Those conditions essentially require the supervisee to report to Probation as directed, answer truthfully the Probation officer's questions, follow Probation's instructions, live at a place approved by the Probation officer, work full time, and allow the Probation officer to visit their home and workplace. The essential conditions should be imposed in virtually all cases, but violating those conditions should only very rarely result in a prison sentence.

The remaining current standard conditions impose greater restrictions on liberty than are warranted in many cases. Out-of-district travel restrictions often preclude types of employment that persons with felony records can actually obtain, e.g., trucking. Not interacting with persons known to have committed felonies prohibits supervisees from engaging in their communities and even with family members. Providing notice of police contact is unnecessary; the Probation officer will ordinarily receive that notice from law enforcement. It is already illegal for persons convicted of a felony to possess firearms, so that condition simply facilitates imprisonment without indictment or trial. There may be circumstances that call for imposition of such conditions, but they should not be presumptively imposed.

Section 5D1.4

In subsections (a) and (b), I believe the word "should" provides better guidance than the word "may." The statute authorizes modifications and early terminations, so courts are aware that they "may" make such orders. The used of "should" emphasizes the rehabilitative goals of supervised release. When modifications of the conditions are necessary to facilitate rehabilitation or when those goals have been met, the Commission should be encouraging judges to exercise their statutory authority to modify conditions or to extend the term of supervised release.

I suggest revising slightly the language regarding assessment following release. The term "as soon as practicable" could be interpreted as meaning immediately upon release. A better assessment, in my view, can be conducted 60 to 90 days after release. At that point, the supervisee will either have employment or need help, will either have stable housing or need assistance, will either have stayed off drugs or need treatment. By delaying the hearing slightly, the court's individualized assessment will be much more meaningful and may provide services that would not always appear to be needed immediately upon release from prison.

The factors to be considered when determining whether early termination is warranted appear appropriate. The Commission should not suggest the need for "extraordinary" or "changed" circumstances for early termination of supervised release. Judges are not required to find new or changed circumstances to modify conditions of supervised release. *E.g., United States v. Parisi*, 821 F.3d 343, 347 (2d Cir. 2016); *United States v. Bainbridge*, 746 F.3d 943, 950 (9th Cir. 2014). When a supervisee has completed their rehabilitative journey, continued supervision is unnecessary.

Subsection (c) again uses "may." As noted above, the section accomplishes little beyond reminding the judge of the statutory authority to extend supervision. I suggest that this subsection be reworded to reference the factors identified for consideration when determining the imposition and term of supervised release. Something along these lines: "When considering whether to extend the term of supervised release, the court should engage in an individualized assessment of the factors set forth in sections 5D1.1 and 5D1.2." I also think that it would be helpful to add the following to this subsection: "Extending a term of supervised release provides a meaningful alternative to incarceration when conditions have been violated."

The application notes to subsection (c) are generally good. Notes 2 and 3, however, would benefit from minor edits. Following the procedures set forth in Fed. R. Crim. P. 32.1 is not always necessary. Many modifications (and some extensions) of supervised release are consensual and do not require a hearing. That reality should be recognized by the note. In note 3, the option of extending the term should be broadened to include both extension and modification as preferred options to revocation.

Chapter 7

I commend the Commission for replacing the word "shall" with the word "should" in most places throughout Chapter 7. That chapter is, after all, merely a set of policy statements that exist at a time of discretionary Guidelines application. Retaining "shall" could confuse counsel, the probation officer, and even the court about the discretion available to the judge when deciding how to respond to non-compliant behavior.

Almost the entire text of Part A reflects a history of decisions made in the 1980s. That discussion could usefully be moved to Chapter 1, Part A, because it should not impact the approach now taken in Chapter 7. A secondary advantage of doing so would be that the misguided "breach of trust" justification for imprisonment sentences for violating supervised release would be moved to the part of the Guidelines describing history, rather than current guidance. Much of the discussion in the "Updating the Approach" section could be relabeled as an Introduction to Chapter 7. In the fourth paragraph of that section, the phrase "the seriousness of the underlying violation" should probably be revised to "the seriousness of the underlying conviction."

Part B

I appreciate that the Commission has acknowledged the significant differences between probation and supervised release. Still, by merely changing the word "supervision" to "probation" in Part B, the proposed amendment creates some tension with the statutes. The statutory provision governing revocation of probation appears at 18 U.S.C. § 3565. Subsection (a) of that statute provides, in essence, that a person who violates a condition of probation faces the same statutory range of punishment as at the time of the original sentencing. Revocation is not required, but if probation is revoked, the court is instructed to "resentence the defendant under subchapter A," that is, under section 3553(a).

Accordingly, I wonder whether the probation revocation table's suggested sentences are consistent with the statutory framework. Part B seems to ignore the differences between probation and supervised release that the

introductory statement seems to acknowledge. Put differently, probation violations are not truly supervision violations that subject the probationer to short terms of imprisonment. Rather, statutorily, probation violations give the court a second crack at the original sentence. I suggest that the entirety of Part B could helpfully be deleted.

Section 7C1.3

I like the bracketed text in subsection (a), and I prefer Option 1 for subsections (b) and (c). Grade A and B violations generally arise because of state prosecutions. In such a case, the state presumably will have resolved the prosecution and sentenced the supervisee in a manner that reflects the state's interests. It seems somewhat contrary to our system of federalism nevertheless to require revocation of supervised release (even when not required by statute) and to impose a prison sentence that implies that the state court somehow inappropriately sentenced the violation of state law. Moreover, imposing violation prison sentences for persons who have been generally successful on supervised release requires that they start from scratch their rehabilitative efforts following release.

I endorse the addition of application note 2. It is consistent with a rehabilitative approach. Often the threat of revocation is sufficient to change a supervisee's attitude and to stimulate positive change. In any event, the additional time can help inform the court's exercise of discretion regarding violation conduct.

Section 7C1.4

I favor Option 1, which requires a judge to consider the totality of the circumstances when imposing a revocation sentence. A revocation sentence consecutive to a state sentence for a violation of state law will rarely be justified. I do not see a federal interest that is served by adding to the state court's determination of the appropriate sentence for the violation of state law. In the past, the "breach of trust" theory purportedly justified revocation sentences, but no federal judge reposes any trust in a person sentenced to supervised release. A term of supervised release is not an act of charity, it is an effort to rehabilitate an offender in ways that often have a punitive effect. Extending or modifying conditions of supervised release are almost always better options than interrupting rehabilitation efforts by imprisoning the person on supervision.

Application note 4 cuts against the theme of the other Chapter 7 amendments. As written, it would recommend that any unserved period of home detention or community confinement be converted into an equivalent period of imprisonment. As with most revocation issues, that circumstance could be adequately addressed through modification of either the length or restrictiveness of either the alternative to incarceration or the period of supervised release. Home detention, for example, can be converted into home incarceration for the same or a longer period of time.

Section 7C1.5

I believe that the Commission should eliminate the Revocation Table entirely. The policy statements in Chapter 7 should require an individualized assessment and rely on the good sense of judges to address the violation conduct appropriately within the statutory maximums for revocation sentences.

If that suggestion in not adopted, I note the following significant issues with the Revocation Table. First, the Grade D recommended ranges should be drastically reduced. I suggest: 0-3, 0-4, 0-5, 0-6, 0-7, and 0-8. Grade D violations involve technical violations of the conditions of supervised release or, at most, motor vehicle offenses. The recommended sentence upon revocation should always acknowledge the possibility of a non-prison sentence (e.g., home detention), a modification, or extension of supervised release, or community service, and the

Commission should state that revocation is not ordinarily appropriate for such violations. My suggested Grade D ranges have an upper end equal to the lower end of a Grade C violation.

Second, the revocation table does not explicitly advise judges to consider the punishment imposed by the state for any grade of violation. Very often, the sentence imposed by the state will adequately address the conduct giving rise to the violation. If so, only rarely should judges add on to that state sentence with a revocation sentence. I suggest that the bottom of the recommended ranges for every grade of violation start with a zero. Moreover, the totality of a person's conduct while on supervised release (including sincere but less than completely successful efforts at rehabilitation) should inform the decision whether and how to respond to non-compliant behavior. A person's struggle to overcome addiction is unlikely to be accomplished without backward steps. Someone who has done well for a significant period of time before slipping up should not have their rehabilitative efforts interrupted and set back by a return to prison. Conversely, someone who has been difficult to supervise and who has accumulated multiple violations should receive a more serious response to that conduct.

Third, the criminal history category to be used in the revocation table should be the criminal history as calculated at the time of the violation or the time of the revocation sentence. The criminal history category should not be frozen during a successful period of supervision. Using an old criminal history category strongly implies that people cannot change and ignores progress made while on supervision or while serving a term of imprisonment. Moreover, the explanation for the decision to use the old criminal history category, set forth in application note 1, provides no meaningful explanation for the decision. The ranges in the revocation table certainly "have been designed to take into account that the defendant violated supervision." It is, after all, a revocation table. But that tautology offers no justification for using an outdated criminal history category to evaluate appropriate responses to recent conduct.

Fourth, the recommended ranges in the table should not be tied to the seriousness of the underlying conviction, as is done with Grade A(2) violations. (And presumably the upper end of the range for Grade A(2) violations should be 60 months, the statutory maximum for revocations of supervised release imposed for Class A convictions. 18 U.S.C. § 3583(e)(3).) The only effect of considering the seriousness of the underlying conviction when revoking supervised release is to add an additional punishment for the original conviction. The double jeopardy problems with that approach are obvious. The same fundamental problem arises in application note 3. It essentially says the court should consider whether the criminal history category at the time of the original sentencing was increased or reduced pursuant to section 4A1.3. Again, that suggests to the court that it should consider the fairness or adequacy of the original sentence when deciding upon the revocation sentence. The same problem arises in new application note 5.

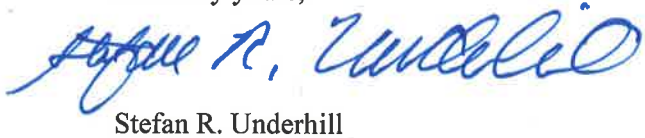
Application note 2 is poorly worded. It implies that every revocation must result in some period of imprisonment: "This range allows for a sentence of less than 1 month." And it suggests that if the supervisee is in a criminal history category higher than 1 (virtually every person on supervision), the policy statements suggest a longer period of imprisonment. I hope that is not the intent of the section.

* * *

Notwithstanding my suggested revisions, I believe the proposed amendments represent a significant step forward. We supervise too many people, and return far too many people to prison—more than 10,000 each year—for very minor violations of their conditions of supervised release. The amendments' emphasis on rehabilitation rather than reincarceration will help judges acknowledge the range of responses they have to violation conduct. Recommending alternatives to reincarceration will facilitate rehabilitation of offenders and thereby dramatically improve public safety.

Thank you for your efforts to improve Chapter 5 of the Sentencing Guidelines and the policy statements in Chapter 7 of the Guidelines Manual. I hope these comments assist those efforts in some small way.

Sincerely yours,



Stefan R. Underhill

UNITED STATES DISTRICT COURT
Northern District of West Virginia
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WHEELING, WEST VIRGINIA 26003

JOHN PRESTON BAILEY
Judge

304-233-1492
Facsimile 304-233-1495

September 23, 2023

Honorable Carlton W. Reeves
United States District Judge
Chairperson U. S. Sentencing Commission
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Via Email

Re: Methamphetamine Guidelines

Dear Judge Reeves:

At the Judicial Conference, I told you that I would be writing to you concerning the proposed amendment to methamphetamine guidelines to do away with the distinction between regular methamphetamine and "ice."

I realize that I am a voice crying in the wilderness (Vox clamantis in deserto) but I feel the distinction is logical and valid, and is based on years of serving an area where meth was the drug of choice.

Low purity is usually the product of the "shake and bake" method or a kitchen lab, using materials gathered by "smurfs" who share in the product. These sources are incapable of producing the purity of "ice." Rather, "ice" is produced by the Mexican drug cartels, often using chemicals from China and using violence to protect their operations.

Accordingly, the distribution of "ice" helps finance the cartels and their attendant violence.

For these reasons, I have consistently rejected the argument that regular meth and "ice" should be considered the same.

Thank you for considering my arguments.

Sincerely,

John Preston Bailey
United States District Judge

JPB/bjt

From: David Counts [redacted]
Sent: Sunday, March 2, 2025 8:59 AM
To: Chair [redacted]
Cc: Alia Moses [redacted]
Subject: Comments on March 3rd Proposals

Chairman Reeves,

As requested, find attached comments/responses on the proposed amendments to the Sentencing Guidelines. These comments relate only to the March 3rd deadline. As always, I appreciate the opportunity to comment and I'm grateful for the work of the Commission. Copying my Chief Judge.

Thank you for your efforts.

All the best!

David

Issues for Comment – Drugs, Part A, Subpart 1, Recalibrating the Use of Drug Weight in §2D1.1

1. **Commission data reflects that the difference between the average guideline minimum and average sentence imposed varies depending on the base offense level, with the greatest difference occurring at the highest base offense levels. Subpart 1 sets forth three options for amending the Drug Quantity Table at subsection (c) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the highest base offense level at [34][32][30]. Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

   Response

   While the drug quantity table is in need some adjustment (such as eliminating ICE or Meth Actual discussed in Part B of this proposed amendment), eliminating the highest three levels simply to align the average guideline minimum with the average sentence imposed seems misguided. Would courts continue to impose sentences below the average guideline minimum after this amendment, or would courts then impose a sentence within the guideline range? I am of the opinion the courts will continue to impose sentences below average guideline minimums, regardless of the base offense level. It seems courts are not inclined to consistently pronounce within guideline range sentences, regardless of those ranges.

   In its background for this amendment, the Commission explains that it has received feedback over the years that §2D1.1 overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing. This makes no sense to me. How would the court measure culpability in drug cases if not for drug type and quantity? Is this not the approach Congress adopted with the statute? Various statutory penalties apply based on drug type and quantity.

   Under Subpart 1, Option 3, the highest base offense level in the drug quantity table would be a level 30. If adopted, 5 kilograms or more of cocaine would net a base offense level 30. There would be no distinction between a defendant who possesses 5 kilograms of cocaine and a defendant who possesses 450 kilograms of cocaine (which is currently level 38). The greater the amount of cocaine distributed, the greater the societal harm. Perhaps the culpability issue is not with the drug quantity table, but rather the adjustments (specific offense characteristics, minor role adjustments, etc.), or maybe relevant conduct. Or perhaps, courts simply view this differently.

   The issues for comment do not provide the offense level at which the deviation between the minimum guideline sentence and the sentence that is imposed levels out, whether that's level 34, 32, or 30, or some other level. If the Commission insists on lowering the base offense levels to better reflect the sentences pronounced, I recommend the Commission set the base offense level where there is the least deviation between the two.

If I were a drug dealer, my mantra in light of this proposed amendment would be, "Go big or go home!" With no additional penalty for possessing a greater quantity of drugs, what do you have to lose?

2. **Subpart 1 of Part A of the proposed amendment would amend §2D1.1 to reduce the highest base offense level in the Drug Quantity Table. The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

   Response

   If any adjustment is made to the drug quantity table, I prefer a reduction throughout the drug quantity table rather than simply capping the table at [34][32][30]. Eliminating the highest base offense levels removes culpability for those who possess greater quantities. Adjusting the entire table and retaining the current drug quantity ranges instead of eliminating the highest levels would continue to hold those defendants who possess greater quantities to a greater level of culpability than those who possess smaller quantities.

   As to the extent of the reduction for all base offense levels in the drug quantity table, I would recommend the Commission adjust the table by [4][6][8] which is in line with the reduction proposed by the Commission for the greatest of the offense levels.

   To be clear, I do not support a reduction in any of the base offense levels reflected in the drug quantity table, nor do I support capping the table at [34][32][30].

3. **The mitigating role cap at §2D1.1(a)(5) provides a decrease for base offense levels of 32 or greater when the mitigating role adjustment at §3B1.2 applies. The mitigating role cap also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). Subpart 1 sets forth three options to decrease the highest base offense level of the Drug Quantity Table to level [34][32][30]. If the Commission adopts any of these options, it will require changes to the mitigating role cap at §2D1.1(a)(5). The Commission seeks comment on how it should address the interaction between the options set forth in Subpart 1 and the mitigating role cap. Specifically, should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

   Response

   If the Commission caps the highest base offense level of the drug quantity table to level [34][32][30], I do not support the retention of §2D1.1(a)(5). I suggest eliminating that provision

altogether. This is especially true if the Commission adopts Subpart 2 as the reduction in Subpart 2 would certainly be applied more frequently than the mitigating role is currently.

However, if the Commission does retain §2D1.1(a)(5), the base offense level that triggers the mitigating role cap depends on which level at which the Commission caps the drug quantity table. Assuming the lowest cap of 30, I would recommend retaining only a portion of §2D1.1(a)(5), as follows:

(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 26 or level 28, decrease by 1 level; or (ii) level 30, decrease by 2 levels.

Of course, if the Commission adopts Subpart 2 of this proposed amendment, §2D1.1(a)(5) needs to be amended to remove reference to mitigating role.

4. **Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) includes two chemical quantity tables at subsections (d) and (e). Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the same substance. If the Commission were to promulgate Option 1, 2, or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Response

Yes. §2D1.11 should be adjusted proportionally.

5. **Subpart 1 of Part A of the Proposed Amendment sets forth three options to decrease the highest base offense level of the Drug Quantity Table from level 38 to level [34][32][30]. Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine, which is the most common drug type in federal drug trafficking offenses. The Commission seeks comment on the interaction between these parts of the proposed amendment. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

Response

If the Commission adopts Subpart 1 of Part A capping the base offense levels in the drug quantity table, I support Option 2 of Subpart 2, of Part B, which would set the quantity thresholds for methamphetamine at the current levels of actual methamphetamine.

I am confident the data would support the finding that most of the methamphetamine recovered is of a very high purity, often times 95% or greater. If the Commission adopts

Subpart 1 of Part A, which would cap the highest offense level of the drug quantity table, I would not support Option 1 of Subpart 2, of Part B, which would set the quantity thresholds for methamphetamine at the current level for methamphetamine mixture. I would only support Option 1 of Subpart 2, or Part B, if the Commission did not adopt Subpart 1 of Part A, capping the offense level.

Issues for Comment – Drugs, Part A, Subpart 2, Recalibrating the Use of Drug Weight in §2D1.1

1. **Subpart 2 of Part A of the proposed amendment would add a new specific offense characteristic at subsection (b) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) relating to low-level trafficking functions in drug offenses. The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

   Response

   This proposed amendment explains that mitigating role in 3B1.2 would not apply to offenses covered by this section. Essentially, this amendment moves mitigating role adjustment from 3B1.2 to 2D1.1. For years, the Commission has asserted that courts were not applying mitigating role as frequently as the Commission intended. Including this proposed SOC in 2D1.1 would certainly lead to an increased application of the reduction, especially if the Commission includes a list of examples of low-level trafficking functions. In any event, that reduction should not be greater than what is currently available in 3D1.2.

   I do not support this proposed SOC. The Commission should leave 3B1.2 available to offenses covered by this section and the courts should conduct an individualized assessment as to minor role, as we do currently. Under this proposed amendment, an individual who is considered low-level may receive a reduction, although that individual may not be considered to be a "minor" participant.

   If the Commission adopts this amendment, I support a 2-level reduction, at most.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions. Are there other factors that this provision should capture? Are there factors included in the proposed amendment that should not be included?**

   Response

   The new SOC captures a lot of what the Commission would consider "low-level" conduct. It's likely most defendants sentenced under 2D1.1 will receive this reduction. I do not support this new SOC. Further, the phrase, "…distributed retail or user-level quantities of controlled substances to end users…" is overly broad.

3. **One of the low-level trafficking functions listed in proposed §2D1.1(b)(17) is the distribution of retail or user-level quantities of controlled substances when certain mitigating circumstances are present. The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**
Response

Response

I do not support this language; it is too broad and would result in over application. If the courts are not applying a minor role adjustment in drug cases, it must be that the courts feel the defendant's conduct does not warrant such a reduction. It appears that in order to circumvent the courts, the Commission is moving minor role to 2D1.1 and essentially pinning down the courts and forcing application of the reduction. This language, "distribution of retail or user-level quantities of controlled substances" is so broad it would net a great deal of defendants who would otherwise not justifiably receive a reduction under minor role.

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

Response

If the Commission adopts the low-level tracking reduction, I support eliminating 2D1.1(a)(5) altogether. This is especially true if the Commission adopts Subpart 2 as the reduction in Subpart 2 would certainly be applied more frequently than the mitigating role is currently. If the Commission does retain §2D1.1(a)(5), the base offense level that triggers the mitigating role cap depends on which level the Commission caps the drug quantity table. Assuming the lowest cap of 30, I would recommend retaining only a portion of §2D1.1(a)(5), as follows:

(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 §2D1.1(b)(17) (Low-Level Trafficking); and (B) the base offense level under subsection (c) is (i) level 26 or level 28, decrease by 1 level; or (ii) level 30, decrease by 2 levels.

Of course, if the Commission adopts Subpart 2 of this proposed amendment, §2D1.1(a)(5) would need to be amended to remove reference to mitigating role.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

Response

See response to Question 4.

6. **Subpart 2 of Part A of the proposed amendment includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

   Response

   YES. If the Commission is forcing the minor role issue by moving it to 2D1.1, then of course 3B1.2 should not apply.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline, which generally refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions). This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

   Response

   Provide instruction prohibiting the role adjustment if the defendant qualifies for a reduction under the new SOC for low-level trafficking functions.

8. **Subpart 2 of Part A of the proposed amendment would add Commentary to §2D1.1 that closely tracks certain provisions currently contained in Application Note 3 of the Commentary to §3B1.2. The proposed Commentary would provide that a low-level trafficking functions reduction applies even when the defendant's relevant conduct is limited to conduct in which the defendant was personally involved. Additionally, the proposed Commentary would state that a reduction ordinarily is not warranted when the defendant received a lower offense level by virtue of being convicted of a significantly less serious offense than warranted by the defendant's actual criminal conduct. The Commission seeks comment on whether including this guidance in the Commentary to §2D1.1 is appropriate. Is the guidance provided in these provisions applicable in the context of the new low-level trafficking functions adjustment at §2D1.1? If appropriate, should the Commission alternatively consider incorporating the prohibition and guidance by reference to the Commentary to §3B1.2?**

Response

The guideline mentioned above is as follows:

"If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by the defendant's actual criminal conduct, a reduction under subsection (b)(17) ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense."

I would not include this guidance in the Commentary to 2D1.1. The new SOC at (b)(17) is a reduction for low-level trafficking functions, not a minor role adjustment. Why combine the two concepts? If the Commission is intending to apply it broadly and prohibit the application of a mitigating role reduction, why then restrict it?

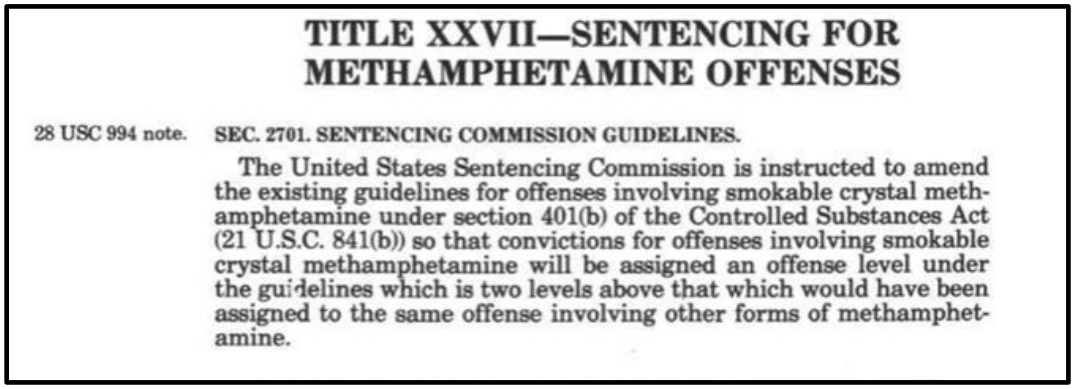
I would not incorporate the prohibition and guidance by reference to the Commentary to §3B1.2 because the proposed amendment states 3B1.2 would not apply to an offense covered by 2D1.1.

Issues for Comment – Drugs, Part B, Subpart 1, "Ice"

1. **Subpart 1 of Part B of the proposed amendment would amend the Drug Quantity Table at subsection (c) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and the Drug Conversion Tables at Application Note 8(D) of the Commentary to §2D1.1 to delete all references to "Ice." The Commission invites comment on whether deleting all references to "Ice" in §2D1.1 is consistent with the 1990 congressional directive (Pub. L. No. 101–647, § 2701 (1990)) and other provisions of federal law.**

   Response

   For reference, Pub L. No. 101-647, § 2701 (1990) was as follows:



TITLE XXVII—SENTENCING FOR METHAMPHETAMINE OFFENSES

28 USC 994 note. SEC. 2701. SENTENCING COMMISSION GUIDELINES.

The United States Sentencing Commission is instructed to amend the existing guidelines for offenses involving smokable crystal methamphetamine under section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b)) so that convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level under the guidelines which is two levels above that which would have been assigned to the same offense involving other forms of methamphetamine.

   "Ice" is seldom, if ever, used to compute the base offense level. "Ice" is simply a street term for methamphetamine. Nor is "Ice" mentioned in the statute. "Ice," for guideline purposes, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity. The majority of methamphetamine recovered is of exceedingly high purity, often times 95% or more, and is often in powder or crystalline form. To see methamphetamine at a lower purity is rare, so rare that I can't recall the last time I saw it, even considering the number of methamphetamine cases I see. Since today's methamphetamine is of such high purity, actual methamphetamine is used to determine the base offense level, not "Ice."

   As to Pub L. No. 101-647, § 2701 (1990) requiring a higher offense level for smokable crystal methamphetamine, today's methamphetamine is typically in crystalline form. That is not to say it is never in any other form, but typically it is in crystalline form. Pub L. No. 101-647, § 2701 (1990) seems woefully outdated. It was enacted during a time when crystal methamphetamine was gaining in popularity. According to www.history.com, in the 1980s, the United States began to tighten regulations around the sale and use of the ephedrine, a pharmaceutical precursor used to make crystal meth. As a result, illegal meth labs turned to an easier to obtain precursor, pseudoephedrine, a chemical found in many cold medicines. Use of crystal meth in the United States exploded in the early 1990s. Between 1994 and 2004, methamphetamine use rose from just under two percent of the U.S. adult population to approximately five percent. It is understandable why Congress targeted crystal methamphetamine. It was the prevailing form of methamphetamine of the time.

However, more recent research shows that other forms of methamphetamine are as addictive and can have the same long-lasting effects. Methamphetamine is swallowed, snorted, injected, or smoked. To intensify the effects, people may take higher doses of the drug, take it more frequently, or change their method of intake. According to the Drug Fact Sheet for Methamphetamine provided by the Drug Enforcement Administration (DEA), those who smoke or inject it report a brief, intense sensation, or rush. Oral ingestion or snorting produces a long-lasting high instead of a rush, which reportedly can continue for as long as half a day. Nonetheless, and regardless of how it is ingested, methamphetamine is a highly addictive drug with potent central nervous system stimulant properties. Both the rush and the high are believed to result from the release of very high levels of neurotransmitter dopamine into areas of the brain that regulate feelings of pleasure. Long-term meth use results in many damaging effects, including addiction. Chronic meth users can exhibit violent behavior, anxiety, confusion, insomnia, and psychotic features including paranoia, aggression, visual and auditory hallucinations, mood disturbances, and delusions, such as the sensation of insects creeping on or under the skin. Such paranoia can result in homicidal or suicidal thoughts. Researchers have reported that as much as 50 percent of the dopamine-producing cells in the brain can be damaged after prolonged exposure to relatively low levels of methamphetamine. Some studies suggested that the use of methamphetamine may also result in serotonergic neurotoxicity. All this is true regardless of how the methamphetamine is ingested (smoking, snorting, swallowing, or injecting).

I foresee no impact on guideline calculations by deleting all references to "Ice," as long as the Commission retains the actual methamphetamine in the drug quantity table. Since the purity of today's methamphetamine is consistently over 80%, using actual methamphetamine to determine the base offense level in the drug quantity table is appropriate. Oddly, to be compliant with Pub L. No. 101-647, § 2701 (1990), the Commission would have to adopt Subpart 1 of Part B of the proposed drug amendment which proposes a 2-level reduction for methamphetamine in non-smokeable, non-crystalline form. I do not support a 2-level reduction for other forms of methamphetamine. Two wrongs do not make a right. Pub. L. No. 101-647, § 2701 (1990) is outdated and Congress should reevaluate crystal methamphetamine versus other forms of methamphetamine. I do not believe the solution to be providing a 2-level reduction for other forms of methamphetamine.

2. **Subpart 1 of Part B of the proposed amendment brackets the possibility of adding a new specific offense characteristic at §2D1.1(b)(19) that provides a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form. The Commission invites comment on whether deleting all references to "Ice," while adding a new specific offense characteristic addressing methamphetamine in a nonsmokable, non-crystalline form, is consistent with the 1990 congressional directive (Pub. L. No. 101–647, § 2701 (1990)) and other provisions of federal law.**

   In addition, the Commission invites general comment on methamphetamine in a non-smokable, non-crystalline form, particularly on its pharmacological effects, potential

for addiction and abuse, the patterns of abuse and harms associated with their abuse, and the patterns of trafficking and harms associated with its trafficking. How is non-smokable, non-crystalline methamphetamine manufactured, distributed, possessed, and used? What are the characteristics of the individuals involved in these various criminal activities? What harms are posed by these activities? How do these harms differ from those associated with other forms of methamphetamine?

Response

The conclusion that crystal methamphetamine is more serious than other forms of methamphetamine is absurd. As explained in my response to the previous question, to be compliant with Pub L. No. 101-647, § 2701 (1990), the Commission would have to adopt Subpart 1 of Part B of the proposed drug amendment which proposes a 2-level reduction for methamphetamine in non-smokeable, non-crystalline form. I do not support a 2-level reduction for other forms of methamphetamine. Pub. L. No. 101-647, § 2701 (1990) is outdated and Congress should reevaluate crystal methamphetamine versus other forms of methamphetamine. I do not believe the solution to be providing a 2-level reduction for other forms of methamphetamine.

Perhaps the Commission should clarify what methamphetamine in "non-smokable, non-crystalline form" means for guideline purposes. Maybe this reduction should apply to situations where the methamphetamine is being transported in a liquid, or some other method where the methamphetamine is not in a usable state but instead needs to be extracted before being used. For example, a rug being soaked in liquid methamphetamine. Once dry, the rug is transported. Later, the methamphetamine is then extracted from the rug and converted into a usable form. Or the methamphetamine being dissolved in paint for transportation, only later to be extracted into a usable form.

As to general comments on methamphetamine in a non-smokeable, non-crystalline form, particularly on its pharmacological effects, potential for addiction and abuse, the patterns of abuse and harms associated with their abuse, and the patterns of trafficking and harms associated with its trafficking, what other forms of methamphetamine are there other than liquid (injectable)? If it's non-smokeable, non-crystalline form, it has to be in liquid form, correct? I cannot imagine the effects of using liquid methamphetamine being significantly more serious or different than smokeable crystalline form.

How is non-smokable, non-crystalline methamphetamine manufactured, distributed, possessed, and used? Storing, transporting, and distributing liquid methamphetamine could possibly present a greater challenge and an increased threat to the safety of the community should the liquid spill. Liquid methamphetamine can also be transported by dissolving it into other liquids, such as paint, or by infusing it into another product, such as soaking a rug in liquid methamphetamine, letting it dry, then transporting it only to be extracted once it has arrived at its intended destination.

As to the characteristics of the individuals involved in these various criminal activities involving other forms of methamphetamine, I think it's safe to say they're very similar to individuals who use smokeable crystal methamphetamine.

Issues for Comment – Drugs, Part B, Subpart 2, Methamphetamine Purity Distinction

1. **The Commission seeks comment on how, if at all, the guidelines should be amended to address the 10:1 quantity ratio between methamphetamine mixture and methamphetamine (actual). Should the Commission adopt either of the above options or neither? Should the Commission equalize the treatment of methamphetamine mixture and methamphetamine (actual) but at some level other than the current quantity thresholds for methamphetamine mixture or methamphetamine (actual)? Should the Commission retain references to both methamphetamine mixture and methamphetamine (actual) and set a quantity ratio between these substances but at some level other than the current 10:1 ratio? If so, what ratio should the Commission establish, and what is the basis for such ratio?**

   Response

   I support equalizing the treatment of methamphetamine mixture and methamphetamine (actual) by adopting Option 2 of Subpart 2 which would set the quantity thresholds for methamphetamine at the current level of methamphetamine (actual), essentially removing all reference to methamphetamine mixture. Most, if not all, of today's methamphetamine is of exceedingly high purity, often 95% pure or more. This court is seeing methamphetamine (actual), not a mixture, and I can't imagine other courts are seeing much different. Adopt Option 2 of Subpart 2 by retaining methamphetamine levels currently reflected in the drug quantity table and remove all reference to methamphetamine actual.

2. **Option 2 in Subpart 2 of Part B of the proposed amendment would amend §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to establish a 1:1 quantity ratio for methamphetamine (actual) and methamphetamine mixture by setting the quantity thresholds for all methamphetamine at the level of methamphetamine (actual). However, this change may result in an increased offense level for some cases involving methamphetamine (actual). For example, under the current §2D1.1, 5 grams of a mixture or substance containing 80 percent methamphetamine is treated as 4 grams of methamphetamine (actual), which triggers a base offense level of 22. By contrast, under Option 2, 5 grams of a mixture or substance containing 80 percent methamphetamine would be treated as 5 grams of methamphetamine, which would trigger a base offense level of 24. Is this an appropriate outcome? Why or why not? If not, how should the Commission revise §2D1.1 to avoid this outcome?**

Response

First, and most importantly, it is rare to see methamphetamine with a purity of less than 95%. With the exceedingly high purity of today's methamphetamine, the situation described above would be rare. In those instances, as rare as they may be, wherein the purity is low, yet the entire amount is treated as actual methamphetamine, the court has at its disposal the § 3553(a) factors. In those cases, the court could easily justify a sentence below the guideline range. Not every situation requires an adjustment, policy, or comment from the Commission. The courts have statutory tools available to address any such inequities.

3. **Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) includes a chemical quantity table specifically for ephedrine, pseudoephedrine, and phenylpropanolamine at subsection (d). The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in §2D1.1, assuming a 50 percent actual yield of the controlled substance from the chemicals.**

   As provided above, Option 1 in Subpart 2 of Part B of the proposed amendment would amend the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to §2D1.1 to set the quantity thresholds for methamphetamine (actual) at the same level as methamphetamine mixture. If the Commission were to promulgate Option 1, should the Commission amend the table at §2D1.11(d) and make conforming changes to the quantity thresholds? Should the Commission revise the quantity thresholds in §2D1.11(d) in a different way? If so, what quantity thresholds should the Commission set and on what basis?

   Response

   If the Commission adopts Option 1, which I do not support, then yes, those thresholds in §2D1.11(d) should be adjusted to make conforming changes. Alternatively, I support Option 2 of Subpart 2 which retains methamphetamine actual and eliminates methamphetamine mixture. In such a scenario, no adjustment is needed to §2D1.11.

4. **Subpart 2 of Part B of the proposed amendment addresses the quantity ratio between methamphetamine mixture and methamphetamine (actual) in §2D1.1. In addition to comment on the methamphetamine purity distinction, the Commission has received comment suggesting that the Commission should reconsider the different treatment between cocaine (i.e., "powder cocaine") and cocaine base (i.e., "crack cocaine") in the Drug Quantity Table at §2D1.1(c). Section 2D1.1 provides base offense levels for offenses involving powder cocaine and crack cocaine that reflect an 18:1 quantity ratio, which tracks the statutory penalty structure for those substances. See 21 U.S.C. §§ 841(b)(1)(A) & (B); 960(b)(1) & (2). The Commission has examined this issue for many years and seeks comment on whether to take action in a future amendment cycle. If so, what action should the Commission take?**

Response

The current 18:1 ratio in the drug quantity table tracks the statutory penalty structure for "powder cocaine" and "crack cocaine." Crack cocaine is more potent and dangerous than powder cocaine. Why adjust the ratio lower than the statutory structure? Clearly, Congress has determined that crack cocaine should be treated harsher than powder cocaine. If the drug quantity table already reflects the same ratio, no further adjustment is warranted.

Issues for Comment – Drugs, Part C, Misrepresentation of Fentanyl and Fentanyl Analogues

1. **Part C of the proposed amendment would amend subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address some concerns relating to application issues with the enhancement. The Commission seeks comment on whether any of the three options set forth above is appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider? Should the Commission provide a different mens rea requirement for §2D1.1(b)(13)? If so, what mens rea requirement should the Commission provide?**

   Response

   I do not support Options 1 or 2. Adding a mens rea will only further restrict the application of this SOC and make it exceedingly difficult for the courts to justify its application. Respectfully, I think the proposals miss the issue. The SOC applies if the defendant knowingly misrepresented or marketed as another substance a mixture or substance containing fentanyl, or if the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl. The issue is that defendants are not marketing or misrepresenting what they're selling. They are fully aware the pills contain fentanyl, and they are disclosing to buyers the pills contain fentanyl. The buyers are also aware that's what they are getting, and in most cases, buyers are asking for pills that are laced with fentanyl.

   If I had to support one of these options, I would support Option 1 for simplification purposes. Even if Option 1 is adopted, I predict courts will continue to not apply this SOC.

   Instead of further manipulating this SOC, which is obviously not working, why not adjust the drug quantity table and increase the offense levels to reflect the harm caused by fentanyl? There is a lot of discussion during this amendment cycle about methamphetamine and the drug quantity table, but nothing on fentanyl. Fentanyl needs to be taken seriously, much more seriously than it's being taken at present. The Commission should promulgate guidelines that adequately address fentanyl and the harms it represents.

2. **The Commission enacted §2D1.1(b)(13) to address cases where individuals purchasing a mixture or substance containing fentanyl or a fentanyl analogue may believe they are purchasing a different substance. The Commission invites general comment on whether the proposed revisions to §2D1.1(b)(13) are appropriate to address this harm and the culpability of the defendants in these cases. Is the use of terms such as "representing" and "marketing" sufficient to achieve this purpose? If not, should the Commission use different terminology to appropriately reflect the criminal conduct in these cases? What terms should the Commission use? Should the Commission consider any other changes to §2D1.1(b)(13) to address the harm in these cases?**

Response

As discussed in my response to Question 1, sellers are not misrepresenting what they are selling, and buyers are not under any delusion as to what they are purchasing. Sellers are clearly telling buyers the pills they are selling are laced with fentanyl. Buyers are intentionally seeking pills laced with fentanyl and they know that pills marked with M-30 are laced with fentanyl. There is no misrepresentation involved.

Please do not continue to amend (b)(13). Instead, adjust the offense levels in the drug quantity table to appropriately reflect the harm presented by fentanyl.

Issues for Comment – Drugs, Part D, Machineguns

1. **Subsection (b)(1) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applies if "a dangerous weapon . . . was possessed" as part of the offense and does not require that the defendant possessed the weapon. In addition, the Commentary to §2D1.1 provides that the enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." See USSG §2D1.1, comment. (n.11(A)). Therefore, §2D1.1(b)(1) may apply more broadly than other weapons-related provisions elsewhere in the guidelines. The Commission seeks comment on whether the changes set forth in Part D of the proposed amendment are appropriate in light of these factors. Should the Commission consider additional changes to §2D1.1(b)(1) to address these considerations? What changes, if any, should the Commission consider?**

   Response

   Yes, the proposed changes in Part D are appropriate and should be apply broadly. There is an increased danger when those involved in drug trafficking also possess weapons. The adjustment is appropriate.

   I would like to see the appropriate definition of a firearm in the commentary of §2D1.1, that would cover machine gun conversion (MCDs or glock switches). Also, perhaps the guideline, specifically the proposed (b)(1)(A), should include language that the 4-level adjustment applies if at the time of the offense, the firearm had an attached MCD. Additionally, should there be an adjustment if the defendant was in possession of an MCD that was not attached to the firearm? Perhaps if the offense involved a firearm and in close proximity to that firearm was an MCD, a 3-level adjustment applies. I'd like to see the Commission address MCDs in this amendment.

Issues for Comment – Drugs, Part E, Safety Valve

1. **The Commission seeks comment on whether the changes set forth in Part E of the proposed amendment are appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider?**

   Response

   Yes. The changes set forth in Part E of this amendment are appropriate and sufficiently address the concerns raised by commenters. I support the amendment and make no further recommendations.

Issues for Comment – Imposition of Supervised Release, Part A (Chapter 5, Part D)

Part A - would amend Part D of Chapter Five, which addresses the imposition of a term of supervised release.

1. **The Commission has received feedback that courts should be afforded more discretion to tailor their supervised release decisions based on an individualized assessment of the defendant. At the same time, the Commission has received feedback that courts and probation officers would benefit from more guidance concerning the imposition, length, and conditions of supervised release.**

    a. **Part A of the proposed amendment would add language throughout Chapter Five, Part D (Supervised Release) directing courts that supervised release decisions should be based on an "individualized assessment" of the statutory factors listed in 18 U.S.C. § 3583(c)–(e) and remove recommended minimum terms of supervised release. The Commission seeks comment on whether the inclusion of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.**

    Response

    Yes, an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance. This is in line with the Commission's proposed amendments to remove departures from the guidelines and encourage courts to instead consider 3553 factors, a proposal I favor.

    b. **Part A of the proposed amendment would maintain the Commentary to §5D1.1 (Imposition of a Term of Supervised Release) that directs courts to pay particular attention to a defendant's criminal or substance abuse history. In addition, new proposed policy statement at §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)) includes as a bracketed option a non-exhaustive list of factors that a court should consider in determining whether early termination of supervised release is warranted. The Commission seeks comment on whether such guidance should be retained or deleted and whether similar guidance should be included elsewhere. If the Commission provides further guidance, what should that guidance be?**

    Response

    In the interest of consistency and simplicity, the guidance should be deleted. A simple statement directing the court to consider 3553 factors (by reference to 3583(e)(1)) when determining whether a term of supervised release should be terminated is sufficient. No need to complicate the issue.

If the guidance is retained, clarification of those factors may be needed. For example, among those factors is, "the ability of the defendant to lawfully self-manage beyond the period of supervision," or "the defendant's substantial compliance with all conditions of supervision." How should the court determine if the defendant has the ability to self-manage beyond the period of supervision? Similarly, what exactly is substantial compliance? Additionally, another factor to consider is, "a demonstrated reduction in risk level over the period of supervision." Should the court rely on the PCRA risk assessment to make this determination? Simply put, including the factors to consider only complicates the issue. Statutorily, courts have the ability to terminate supervised release after one year of supervision (3583(e)(1)) and are required to consider 3553 factors when making that determination. Further guidance is not necessary.

c. **Is there any other approach the Commission should consider to provide courts with appropriate discretion while also including useful guidance, either throughout Chapter Five, Part D, or for certain guideline provisions?**

Response

Keep it simple and consistent with other proposed amendments. Encourage courts to consider 3553 factors when making determinations.

2. **Section 5D1.1(c) instructs that "[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." The Commission has received feedback that imposition of a term of supervised release in such cases varies substantially by jurisdiction, may be excessive, and may divert resources. Should the Commission amend §5D1.1(c) to further discourage the imposition of supervised release for individuals who are likely to be deported?**

Response

These defendants (those who are deportable aliens) pose significant challenges to the courts, especially in border districts, like the district where I serve. The Commission's view is that supervised release should not be imposed when the defendant is a deportable alien and who likely will be deported after imprisonment. My concern is not the commentary or the Commission's guidance on the matter, but rather the environment in which the courts operate. The issue, it seems, is the enforcement of removal orders and the enforcement of immigration laws, both of which are beyond the court's control. For many years, the courts have witnessed these individuals processed through the system only to be "paroled" by immigration officials and allowed to remain in the United States. Or, more often, once removed the defendant very quickly returns to the United States illegally. The fact that an individual is deportable or physically removed carries absolutely no measure of certainty and does not serve to protect the community or deter the individual from illegally reentering the United States.

Amending 5D1.1(c) to further discourage the imposition of supervised release is misguided and counterproductive. This proposed amendment also suggests the courts should state the reason for its decision for the record. While I support individualized assessments, this requirement would be burdensome on courts in border districts, and especially border divisions, with high volumes of these cases.

I am concerned with providing post-release supervision for those, and only those, who need it. I also share the Commission's desire to prevent probation system resources from being wasted on supervisory services for releasees who do not need them. But on this matter, regarding supervised release for deportable aliens, I believe a term of supervised release is necessary to protect the public and to serve as a deterrent, both of which outweigh any concerns with respect to probation system resources. If the individual is removed from the United States, and that individual remains in their country of origin, the probation system is not providing the individual typical supervisory services (e.g., substance abuse or mental health treatment). Instead, minimal resources are focused merely on the monitoring of the defendant's removal and possible reentry. Monitoring deportable aliens on TSR, even though deported in most cases, does use probation resources, albeit minimal. The officer, or a clerk, simply monitors the defendant's record through ATLAS. It's all automated. If a defendant has any contact with law enforcement, the system alerts the officer. The officer verifies the contact and, if necessary, pursues a 12C. It takes very little time or effort on the officer's part. Naturally, this is more of a burden in border divisions. Probation also monitors these aliens from sentencing to removal in order to verify removal. Sometimes after sentencing aliens go back to the state system to answer for separate charges. Probation keeps tabs on them to make sure they are eventually removed. Also, as stated above, when an illegal alien reenters the country, resources are used to process the 12C, TOJ, and all things associated with revocation. So there is an impact on resources throughout the court family. Again, in my opinion it's minimal and justified, and is the same as in all other cases.

How else do we protect the community (just to pick one factor)? These defendants should not be treated differently than other offenders. Frankly, I think taxpayers are fine with, and expect, their money to be used to do such monitoring. If we lived in a perfect world where we knew that these individuals would indeed be removed and remain in their country of origin then there would be no need to put them on TSR. But that's not the case. Actually, an argument can be made that monitoring those who might more easily be lost post-release is as, or more, important than others, but I'll save that discussion for another day.

Clearly the end justifies the means. Protecting the community certainly justifies the minimal use of probation's resources. Although we are all cognizant of budgetary concerns, that cannot be the sole driver of this determination. I would much rather move resources from other areas/programs to monitor aliens on TSR. **Bottom line: these defendants should be treated as all other criminal defendants convicted of federal crimes.**

3. **In §5D1.4, Part A of the proposed amendment provides an option to include a non-exhaustive list of factors for courts to consider when determining whether early termination is warranted. These factors are drawn from the Post-Conviction Supervision Policies in the Guide to Judiciary Policy (Vol. 8E, Ch. 3, § 360.20, available at https://www.uscourts.gov/file/78805/download) and the Safer Supervision Act—a bipartisan bill introduced in the Senate and House of Representatives in the 118th Congress that would have amended 18 U.S.C. § 3583. See S. 2861, H.R. 5005. Are the listed factors appropriate? Should the Commission omit or amend any of the listed factors, or should it include other specific factors?**

   Response

   Keep it simple. Guidance is already provided in the post-conviction supervision policies. There is no need to then add that guidance to the Guidelines. As to the Safer Supervision Act, perhaps Congress will reintroduce the bill this session. Nonetheless, guidance is already provided.

4. **The First Step Act of 2018 (FSA), Pub. L. 115—391, allows individuals in custody who successfully complete evidence-based recidivism reduction programming or productive activities to earn time credits. See 18 U.S.C. § 3632(d)(4)(A). How those credits are applied may depend on whether the defendant's sentence includes a term of supervised release. Specifically, the FSA provides "[i]f the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to [18 U.S.C. § 3583], the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under [18 U.S.C. § 3632]." 18 U.S.C. § 3624(g)(3).**

   The Commission seeks comment on whether and how the changes to supervised release set forth in Part A of the proposed amendment may impact defendants' eligibility to benefit from the FSA earned time credits. Should the Commission make any additional or different changes to Chapter Five to avoid any unintended consequences that would impact a defendant's eligibility? If so, what changes should be made?

   Response

   This sounds like a BOP problem, or at least one Congress should address. Time credits and how they are applied by the Bureau of Prisons should not be considered when imposing supervised release. Instead, after considering the appropriate 3553 factors, post-release supervision should be for those, and only those, who need it. Is that not the message the Commission is sending with these proposed amendments?

   Instead, perhaps the Commission should consider a reduction under 1B1.13/3582(c)(1)(A). Would earned time credits in BOP qualify as an "extraordinary and compelling reason" to warrant

a reduction? The Commission would have to engage in some fancy footwork to make that work, but I would rather see the Commission explore an alternative to imposing supervised release simply to provide the defendant with the opportunity to apply earned time credits. The Commission cannot encourage the courts to impose supervised release for only those defendants who need it, but in the same breath say supervised release should be imposed simply to allow the defendant the advantage of earned time credits.

5. **At §5D1.3 (Conditions of Supervised Release), Part A of the proposed amendment retains two general categories of discretionary conditions of supervised release without amending their substance—"standard" and "special" conditions. In doing so, the Commission brackets language that would alternatively refer to "standard" conditions as "examples of common conditions that may be warranted in appropriate cases." Part A of the proposed amendment also includes in its listing of "special" conditions those conditions that currently are labeled as "Additional Conditions." The Commission seeks comment on these proposals and on whether another approach is warranted.**

   Response

   What seems like a simple renaming may have a substantial impact on the courts. Renaming "standard conditions" to "examples of common conditions **that may be warranted** in appropriate cases" seems to require courts to justify the imposition of any of one of those conditions (focusing on the phrase, "…that may be warranted"). In short, conditions that are now considered standard and routinely imposed in every case would then require courts to justify the imposition of those conditions. This approach is certainly in line with the proposed amendments this amendment cycle with a focus on an individualized assessment and would be extremely burdensome to courts.

6. **Part A of the proposed amendment would establish a new policy statement at §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)), which, among other things, addresses a court's determination whether to terminate a term of supervised release. The Commission seeks comment on whether it should provide that the completion of reentry programs (more information available at https://www.ussc.gov/education/problem-solving-courtresources), such as the Supervision to Aid Reentry Program in the Eastern District of Pennsylvania, should be considered by a court when determining whether to terminate the supervision.**

   Response

   Considering the successful completion of a reentry program when making a determination to terminate a term of supervised release would provide strong incentive to offenders to successfully complete those programs. As with all considerations, completion of a reentry program alone should not justify early termination of supervised release. Instead, successful

completion of such programs in conjunction with other factors may provide solid justification for earlier termination.

7. **Furthermore, the Commission seeks comment on whether the new policy statement at §5D1.4 should provide guidance to courts on the appropriate procedures to employ when determining whether to terminate a term of supervised release. For example, should the Commission recommend that courts make the determination pursuant to a full public proceeding, or is a more informal proceeding sufficient? In either case, should the Commission encourage courts to appoint counsel to represent the defendant? How might the Commission encourage courts to ensure that any victim of the offense (or of any violation of a condition of supervised release) is notified of the early termination consideration and afforded a reasonable opportunity to be heard? Are there other appropriate approaches the Commission should recommend?**

Response

I prefer an informal process. That process has proven sufficient. A more formal process which includes a public proceeding and with appointed counsel would discourage courts from considering early termination, especially those courts in border districts, like where I serve, with exceedingly high caseloads. As always, if the defendant is not satisfied with the outcome of the informal process, he or she can petition the court for a hearing. Early termination of supervised release is not a new concept. Courts already have processes in place to accommodate it. Providing any guidance on this matter would only complicate the issue. Keep it simple.

Issues for Comment – Revocation of Supervised Release, Part B (Chapter 7)

Part B would amend Chapter Seven, which addresses the procedures for handling a violation of the terms of probation and supervised release. Issues for comment are also provided.

1. **Part B of the proposed amendment adds language to address feedback indicating both that courts and probation officers should be afforded more discretion in their ability to address a defendant's non-compliant behavior while on supervised release and that they would benefit from more guidance concerning revocations of supervised release.**

    a. **Part B would include throughout Chapter Seven, Part C (Supervised Release Violations) a recommendation that courts use an "individualized assessment" based on the statutory factors listed in 18 U.S.C. § 3583(e) when addressing noncompliant behavior. The Commission seeks comment on whether the recommendation of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.**

    Response

    Yes, the recommendation of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance. Again, this is in line with the Commission's focus on individual assessments during this amendment cycle. Keep it simple.

    b. **New policy statement §7C1.3 (Responses to Violations of Supervised Release (Policy Statement)) includes in the Commentary examples of how a court might address allegations of non-compliant behavior short of the more formal options listed in 18 U.S.C. § 3583(e). In addition, Part B maintains instructions on violations related to community confinement conditions in the Commentary to new policy statement §7C1.4 (Revocation of Supervised Release (Policy Statement)). The Commission seeks comment on whether such guidance should be retained or deleted and whether similar guidance should be included elsewhere. If the Commission provides further guidance, what should that guidance be?**

    Response

    Part B of the proposed amendment provides for two options related to responses to violations:

    Option 1 requires revocation only when statutorily required.

    Option 2 requires revocation when statutorily required and for Grade A or Grade B violations.

I prefer Option 1 which requires revocation only when statutorily required. This approach provides for the greatest flexibility and allows the court to engage in an individualized assessment for most violations.

As to the instructions on violations related to community confinement conditions in the Commentary to new policy statement §7C1.4 (Revocation of Supervised Release (Policy Statement)), the proposed instruction is as follows:

"In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended."

I do not support this instruction. It should be omitted. If the courts are encouraged to make an individualized assessment, instructions such as this seem counterproductive.

Nonetheless, if the Commission retains this guidance, it should also appear under 7B1.3 (Revocation of Probation). I'm not sure why the Commission would provide this guidance for revocation of supervised release but not for revocation of probation.

c. **Is there any other approach the Commission should consider to provide courts with appropriate discretion while also providing useful guidance, either throughout Chapter Seven, Part C, or for certain guideline provisions?**

Response

None.

2. **Part B of the proposed amendment includes two options to address when revocation is required or appropriate under new §7C1.3 (Responses to Violations of Supervised Release (Policy Statement)). Option 1 would remove the language indicating that revocation is mandatory in all cases of Grade A or B violations and provide that the court should conduct an individualized assessment to determine whether to revoke in any cases that revocation is not required by statute. Option 2 would duplicate the language in §7B1.3(a) that provides that "the court shall revoke" supervised release upon a finding of a Grade A or B violation and may revoke in other cases. Should the Commission continue to provide guidance tying whether revocation is required to the grade of the violation, or should the Commission remove this instruction and permit courts to make revocation determinations based on an individualized assessment in all cases? If the latter, should the Commission provide further guidance about when revocation is appropriate?**

Response

The Commission should remove this instruction (Option 1) and permit courts to make revocation determinations based on an individualized assessment in all cases, unless revocation is required by statute. No further guidance is necessary. The Commission seems conflicted this amendment

cycle. It encourages courts to make individualized assessments but then attempts to retrain the courts by providing special instructions. Go with Option 1. No further guidance is necessary.

3. **Given the proposed amendment's goal of promoting judicial discretion at revocation, the Commission seeks comment on whether it should replace the Supervised Release Revocation Table set forth in proposed §7C1.4 (Term of Imprisonment—Supervised Release) with guidance indicating that courts abide by the statutory limits regarding maximum and minimum terms. If the Commission decides to retain the Revocation Table, would any further changes beyond those set forth in Part B of the proposed amendment be appropriate? For example, should the Commission recommend a sentence range that begins at less than one month in all cases, not just those involving Grade D violations for individuals in Criminal History Category I? Should it eliminate the higher set of ranges for cases in which the defendant is on supervised release as a result of a sentence for a Class A felony?**

Response

In the end, the Guidelines are only advisory. The Commission should retain the revocation table without change (other than Grade D violations) as it provides a guideline range as a reference point. The Court, after engaging in an individualized assessment, can sentence the defendant within that range, or above or below that range. As always, the court should explain for the record the reasoning for the sentence imposed.

4. **The Commission further seeks comment on whether and how a retained Supervised Release Revocation Table should make recommendations to courts regarding their consideration of criminal history. Should the defendant's criminal history category be recalculated at the time of revocation for a violation of supervised release? For example, should a court recalculate a defendant's criminal history score to exclude prior sentences that are no longer countable under the rules in §4A1.2 (Definitions and Instructions for Computing Criminal History) or to account for new offenses a defendant may have been sentenced for after commission of the offense for which probation or supervised release is being revoked?**

Response

I do not support recalculating the criminal history score at revocation. The revocation table simply provides a starting point for courts to consider. If after an individualized assessment the court determines that the defendant's criminal history score is overrepresented, then the court can sentence the defendant accordingly with an explanation on the record. Likewise, if the defendant has new criminal history not captured when the criminal history score was originally calculated, the court can conduct an individualized assessment and sentence accordingly. Of

particular concern is the added complication/burden of recalculating that score. For border districts and especially border divisions with extreme caseloads, this could be time consuming.

Instead, the Commission should provide guidance in the commentary that courts should consider those convictions that have aged out or new convictions not considered in the original score when engaging in the individualized assessment. Nothing more is needed.

5. **The Commission seeks comment on whether it should issue more specific guidance on the appropriate response to Grade D violations. Should the Commission state that revocation is not ordinarily appropriate for such violations, unless revocation is required under 18 U.S.C. § 3583(g)? Should the Commission further state that revocation may be appropriate for Grade D violations if there have been multiple violations or if the court determines that revocation is necessary for protection of the public? Would such statements imply that revocation is ordinarily appropriate for Grade A, B, and C violations?**

   Response

   The Commission should not issue more specific guidance on the appropriate response to Grade D violations. The appropriate response should instead be determined after the court engages in an individualized assessment. No need to pin the court down on what the appropriate response should be to Grade D violations. As to multiple Grade D violations, or if revocation is necessary for protection of the public, wouldn't this be a factor the court considers when conducting an individualized assessment? Respectfully, the Commission needs to choose a path: let the court conduct an individualized assessment and formulate a response based on that assessment, or tell the court what it should do and when it should do it. It can't be both ways.

6. **The recommended ranges of imprisonment set forth in the Revocation Tables at §7B1.4 (Term of Imprisonment—Probation) and §7C1.4 (Term of Imprisonment—Supervised Release) are determined, in part, by the defendant's criminal history category. For both tables, the criminal history category "is the category applicable at the time the defendant originally was sentenced" to a term of probation or supervised release. The Commission seeks comment on whether a defendant's criminal history score should be recalculated at the time of revocation to reflect changes made by amendments listed in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) if one or more of those amendments have the effect of lowering the defendant's criminal history category. For example, Part A of Amendment 821, which is applied retroactively, limits the overall criminal history impact of "status points," potentially resulting in a defendant's criminal history being lowered (e.g., a defendant assigned criminal history category IV at the time of original sentencing may have that category reduced to III). Should the Revocation Tables at §7B1.4 (Term of Imprisonment—Probation) and §7C1.4 (Term of Imprisonment— Supervised Release) allow for a defendant to benefit from these types of retroactive changes? Should these changes apply equally to**

both tables or, given the different purposes of probation and supervised release, should the Commission adopt different rules for each table?

Response

I'm not a fan of Amendment 821, but we've bought it and now we own it. To be fair and equitable, I support recalculating the criminal history score at the time of revocation to reflect changes made by amendments listed in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) if one or more of those amendments have the effect of lowering the defendant's criminal history category. The same rule should apply to both tables. I see no benefit in applying it to one and not the other.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

District Judge Sara Ellis, Illinois, Northern

Topics:

Supervised Release

Comments:

I write to support the proposed amendments to the Supervised Release Guidelines. For too long, supervised release has been an overlooked aspect of sentencing and treated more akin to punishment, rather than the stated goals of assisting with facilitating an individual's re-entry into society, rehabilitation, and protecting the public from further crimes. These proposed amendments seek to align the conditions and length of supervised release with their original goals.

Reminding judges that they should not reflexively impose supervised release in every case is important. Research teaches us that those individuals who are unlikely to reoffend do worse when their level of supervision is high. Asking judges to make an individual assessment of whether someone would benefit from supervised release and tailor the terms of supervision to best achieve the court's stated goals is not a burdensome requirement. Instead, it is what justice demands. Judges should not use these terms as a means of tripping up someone on supervised release. Thoughtful consideration of each term and its purpose will prevent instances where, because of geography or a lack of access to resources, someone cannot comply with the conditions or must leave her/his community in order to comply. This occurs regularly in rural communities and tribal lands. Having judges revisit the conditions of supervised release once someone begins their term is the ideal time to tailor the terms imposed to any changed circumstances someone is facing upon release from custody. Again, this is not burdensome. While it may be inconvenient, that is not a good reason to oppose it.

Finally, encouraging judges to review the term of supervision after one year and be open to early termination is consistent with the original intent of supervised release. Probation's resources are limited, and judges must be responsible stewards of not only the tangible resources but also of the time and energy probation officers expend in supervising people on release. If someone has demonstrated that (s)/he can receive support from family or the community and the likelihood of recidivism is low, it is incumbent on judges to terminate supervision satisfactorily and early.

Otherwise, judges are simply extending supervision as an additional form of punishment. Moreover, justice requires funneling limited resources to those individuals for whom the resources would make a marked difference in their lives and prevent recidivism. Obviously, judges make the decision to terminate supervision early in conjunction with information received from Probation and the parties. Encouraging judges to do this review after one year would not obstruct that process.

I thank the Commission for its thoughtful review of the Supervised Release Guidelines and proposed amendments. These proposed amendments remind us that there are many aspects to sentencing, including rehabilitation and reintegration into society. Punishment and retribution are not the sole purposes. These amendments bring the focus back to supporting individuals after they have harmed society so that they have what they need to avoid recidivism and make society safer and more just.

Submitted on: March 3, 2025

From: Wes Hendrix [redacted]
Sent: Monday, March 3, 2025 10:29 AM
To: [redacted]
Subject: Comments to USSC Proposals

Judge Reeves,

In response to your request for comments by today's deadline, I reviewed the Commission's proposals. I also reviewed Judge Counts's thoughtful comments and concerns. I share Judge Counts's concerns and join his comments. Like Judge Counts, I have a voluminous criminal docket, and our dockets are similar. Although we serve in different districts, the divisions we cover in West Texas border each other. I also teach sentencing law and policy at Texas Tech University School of Law, so it is an area in which I have great interest.

Thank you for your work on the Sentencing Commission. If you have any questions, please do not hesitate to contact me.

Best regards,

James Wesley Hendrix
United States District Judge
Northern District of Texas

From: Sean Jordan [redacted]
Sent: Tuesday, March 4, 2025 12:25 AM
To: Chair [redacted]
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission

Judge Reeves,

First, my thanks to you and your colleagues for your service on the Sentencing Commission. Your service to our country in this role is greatly appreciated.

In regard to comments on the proposed amendments on supervised release and drug offenses, I generally agree with and join the comments already submitted by my colleague Judge David Counts. One proposed change on which I have a different view than Judge Counts concerns the misrepresentation of fentanyl. In my experience, I do see cases where this could be a factor. In my view, option 1 presents a good alternative and I support it.

Two proposals that I do not support concern me the most. For the reasons aptly expressed by Judge Counts, I think it would be a mistake to reduce any of the base offense levels in the drug quantity table. If any such change is made, I also agree with Judge Counts that appropriate reductions be made throughout the table rather than capping the table at [34], [32], [30]. Likewise, the proposal to effectively move the mitigating role adjustment from 3B1.2 to 2D1.1 for drug offenses is also both unnecessary and a mistake. It appears to be designed to force an adjustment downward in cases that merit no such downward calculation. Our court sees a high-percentage of drug trafficking cases, and I think Section 3B1.2 works well and allows for appropriate, individualized assessment. No change is necessary or warranted, and the proposed alterations will make the guidelines less workable and more challenging in application.

Thank you for soliciting comments on the proposals, and thanks again for the hard work you and your colleagues are doing for the Commission and our country.

Sean D. Jordan
United States District Judge
Eastern District of Texas
United States Courthouse
7940 Preston Road,
Plano, Texas, 75024
[redacted]

From: Sherri Lydon [redacted]
Sent: Sunday, February 9, 2025 2:48 PM
To: Chair [redacted]
[redacted]

Judge Reeves:

First, I appreciate the work you and the Commission have put into these amendments. I know these are complex issues, and I'm grateful for the thoughtful approach you've taken in trying to improve the Guidelines.

Supervised Release/Revocation: Allowing district judges discretion to waive supervised release in cases where the sentence exceeds one year—unless required by statute—makes sense. My concern is that this amendment could lead to more appeals, with defendants arguing the court failed to adequately justify supervision or its length. I have similar reservations about the revocation amendments. Without seeing this play out in practice, I wonder if judges will now be expected to provide even more justification at sentencing.

Drug Offenses: I'm not a fan of lowering BOLs for drug offenses, but that decision has already been made. My concern is what happens if the change is retroactive. One possible approach would be reducing the top range from 38 to 30. Aligning all meth BO Ls with meth mixture BOLs makes sense, given the inconsistency in testing practices nationwide. As for the fentanyl misrepresentation amendment, the knowledge requirement is unrealistic, proving it is too difficult, and no judge wants the appellate risk of making a knowledge finding. That's why I prefer Option 3, which allows for a two—level increase if the defendant misrepresents the substance as something else.

Safety Valve: I'm skeptical of this amendment. I've seen defendants make weak claims of providing full and truthful information with little more than a few scribbled notes. Courts should handle this case by case, rather than treating written submissions and in person meetings as equivalent.
Again, I appreciate the time and effort you and the Commission have put into these proposed changes. Thank you for your work in tackling these difficult but important issues.

Best regards,
Sherri

Sherri A. Lydon
United States District Judge
District of South Carolina
[redacted]

United States District Court

District of Minnesota

Chambers of
KATHERINE M. MENENDEZ
District Judge

14W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
[redacted]

March 3, 2025

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments Related to Supervised Release

Dear Chairperson Reeves and Sentencing Commissioners:

I am writing to submit comments regarding the proposals for revising the Sentencing Guidelines related to supervised release. I appreciate the Commission's thoughtful approach to updating the guidelines that affect both the imposition and the revocation of supervised release. I have reviewed many of the comments that have been submitted already, and I will try not to restate opinions that have already been shared. I would like to address three categories of the proposed changes.

First, I want to share a brief word about my background. I spent almost two decades as an Assistant Federal Defender before taking the bench. Then in 2016, I became a Magistrate Judge, and in 2021, I became a District Court Judge. My whole legal career has been spent in the District of Minnesota. This means that some of my perspectives were formed as much by my work as a defender as my work as a judge. It also means that I have a lot of experience about how things work in Minnesota, but much less understanding about how things work elsewhere.

I also want to mention that I am one of the two judges now presiding over our District's Reentry Court. I was fortunate to have inherited an established program founded by two of my colleagues, in collaboration with other stakeholders in our district. I am still learning the ropes, but this has taught me even more about the challenges facing people who are attempting to reenter society following terms of imprisonment. Through my role in Reentry Court, I have learned a lot about the programs and efforts that seem best suited to successful reentry, particularly for people at the highest risk of recidivism.

Early Termination

First, I want to weigh in about early termination of supervised release. I have reservations about creating a presumption that early termination is usually appropriate, and I am particularly concerned about the suggestion that one year of supervision is generally enough.

Many of the defendants I sentence and those that participate in reentry court face a long list of challenges to becoming successful participants in society. Many come from multi-generational poverty and face enormous financial challenges every day. These challenges are often a large part of what led to their criminal offenses in the first place, and financial burdens are a frequent factor in people returning to crime.

In addition, some defendants lack "pro-social" connections and role models. And many don't have much experience with key components for success, such as getting and holding on to a job, finding and keeping stable housing, navigating health care systems and insurance, and accessing resources for treatment and mental health care.

Also, people coming out of prison face unique challenges even beyond these things. They have a particularly difficult time finding employment and housing in light of their criminal histories. This impact is more pronounced for those with the most serious records. Moreover, many experience real difficulties reintegrating with their families after spending many years away.

This combination of unique challenges makes it difficult for many defendants – particularly those who have served long sentences – to find their footing and succeed following release from prison. Our Probation Office has many resources to help supervisees handle every one of these obstacles: job-placement programs, treatment referrals, community groups that can provide training and mentorship, help getting licenses restored, and more. I would hate to see these resources evaporate at the one-year mark, which is just when some extra help might be needed.

In addition, many defendants do well for a time following their release, buoyed by optimism, and then slip up and need help when things get hard. Others do much better with some structure and "guardrails" in place, but then struggle when that accountability is abruptly gone.

By no means is the answer is to keep everyone "on paper" for as long as possible. Indeed, many people should have their supervision terminated at an early opportunity, even after a single year. And judges should absolutely have the discretion and authority to end people's supervision early. I also support adopting guidelines that remind judges about the importance of considering early termination where appropriate. But one year may often be too short, and creating a presumption of that term could be a mistake.

Conditions of Supervision

I also have some concerns about the proposed revisions related to the imposition of special conditions. Of course judges should be thoughtful about which conditions to impose. But I am concerned about the workability of a suggestion that even the "standard conditions" should be customized for every defendant. Our Probation Office would have a more difficult time supervising hundreds of defendants when even the less important, mundane conditions might vary widely from one defendant to the next. It is essential for each special condition to be carefully thought out, explained, and justified. But I am not sure it is practicable to extend that granularity to the most routine standard conditions.

Revocation of Supervised Release

Finally, I want to share some thoughts about the proposed changes related to revocation of supervised release. I am delighted that the Commission is considering how to revise these guidelines. The current Chapter 7 guidelines seem somewhat out of step with the practice today, at least the practice in our district. In my experience, the judges in Minnesota are already aware of their discretion to craft solutions in the face of supervised release violations, and it will be terrific to see the guidelines adjusted to reflect and embrace the need for that flexibility. I support and appreciate the proposed changes that emphasize the need for an individualized assessment.

My experiences both as an Assistant Federal Defendant and as a judge in Reentry Court have really taught me that prison is often not the solution for a violation of supervised release. For instance, when a violation involves drug and alcohol addiction, it is essential that treatment is a part of the response, rather than simply sending someone back to prison. Prison does very little to achieve and support long-term sobriety; sometimes a much shorter term of local incarceration (two weeks or a month) can help some break the immediate hold of an addiction and then set someone up for success at in-patient treatment. But longer terms of imprisonment often fail to provide tools for rehabilitation, despite everyone's best intentions. That is particularly true with comparatively short terms of incarceration, like those of nine months or a year. By the time someone is designated by the Bureau of Prisons and transported through the often slow transit process, several months may have passed before they arrive at their BOP facility. As a result they are often ineligible for much of the substantive programming that could help them with addiction services. So, in my experience, people regularly come out of a violation sentence without having receiving any treatment whatsoever, and they are back to where they started or even further behind.

Similarly, when the violation involves avoiding contact with the Probation Officer, there are better ways to both deter that noncompliance and strengthen accountability than sending a supervisee back to prison. For instance, a period of house arrest with electronic monitoring can allow someone to continue to care for their family, keep their job, attend treatment, etc., while still providing accountability and a sanction for being out of contact. Also, when someone has a good job, in my experience crafting sanctions (even for somewhat more serious violations) that let them keep that job often makes more sense than a sentence of incarceration that risks the

person being fired. Even in cases of new criminal conduct, flexibility is needed. Sometimes the new offense does not itself lead to a sentence of incarceration, and the supervised release judge needs the discretion to determine whether that non-custodial result is best overall, or whether incarceration is needed.

For these reasons, I support several aspects of the Chapter 7 proposals. First, I support the proposal to create a new § 7C1.3 Policy Statement, which would include a list of options available to courts beyond just incarceration. While those of us who have been around for a while might already be familiar with these options, newer judges might not be, so it would be very valuable to have them captured in a list and implicitly approved by the Sentencing Commission. Second, I think Option 1 for the new § 7C1.3 (which does not automatically require prison for Grade A and B violations) best captures the flexibility and individualized assessment needed in the supervised release context.

I also support the proposed revision that would allow revocation sentences to be run either concurrently or consecutively with sentences for new criminal conduct. It does not always make sense to add on additional time in prison for supervised release violation. Sometimes the supervised release violation sentence can be used more constructively in another way, such as adding a term of halfway-house time or house arrest following release from the sentence for the new offense, to help the person transition back to the community. This is particularly where the state criminal justice system offers much less programming and many fewer resources for reentry. While the original idea of punishing someone for violating the trust of supervision separate and apart from punishing the new offense was a good idea in theory, I would be surprised if anyone learned a separate "lesson" from the violation sentence. And such a sentence frequently has the effect of adding on time while preventing someone from participating in in-custody programming in either the federal or the state system. (Often a state detainer on a federal inmate or a federal detainer on a state inmate prevents that person's participation in much of the available rehabilitative programming in prison.) A presumption of consecutive time makes this conundrum worse.

Finally, I am glad to see the creation of a Grade D violation. However, Grade D might be most useful if it has a no-time floor at every criminal history category. This would best capture the flexibility described elsewhere in the proposed amendments. Having each category begin with "up to" would reinforce that incarceration is not presumed in any way for Grade D violations. But in any case, the adoption of Grade D is an important addition to the guidelines.

Conclusion

I appreciate the Commission's thoughtful proposals, and I am grateful for the chance to submit comments.

Sincerely,

s/Katherine M. Menendez

Katherine M. Menendez
United States District Judge
District of Minnesota

From: [redacted]
To: [redacted]
Subject: FW: CLC"s feedback to U.S. Sentencing Commission on recently proposed Guidelines amendments re supervised release
Date: Tuesday, February 18, 2025 10:21:40 AM
Attachments: [redacted]

Dear Judge Reeves,

You will have recently received the a memo from Judge Engelmayer of our court, and I just wanted to add that while I am not on the relevant committee, I wholeheartedly agree with its positions.

Thank you for the work you and the Commission are doing to update the Guidelines.

Best,

Cathy Seibel

Cathy Seibel
United States District Judge
Southern District of New York
300 Quarropas Street
White Plains, NY 10601
[redacted]

From: Brantley Starr [redacted]
Sent: Monday, March 3, 2025 4:30 PM
To: Chair [redacted]
Subject: Comments to USSC proposals

Dear Judge Reeves,

Like Judge Hendrix, I too will join in Judge Counts' comments to the proposals.

Thank you.

Brantley Starr

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

District Judge Robert Wier, Kentucky, Eastern

Topics:

Supervised Release

Drug Offenses

Comments:

I appreciate the Commission's work. The scope of potential changes, though, has been, to quote a probation officer I spoke with about the latest proposals, "overwhelming." Too much, too soon is the sentiment.

I've tried to digest the most recent proposals. On the SR topics, 5D1.4 seems to layer yet more work on our stretched USPO. The call for sequential assessment, particular to continuation of SR, is an open-ended and assuredly taxing assignment. Don't forget that a defendant can always initiate a motion seeking SR relief. In my experience, the candidates worthy of removal emerge organically, and I'd urge caution on creating yet more structure in the SR world.

As to meth, it plainly remains a scourge in America. Congress has flatly signaled that pure meth merits a sharper response and weightier result. In my experience, the age of pure meth on the street has spiked violence and heightened the corrosive power of the drug. And, unlike opioids, there is no MAT for meth users. Pure meth on the street simply does more harm. Please be circumspect on any step that lowers the gravity of dealing in actual methamphetamine.

Lastly, retroactivity sends a wave through the entire system. The 821 amendment resulted in 470+ motions in our district alone. Please remember that considerations of change magnitude and difficulty in administration are not abstract to the system's line workers.

I'm grateful for the chance to comment and will always give the Guidelines their lawful and respected place in sentencing.

Thank you,
R.E. Wier

U.S. Department of Justice

Criminal Division

Appellate Section

Washington, D.C. 20530

March 3, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the Sentencing Commission's request for comment on its proposed amendments to the Sentencing Guidelines and issues for comment published in the Federal Register on January 24, 2024.[1] The letter also serves as the Department's written testimony for the Commission's upcoming hearing on March 12 and 13, 2025.

The Department greatly appreciates the care and attention that the Commission has shown in each of the proposed amendments. As explained further below, however, we have significant concerns with the proposed amendments that would reduce the highest base offense levels in the Drug Quantity Table and add a reduction for "low-level trafficking" in §2D1.1. Although we understand the Commission's interest in eliminating "ice" and the purity distinction for methamphetamine from the Guidelines, we are concerned that making these changes absent legislative fixes may further complicate the Guidelines, fail to comply with congressional directives, and deviate from the policy choices reflected in the Controlled Substances Act. Accordingly, we recommend that the Commission seek legislative fixes before making such changes.

We thank the Commission for addressing our concerns with how the fake pills enhancement may apply and the public safety risks posed by drug traffickers who possess machineguns. We support revisions to the fake pills enhancement and recommend additional revisions to fully address concerns with the enhancement's effectiveness. Additionally, we support ensuring that §2D1.1 appropriately accounts for the increased dangers of drug traffickers who possess machineguns, including machinegun conversion devices (MCDs), and also recommend accounting for the enhanced public safety risks of drug traffickers who possess machineguns/MCDs *and* large capacity magazines or multiple firearms. Finally, while we

[1] *Notice of request for public comment and hearing*, 90 Fed. Reg. 22, 8968 (Feb 4, 2025), https://www.govinfo.gov/content/pkg/FR-2025-02-04/pdf/2025-02129.pdf; *see also* U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (January 24, 2025), https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2024-2025-amendments-published-january-2025.

appreciate the need to ensure that defendants can safely provide truthful information to the government to qualify for safety valve relief, we are concerned that the proposed amendment to the commentary would undermine the guideline's intent.

With respect to the proposed supervised release amendment, the Department is generally supportive of the Commission's proposal to reaffirm judicial discretion in imposing supervised release terms and managing violations. But we are concerned that some aspects of the proposal would add procedural hurdles and complexity by requiring "individualized assessments" at multiple steps, infringe on judicial discretion regarding imposing or revoking supervised release in certain situations, reduce supervised release for sex offenders and certain national security offenses, and introduce confusion with the new grade D violations.

We thank you, the other Commissioners, and Commission staff for being responsive to the Department's sentencing priorities and to the needs and responsibilities of the Executive Branch. And we look forward to working with you during the remainder of the amendment year on all the published amendment proposals.

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I. Drugs

A. Drug Quantity Table Reductions

The Department opposes the Commission's proposal to reduce the base offense levels in §2D1.1 for defendants who are responsible for the largest quantities of controlled substances. In so doing, the Department appreciates the concerns of some stakeholders that §2D1.1 may "overly rel[y] on drug type and quantity as a measure of offense culpability" and may "result[] in sentences greater than necessary."[2] And we recognize data suggesting that, on average, when imposing sentences using the Drug Quantity Table, judges impose sentences below the guideline range at the highest offense levels.[3] As explained further below, however, we are concerned that the Commission's proposal would produce guidelines that provide less useful guidance to judges and fail to reflect the seriousness of conduct that poses grave dangers to society.

The Commission's proposal would impose an artificial ceiling on the drug quantity calculations and substantially reduce the offense levels for those defendants responsible for the largest quantities of drugs. Such a reduction would be inconsistent with Congress' intent, untether the Guidelines from statutory penalties, and be inconsistent with the ongoing public safety and public health crisis stemming from synthetic opioids, drug trafficking by cartels, and other emerging narcotics threats.

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[2] U.S. Sent'g. Comm'n., *Proposed Amendments to the Sentencing Guidelines* (Jan. 24, 2025) at 57, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2024-2025-amendments-published-january-2025.

[3] *Id.*; see also U.S. Sent'g Comm'n, Public Data Briefing: *Proposed Amendments on Drug Offenses* (2025) ("Drug Data Briefing") Slides 7-8, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf.

Our nation is immersed in a drug crisis, with drug deaths having increased significantly since 2017.[4] While 2023 saw the first decrease in drug deaths since 2018, the number of lives lost to drug overdoses remains unacceptably high.[5] Two drugs are primarily responsible for this crisis—methamphetamine and fentanyl.[6] Both are synthetic drugs, largely made in labs abroad and trafficked into the United States, and potentially lethal in small doses.[7] Even as opioid deaths dipped in 2023, deaths associated with cocaine and psychostimulants (such as methamphetamine) increased.[8] Other drug threats continue to emerge, including an increase in deaths involving carfentanil, a fentanyl analogue that is 100 times more potent than fentanyl; and nitazenes, which can also be more powerful than fentanyl.[9] Against this backdrop of drug-related deaths, the Commission's amendments would reduce sentences for those trafficking in particularly large and dangerous quantities of these and other drugs. We have several specific concerns with these amendments.

First, such a reduction would seem counter to the congressional intent underpinning the Controlled Substances Act and the Commission's organic statute. Congress established a sentencing scheme that is based, in part, on the type and quantity of drugs for which a defendant is responsible.[10] As the Supreme Court has stated, "[t]he penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level."[11] Thus, it "assigns more severe penalties to the distribution of larger quantities of drugs."[12] In establishing the Sentencing Guidelines, the Congress directed the Commission to ensure that its rules were "consistent with all pertinent provisions of any federal statute."[13] Congress also directed that the Guidelines shall "establish a sentencing range that is consistent with all pertinent provisions of Title 18, United States Code" and specify a "substantial term of

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[4] Centers for Disease Control and Prevention, National Vital Statistics System, 12 month-ending Provisional Number and Percent Change of Drug Overdose Deaths, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (Feb. 2, 2025).

[5] *Id.*; *see also* Centers for Disease Control and Prevention, *U.S. Overdose Deaths Decrease in 2023, First Time Since 2018* (May 15, 2024), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240515.htm.

[6] Drug Enforcement Administration, *National Drug Threat Assessment 2024* (May 9, 2024) at 1, 24 ("Fentanyl and other synthetic drugs, like methamphetamine, are responsible for nearly all of the fatal drug overdoses and poisonings in our country."), https://www.dea.gov/sites/default/files/2024-05/5.23.2024%20NDTA-updated.pdf.

[7] *Id.* at 1, 22 ("A lethal dose of fentanyl is approximately 2 mg, depending on the user's opiate tolerance and other factors"); *see also United States v. Melendez*, 57 F.4th 505,508 (5th Cir. 2023) (stating that even two ounces could produce thousands of lethal doses).

[8] *U.S. Overdose Deaths Decrease in 2023*, *supra*.

[9] Deaths involving carfentanil increased 720.7 percent from the first half of 2023 to the first half of 2024. *See* L.J. Tanz, *et al.*, *Detection of Illegally Manufactured Fentanyls and Carfentanil in Drug Overdose Deaths—United States, 2021–2024*, MMWR Morb Mortal Wkly Rep 2024; 73:1099–1105, at https://www.cdc.gov/mmwr/volumes/73/wr/mm7348a2.htm; A. Roberts, *et al.*, *Notes from the Field: Nitazene-Related Deaths—Tennessee, 2019–2021*, MMWR Morb Mortal Wkly Rep 2022; 71:1196–1197, at https://www.cdc.gov/mmwr/volumes/71/wr/mm7137a5.htm (discussing rise of nitazenes).

[10] *See* 21 U.S.C. § 841(b).

[11] *Chapman v. United States*, 500 U.S. 453, 465 (1991).

[12] *Id.*

[13] 28 U.S.C. § 994(a).

imprisonment" for a defendant who traffics in "a substantial quantity of a controlled substance."[14] This scheme makes sense. As a general matter, those who traffic in higher quantities are more culpable and merit more serious punishment. But the Commission's proposal would stray from those directives by lowering penalties for those who traffic in the highest quantities of these deadly drugs.

The wholesale elimination of the drug guidelines applicable to larger quantities of illegal drugs is contrary to the Controlled Substances Act and Congress' directives to the Commission. All three proposals would create situations where the Guidelines provide no meaningful additional penalty for drug traffickers who deal in particularly large quantities of drugs. Rather, the Guidelines would set a ceiling on drug weight that would produce sentences at or near the bottom of the applicable statutory sentencing range. As a result, the Guidelines would equate conduct involving four kilograms of fentanyl with conduct involving 40 kilograms or 400 kilograms of fentanyl. Although these quantities would each trigger a statutory mandatory minimum sentence of ten years and a maximum sentence of life,[15] the proposals would remove any graduated penalties and tether all sentences, regardless of quantity, at, near, or below the mandatory minimum sentence.[16]

Under Option One, *any* quantity of fentanyl exceeding four kilograms would trigger a base offense level of 34 (151 to 188 months for a defendant in Criminal History Category I). With credit for acceptance of responsibility, the offense level would be 31 (108 to 135 months). Absent other applicable adjustments, this proposal would set the guideline sentencing range at or near the 120-month mandatory minimum, despite the statutory sentencing range of ten years to life. Under Option Two, the effect is even more dramatic because 1.2 kilograms of fentanyl or more would trigger a base offense level of 32 (121 to 151 months for a defendant in Criminal History Category I). With credit for acceptance of responsibility, the guideline range would be 29 (87 to 108 months), below the ten-year mandatory minimum. Under Option Three, the Guidelines exposure for a fentanyl trafficker would not significantly increase whether the defendant distributes 400 grams, 40 kilograms, or 400 kilograms of fentanyl. Each of those quantities would trigger a level 30 (97 to 121 months for a defendant in Criminal History Category I). With acceptance of responsibility, the guideline range would be 27 (70 to 87 months)—far below the mandatory minimum sentence.

Reducing the maximum guideline exposure for all offenses to levels at, near, or below the mandatory minimum sentences established by Congress would be inconsistent with the Congressional intent to provide for higher penalties for those who traffic in larger quantities of drugs. Doing so would also anchor the guideline calculations for drug trafficking defendants to at, near, or below the statutory minimum sentences, despite the fact that Congress created a much wider range of sentencing exposure for drug trafficking defendants. For many important drug

[14] 28 U.S.C. §§ 994(b)(1), (i)(5).

[15] 21 U.S.C. § 841(b)(1)(A)(vi).

[16] Congress has indicated that certain individuals who are responsible for large quantities of drugs (300 times the quantity that triggers the five-year mandatory minimum) should receive a mandatory life sentence. 21 U.S.C. § 848(b)(2)(A). Given the view of Congress that particularly large quantities of drugs should, in some instances, trigger severe sentences, it would be inappropriate for the Commission to fundamentally alter the structure of the Guidelines so that they provide no additional penalty associated with particularly large quantities of drugs.

cases involving significant quantities, the sentence would be driven solely by the mandatory minimums and not affected at all by the Guidelines.

Second, we appreciate the Commission's data-driven decision making and goal to ensure that the Guidelines reflect sentencing realities. But we disagree that the Commission's data indicating that, on average, judges impose below-guideline sentences at higher offense levels when using the Drug Quantity Table necessarily means that lowering offense levels would better align the guideline range and sentence imposed, or that doing so would be a principled response for those who traffic large quantities of drugs, especially under the current drug crisis. We appreciate the Guidelines' anchoring effect and understand that lowering the range for certain offenses may appropriately result in more within-guideline sentences for those types of offenses. But in our view, lowering base offense levels for the highest drug quantities is unlikely to achieve the Commission's stated goal of aligning drug sentences with the Guidelines. Instead, it may result in an additional lowering of drug sentences similar to what occurred after the Commission reduced offense levels in 2014. That year, the Commission reduced by two levels the base offense levels assigned by the Drug Quantity Table for each drug quantity across all drug types.[17] Despite this reduction, the average sentence imposed in drug trafficking cases continues to be lower than the guideline sentence.[18]

The current amendment would go even farther than 2014. The 2014 amendments changed the relationship between the Guidelines and the statutory mandatory minimums but still "maintain[ed] consistency with such penalties."[19] In lowering the base offense levels, the Commission noted that existing statutory enhancements and guidelines enhancements would continue to ensure that the "most dangerous or serious offenders will continue to receive appropriately severe sentences" and that the Guidelines would still provide for a base offense level of 38 "for offenders who traffic the greatest quantities of most drug types" whose sentences would not be reduced.[20] The Commission's proposal now takes an additional—and dramatic—step to eliminate graduated higher penalties for drug traffickers who distribute significant quantities of drugs.

Third, to the extent that the Commission's proposed changes may be driven by concern about the effect of the current guidelines on less culpable defendants, those concerns may be

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[17] U.S.S.G., App. C, amend. 782 (Amendment 782") (effective Nov. 1, 2014), https://www.ussc.gov/guidelines/amendment/782.

[18] At the time the Drug Quantity Tables was adjusted in 2014, the need to address prison overcapacity was one of the motivations behind the change. *See* U.S.S. G. Amend. 782. Even several years into the opioid crisis, the federal prison population remains significantly lower than it was in 2014. *See* Federal Bureau of Prisons General Inmate Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops; *see also* U.S. Sent'g Comm'n, *Quarterly Data Report for Fiscal Year 2018*, Figure 10, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2018_Quarterly_Report_Final.pdf; U.S. Sent'g Comm'n, *Quarterly Data Report, 4th Quarter Release Preliminary Fiscal Year Data Through September 30, 2024*, Figure 10, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY24.pdf.

[19] Amendment 782, *Reason for Amendment*.

[20] *Id.*

misplaced. As a threshold matter, the large quantities of drugs involved at the highest base offense levels would often negate lower culpability for many defendants. But for lower-level defendants caught with higher quantities, the existing statutory and guideline mechanisms—the safety valve, mitigating role reduction, zero-point offender reduction, and judicial discretion under 18 U.S.C. § 3553(a)—provide relief and reduce sentences in appropriate cases. Notably, the statutory safety valve does not take quantity into account. Role and lack of criminal history are eligibility factors. In designing the safety valve, Congress recognized—and addressed—concerns that a scheme based on drug type and quantity could result in higher sentences for some lower-level participants caught with significant quantities than for the actual leaders. And Congress again addressed additional eligibility concerns by expanding eligibility under the First Step Act well beyond those with little or no criminal history.[21]

The Guidelines similarly provide multiple mechanisms for relief and leniency when appropriate. Many of the defendants whose guideline ranges are at the highest offense levels were involved in methamphetamine trafficking.[22] For example, in a case in which the current Drug Quantity Table could result in a lengthy sentence for a lower-level defendant (such as a courier transporting 50 kilograms of methamphetamine), the Guidelines already provide multiple reductions, including mitigating role reductions under §3B1.2,[23] the related reductions available under §2D1.1(a)(5) and §2D1.1(b)(17), the safety valve reduction under §2D1.1(b)(18), and the zero-point offender reduction under §4C1.1. Even after those reductions, a sentencing judge can consider the individualized factors related to the defendant under 18 U.S.C. § 3553(a) to vary to a lower sentence when appropriate.[24] In the Department's view, the principled scheme is to allow for sentencing judges to impose reduced sentences for particular individuals than to broadly eliminate the top base offense levels of the Drug Quantity Table, equate vastly different drug quantities and drug trafficking behavior under the guidelines, and untether the Guidelines from the statutory penalties.

Commission data indicate that the average sentence imposed for methamphetamine offenses is lower than the applicable guideline sentence.[25] This data suggest that judges already

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[21] Pub. L. No. 115-391 § 402, 132 Stat 5149 (2018).

[22] Drug Data Briefing, *supra*, Slides 4-5, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf

[23] The Commission's data shows that the mitigating role adjustment was applied to approximately 39.8 percent of defendants whose base offense level was 38. *Id*. at Slide 10. Many of these same defendants would (or did) qualify for multiple additional adjustments.

[24] The Commission has requested comment on the need for potential changes to the mitigating role cap set forth in §2D1.1(a)(5). As noted in the text, the Department opposes reductions in the Drug Quantity Table. However, if the Commission were to reduce the base offense levels for drug offenses, it would eliminate the need for a mitigating role cap. As discussed, *supra*, the Commission established this cap pursuant to a directive in the Fair Sentencing Act. Pub. L. 111-220, § 7. If the Commission chooses to retain the cap, the Commission could consider simplifying §2D1.1(a)(5) to provide for a two-level reduction for defendants who qualify for a mitigating role reduction, unless the defendant's relevant conduct included the distribution of fentanyl, fentanyl analogues, or other opioids. Given the particularly deadly nature of these substances, we do not think that such offenders should not benefit from any further sentencing reductions for trafficking in these drugs.

[25] U.S. Sent'g Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 2024) ("Methamphetamine report"), at Figure 28, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

have the tools they need to reduce sentences below the applicable guidelines when they consider it to be appropriate. Doing more would only further untether the Guidelines from mandatory minimums and statutory penalty ranges and would undermine the Guidelines' ability to provide meaningful guidance to judges.

Fourth, the Commission's proposal could also result in the unintended consequence of lowering sentences for cartel leaders and major drug traffickers. The drug quantities that currently trigger the highest base offense level of 38 are quite substantial. For example, a defendant must be responsible for 36 kilograms or more of fentanyl (18 million potentially lethal doses) to trigger a level 38. By eliminating higher offense levels for defendants who are responsible for substantial and dangerous quantities of drugs, the Commission would be creating a potential sentencing windfall for some of the most culpable drug traffickers who are members of cartels or other transnational criminal organizations that are distributing significant quantities of deadly fentanyl.[26] Many of these individuals at the highest levels of culpability may be located outside the United States. They may lack criminal records or may not personally carry firearms. Reducing the penalties for high-ranking members of large drug trafficking organizations while our nation is immersed in a crisis of drug overdose deaths would seem counter to the Commission's intent and send the wrong message to the criminal networks that are profiting from the distribution of fentanyl and other deadly substances. It could lead to the unintended consequence that cartel leaders who distribute massive quantities of deadly drugs bear no more culpability than those who are far lower in the distribution chain. In addition, this reduction in sentencing exposure could affect the willingness of those who are responsible for large quantities of drugs to cooperate with law enforcement, thus hindering the ability of investigators to identify and prosecute those at the highest levels of the transnational criminal organizations that are sending these dangerous substances into the United States.[27]

The Commission also has requested comment on whether it should consider reducing all drug base offense levels. As discussed above, the drug quantities with respect to the most commonly trafficked drugs should be consistent with the statutory scheme in the Controlled Substances Act. Reducing the offense levels would de-link the Guidelines from the structure established by Congress. While the Commission's data indicate that defendants who are sentenced at high base offense levels often are sentenced below the applicable guideline, this does not provide clear explanations about what motivated individual judges to vary downward in particular cases. Absent clearer information, the Department does not advocate making changes

[26] Take the example of a defendant who is responsible for over 36 kilograms of fentanyl. Under the current version of §2D1.1, that defendant would have a base offense level 38. An additional four-level aggravating role enhancement under §3B1.1 and two-level enhancements for using violence under §2D.1(b)(2) and maintaining a premises for drug distribution under §2D1.1(b)(1) would yield an offense level of 46. Even after a three-level adjustment for acceptance of responsibility, the offense level would be 43, yielding a guideline recommendation of life imprisonment. Under Option One, that same defendant's offense level after acceptance would be 39 (262 to 327 months). Under Option Two, he would be at level 37 (210 to 262 months), and under Option Three, the offense level would be 35 (168 to 210 months). Thus, Option Three would have the effect of reducing a defendant's sentencing range from life down to a low-end sentence of 14 years for a highly violent leader of an organization trafficking in massive amounts of deadly fentanyl.

[27] As the Commission's data show, more than 25 percent of defendants with base offense levels of 30 or higher (and 43.4 percent of those at base offense level 38) received downward departures due to cooperation or participation in early disposition programs.

to the current offense levels, particularly since the levels are consistent with the penalties in the applicable statute. Instead, in the Department's view, district judges should continue to make individualized assessments of each defendant's conduct under 18 U.S.C. § 3553(a) and impose an appropriate sentence.

Fifth, the Department is particularly troubled by any proposal that would reduce penalties for fentanyl. Given the deadly nature of fentanyl, the Department's view is that the current guidelines for many fentanyl offenses are too low. In the context of fentanyl, just two milligrams can be deadly, and one kilogram has the potential to kill 500,000 people.[28] A reasonable scheme imposes higher penalties on those who traffic in multikilogram quantities of fentanyl, which have the potential to kill millions. The potential lethality of fentanyl is particularly significant because it often is distributed in the form of pills that are designed to look like legitimately manufactured pharmaceuticals.[29] This heightens the risk of death for individuals who do not even realize they are consuming fentanyl.

Under the current Drug Quantity Table, it takes 40 grams (20,000 potentially deadly doses) to trigger a level 24. Under the statute, if a defendant distributes over 40 grams of fentanyl, he will face a 60-month mandatory minimum.[30] Under the current guideline, that is a level 24 (51 to 63 months for a defendant in Criminal History Category I). If the base offense were reduced even by two levels to 22, it would yield a range of 41 to 51 months, well below the mandatory minimum sentence. Moreover, if the defendant qualifies for the safety valve, a host of other potential reductions would come into play, including the two-level reduction for safety valve, a two-level reduction for zero-point offenders, and even the further function-based reductions proposed for §2D1.1(b)(17). The result is a cascade of reductions that could put the guideline range at or even below the 24-30 month floor set in §5C1.2 for a defendant responsible for distributing approximately 22,500 potentially deadly doses of fentanyl.[31] We have significant concerns with this result considering the gravity of the offense.

Any further reductions in the guideline sentences for fentanyl offenses sends an inappropriate message to the public at a time when our nation remains in the throes of an opioid crisis. While drug users often need compassion and access to treatment, the traffickers who seek to profit from the sale and distribution of fentanyl and other deadly opioids rightly deserve significant sentences to punish and deter their conduct, which has damaged so many communities throughout the nation. The Department strongly opposes any reductions in the Drug Quantity Table, but it believes that any reduction in the penalties for fentanyl, fentanyl

[28] Drug Enforcement Administration's *Facts About Fentanyl*, at https://www.dea.gov/resources/facts-about-fentanyl.

[29] *Id.*

[30] 21 U.S.C. § 841(b)(1)(B)(vi).

[31] The significant statutory sentences that would be available will make the issue of safety valve eligibility extremely significant in cases where the Department brings charges that carry potential mandatory minimum sentences.

analogues, or other opioids would be particularly misguided.[32] The Department opposes all these proposed reductions to the current Drug Quantity Table as unnecessary and unwise.[33]

B. The New Trafficking Functions Reduction

The Department does not support the Commission's proposal to create new specific offense characteristics that would reduce a defendant's offense level under §2D1.1 based upon the defendant's "functions." We are concerned that the new provisions would add unnecessary complexity and complications to the Guidelines at a time when the Commission is seeking to simplify them. Generally, these changes would pivot the Guidelines to a bifurcated approach to address a defendant's role. While defendants in non-drug cases would continue to have their role assessed on the well-established criteria in Chapter 3, the conduct of drug trafficking defendants would be evaluated under a new and convoluted scheme that is likely to generate a substantial amount of litigation and confusion. Many of the "low-level trafficking functions" identified by the Commission will prove to be difficult to apply and will encompass defendants who perform crucial roles in the drug trade. We have several specific concerns.

First, as noted above, we think that existing statutory and Guidelines mechanisms appropriately account for defendants with lesser culpability. The existing mitigating role adjustment in §3B1.2 already provides a means of reducing the sentences of individuals who play minor or minimal roles in drug trafficking organizations and thus have lower levels of criminal culpability. The mitigating role adjustment already considers the role that the defendant played in a particular criminal enterprise. Litigants and the courts regularly apply this reduction, and there is a substantial body of case law regarding its application.[34] The Guidelines also provide additional mechanisms for reducing the sentences of lower-level drug offenders, including the mitigating role cap in §2D1.1(a)(5), the safety valve reduction under §2D1.1(b)(18), and the zero-point reduction.

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[32] In Issue for Comment Five, the Commission requested comment on the interaction between any reduction in the Drug Quantity Table and its separate consideration of amendments to the methamphetamine guidelines. Should the Commission adopt any reduction of the Drug Quantity Table, the Department opposes any changes to the methamphetamine guidelines that would further reduce the penalties for methamphetamine trafficking. Such a reductions would be inconsistent with the statutory structure and not take into account the significant danger posed by this drug.

[33] Should the Commission consider any reduction in the higher offense levels, it should not go any further than the current level 36. As discussed above, the three options proposed by the Commission would reduce the guideline sentences for significant traffickers close to or at the mandatory minimum, and in doing so, would not account the far greater risk to public health and safety posed by very large quantities of drugs. The Department also opposes changes to §2D1.11. However, if the Commission were to reduce the Drug Quantity Tables, it appears that the chemical tables in subsections (d) and (e), particularly (d), may require consideration for amendments. For example, currently the quantity table for precursor chemicals ephedrine, pseudoephedrine, and phenylpropanolamine goes up to a level 38. If the table for controlled substances no longer goes up to 38, the Commission may need to consider whether changes would be appropriate to the offense levels associated with these chemicals to ensure that the punishment for crimes involving these chemicals is not higher than the punishment for crimes associated with the controlled substances they are used to make.

[34] Commission data shows that §3B1.2 is applied in thousands of cases and at all base offense levels. Drug Data Briefing Slides 9-13.

Second, we are concerned that this new reduction would add complexity and result in litigation that would undermine its application. The Commission's proposal would create a new structure and remove the §3B1.2 analysis from the guideline calculation in drug trafficking cases. The proposed specific offense characteristic envisions a much broader and complicated inquiry into the defendant's role than the §3B1.2 analysis. It would require determining the "defendant's most serious conduct" or the "defendant's primary function" to discern whether the defendant performed sufficiently low-level drug trafficking functions. This fact-based analysis is likely to complicate sentencing proceedings as the parties dispute the wide variety of factual challenges that will arise under this proposed amendment. For example, drug defendants who possess or transport drugs as part of their criminal conduct could argue that they did not have an ownership interest or claim a significant share of the profits from the offense. While a defendant should bear the burden of proof,[35] in an age of encrypted communications, it may be very difficult (if not impossible) for the government to present evidence to address claims related to ownership and profit. The issues of ownership and profit are not elements of the offense, and evidence about them is often unavailable to the government.

Third, it is not at all clear that the specific functions in the proposed amendments necessarily reflect the nature and extent of an individual's role in a particular drug offense. Each offense is unique, involving specific situations and actors, and each participant important to furthering the conspiracy. The various terms used in the proposed amendment do not adequately reflect the breadth of conduct that occurs in drug trafficking offenses. We note that many of the roles that the Commission has identified are not low-level at all but are fundamental to the success of drug operations.

We have several concerns with how the proposed amendment seeks to delineate those with lower culpability, and how in doing so, it fails to reflect the realities of drug trafficking. Under either option, those who package, store, or engage in electronic communications related to drug transactions would potentially be eligible for the reduction. But those who do so are not necessarily less culpable than the individual who engages in the final sale, particularly if they do so on a regular basis. The descriptions of "low-level" functions would appear to apply to an individual who operated a drug distribution location where bulk quantities of drugs were received, processed and packaged for sale, provided that the person operating the distribution location used others to deliver the drugs to customers. As drafted, this reduction could even potentially apply to an individual who qualified for an aggravating role adjustment under §3B1.1 by organizing or supervising cooks, packagers, and drug distributors at the location. As a result, nothing in the proposal's language would preclude an individual from obtaining an aggravating role enhancement yet qualifying for a reduction under the proposed trafficking functions adjustment.

Another concern involves how the proposed amendment treats those who play an important role in facilitating a drug operation by transporting drugs. The proposal makes no distinction based on quantity or frequency. It does not distinguish between an individual who

[35] As with a mitigating role adjustment, the defendant should bear the burden of proof that the defendant is entitled to a reduction under this new provision. *See, e.g., United States v. Wynn*, 108 F.4th 73, 80 (2d Cir. 2024) (defendant has burden of establishing entitlement to mitigating role reduction). If the Commission adopts this proposed amendment, it should consider adding language to make clear that the defendant bears this burden.

does so once and another who does so dozens of times, regardless of the quantities involved. Thus, a drug courier who is paid $500 to drive a small load of drugs across the border on one occasion, a tractor trailer driver who routinely transports hundreds of kilograms of drugs across the country, and a drug courier who routinely and frequently transports small quantities of drugs across the border, would all be considered to perform low-level functions that merit sentence reductions. And those that organized and paid them to do so may also qualify. The result would treat very differently situated defendants as similar and lacks the broader flexibility that exists in the current §3B1.2 analysis.

Another concern involves how the proposal characterizes some quintessential drug trafficking activity (distributing controlled substances) as a low-level function. Street level dealers who sell drugs to customers are key players in drug distribution networks. They are the individuals responsible for providing the drugs to end users who die each day from drug poisonings—behavior with severe real-world consequences. Yet this proposal would allow at least some such drug dealers to draw the benefit of a reduced sentence.

Fourth, the proposal would inject uncertainty into one of the most-commonly applied guidelines and in a manner that will require substantial litigation for what may amount to limited benefit. Take, for example, the determination of whether a defendant distributed "retail or user-level quantities." These are not terms with clearly accepted definitions and may even vary by region or community. It will likewise be challenging to litigate issues surrounding the defendant's "motivation." While such factors are part of the current §2D1.1(b)(17), this proposal would greatly expand the scope of litigation over a defendant's motivations.[36] It is likely that, in many cases, the only evidence of whether a defendant was "motivated by a family relationship or threats" or "was otherwise unlikely to commit" the offense will be a defendant's own self-serving statement. Such evidence is not required to prove the elements of the offense and is generally inaccessible to the government. Sentencing hearings over the application of this provision may descend into significant disputes over the meaning of emails, text messages, prior conversations or past actions to find evidence that sheds light on a defendant's various motivations and criminal proclivities. All of this fact-finding and sentencing litigation will deepen the complexity of sentencing proceedings and, at least in the short term, the need for clarifying case law through the appellate process.

Similarly, discerning whether a defendant's conduct was "motivated primarily by a substance abuse disorder" will often be difficult to demonstrate. While it is not uncommon for

[36] The current version of §2D1.1(b)(17) only can apply when a defendant qualifies for the four-level minimal role adjustment under §3B1.2(a). It is not applied frequently and was not applied to any cases in 2022 or 2023. *See* U.S. Sent'g Comm'n, *2022 Guideline Application Frequences Report*, https://www.ussc.gov/research/data-reports/guideline/2022-guideline-application-frequencies; *see also* U.S. Sent'g Comm'n, *2023 Guideline Application Frequences Report*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch2_Guideline_FY23.pdf. Adopting this proposal would greatly increase the occasions in which judges will be asked to assess the motivations of defendants, which are not part of the elements of an offense, not generally accessible to the government, and for which the defendant is often the sole possessor of relevant evidence.

drug trafficking defendants to use drugs, it will be extremely challenging to litigate questions about how much their substance use motivated their criminal activity. A defendant's self-serving statements may require prosecutors to contest the defendant's credibility and identify other potential motivations (such as profit, status, or personal relationships), and judges then would need to sift through various motivations to determine whether substance abuse was the *primary* motivator.

For all of these reasons, this proposal would seem to complicate the Guidelines at a time when the Commission has been seeking to simplify them. It would jettison the longstanding application of §3B1.2 and create a variety of new, undefined terms that will be the source of substantial litigation. It will require cumbersome factfinding on a variety of topics about which the government often has limited information (*e.g.*, a defendant's motivation, ownership interest, claims to a significant share of the profit). As a result, government resources will be diverted to investigating these peripheral issues to combat defendants' efforts to qualify for these guideline reductions. If this proposal is motivated by concerns about the scope of the current mitigating role adjustment, the Department recommends that the Commission to conduct a review of §3B1.2 and its commentary rather than making this substantial change to §2D1.1. Should the Commission wish to provide additional mechanisms for relief, providing additional guidance on appropriate use of the mitigating role reduction for "minimal" participants may better accomplish this goal without adding complexity and litigation.

Despite our significant concerns with its application, if the Commission nevertheless adopts a version of the proposed trafficking functions amendment, we note several changes that the Commission should consider. While these changes will not address our core concerns with the proposal, these changes may help the Commission accomplish its apparent goal with fewer negative consequences:

- Although the proposal would not apply to a defendant who possessed a firearm or induced another participant to do so, it would be cleaner, clearer, and consistent with provisions such as §4C1.1(a)(7) to exclude from application any defendant who qualified for the dangerous weapon enhancement under §2D1.1(b)(1). This would ensure consistency across §2D1.1 and limit the application of the reduction to defendants who are associated with violence or risks of violence.

- Individuals whose relevant conduct resulted in death or serious bodily injury should similarly be excluded. There are some instances where a defendant's drug trafficking results in death or serious bodily injury but the defendant has not been charged or convicted of a statutory death-resulting offense that triggers the offense levels under §2D1.1(a)(1)-(4). Defendants who are responsible for death or serious bodily injury, like defendants who engage in violence, have a higher level of culpability and should not be permitted to benefit from a sentence reduction targeted toward lower-level offenders.

- Defendants who qualify for an aggravating role adjustment under §3B1.1 should be explicitly excluded from receiving the reduction, similar to §4C1.1(a)(10). A defendant who has a leadership or organizational role in the offense does not perform a low-level function, even if the defendant is part of a much larger

operation. For example, a defendant who supervises and organizes other workers in a stash house or drug packaging operation should not be able to claim to be performing a low-level function.

- The reduction should be available only to those "whose most serious conduct was limited to" performing low-level functions. The alternative proposal, which requires an assessment of the defendant's "primary function," is far more subjective and is likely to generate significant and unproductive litigation. Limiting the reduction to those whose most serious conduct was low level and who never performed a more significant function in the drug trafficking operation would more appropriately limit the availability of this reduction to the most-deserving defendants and will avoid situations where defendants who perform higher-level functions seek to characterize other roles as their primary function.

- Option One would likely result in less litigation than Option Two. By characterizing the various roles merely as examples, Option Two opens the door to arguments that a particular defendant's conduct somehow should be characterized as a "low-level function." Option One, although flawed, provides somewhat more specific guidance regarding its operation.

We address additional issues for comment below. In Issue for Comment Eight, the Commission requested comment on the possibility of placing language from application note 3(A) in §3B1.2 into proposed note 21(A) of §2D1.1. Doing so is unnecessary and may cause confusion. Application note 3(A) in §3B1.2 was originally added in Amendment 635 to resolve a circuit conflict over whether the mitigating role adjustment could apply only when a defendant's relevant conduct was limited to drugs that the defendant personally handled.[37] Because proposed (b)(17) is focused solely on the defendant's own conduct and not the conduct of others, adding application note 21(A) does not serve the same clarifying purpose and could potentially be interpreted to render this reduction unavailable for defendants whose relevant conduct includes the conduct of others involved in the offense. The Department does not oppose the proposed application note 21(B), which would make this new amendment inapplicable to matters where the defendant's base offense level is lower because he has been convicted of an offense that is significantly less serious than his actual conduct.

The proposed reduction for trafficking functions is far broader than §3B1.2 (which can range from two to four levels) and potentially may apply to a far larger number of defendants whose conduct could not credibly be described as minor or minimal.[38] It would be inappropriate to expand the scope of the role/function reduction while making an even greater six-level reduction available. Rather, since the Commission is seeking to broaden the applicability of the reduction, the Department suggests that the available reduction should be no greater than two-

[37] U.S.S.G., App. C, amend. 635, https://www.ussc.gov/guidelines/amendment/635.

[38] Given this breadth, if the Commission adopts this proposal, the Department agrees that it would be appropriate to include a special instruction that §3B1.2 should not be applied to defendants whose guidelines are calculated under §2D1.1. Similarly, if a defendant's guideline sentence is calculated under another section of Chapter 2 that includes a cross-reference to §2D1.1, the guidelines should not permit the defendant to qualify for both a mitigating role adjustment and the low-level function adjustment.

levels in most cases, with a four-level reduction available in particularly extraordinary cases where a defendant's functions were exceedingly limited.

In Issues for Comment Four and Five, the Commission requested comment on the potential effect of the trafficking functions proposal on §2D1.1(a)(5). In the Department's view, it would make little sense as a matter of policy to retain §2D1.1(a)(5) if the Commission adopted its proposal to reduce the Drug Quantity Table. The difficulty is that eliminating §2D1.1(a)(5) might require congressional action because the level 32 cap was established in the Fair Sentencing Act based upon the then-existing (and still current) Drug Quantity Table.[39] In particular, Congress created the reduction in the Fair Sentencing Act for situations where defendants receive a "minimal role adjustment." We are concerned about whether the guideline would continue to be consistent with the directives of the Fair Sentencing Act if §3B1.2 is no longer applicable to drug trafficking offenses.[40] If, by contrast, the Commission retains the Drug Quantity Table in its current form but implements the trafficking functions amendment, then the need for (a)(5) would be more limited. The breadth of the proposed change and the scope of its potential applicability to many defendants who perform important roles in drug trafficking offenses would seem to reduce the need for further reductions under §2D1.1(a)(5).

If the Commission were to adopt the trafficking functions amendment, it would create substantial redundancy with the current §2D1.1(b)(17), which the Commission proposes to retain as (b)(18) and, as with §2D1.1(a)(5), it also may create a discrepancy with the congressional directive in the Fair Sentencing Act. In § 7(2) of the Fair Sentencing Act, Congress directed the Commission to amend the guidelines to provide for additional reductions for the conduct described in the current (b)(17) for a defendant who "qualifies for a minimal role adjustment under the guidelines." Although we recognize that the Commission's proposal would incorporate many of the existing (b)(17) factors into the new (b)(18), eliminating the application of the minimal role adjustment from drug trafficking offenses may be inconsistent with this congressional directive.[41] Additionally, because the existing (b)(17) factors would be incorporated into the new (b)(17) while also be retained in the new (b)(18), some defendants who qualify for the reduction based on these factors would be entitled to a duplicative further reduction for the same factors. If the Commission adopts the trafficking functions amendment, it should eliminate this redundancy by striking these factors from the trafficking functions amendment.

In several Issues for Comment, the Commission also requested comment on other provisions that may be affected by this proposal. Section 2D1.8 currently provides for a four-level reduction in the offense level for convictions under 21 U.S.C. § 856 (related to maintain a premises for drug trafficking) when the defendant had no participation in the underlying drug offense but precludes application of the mitigating role adjustment under §3B1.2. If the low-

[39] Fair Sentencing Act, Pub. L. 111-220, §7, 124 Stat. 2374 (2010).

[40] We explain in Section I.C.1, *infra*, our view concerning the Commission's ongoing obligation to comply with extant congressional directives.

[41] As noted above, this same issue arises with the §2D1.1(a)(5), which is also based on the Section 7 of the Fair Sentencing Act and also makes direct reference to the minimal role adjustment.

level function adjustment is adopted, the special instruction in §2D1.8(b)(1) should be amended to preclude application of the trafficking functions adjustment to avoid a double reduction.

C. Methamphetamine Amendments

1. Elimination of "Ice" Guideline

The Department recognizes the desire to eliminate the separate guideline for "ice" but does not believe that the proposed amendment can be reconciled with the existing 1990 Crime Control Act directive from Congress. Accordingly, the Department recommends against proceeding with the amendment at this time and instead recommends that the Commission first seek legislative changes from Congress.

The nature of methamphetamine trafficking and use has evolved since the passage of the 1990 Crime Control Act. In particular, when the Commission created the "ice" guideline, there was substantial concern about the high purity level of crystal methamphetamine.[42] But methamphetamine production has evolved over time so that nearly all methamphetamine seized in the United States can be considered "ice" because of its high purity level.[43] As the Commission notes, most methamphetamine that is tested for purity is over 90 percent pure.[44] The Guidelines define "ice' as "a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity."[45] In most cases the drug quantity calculation for "ice" results in the same offense level as if the substance were calculated under the methamphetamine (actual) guideline. For example, six kilograms of 95 percent pure methamphetamine would trigger base offense level 38 whether the ice or methamphetamine (actual) guideline is applied.[46] Generally, the only reason methamphetamine does not satisfy this definition is because some labs (particularly state labs) do not always conduct a purity analysis. As a result, there may no longer be compelling reasons to retain a separate guideline specifically targeting "ice."

Although the Department does not necessarily oppose the elimination of the "ice" guideline to the extent permitted by law, we have concerns with the Commission's ability to do

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[42] U.S. Sent'g Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 2024) ("Methamphetamine report") at 14-15, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

[43] *Id*. at 9, Figure 3.

[44] As the Commission has noted, in 2003, the average purity of methamphetamine was 57.4 percent, but rose to 97.2 percent in 2019. *Id*. at 9-10.

[45] §2D1.1 (note C to Drug Quantity Table). The term "ice" does not have a commonly accepted scientific definition nor is it defined in the Controlled Substances Act.

[46] There are some situations where the ice guidelines and methamphetamine (actual) guidelines will produce different results. For example, 502 grams of 92 percent pure methamphetamine would trigger a base offense level of 34 under the "ice" guideline (because the quantity was over 500 grams) but would trigger a base offense level 32 under the methamphetamine (actual) guideline because the purity factor would reduce the quantity calculation below 500 grams. Such situations are relatively rare.

so while complying with congressional directives.[47] Specifically, the Crime Control Act of 1990 instructed the Commission to amend the existing guidelines "so that convictions for offenses involving smokable crystal methamphetamine" would be assigned an offense level that "is two levels above that which could have been assigned to the same offense involving other forms of methamphetamine."[48] We acknowledge that Congress did not specifically use the term "ice" and, accordingly, its directive does not require the Commission to retain the term "ice" in the Guidelines. But even if the Commission elects to eliminate "ice" from the Guidelines, compliance with this directive would require the Commission to impose a higher penalty for offenses involving "smokable crystal methamphetamine."

Because most methamphetamine on the market today is in crystal form and capable of being smoked, the Commission has suggested the alternative approach of permitting a two-level reduction for offenses that involve methamphetamine that is in a non-smokable, non-crystalline form. We acknowledge the intuitive appeal to this approach, but we have concerns about its practical application.

First, the proposed specific offense characteristic addressing methamphetamine in a non-smokable, non-crystalline form is likely to result in confusion and protracted litigation. The Commission has not proposed any definitions of the terms "non-smokable" and "non-crystalline form," and there may not be universal consensus on the meanings of these terms, which can easily lead to inconsistent interpretations. For example, methamphetamine is sometimes smuggled in a liquid form to facilitate its trafficking.[49] While a liquid may not be considered smokable or crystalline, it can readily be converted to such a form through a simple evaporation process. Methamphetamine can also be in tablet form. Although tablets are not typically smoked, they can be consumed by smoking (particularly if the tablet is ground into a powder or not intact). This practice is common with fake tablets containing fentanyl. Sentencing hearings could become debates about whether a particular form of methamphetamine is smokeable or is in crystal form and lead to inconsistent results across jurisdictions for the same offense

Second, there is no clear policy reason why liquid or tablet forms of methamphetamine should be treated differently than other forms of methamphetamine for sentencing purposes. Applying the proposed specific offense characteristic to these forms of methamphetamine could create confusion in the application of the Guidelines and have the unintended effect of causing drug traffickers to increase their production of these forms of methamphetamine (such as

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[47] In the Comprehensive Methamphetamine Control Act of 1996, Congress directed the Commission to increase penalties for methamphetamine offenses. Pub. L. No. 104-237 § 301, 110 Stat. 3099. This directive, which is not specific to ice, requires that the Guidelines and policy statements provide for "increased penalties" for methamphetamine trafficking offenses, among other requirements. In response, the Commission reduced by half the quantities of a mixture or substance containing methamphetamine for each offense level in the Drug Quantity Table. U.S.S.G. App. C, amend. 555 (effective Nov. 1, 1997). Although the Commission may not have seen this directive as an impediment to reducing drug penalties in 2014, if the Commission chooses to reduce methamphetamine penalties by setting levels at the mixture level, we urge the Commission to evaluate compliance with this and other congressional directives.

[48] Crime Control Act of 1990, Pub. L. No. 101-647, § 2701, 104 Stat. 4789, 4912 (1990).

[49] Methamphetamine report at 41.

increasing the use of liquid methamphetamine as a trafficking tool). Additionally, distinguishing between tablet, liquid, and powder forms of methamphetamine would seem to introduce the very disparities that the Commission is seeking to avoid in eliminating "ice" from the Guidelines.

Finally, the Department responds to the suggestion in some recent stakeholder submissions that directives such as the one in the 1990 Crime Control Act do not bind the Commission indefinitely when, as here, they are not "codified" and/or the Commission has previously taken measures to implement the directive.[50] The Department sees no merit in either strand of that argument. As to the first, it should make no difference that the 1990 congressional directive appears in the Statutes at Large, in a provision indicating that it would be codified as a "note" to 28 U.S.C. § 994.[51] To the contrary, "[t]hough the appearance of a provision in the current edition of the United States Code is prima facie evidence that the provision has the force of law, . . . it is the Statutes at Large that provides the legal evidence of laws."[52] As for the additional suggestion that a statutory directive ceases to bind the Commission once it has responded to the directive for the first time, that contention runs contrary to the foundational principle that "American statutes not limited by their own terms remain in force until amended or repealed by competent authority."[53]

An example illustrates the problems with deviating from that principle in the manner that has been proposed. Suppose that, in 2024, Congress directed the Commission to increase the base offense level for federal robbery offenses and that the Commission responded in 2025 by implementing a two-level increase in the pertinent guidelines. Then suppose the Commission decided the following year that it preferred to study the matter further and so reversed the two-level increase pending further data collection. Under the stakeholder's submission, the Commission need not ever return to the higher robbery base offense levels directed by Congress, because the Commission's initial action in increasing those levels for a single amendment cycle sufficed to comply with the directive. We respectfully suggest that such an understanding finds no support in sound principles of statutory construction—and provides no basis for disregarding the directive in the 1990 Crime Control Act concerning smokeable crystal methamphetamine.

In sum, eliminating the "ice" guideline while still complying with the directive of Congress is challenging and could potentially produce unintended consequences. We therefore recommend that the Commission refrain from acting on this proposal at this time and that it instead advise Congress of this issue and suggest that Congress consider repealing its 1990 directive. In the Department's view, it would be more appropriate to take that approach than to

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[50] *See* Heather Williams, Federal Public and Community Defenders Comment on Simplification of the Three-Step Process, at 18-24 (Feb. 22, 2024); *see also* Heather Williams, Federal Defender Sentencing Guidelines Committee Letter, Defender Comment on Simplification of the Three-Step Process, at Appendix p. 4 (February 3, 2025).

[51] Pub. L. No. 101-647, § 2701, 104 Stat. 4789, 4912 (1990).

[52] *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (quotation marks omitted); *see Cameron v. McDonough*, 1 F.4th 992, 995 (Fed. Cir. 2021) (calling it "well-established that the placement of a provision in the United States Code as a note is not dispositive").

[53] 2 Shambie Singer, Sutherland Statutory Construction § 34:1 (8th ed.); *see id.* § 34:4 (explaining that, while a statute does "occasionally . . . specify a date, event, or circumstance for its own termination," "[a] legislature must clearly evince such an intent in the act at issue or a related act in order to overcome the presumption of continuity").

attempt to craft a new guideline (and potentially create substantial litigation) seeking to address the rare cases of methamphetamine that are neither smokable nor crystalline.

2. Methamphetamine Purity Distinction

The Commission also proposes to eliminate the distinction between methamphetamine (mixture) and methamphetamine (actual). The Department recognizes that a number of judges have concerns about this distinction and have expressed a categorical disagreement with the methamphetamine guidelines.[54] While the Department is not necessarily opposed to eliminating this distinction in the Guidelines, any such change must account for the statutory distinction in the Controlled Substances Act and should not establish guideline levels that are below the applicable mandatory minimum sentences. Accordingly, the Department suggests that the Commission consider engaging with Congress about these concerns prior to making significant changes to the methamphetamine guidelines. We also acknowledge that one of the issues that the Commission is trying to solve is disparity that results from different sentencing practices across the country. The Department favors one rule across the country that has uniform application. While we recommend engaging with Congress to avoid complications that would result from a guidelines scheme that diverges from the statutory scheme, we appreciate that the Commission may wish to act sooner. If the Commission decides to proceed, we think that setting the guideline at the current actual levels would result in fewer complications.

The Controlled Substances Act provides for a ten-year mandatory minimum sentence for drug trafficking offenses involving 50 grams or more of methamphetamine or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine.[55] It also provides for a five-year mandatory minimum penalty for drug trafficking offenses involving five grams or more of methamphetamine or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine.[56] The current methamphetamine guidelines retain this distinction, and the statute's 10:1 ratio for mixture/actual methamphetamine appears throughout the Drug Quantity Table.

The market for methamphetamine has evolved in recent years. While there was a time when trafficking in higher-purity methamphetamine reasonably could be associated with high-level drug suppliers, that is no longer true in all cases. Large-scale methamphetamine laboratories now consistently produce methamphetamine with a high purity level, frequently well over 90 percent pure.[57] As a result, methamphetamine traffickers at all levels of the chain of distribution often distribute methamphetamine that has a purity level that is just as high as that of

[54] *See, e.g., United States v. Robinson*, 2022 WL 17904534, at *3 (S.D. Miss. Dec. 23, 2022) (Reeves, J.).

[55] 21 U.S.C. § 841(b)(1)(A)(viii).

[56] 21 U.S.C. § 841(b)(1)(B)(viii).

[57] Methamphetamine report, *supra*, at 3.

an individual who is at the top of the chain.[58] This has led some judges to question the rationale for imposing higher penalties for "actual" methamphetamine.[59]

The current methamphetamine guidelines also present some challenges that can result in disparate treatment of similarly situated defendants. First, not all laboratories that test methamphetamine will produce a purity analysis. As a result, two defendants with the same quantity of methamphetamine of equivalent purity may face different sentences under the guidelines based upon which laboratory tested the seized drugs or whether the lab results are available at the time of sentencing.[60] Second, the fact that several judges have expressed categorical disagreement with the methamphetamine guidelines has created situations where two defendants in the same district may have significantly different sentences depending upon whether the judge assigned to their case has endorsed this categorical disagreement.[61]

The Department acknowledges these concerns and the criticism that has been raised by some judges. However, not all judges have been persuaded that the actual/mixture distinction in the Guidelines is inappropriate.[62] As noted above, despite the concerns expressed by some judges about the actual/mixture disparity, this is a distinction created by Congress that is part of the structure of the Controlled Substances Act's sentencing scheme. Any changes adopted by the Commission should take into consideration the directives set forth by Congress in 28 U.S.C. § 994(b) and other congressional directives.[63] Given the Commission's concerns and the possibility that the proposal may deviate from congressionally set policy, the Department suggests that the Commission refrain from making any changes before Congress acts. Instead, we recommend that the Commission seek legislative changes from Congress.

Although we do not think it appropriate to proceed absent a legislative change, should the Commission nevertheless proceed, Option Two—which would set the quantity thresholds at the current levels for methamphetamine (actual)—would present fewer problems. Option One, which would set the quantity thresholds at the current levels for methamphetamine mixture, would create an inappropriate discrepancy between the mandatory minimums created by

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[58] *See, e.g., United States v. Bean,* 371 F.Supp.3d 46, 52-53 (D.N.H. 2019) (low level street dealers are just as likely as kingpins to have access to extremely pure methamphetamine).

[59] *See, e.g., United States v. Nawanna*, 321 F.Supp.3d 943, 951-55 (N.D. Iowa 2018).

[60] *See, e.g.*, *United States v. Johnson*, 812 Fed. App'x 329, 332 (6th Cir. 2020) (unpublished) (defendants faced different sentencing calculations because drug purity results became available after first defendant was sentenced but before second defendant was sentenced); *United States v. Rodriguez*, 382 F.Supp.3d 892, 897 (D. Alaska 2019) (noting that methamphetamine cases investigated by federal law enforcement agencies almost always had purity analysis but such analysis was less frequently available in cases investigated by state or local law enforcement agencies).

[61] *United States v. Jimenez-Marquez*, 2024 WL 4281014, at *4 (D.N.M. Sept 24, 2024) (refusing to grant downward variance based upon actual/mixture disparity despite the fact that another judge in the district had done so).

[62] *Id.* at *3 (identifying the need to reduce methamphetamine overdoses and deaths, the addictive nature of high purity methamphetamine, and the need to combat international drug trafficking organizations as policy reasons supporting the current guideline structure).

[63] We explain in Section I.C.1, *supra*, our view concerning the Commission's ongoing obligation to comply with extant congressional directives.

Congress and the Guidelines. For example, a defendant who distributed 60 grams of 95 percent pure methamphetamine would face a ten-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A)(viii). Under Option One, the base offense under the Drug Quantity Table would be 24 (51 to 63 months for a defendant with a Criminal History Category of I). Thus, the low end of the base offense level would be less than half of the applicable mandatory minimum sentence. For a defendant who qualifies for the safety valve reduction and has no prior criminal history who is potentially eligible for the two-level safety valve reduction, the two-level zero-point offender reduction, and a three-level reduction for acceptance of responsibility, the adjusted offense level would be 17 (24 to 30 months), which is the safety valve floor set forth in §5C1.2.

Moreover, the Commission's proposal would vastly increase the quantity of actual methamphetamine that is necessary to trigger higher offense levels. Currently, 4.5 kilograms would trigger a level 38. Under Option One, 4.5 kilos would be level 32 (121 to 151 months). Thus, the change would mean that the Guidelines would recommend a sentence at or near the mandatory minimum for a quantity 90 times the quantity necessary to trigger the mandatory minimum. The base offense level for a kilogram of actual methamphetamine would be reduced from 34 to 30 (97 to 121 months) despite being 20 times the quantity that triggers the 120-month mandatory minimum. This also could create a substantial disincentive for defendants to engage in high-level cooperation of the sort that warrants a substantial-assistance motion from the government, because merely qualifying for the safety valve will be sufficient to dramatically reduce their sentencing exposure.[64]

Option Two would equalize the guidelines for all methamphetamine at the higher level that is currently associated with methamphetamine (actual). Given the highly pure nature of the methamphetamine that is proliferating in the United States today and the increased number of overdoses and deaths associated with these substances, that approach is appropriate and will provide for more uniform sentences in methamphetamine cases.[65] It is also more consistent with the clear intent of Congress that highly pure methamphetamine should be punished more severely. Because most methamphetamine is highly pure, the lower penalties under the mixture

[64] In Issue for Comment Four, the Commission requested comment on whether §2D1.11 would need to be amended if Option One were adopted. As discussed above, the Department opposes Option One. If, however, the Commission chooses to adopt Option One, the Department believes that the risks posed by methamphetamine are substantial and crimes involving methamphetamine precursors are crimes that merit significant punishment. The Department would oppose any changes to §2D1.11 that would reduce the penalties for precursor chemicals.

[65] In Issue for Comment Two, the Commission requested comment on the potential risk that Option Two would raise the guideline range in some limited number of cases involving methamphetamine (actual). While such a possibility exits, given the high level of methamphetamine purity, such a risk would likely only come into play in a small number of cases where the drug weight was slightly over the triggering threshold for a particular base offense level. Absent some empirical evidence that this will present a widespread problem, the Department does not believe that the Commission needs to separately address this issue. When such unique issues arise, the district court can address any concerns when applying the § 3553(a) factors.

guideline are generally inappropriate and have the potential to yield disparate results for similarly situated defendants.[66]

D. Crack-Powder Cocaine

In Issue for Comment Four, the Commission requested comment on whether it should take future action to address the 18:1 ratio involving powder and crack cocaine. The Department previously has expressed its view that this ratio is inappropriate. However, the ratio was established by Congress and remains in the Controlled Substances Act. The Department's view is that the Guidelines should be consistent with the statutory scheme. The Commission should refrain from taking further action on the crack/powder ratio issue until Congress acts to address the matter.

E. Fentanyl Fake Pills Enhancement

The Commission has proposed amendments to the specific offense characteristic at §2D1.1(b)(13), which was first added to the Guidelines in 2018 and subsequently amended in 2023. The Department appreciates the Commission's willingness to address the application issues with §2D1.1(b)(13) and agrees that this enhancement should be further refined. The current version of §2D1.1(b)(13) is ineffective because it requires proof related to a defendant's *mens rea* and by further requiring that the defendant knowingly engage in misrepresentation or marketing related to the nature of the substance involved in the offense.

The Commission has proposed three options. Option One presents an offense-based enhancement that would remove the *mens rea* requirement. Option Two presents a defendant-based enhancement with a *mens rea* requirement (knowledge/reason to believe or knowledge/reckless disregard). Option Three presents a tiered approach retaining a *mens rea* requirement (knowledge/reason to believe or knowledge/reckless disregard) for the defendant-based enhancement and offering an offense-based enhancement with no *mens rea* requirement.

As discussed below, the Department has concerns with each of these three proposals. The Department recommends a hybrid approach that retains the current defendant-based language of part (A) that addresses defendants who make knowing misrepresentations about the identity of the fentanyl that are trafficking but amends part (B) to establish an offense-based approach to provide enhancements for offenses involving fake fentanyl pills and other similar substances that would appear to a reasonable person to be legitimately manufactured or which the defendant represented as being legitimately manufactured. The second clause of our part (B) would apply to defendants who assure consumers that the pill is real without making any affirmative representation about what the substance is and without the need to specifically establish that the defendant knew the substance was fentanyl. This approach would expand the

[66] If a defendant is charged with the ten-year mandatory minimum under the "mixture" statute, 21 U.S.C. § 841(b)(1)(A)(viii), that would yield a base offense level of 34 (151 to 188 months) under Option Two. While this is somewhat higher than the mandatory minimum threshold, that result is not overly problematic because (as discussed elsewhere) the purity of most mixtures is so high that the higher guideline is likely to fairly reflect the significance of the quantity of the substance involved in the offense. However, in applying the factors set forth in 18 U.S.C. § 3553(a), the sentencing court would have the ability to vary downward to address any perceived unfairness in the application of this guideline to a particular defendant.

scope of §2D1.1(b)(13) so that it applies not only to those who affirmatively make misrepresentations, but also to those who manufacture and distribute these deceptive and deadly substances absent evidence of affirmative misrepresentations.

Since 2012, fentanyl has shown a dramatic increase in the illicit drug supply as a single substance, in mixtures with other illicit drugs (*i.e.*, heroin, cocaine, and methamphetamine), and in forms that mimic pharmaceutical preparations including prescription opiates and benzodiazepines.[67] Fentanyl is often pressed into fake prescription pills either before or after being brought into the United States for distribution.[68] In 2023, DEA seized more than 80 million fentanyl-laced fake pills, an increase from the previous year. DEA estimations vary but approximately 40 to 60 percent of pills tested contain a potentially lethal dose of fentanyl.[69] These fake pills are made to look like legitimate prescription drugs such as Oxycontin, Percocet, Vicodin, Xanax, or Adderall, but actually contain fentanyl, methamphetamine, or other synthetic drugs.[70] These fake pills are often sold on social media and e-commerce platforms, where they are available to anyone with a smartphone, including minors.[71] The pills are sold on these platforms, in many instances purposely appearing to resemble legitimate pharmaceutical drugs, and often through the use of coded language or emojis that disguise the true nature of the pills.[72]

Although the number of fentanyl-laced pilled seized by DEA is steadily rising, the §2D1.1(b)(13) enhancement is applied infrequently. As noted by the Commission, this enhancement was applied in only 2.2 percent of fentanyl cases and 1.5 percent of fentanyl analogue cases in FY 2023, and 2.7 percent of fentanyl cases and 2.3 percent of fentanyl analogue cases in FY 2024; those percentages amount to only 70 defendants in FY 2023 and 106 defendants in FY 2024 in fentanyl and fentanyl analogue cases, when in each of those years there were over 3,000 fentanyl and fentanyl analogue cases.[73] The enhancement is applied rarely despite the growing prevalence of fake pills containing fentanyl, fentanyl analogues, and synthetic opioids and the danger posed by these pills, as shown by the staggering number of

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[67] United Nations Office on Drugs and Crime, Global SMART Update Volume 17, March 2017, at https://www.unodc.org/documents/scientific/Global_SMART_Update_17_web.pdf.

[68] *Hearing on Countering Illicit Fentanyl Trafficking Before the S. Comm. on Foreign Relations*, 118th Cong. (February 15, 2023) (statement of Anne Milgram, Administrator, Drug Enforcement Administration), https://www.foreign.senate.gov/imo/media/doc/f4597c23-de04-fa71-e612-bcbc49b6826c/021523_Milgram_Testimony.pdf.

[69] *See* Milgram Statement, *supra*, n.68 ("DEA lab testing reveals that 6 out of 10 of these fentanyl-laced fake prescription pills contain a potentially lethal dose"). *But see* Drug Enforcement Administration, *Facts About Fentanyl* (March 2025), https://www.dea.gov/resources/facts-about-fentanyl (estimating "42% of pills tested for fentanyl contained at least 2 mg of fentanyl, considered a potentially lethal dose").

[70] Drug Enforcement Administration, *One Pill Can Kill* (March 2025), https://www.dea.gov/onepill/teens.

[71] Drug Enforcement Administration, *Emoji Drug Code Decoded* (March 2025), https://www.dea.gov/sites/default/files/2022-04/Emoji%20Decoded_FO%20One%20Page_v2.pdf

[72] *Id*.

[73] Drug Data Briefing, Slides 27-28, *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf*.

overdose deaths. Although the Commission has recognized these concerns, its proposed amendments will not adequately address the problem.

1. Option One's Offense-Based Enhancement

The Commission has proposed eliminating the *mens rea* requirement in Option One and alternatively offered an offense-based enhancement. While the Department has acknowledged that the *mens rea* requiring knowledge can be difficult to prove and is a likely reason for relatively few cases in which the enhancement is applied, the Department believes that eliminating the *mens rea* but using the specific offense-based formulation in Option One will not meaningfully expand the number of instances in which the enhancement is applied. That is because this offense-based provision appears to require proof that the defendant has affirmatively misrepresented or marketed the substance containing fentanyl as another substance—a flaw that exists in the current version of §2D1.1(b)(13).

As the Commission notes, "the specific offense characteristic includes a *mens rea* requirement to ensure that only the most culpable" are subject to an enhancement.[74] However, by retaining the misrepresentation/marketing requirement, Option One will continue to apply to only a limited number of defendants. In fact, the language in Option One means that the enhancement is likely to apply primarily to offenses involving defendants operating at the lowest level of the drug distribution chain and not cases involving actors higher in the distribution chain. To be effective, this enhancement should apply not only to street-level dealers who might mislead a drug customer, but to the kingpins and higher-level dealers making and profiting from the distribution of these fake pills. As the Department has explained, those higher-level dealers generally are not actively marketing or misrepresenting the nature of the drug to the lower-level dealers. In fact, drug traffickers frequently communicate in coded or vague terms that are not sufficiently specific to satisfy the misrepresentation/marketing requirement. However, these higher-level traffickers are equally, if not more culpable, than street-level dealers for the proliferation of these dangerous substances and should be subject to the same enhancement. Moreover, the proliferation of fake pills is so substantial that many drug traffickers and customers are seeking out fentanyl pills, meaning that cases of actual misrepresentation (even at the street level) have become less common.

2. Options Two and Three

Options Two and Three both include a *mens rea* requirement for the defendant-based enhancement. As a preliminary matter, the Department endorses the decision to eliminate the distinction between knowledge and willful blindness and conscious avoidance that is in the current version of §2D1.1(b)(13). In distinguishing between a four-level enhancement and a two-level enhancement, the Commission adopted a standard of "willful blindness" or "conscious avoidance" that differs from the standard for knowledge. This interpretation may run counter to Supreme Court precedent that recognized that conscious avoidance and willful blindness are already the legal equivalent of knowledge. The Court has explained that "[m]any criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by

[74] U.S.S.C. Supp. to App. C, amend. 807 (2021), https://www.ussc.gov/guidelines/amendment/807.

deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances."[75] The Court went on to note "[t]he traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge . . . It is also said that persons who know enough to blind themselves to direct proof of critical facts *in effect have actual knowledge of those facts*."[76] Thus, eliminating the distinction between knowledge and willful blindness (or conscious avoidance) is consistent with the Supreme Court's views and the approach taken in courts across the country when considering conscious avoidance and knowledge.[77] Because conscious avoidance is simply an alternative method of proving knowledge, the method by which *mens rea* is proven should not result in a different guideline calculation.

While it is widely known that many fake pills contain fentanyl, with the *mens rea* requirement under Options Two and Three, prosecutors must prove that defendants have specific knowledge or reason to believe that the pills they are trafficking contain fentanyl.[78] The difficulty of establishing such knowledge, combined with a continued requirement that the defendant make misrepresentations or market the fentanyl as another substance, will make either Option Two or Option Three inapplicable in the vast majority of cases. Drug traffickers frequently use coded language that is purposely vague to describe the illegal substances that are the subject of their transactions. Prosecutors have reported that this coded language and the claim by defendants that they do not know that the specific pills they trafficked contain fentanyl can make it difficult to prove that defendants have the actual knowledge that they are trafficking fentanyl (as opposed to another controlled substance). As noted above, these options will again be inapplicable in cases involving the high-level traffickers who are profiting handsomely from producing and distributing dangerous fake pills.

3. The Department's Proposal

The Department believes that an alternative offense-based description of the enhancement that more accurately reflects the problem associated with fake fentanyl pills and similar substances is the most appropriate. The Department offers this alternative approach to

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[75] *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011).

[76] *Id.* (emphasis added).

[77] *See Ragbir v. United States,* 950 F.3d 54, 65 n.29 (3d Cir. 2020) ("*Global-Tech* did not promulgate a new test; rather, it stated already settled law."); *see also United States v. Mikaitis*, 33 F.4th 393, 398 (7th Cir. 2022) ("A properly worded, appropriately given ostrich instruction informs the jury that deliberate avoidance of knowledge is a form of knowledge at least functionally equivalent to actual knowledge."); *United States v. Valbrun*, 877 F.3d 440, 445 (1st Cir. 2017) ("The doctrine of willful blindness permits the government to prove scienter when a defendant deliberately shields himself from apparent evidence of criminality. In effect, the law treats persons who know enough to blind themselves to direct proof of critical facts as having actual knowledge of those facts.") (internal quotation omitted); *United States v. Clay*, 832 F.3d 1259, 1313 (11th Cir. 2016) (approving jury instruction that "[i]f a defendant's knowledge of a fact is an essential part of a crime, it is enough that the defendant was aware of a high probability that the fact existed and took deliberate action to avoid learning of the fact unless the defendant actually believed the fact did not exist").

[78] Demonstrating the defendant's knowledge that a substance contained fentanyl will often require unusual facts. *See United States v. Wiley*, 122 F.4th 725, 731 (8th Cir. 2024) (concluding the district court did not err in applying the enhancement when the defendant advertised his drugs without reference to fentanyl and established knowledge of the presence of fentanyl in the pills from his own overdose on similar pills).

appropriately address concerns raised by commenters and address harm and culpability. The Department's recommended alternative is below.

> "(13) If (A) the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels; or if (B) the offense involved an illicitly-manufactured substance that would appear, to a reasonable person, to be legitimately manufactured, or that the defendant represented or marketed as legitimately manufactured, but was in fact a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide), a fentanyl analogue, or a synthetic opioid, increase by 4 levels, unless the defendant establishes by a preponderance of the evidence that the defendant did not know, and had no reason to believe, that the substance contained fentanyl, a fentanyl analogue, or a synthetic opioid."

This alternative retains language in the current version of §2D1.1(b)(13) that provides an enhancement when a defendant affirmatively misrepresents or markets a substance as something other than fentanyl, but also provides for a four-level enhancement if the offense involved a substance that would appear to a reasonable person to be legitimately manufactured or that the defendant represented or marketed as legitimately manufactured, but was in fact another mixture or substance containing fentanyl, a fentanyl analogue[79], or a synthetic opioid.[80] This offense-based enhancement will address the significant problem presented by the sale of these fake pills—that an individual can unwittingly consume fentanyl because of the deceptive way that the pills are designed. It also allows the enhancement to apply in situations where a defendant does not make specific representations about the precise identity of the substance but provides general assurances that it is legitimately manufactured. The Department has added "synthetic opioid" to the enhancement to reflect the reality that many of these pills leading to overdoses contain more than one substance and that fentanyl is not the only synthetic opioid that is being illegally produced and trafficked. The Department noted this worrying trend during the last amendment cycle and requested that the Commission monitor the situation. Should the Commission determine that this enhancement is appropriately limited to fentanyl and fentanyl analogues at this time, we urge continued attention to synthetic opioids when considering future amendments.

In recognition that the offense-based enhancement proposed by the Department does not include a *mens rea*, it does include a rebuttable presumption. Although it is difficult for prosecutors to prove that the defendant had knowledge, facts establishing that the defendant lacked actual or constructive knowledge that the substance they were selling contained fentanyl, a fentanyl analogue, or a synthetic opioid are more appropriately established by the defendant.

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[79] Because the definition of "fentanyl analogue" in note (J) of the Drug Quantity Table includes any substance that is structurally similar to fentanyl, this definition would necessarily include fentanyl-related substances that have been scheduled as a class. *See* 21 C.F.R. § 1308.11(h)(30); U.S.S.G. §2D1.1(c) n.J.

[80] The Department recognizes that our proposal of a four-level increase for both forms of covered conduct differs from 2D1.1(b)(13)'s current tiered structure. If the Commission agrees that our proposal is substantively sound but prefers to retain a tiered structure, it would be possible to provide a four-level increase in our proposed subparagraph (A) and a two-level increase in subparagraph (B).

The enhancement would thus apply presumptively, but a defendant would be afforded the opportunity to rebut that presumption.

The Department's goal is to provide an enhancement that meaningfully accounts for the pernicious and dangerous conduct at issue and resolves ambiguity related to the application of this enhancement leading to appropriate broader use of this enhancement. Neither the options presented by the Commission nor the current enhancement adequately addresses the danger posed by criminal drug networks mass-producing fake pills that contain potentially lethal doses of fentanyl that can be consumed by an individual who may think they are taking a safe pharmaceutical. These unwitting consumers are often placed at higher risk of a drug poisoning or overdose death.

F. Machinegun Drug Trafficking Enhancement

The Department thanks the Commission for publishing proposed amendments to reflect the increased dangers of drug traffickers who possess machineguns or machinegun conversion devices. We appreciate the Commission's other amendments to address the emerging public safety threat posed by crimes involving machinegun conversion devices (MCDs) that we addressed in our February 3 letter and at the February 12 hearing. We similarly support amending the enhancement at §2D1.1(b)(1) to appropriately account for the extreme risk of serious violence when drug traffickers possess these deadly tools of the drug trade.

As the Commission explains, its proposal responds to concerns that the Guidelines in their current form fail to reflect the gravity of drug trafficking offenses involving machineguns. The problem arises because when a defendant is convicted of a drug trafficking offense and the offense also involves the possession of a firearm, §2D1.1 does not distinguish between offenders possessing a firearm with six bullets, a firearm with a large-capacity magazine loaded with 20 bullets, and a firearm with a large-capacity magazine loaded with 20 bullets and also equipped with an MCD. Rather, §2D1.1 simply provides a two-level increase for when a "dangerous weapon" (defined to include a firearm) is possessed in connection with a drug trafficking offense.[81]

The courts have repeatedly recognized the dangerousness of machineguns and their adverse impact on public safety.[82] MCDs only compound these concerns. As we noted in our February 3, 2025 letter, these devices, "which are easily manufactured,"[83] are designed to be inserted into semiautomatic firearms to convert that weapon into an illegal fully automatic machinegun.[84] By so doing, MCDs substantially increase a firearm's

[81] §2D1.1(b)(1). "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." §2D1.1 cmt. (n.1).

[82] *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) ("A modern machine gun can fire more than 1,000 rounds per minute, allowing a shooter to kill dozens of people within a matter of seconds. Short of bombs, missiles, and biochemical agents, we can conceive of few weapons that are more dangerous than machineguns.") (internal citations omitted).

[83] *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022).

[84] Subject to few exceptions, machineguns are illegal to possess. 18 U.S.C. § 922(o).

dangerousness. MCDs are cheap to make (often on a 3D-printer), easy to disguise, and difficult to regulate. As one court has explained, the added "dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it."[85] Federal law accordingly makes the possession of an unregistered MCD, even when not affixed to a firearm, a separate, stand-alone crime.[86]

Machineguns are among the deadliest "tools of the trade" employed by drug traffickers,[87] and machineguns used to support drug trafficking conspiracies have become more common in recent years. In a recent District of Columbia drug conspiracy prosecution, for example, defendants used AR-15 pistol machineguns to protect their open-air drug operation from rival gangs.[88] The use of machineguns, including MCDs, to support drug trafficking can be seen in communities as diverse as Seattle (where 12 individuals were indicted in October of 2024 on drug distribution and weapons charges in connection with a fentanyl-trafficking ring);[89] Anchorage (where a man was indicted in July 2024 for possessing with intent to distribute controlled substances and possessing a "ghost gun" that had been modified to be capable of fully automatic fire);[90] and West Columbia, South Carolina (where a December 2023 multi-agency takedown led to charges against 20 individuals, including members of the Bloods, Crips, and Gangster Disciple street gangs, and led to the seizure of several MCDs).[91]

Dangerous weapons enhancements appear in a significant percentage of drug trafficking cases. The Commission recently reported that the dangerous weapon enhancement was applied in 21.2 percent of all cases sentenced under §2D1.1 in fiscal year 2023, a total of 3,906 cases. A machinegun was involved in 148 of those cases. Machinegun cases represented 3.9 percent of the drug trafficking cases in which the

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[85] *Hixson*, 624 F. Supp. 3d at 940.

[86] *See* 18 U.S.C. § 922(o); 26 U.S.C. § 5861(d).

[87] *See United States v. Morales Velez*, 100 F.4th 334, 340-46 (1st Cir. 2024) (affirming upward variance to a sentence of twice the guideline range based upon the nature of machineguns and the amount and type of ammunition found with the gun in a case involving possession of a firearm in furtherance of a drug trafficking crime).

[88] U.S. Dep't of Justice, Press Release, *Senior Leaders of Violent Drug Gang Convicted of Drug Trafficking While Armed with Machine Guns* (September 16, 2024), at https://www.justice.gov/usao-dc/pr/senior-leaders-violent-drug-gang-convicted-drug-trafficking-while-armed-machine-guns.

[89] See WAW-USAO Press Release, Twelve Indicted in Connection with Violent Drug Trafficking Gang that Distributed Fentanyl in Seattle and Everett (October 31, 2024), available at https://www.justice.gov/usao-wdwa/pr/twelve-indicted-connection-violent-drug-trafficking-gang-distributed-fentanyl-seattle.

[90] *See* AK-USAO Press Release, *Anchorage Man Indicted for Trafficking Drugs, Possessing Fully Automatic "Ghost Gun"* (July 25, 2024), *available at* https://www.justice.gov/usao-ak/pr/anchorage-man-indicted-trafficking-drugs-possessing-fully-automatic-ghost-gun.

[91] *See* SC-USAO Press Release, *Multi-Agency Take Down Results in Numerous Firearms, Illegal Narcotics, and Conspiracy Charges* (December 15, 2023), *available at* https://www.justice.gov/usao-sc/pr/multi-agency-take-down-results-numerous-firearms-illegal-narcotics-and-conspiracy.

dangerous weapon specific offense characteristic was applied.[92]

The Commission has requested comment on several issues. For example, the Commission asks whether the changes set forth in Part D of the proposed amendment are appropriate in light of the fact that the proposed four-level enhancement for possession of a machinegun "does not require that the defendant possessed the weapon" and the enhancement should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."[93] The Department supports the proposed changes because, as noted above, the specific offense characteristic of a four-level enhancement recognizes that the possession of a machinegun by one or more participants in a drug trafficking crime dramatically increases the risk to public safety.

Courts regularly employ the fact-specific analysis required to ascertain whether a dangerous weapon was present during the drug trafficking offense and whether it is "clearly improbable" that the weapon related to the offense.[94] The same analysis is appropriate for the proposed tiered enhancement, based on whether the weapon possessed was a machinegun or some other dangerous weapon.

The Department appreciates the opportunity to provide input on additional changes that the Commission should consider in its evaluation of §2D1.1(b)(1). While the Department strongly supports the proposed enhancement for a machinegun, including MCDs, in §2D1.1(b)(1)(A), we believe that the Commission should consider the following additional changes:

§2D1.1(b)(1) should include enhancements for the number of firearms

Similar to the recommendation in our annual 2023 and 2024 letters to the Commission, the Department recommends that §2D1.1(b)(1) incorporate enhancements that account for the number of firearms possessed. It is unreasonable that a defendant who possesses three or more firearms in a drug trafficking case should receive the same enhancement as a defendant who possesses a single firearm. Section 2D1.1(b)(1) may also reach leaders, managers, and organizers who direct others to possess firearms but who, to insulate themselves from criminal liability, intentionally do not possess firearms themselves. In such situations, a defendant's sentence should properly reflect the number of firearms possessed by the members of the entire conspiracy, because the danger to the public increases when a drug trafficking organization possesses multiple firearms.

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[92] *See* United States Sentencing Commission Public Data Briefing Video Transcript (February 2025), at pgs. 6-7, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/transcript_2025-Drug-Offenses.pdf.

[93] Proposed Amendment, §2D1.1(b)(1).

[94] *See United States v. Graham*, 123 F.4th 1197, 1288-89 (11th Cir 2024) (trial testimony regarding a firearm observed during surveillance of a drug deal and a second firearms recovered adjacent to drugs supported application of the enhancement); *see also, e.g.*, *United States v. Zamudio*, 18 F.4th 557, 561-62 (7th Cir. 2021); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764-66 (5th Cir. 2008).

In our July 15, 2024, annual letter and in our recent February 3 letter, the Department requested that the Commission make cumulative, rather than applicable in the alternative, enhancements for adding a large capacity magazine and an MCD to a semiautomatic firearm.[95] We believe that making such a change would more fully address the dangers presented by MCDs, because when a defendant possesses an MCD it makes that defendant's conduct more threatening to public safety. Indeed, a defendant with an MCD-equipped firearm is more likely also to use a high-capacity magazine because the benefit of a high rate of fire would be diminished if used in conjunction with a standard capacity magazine. Difficult to control even for experienced users, machineguns and firearms with MCDs are unlikely to be used for hunting or sport. That too speaks in favor of a cumulative enhancement. For the reasons noted in our February 3 letter and during the February 12 hearing, we do not think that unaffixed and affixed MCDs should be treated differently.

To that end, and in accord with the Department's previous proposals,[96] the Department recommends that the Commission consider an enhancement for possession of quantities of firearms, such as three or more:

(b) Specific Offense Characteristics

(1) (apply the greater):

(A) If three or more firearms were possessed, a semiautomatic firearm capable of accepting a large capacity magazine was possessed, or ~~If~~ a firearm ~~machinegun~~ ~~(~~as described ~~defined~~ in 26 U.S.C. § 5845~~(b))~~ was possessed, increase by **4** levels;

(B) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

§2D1.1 should include an additional enhancement for all NFA firearms

The Department also recommends that the Commission consider incorporating all firearms as defined under the National Firearms Act (NFA) in the proposed four-point enhancement in §2D1.1(b)(1)(A). While incorporating machineguns (including MCDs) would be an improvement over the status quo, we are concerned that failing to incorporate all NFA firearms could lead to an unintended and incongruous result where a defendant whose offense involves the possession of other types of more dangerous weapons, such as pipe bombs, Molotov cocktails, or silencers, would receive a lower sentence than a similarly situated defendant whose offense involves the possession of a machinegun, because such weapons would be "firearms"

[95] *See* Scott A.C. Meisler, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 3 (July 15, 2024), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=129.

[96] *See* Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 10 (July 31, 2023), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=38.

under the Title 18 definition, and subject only to the two-point enhancement in the proposed §2D1.1(b)(1)(B). [97]

G. Expansion of the §5C1.2 Commentary

The Department does not support the proposed amendment to the Guidelines commentary to §5C1.2 regarding the safety valve. By specifically underscoring the use of written submissions to comply with the safety valve requirements, the proposed amendment will greatly incentivize their use. That outcome is problematic because, in our experience, such written submissions may be insufficient to demonstrate a defendant's truthfulness. The proposal is thus likely to result in additional sentencing disputes over the applicability of the safety valve.

Section 5C1.2 is premised upon the statutory language in 18 U.S.C. § 3553(f). To obtain relief from a mandatory minimum sentence, a defendant must satisfy five criteria. One key element of qualifying for the safety valve is that, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."[98] While the safety valve does not specifically state how a defendant can satisfy this obligation, personal debriefings are the most common way this is accomplished. As the First Circuit has stated, "[a]s a practical matter, a defendant who declines to offer himself for a debriefing takes a very dangerous course."[99] A defendant who relies upon a written submission "runs an obvious and profound risk: The government is perfectly free to point out the suspicious omissions at sentencing, and the district court is entitled to make a common sense judgment."[100]

A defendant bears the burden of proving that he has satisfied the safety valve factors and has an affirmative responsibility to disclose all relevant information truthfully.[101] Gauging whether a defendant's proffer is "complete and truthful" is often challenging under the best of circumstances. An in-person, face-to-face proffer is typically the most effective and efficient method to assess a defendant's truthfulness. A safety valve debriefing "is a situation that cries out for straight talk; equivocations, half-truths, and veiled allusions will not do."[102] The real-time back-and-forth directly with the defendant allows the prosecutor and case agent to assess the internal logic of the defendant's statements and how well the statements comport with the known evidence in the case. Follow-up questions are critical. And, oftentimes, proffers include

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[97] We recognize that the Commission is currently considering how to account for MCDs in §2K2.1 pursuant to the proposed amendments published on January 2, 2025. Depending on how the Commission proceeds with regard to affixed and unaffixed MCDs, large capacity magazines, and other issues raised in stakeholder comments and at the February 12 hearing, it may want to make similar adjustments in §2D1.1 here. We would welcome an opportunity to engage further with the Commission to discuss other potential options to provide for enhancements for situations where drug traffickers possess these particularly dangerous weapons.

[98] 18 U.S.C. § 3553(f)(1)(5); U.S.S.G. §5C1.2(a)(5).

[99] *United States v. Montanez*, 82 F.3d 520, 523 (1st Cir. 1996).

[100] *Id.*

[101] *United States v. Mancilla-Ibarra*, 947 F.3d 1343, 1350-51 (11th Cir. 2020).

[102] *United States v. Matos*, 328 F.3d 34, 39 (1st Cir. 2003).

reviewing pieces of evidence with the defendant, such as showing photographs of potential associates, playing audio or video, or reviewing the contents of a defendant's cell phone or social media. Through this real-time exchange, defendants often discuss individuals and events related to their drug network they would otherwise withhold. In addition, there is value in trained investigators being able to observe the defendant's body language and facial expressions, as those visual cues can spur follow-up questions or areas of inquiry. But written submissions, which may be curated by counsel, deprive the government of these opportunities to test the defendant's candor in a meaningful way. Moreover, even in in-person proffers, safety valve defendants are often loath to "name names" and specifically identify other wrongdoers and their contact information, at least initially. Defendants will be even less likely to be forthcoming when having to commit those names or phone numbers to writing, which will in turn only prompt further follow-up questions from the government.

Additionally, requiring defendants to confer directly with investigators further incentivizes truthfulness by providing an opportunity for the government to emphasize the importance of telling the truth. Making false statements to prosecutors and investigators can carry additional negative consequences for lying or minimizing, such as the loss of acceptance of responsibility credit,[103] an enhancement for obstruction of justice,[104] or a prosecution for making false statements.[105] A written submission, particularly one prepared and submitted by counsel, may have the unintended consequence of serving to insulate defendants from fully appreciating the importance of being truthful and complete in their statements, thus decreasing the likelihood that defendants will be as forthcoming as they would be in an in-person proffer.

The Department is sympathetic to the safety concerns of incarcerated defendants, including those who are perceived to be cooperators by dint of their being temporarily transported out of a pretrial detention facility. The proposed amendment, however, is not tailored to addressing that concern. Moreover, where a defendant faces such risks, prosecutors and defense counsel can—and frequently do—work together to craft tailored solutions to protect a particular defendant's safety. For example, because in-person safety-valve debriefings are not necessarily lengthy, the parties can conduct safety valve proffers on the same day a defendant is scheduled for court, conduct proffers at the pretrial detention facility, conduct proffers by video, or in some limited circumstances where the typical back-and-forth is unnecessary, conduct a carefully tailored proffer in writing.

Presently, §5C1.2 is silent as to means by which a safety valve proffer must take place—which is consistent with the language of 18 U.S.C. § 3553(f). By not singling out one mode of communication, the guideline permits the government full latitude to evaluate whether the defendant is being "complete and truthful," while at the same time affording the parties flexibility to address acute safety risks as they arise in individual cases. Similarly, it permits prosecutors and defense attorneys the ability to agree to accept written proffers in other unique or limited situations. The proposed amendment, by contrast, highlights and enshrines the written proffer method in the guideline's commentary for all cases, which will only incentivize efforts to

[103] §3E1.1, cmt. n.1(A).

[104] §3C1.1, cmt. n.4(G).

[105] 18 U.S.C. § 1001.

use that method and lead to the significant shortcomings outlined above, especially since it will be unlikely to satisfy the defendant's burden of demonstrating their eligibility for the safety valve in many cases. Adopting this language will encourage the submission of written proffers, which will often be inadequate, resulting in increased litigation over safety valve issues and failing to satisfy the statutory requirement of a truthful and complete statement. Accordingly, the Commission should decline to adopt the proposed amendment to the application notes to §5C1.2.

II. Supervised Release Amendments

The Commission proposes to amend guidelines and policy statements relating to a district court's decision to impose supervised release (Part A) and the court's response to violations of those terms (Part B). Supervised release serves several important societal needs, including protection of the public and rehabilitation of the defendant.[106] According to the 2023 Sentencing Commission Data File,[107] supervised release was ordered in 82.5 percent of all criminal cases in Fiscal Year 2023. The Commission's proposed amendments would change the current system by, among other things, placing procedural requirements on many steps of the supervised release process. The Department appreciates the Commission's attention to this important aspect of sentencing and the desire to ensure that supervised release is not reflexively imposed or revoked upon discovery of a violation. As discussed below, the Department has several concerns with these proposed amendments, many of which would add procedural requirements that may create confusion and unnecessary litigation and interfere with the ability of district courts to manage the supervised release process.

A. Part A (Imposition of Supervised Release)

1. General Discussion

One of the Commission's stated goals for the Part A amendment "is to provide courts greater discretion to impose a term of supervised release in the manner it determines is most appropriate based on an individualized assessment of the defendant."[108] In general, the Department does not oppose amendments that support and strengthen the sentencing discretion of district courts—or that underscore that supervised release should not be imposed mechanically and in all cases. The Department therefore does not oppose the Commission's proposal to eliminate the current language in §5D1.1(a)(2) requiring courts to impose a term of supervised release in certain situations. As referenced previously, however, the Department has concerns with several other aspects of these amendments.

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[106] *See, e.g., United States* v. *Johnson*, 529 U.S. 53, 59 (2000) ("Supervised release fulfills rehabilitative ends, distinct from those served by incarceration."); *United States v. Hamilton*, 986 F.3d 413, 418 (4th Cir. 2021) ("This system of supervised release serves several purposes as demonstrated by the selected sentencing factors that § 3583 mandates courts consider when setting the term and conditions of supervised release . . . Key among these are protection of the public . . . and rehabilitation of the defendant.").

[107] *2023 Sourcebook of Federal Sentencing Statistics*, Table 18, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf.

[108] Proposed Amendment, Supervised Release, at 3.

First, the proposed language in §5D1.1(b) would limit courts' discretion to impose supervised release while adding additional administrative burdens. The proposed amendment to §5D1.1(b) (concerning the imposition of a term of supervised release) would replace current guideline language that arises out of 18 U.S.C. § 3583. Section 3583(a) states that a court "may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." Similarly, §5D1.1(b) currently provides that a court "may order a term of supervised release to follow imprisonment." The proposed amendment, however, seems to place a greater restriction on the district court than required by statute by stating that "[w]hen a term of supervised release is not required by statute, the court should order a term of supervised release to follow imprisonment *when, and only when*, warranted by an individualized assessment of the need for supervision."[109] The proposed amendment includes individualized assessment language when courts decide what supervised release conditions to apply and how long a term of supervised release is appropriate;[110] whether to modify a defendant's supervised release conditions upon release from imprisonment;[111] whether to terminate a defendant's supervised release;[112] whether to extend a term of supervised release;[113] how to respond to an allegation of non-compliance;[114] whether to revoke a term of supervised release;[115] and whether to impose a revocation sentence concurrently or consecutively.[116]

These proposed amendments would create confusion within the courts and among litigants as they try to determine whether and to what extent this new language interacts with the statutory obligations in § 3583. Imposing this procedural requirement at every step of the supervised release process also may place form (the need to follow this particular approach) over substance (the court's evaluation of the § 3583(c) factors). It also may interfere with the district court's authority to manage its sentencing proceedings. We agree that, "[i]f terms of supervised release are too long, the [c]ourts already have the necessary discretion in many cases to set limits as they see fit, both at initial sentencing and at revocation."[117]

Second, we have reservations about the Commission's proposed amendments to §5D1.4 (concerning altering or terminating a term of supervised release). Those proposed amendments appear to add a new process and series of requirements to a statutory scheme that already

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[109] Proposed Amendment §5D1.1(b) (emphasis added). If the Commission chooses to retain this provision, we recommend that it alter the language to avoid placing a thumb on the scale against imposition of supervised release. In our view, more neutral wording would advise courts that, "[w]hen a term of supervised release is not required by statute, the court may order a term of supervised release to follow imprisonment when warranted by an individualized assessment of the need for supervision."

[110] Proposed Amendment, §5D1.2(a).

[111] *Id.*, §5D1.4(a).

[112] *Id.*, §5D1.4(b).

[113] *Id.*, §5D1.4(c).

[114] *Id.*, §7C1.3(a).

[115] *Id.*, §7C1.3(b).

[116] *Id.*, §7C1.4.

[117] Comments of John Marshall (Feb. 5, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/20250206_comment-prelim-jan.pdf.

provides courts with the authority to take these steps.[118] Section 3583(e) allows courts, working with probation officers and counsel, to evaluate defendants' circumstances and determine whether any changes need to be made to the term of supervised release. Through this process, courts and probation officers focus their time and resources on defendants who would benefit from modification or termination.

By contrast, the amendment "encourage[s]" courts to conduct a review of a defendant's supervised release conditions "as soon as practicable after the defendant's release from imprisonment."[119] Similarly, the amendment "encourage[s]" courts to consider whether to terminate a defendant's supervised release "upon the expiration of one year of supervision and periodically throughout the term of supervision thereafter."[120] It also says that courts "should" consider a list of non-exhaustive factors. Although we do not object to a court considering the types of factors listed in proposed §5D1.4(b),[121] it is not clear what problem these additional procedural steps are designed to address. These amendments also would encourage inefficiency by pushing courts and probation officers to review all defendants for possible modification and termination. As Judge Cote notes, "while individual judges may wish to conduct a re-assessment at the beginning of supervision of the conditions of supervised release they imposed at sentencing, it infringes on judicial discretion in case management to add the re-assessment recommendation as a policy statement to the Guidelines"[122] There also is a risk that these steps will create confusion and interfere with existing court and probation processes. For these reasons, we urge the Commission to rely on the existing statutes rather than add additional procedural requirements, including the requirements discussed in Issue for Comment Seven.[123]

We oppose the removal of the recommendation in §5D1.2(b)(2) to impose the maximum term of supervised release for people convicted of sex offenses. In general, we believe that requiring a defined and lengthy period of supervised release for this universe of offenders will help reduce recidivism, benefit offender rehabilitation, and protect children and other victims from abuse. Notably, the Commission does not appear to offer a specific reason why this requirement should be removed. This recommendation has been part of the Guidelines since 2001, tracks the statute, and is consistent with the Commission's recent amendments.[124] A longer period of supervised release for an offender with this offense conduct appropriately provides more rehabilitation and assists in protecting the members of the community. We

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[118] *See* 18 U.S.C. § 3583(e).

[119] Proposed Amendment, §5D1.4(a).

[120] *Id.*, §5D1.4(b).

[121] *See id.*, Issue for Comment Three.

[122] Comments of District Judge Denise Cote (Jan. 24, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/20250206_comment-prelim-jan.pdf.

[123] In response to Issue for Comment Six, the Department does not object to including completion of a reentry program as a factor for a court to consider when determining whether to terminate a defendant's supervised release.

[124] We recognize that the Commission's recent amendments raising penalties for sexual abuse of a ward (Amendment 816) and recalibrating the sex offense definition in §4C1.1(b)(2) (Amendment 830) affect sentencing and punishment, which serves different functions than supervised release. But these changes also recognize the special nature of sex offenses and that sex offenders may require different supervision and rehabilitation.

similarly oppose removing the current supervised release guidance for violations of 18 U.S.C. § 2332b(g)(5)(B) (acts of terrorism transcending national boundaries) that resulted in, or created a foreseeable risk of, death or serious bodily injury to another.

2. Issues For Comment Not Addressed Previously

With respect to Issue for Comment One, which discusses whether and how to provide courts with discretion and guidance, as noted previously, the Department is generally opposed to imposing additional procedural requirements on the supervised release process.

In answer to Issue for Comment Two, which addresses whether to impose supervised release for defendants who are likely to be deported, the Guidelines currently discourage courts from imposing a term of supervised release when such a term is not required by statute and the defendant "is a deportable alien who likely will be deported after imprisonment."[125] It is not clear how useful additional language would be for district courts. In cases where a term of supervised release is not required by statute, courts have the discretion to determine, consistent with § 3583, whether to impose supervised release.

In response to Issue for Comment Four, which addresses the interplay between supervised release and the First Step Act, we generally would prefer an inmate who is eligible to earn First Step Act (FSA) time credits to have a term of supervised release so that the Bureau of Prisons (BOP) may use its statutory discretion to apply up to one year of credits toward early supervised release. For those inmates who do not have a supervised release term to follow their confinement, BOP is required by the FSA to apply their credits to prerelease custody—that is, to a Residential Reentry Center (RRC) or home confinement. Depending on how many credits those inmates have accrued, the community placement could last for many months or even years.

In addition to using limited bedspace in RRCs for FSA-eligible inmates, the BOP is required by 18 U.S.C. § 3624(c)(1) to ensure, to the extent practicable, that an inmate spends up to 12 months "under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." Many of these inmates who are not FSA-eligible are completing lengthy sentences and require the full 12 months to help them achieve successful reentry into the community. When RRC beds are occupied for an extensive time by low- or minimum-recidivism risk inmates who have earned FSA time credits (but do not have a term of supervised release), they limit the opportunities for those inmates who are more likely to need the full benefit of community placements.

In response to Issue for Comment Five, which addresses the conditions of supervised release, the Department prefers the terms currently used in the guidelines (standard and special conditions). Although we understand the Commission's desire to provide district courts with greater discretion, there is value in making changes in an incremental fashion.

In answer to Issue for Comment Seven, which addresses guidance for termination decisions, we do not believe that the new policy statement should include additional guidance on the procedures to use when deciding whether to terminate a term of supervised release.

[125] §5D1.1(c).

Section 3583(e)(1) provides that a court may terminate a term of supervised release "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." Federal Rule of Criminal Procedure 32.1(c), in turn, generally provides for a hearing, subject to certain specific exceptions, including if "the relief sought is favorable to the person and does not extend the term of probation or of supervised release."[126] Taken together, the statute and rule provide the court with the guidance necessary in deciding whether to terminate supervised release.

B. Part B (Revocation of Supervised Release)

1. General Discussion

Consistent with our prior comments, the Department appreciates the need for district courts to have the discretion to manage their supervised release dockets. For example, the Southern District of New York has developed a court-involved supervised release program that helps defendants complete their terms of supervision successfully.[127] The Eastern District of Pennsylvania,[128] along with other districts,[129] also have developed reentry programs. Districts and district courts should have the flexibility to devise solutions to achieve similar ends and to identify ways to respond when defendants violate their terms of supervised release.

For many of the same reasons discussed previously, we are concerned that some of the amendments in Part B (dealing with the revocation of supervised release) do not appropriately channel district courts' discretion in this area. For example, the amendment proposes to add the following to the introductory language regarding supervised release violations:

> Because supervised release is intended to promote rehabilitation and ease the defendant's transition back into the community, the Commission encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety.[130]

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[126] Fed. R. Crim. P. 32.1(c)(2)(B).

[127] Comments of Senior District Judge Richard M. Berman (Jan. 29, 2025) (including a report entitled Court Involved Supervised Release (June 10, 2024)), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/20250206_comment-prelim-jan.pdf.

[128] Eastern District of Pennsylvania Reentry Court, https://www.paed.uscourts.gov/reentry-court.

[129] *Problem-Solving Courts*, https://www.ussc.gov/education/problem-solving-court-resources (including a map of reentry programs).

[130] Proposed Amendment at 41.

As noted previously, supervised release is designed to, among other things, rehabilitate the defendant *and* protect the public.[131] As the Seventh Circuit has noted, "Congress told courts to consider various factors, including the nature and circumstances of a violation and the corresponding need to protect the public, before choosing a sentence."[132] Courts are well-equipped to consider alternatives to incarceration, and § 3583(e) empowers courts to, among other things, modify supervised release conditions, extend a term of supervised release, and revoke supervised release. Judges have used these tools effectively to distinguish between violations of supervised release that warrant imprisonment and those that do not. For example, the judiciary published research in 2022 showing that "revocations for technical violations had relatively negligible impacts on federal prison populations."[133] The above encouragement for courts to take interim steps before revocation does not sufficiently take into account the need to protect the public and the other factors cross-referenced in § 3583(e). It also interferes with the district court's authority to fashion an appropriate sentence.

We also have several concerns with how proposed §7C1.3 would create a new framework for responding to violations of supervised release. First, the amendment requires a court to "conduct an individualized assessment" to decide what steps to take when it "receiv[es] an allegation that the defendant is in non-compliance." This language places a procedural obligation on the court but does not carefully define what constitutes an "allegation that the defendant is in non-compliance." For example, it does not explain in what form the allegation should take (whether through a motion or through something less formal) and does not expressly state who should make the allegation. To the extent the amendment is designed to address the perception that courts reflexively impose revocation, it is not clear that this is occurring. It also is not clear that these procedural steps are an appropriately tailored solution. Rather than create an entirely new policy statement, we would prefer that the Commission make tailored amendments (if any are justified) to the existing §7B1.3.

The proposed §7C1.3 provides two options: requiring revocation only if a statute requires it (Option One) or requiring revocations for statutory violations or a Grade A or B violation (Option Two). If the Commission is inclined to adopt this new proposed §7C1.3, we strongly prefer Option Two, as this would retain some of the elements of the previous policy statement. It also would continue to distinguish criminal conduct based on seriousness.

The proposed §7C1.4 (revocation of supervised release) shortens the text of the policy statement and also provides two options. Under Option One, a court should conduct an individualized assessment to decide the length of imprisonment and whether the sentence should be served concurrently, partially concurrently, or consecutively. Option Two requires the same individualized assessment but states that any term of imprisonment "should" be consecutive to any other sentence of imprisonment. If the Commission is going to make these larger

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[131] *Hamilton*, 986 F.3d at 418; *see also* 18 U.S.C. § 3583(c) (cross-referencing, among others, 18 U.S.C. § 3553(a)(2)(C)).

[132] *United States v. Dawson*, 980 F.3d 1156, 1164 (7th Cir. 2020).

[133] *Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes* (June 14, 2022), https://www.uscourts.gov/data-news/judiciary-news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes.

amendments, we prefer Option Two, as it continues to recognize how violating a term of supervised release is separate from any underlying criminal conduct.

Indeed, one goal of supervised release is to encourage defendants, as part of their rehabilitation efforts, to follow rules, including the rules and conditions imposed by the court as part of its sentence. Imposing a consecutive sentence for a supervised release violation supports this goal. As Senior United States Probation Officer Whitver states, "The impact of certain and proportional judicial responses cannot be overstated—when individuals understand that violations will lead to immediate and predictable sanctions, they are far more likely to take their supervision seriously and commit to real change."[134] Without such a consecutive sentence, the punishment for the defendant's behavior will depend on the views of another court and potentially from a different criminal justice system.[135] As Senior Officer Whitver warns, the "lack of enforcement will simply embolden individuals under supervision to disregard their conditions, knowing there are few real consequences. I fear the result will reduce federal probation to a meaningless bureaucratic process, rather than a tool for rehabilitation and accountability."[136]

2. Issues For Comment Not Addressed Previously

Issues for Comment One(a)-(c) address the balance between providing courts more discretion to address a defendant's non-compliance on supervised release while also providing sufficient guidance. With respect to Issues for Comment One(a) and One(c), as discussed previously, we believe that focusing on the language of § 3583 provides the courts with information needed to tailor responses to violations of supervised release. We take no position on Issue One(b), which addresses whether to include instructions on violations related to community confinement conditions in the commentary to the new guideline §7C1.4.

Issue for Comment Two concerns the proposed amendments to §7C1.3. As discussed previously, the Guidelines should continue to tie revocation to the grade of the violation. Grade A and B violations are serious—they may involve crimes of violence, dangerous weapons, controlled substances, and/or lengthy sentences.[137] Engaging in such behavior amounts to a serious violation of judicially imposed conditions of release and warrants revocation.

Issue for Comment Three asks whether the Commission should replace the supervised release revocation table "with guidance indicating that courts abide by the statutory limits regarding maximum and minimum terms." We recommend that the Commission retain the

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[134] Comments of Senior United States Probation Officer Chris K. Whitver, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/20250206_comment-prelim-jan.pdf.

[135] We appreciate that the proposed supervised release amendments seek to move away from the "breach of trust" view of supervised release. *See* Proposed Introduction to Chapter 7, *Updating the Approach*. Even under the proposed new approach, however, encouraging defendants to follow the court's rules and conditions remains an important goal. *Id.* ("These changes are intended to better allocate taxpayer dollars and probation resources, encourage compliance and improve public safety, and facilitate the reentry and rehabilitation of defendants.").

[136] Comments of Senior United States Probation Officer Chris K. Whitver.

[137] §7B1.1(a).

supervised release revocation table. Although we appreciate the Commission's desire to provide district courts with greater discretion, eliminating the table risks creating greater sentencing disparities.

Issue for Comment Four seeks comment on "whether and how a retained Supervised Release Revocation Table should make recommendations to courts regarding their consideration of criminal history." Relatedly, Issue for Comment Six asks whether a defendant's criminal history score should be recalculated at revocation proceedings. We do not believe that the district court should attempt to recalculate a defendant's criminal history score as part of the revocation proceeding. The focus at a revocation hearing should be on the original judgment and the defendant's non-compliance with conditions imposed by the court. Attempting to recalculate a defendant's criminal history score will introduce additional procedural uncertainty and will overly complicate what should be a relatively simple proceeding. To the extent a defendant's criminal history score has meaningfully changed since the time of the original sentencing, the district court can consider that information as part of its § 3583(e) analysis.

Issue for Comment Five addresses whether the Commission "should issue more specific guidance on the appropriate response to Grade D violations." There appears to be considerable overlap between the proposed punishment ranges of Grades C and D. For example, a Grade D violation with a Criminal History Category of II would carry a 2-8 month range, while a similar Grade C violation would have a 4-10 month range. We are not certain that this additional grade is necessary, especially since district judges are capable of making distinctions between the proposed Grades C and D as part of the § 3583(e) analysis. But if the Commission does include separate ranges for Grade D violations, we see no need to further channel the court's exercise of discretion through language suggesting that revocation "is not ordinarily appropriate" for such violations or tying revocation to multiple violations.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on these and other issues throughout the amendment year.

Sincerely,

Scott Meisler

Scott Meisler, Deputy Chief, Appellate Section,
Criminal Division
U.S. Department of Justice
Ex Officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

801 I Street, 3rd Floor
Sacramento, California 95814

Chair: Heather Williams [redacted]

March 3, 2025

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on 2025 Proposed Amendments

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our views on the Sentencing Commission's second set of proposed 2025 amendments, which are enclosed with this letter:

Proposal 1: Supervised release

Proposal 2: Drug offenses

We appreciate the Commission considering our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Defender
Chair, Federal Defender Sentencing Guidelines Committee

cc (w/encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Scott A.C. Meisler, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Federal Public and Community Defenders
Comment on Supervised Release

(Proposal 1)

March 3, 2025

Table of Contents

Defenders welcome both parts of the Commission's Proposed Amendment on Supervised Release. At the sentencing stage, by urging courts to make careful, individualized assessments as to whether to impose supervision and for how long, which conditions to require, and when to terminate supervision early, Part A reflects that Congress never intended lengthy terms of often-intensive supervision for everyone transitioning out of prison. At the supervision stage, by encouraging courts to consider interim steps and offering more moderate options to address non-compliance, as well as recalibrating the sentencing table for technical violations, Part B recognizes that Congress designed supervised release to further rehabilitative, not punitive, ends. In other words, this amendment reinforces the law and legislative intent, offering helpful guidance along the way. This is important because, in our experience, the law is not closely observed in many courtrooms across the country.

As this proposal acknowledges, Congress crafted supervised release to help ease returning individuals' transition back into their communities and to provide rehabilitation to those who need it. But not everyone needs this support. Some return home to loving family, caring communities, solid job prospects, and have benefitted from programming and other resources in the BOP that obviate the need for supervision upon release. On the other end of the spectrum are those who lack a support network, resources, or job skills, or who suffer mental illness, including substance use disorder. Yet, today, the vast majority of those convicted of a federal crime are sentenced to a term of supervised release following prison, even when not required by statute. Supervising the former group diverts scarce resources from the latter group. And stakeholders have long lamented that far from providing rehabilitation, supervised release has devolved into a means of expedient reimprisonment, often for minor and technical violations.[1]

But the story need not be so bleak. Supervision could be reformed to "focus on income support, healthcare, and employment programs, all of which

[1] Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 Va. L. Rev. Online 297, 325 (2022) ("The current supervised release system offers prosecutors and courts . . . an expedient route to imprisonment that avoids the inconveniences of obtaining an indictment, affording the right to jury trial, and proving guilt beyond a reasonable doubt."); *see infra* n.10.

effectively divert people from crime."[2] We all would benefit from a supervision system that promotes community reintegration and rehabilitation. Effective rehabilitation deters future crime and improves public safety, while over-supervision often leads to reincarceration, which, even for short periods, can have a criminogenic effect. That is why this amendment is critical. It is not an attack on probation officers, or on the supervised release system, wholesale. Quite the opposite. It would help the system function more effectively, efficiently, and fairly by reserving limited probation resources for those who truly need them, and it would reduce reincarceration rates without threatening public safety at a time when the Bureau of Prisons faces crisis-level overcapacity and understaffing problems.[3]

In Defenders' view, if the least restrictive version of this amendment were enacted as written, there would be a net positive impact, in many districts, on individuals leaving custody and their communities. That said, below we offer refinements that would more effectively serve the Commission's intent to provide courts greater discretion and promote rehabilitation. Many of our suggestions are contemplated by various "Issues for Comment" (IFCs), and merely build upon the strong foundation already embodied in the language of this amendment.

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[2] David J. Harding, Bruce Western & Jasmin A. Sandelson, *From Supervision to Opportunity: Reimagining Probation and Parole*, 701 ANNALS of the Am. Acad. of Pol. & Soc. Sci. 8, 17 (2022); *see also* DOJ, Report on Resources and Demographic Data for Individuals on Federal Probation and Supervised Release 8 (2023) ("In addition to medical, psychiatric, or psychological treatment that might be required by a district court, U.S. Probation and Pretrial Services also attempts to address other criminogenic needs, including deficits in educational, vocational, and employment skills. In FY22, U.S. Probation and Pretrial Services spent approximately $10,000 on education resources, $117,000 on employment resources, and nearly $700,000 on resources related to life skills."). Since January 20, 2025, a significant number of Executive branch documents have been removed from agency websites. As of this comment's filings, the documents cited herein were available online. Defenders maintain copies of the documents in case they become unavailable and are needed by the Commission or its staff.

[3] *See* Defenders' Comments on the USSC's 2025 Proposed Drug Amendments I.B. (March 3, 2025) (discussing crises in federal Bureau of Prisons and Commission's statutory mandate to formulate guidelines to address same).

I. PART A: Chapter Five, Part D

We applaud the Commission's efforts to move courts away from reflexively giving people long supervised release terms with little hope for early termination, and toward thoughtfully assessing (and reassessing) individualized needs, as envisioned by Congress.[4] In particular, the proposed new §5D "Introductory Commentary" provides crucial grounding for the portion of the sentencing hearing that's too often given short shrift by judges and attorneys alike. By setting forth the relevant legal framework, this commentary reminds courts that the law *requires* an individualized determination of need before imposing supervised release, and that the system serves rehabilitative aims distinct from the goals of incarceration.[5]

Given how routinely judges mete out lengthy supervised release terms, mechanistically imposing long (often identical) lists of restrictive "standard" conditions, the people we represent often confuse supervised release with probation and parole—types of punishment.[6] But as the proposed amendment observes, supervised release is neither probation nor parole. Congress chose to exclude punishment-oriented factors from the list of criteria to consider to impose supervised release.[7] Although its scope has

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[4] *See* 18 U.S.C. § 3583(a) ("The court . . . *may* include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment . . . ." (emphasis added)); S. Rep. No. 98-225 at 123 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3307 (emphasizing that placement on supervision following imprisonment "is dependent on whether the judge concludes [the individual] needs supervision").

[5] *See* 18 U.S.C. §§ 3583(c); 3553(a) (requiring the sentence, including the term of supervised release, to be sufficient without being greater than necessary).

[6] *See* Liman Center, *Collecting Conditions: A Release Snapshot of Conditions District Connecticut* 10–12 (2025) (examining individuals given supervised release in the District of Connecticut and finding for each of them, "judges imposed the District of Connecticut's entire list of standard conditions" and that "[f]or many of the most common types of conditions—including treatment and search conditions—we observed nearly identical condition language for most defendants") (on file with author).

[7] *See* 18 U.S.C. § 3583(c) (excluding the need to reflect offense seriousness, promote respect for the law, and provide "just punishment"); *see also* S. Rep. No. 98-225 at 124, 1984 U.S.C.C.A.N. at 3307 ("The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a

expanded over time to include more penalties for violations,[8] Congress' original and overarching goal was to design a supervised release system that helped ease a person's "transition into the community after the service of a long prison term" or "provide rehabilitation to a [person] who has spent a fairly short period in prison . . . but still needs supervision and training programs after release."[9]

For many people struggling to get their lives back on track after a period of incarceration, supervised release too often provides a trapdoor back into custody, instead of the tools they need to rebuild.[10] For others, who do

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term of supervised release . . . ."); *United States v. Granderson*, 511 U.S. 39, 50 (1994) ("Supervised release, in contrast to probation, is not a punishment in lieu of incarceration.").

[8] Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 999–1000 (2013) (explaining originally the "SRA allowed judges to treat a violation of the conditions of supervised release as a criminal contempt" but flagging that "[e]ven before the SRA went into effect in 1987, however, Congress added a revocation mechanism."); *see also* Jacob Schuman, *Supervised Release Is Not Parole*, 53 Loy. L.A. L. Rev. 587, 604–05 (2020) (explaining SRA did not originally contemplate that a minor supervised release violation should result in resentencing, and outlining how that changed over time).

[9] *See* S. Rep. No. 98-225 at 124 (1983); *see also Tapia v. United States*, 564 U.S. 319, 326 (2011) ("For example, a court may not take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release."); *Johnson v. United States*, 529 U.S. 694, 708–09 (2000) ("The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty.").

[10] Stefan R. Underhill, J., *Supervised Release Needs Rehabilitation*, 10 Va. J. Crim. L. 1, 3 (2024) ("Unfortunately, supervised release quickly became a means to ease the defendant's transition from the community back to prison. Indeed, over the past decade, revocations of supervised release have sent an estimated 100,000 or more former federal prisoners back to prison, principally for technical violations rather than for true recidivism."); Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 Fed. Sent. R. 204, 204 (1994) ("What was originally designed to assist re-integration into the community is instead facilitating reincarceration. Supervised release is set up so that a releasee is almost certain to do something that can be taken as a violation of some condition of release. Violations will become virtually universal unless probation officers and judges interpret release conditions liberally and even overlook some violations."); *United States v. Trotter*, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018) ("Violating a condition of supervised release can lead to—and in instances must lead to—additional incarceration. This situation can trap some defendants, particularly

not face the same struggles, supervised release is a needless intrusion on their lives and liberty. Part A, with its "individualized assessment of need" standard, would help ameliorate these problems. Courts are experts at applying the factors outlined in § 3583(c), which mirror (except for those focused on punishment) the § 3553(a) factors they know well. On balance, we believe Part A provides sufficient guidance and discretion to judges to impose supervised release to meet rehabilitative, not punitive, ends.

Below we discuss each §5D1 subsection in turn, explaining why these improvements are essential. We suggest alterations—including adding and removing some language—in keeping with the spirit of the amendment, but that would, in our view, better effectuate the statutory goals of reintegration, rehabilitation, deterrence, and community safety.

A. §5D1.1: It makes sense to impose terms of supervision only when required by statute or when warranted by an individualized assessment of need.

Defenders support the proposed changes to §5D1.1. Congress wanted to avoid wasting resources "on supervisory services for releasees who do not need them."[11] Yet in fiscal year 2023, 89% of people sentenced to prison were also sentenced to a term of supervised release.[12] And out of these individuals, only 28% were required by statute to be sentenced to some period of supervision, with over half being recommended by the Manual, while 21% of those terms were required by neither statute nor the Manual.[13] This is not only a burden on individuals who do not benefit from post-release supervision

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substances abusers, in a cycle where they oscillate between supervised release and prison.").

[11] S. Rep. No. 98-225, at 56–57, 1983 U.S.C.C.A.N. 3182, 3239–40; *see also Johnson*, 529 U.S. at 701 ("Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it. . . . Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most.").

[12] The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2023. The Commission's "Individual Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, Commission Datafiles.

[13] USSC, FY 2023 Individual Datafiles.

(and are not required by law to receive it), it also taxes limited court and probation resources as well.[14] The more strain on these scant, and in some places almost-non-existent, resources,[15] the less likely that individuals who truly need them will receive them. Of course, without rehabilitative capabilities, the function of post-release supervision becomes principally enforcement-oriented, that is, to monitor and control.[16] In this atmosphere, the revolving door of supervision, violation, reincarceration, and more supervision continues unabated, offering little in the way of increased public safety.[17]

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[14] One-Pager, Office of Sen. Chris Coons, Safer Supervision Act (last visited Mar. 1, 2025) ("[S]upervised release is now imposed in virtually every case, leading to a significantly overburdened system in which probation officers report that they are unable to provide supervisees with the close supervision that high-risk individuals need to reintegrate into society."); *see also* Harding, et al., at 15 (discussing the strain on supervision officers with high caseloads who are often left with "little time to do more than administer a drug test, check pay stubs and residential addresses, inquire about compliance with conditions, and collect supervision fees"); Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. St. Thomas L. J. 521, 522 (2006) ("Squandering our scarce correctional treatment program resources on low-risk [individuals] that do not need them is a waste of those resources.").

[15] DOJ Report on Resources, at 8 (documenting that nationally, the USPO spends only $10,000 on "education resources" and $117,000 on "employment resources," two of the rehabilitative services most needed by returning individuals).

[16] *See* Joseph A. DaGrossa, Dissertation, The Incapacitation and Specific Deterrent Effects of Responses to Technical Non-Compliance of Offenders Under Supervision: Analysis From a Sample of Federal Judicial Districts, at 149 (2018) (noting that supervision, as it currently exists, bears little resemblance to its historical mission of aiding individuals' adjustment to the community, focusing instead on "frequent drug testing, the administration of polygraph tests, and increased searches of [individuals'] person and residence" (citing Todd R. Clear & Natasha A. Frost, The Punishment Imperative 122 (2014))); *see generally* James Bonta et al., *Exploring the Black Box of Community Supervision*, 47 J. Offender Rehab. 248 (2008) (conducting a detailed examination of taped interviews between probation officers and their supervisees and concluding that probation officers spent too much time on the enforcement aspect of supervision and not enough time on the service delivery aspect).

[17] *See* Evangeline Lopoo et al., *How Little Supervision Can We Have?*, 6 Ann. Rev. of Criminol. 23, 37 (2023) ("[O]ur findings suggest that more probation and parole are associated with increased incarceration and fail to reduce crime . . . .");

To fix this, Part A removes the recommendation that supervised release be imposed whenever a sentence of more than one year is imposed. Instead, courts would be guided to use their discretion to impose supervision only when required by statute, or when (and only when) warranted by an individual's needs. The proposed language better tracks § 3583(c) because not everyone sentenced to more than one year in prison will need a term of supervised release under the factors listed there.[18] Additionally, we support encouraging courts to state on the record the reasons for imposing supervised release. Not only would this allow sentencing courts to consider the salient statutory factors more fully, but it would create a helpful record for decisionmakers down the road.

In response to IFC 1(b), Defenders do not believe there is added value in retaining the commentary in §5D1.1 directing courts to pay particular attention to criminal history or substance use. These factors are already incorporated into the individualized assessment, which includes the history and characteristics of the individual, and therefore they are unnecessary to highlight in isolation.

In response to IFC 2, with respect to noncitizens subject to removal from the country, Defenders urge the Commission to more forcefully discourage the imposition of supervised release by removing the last sentence of Application Note 5 that states supervision is appropriate "if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case." In its place, the Commission should add the language from this IFC: "Imposition of a term of supervised release in such cases may be excessive and may divert resources that would be better devoted elsewhere."

In 2011, the Commission recognized that the high proportion of noncitizens convicted in the federal system, combined with the high

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Harvard Kennedy School Malcolm Wiener Center, *Statement on the Future of Community Corrections* (May 17, 2018) (explaining that "[n]umerous jurisdictions have reduced the number of people on probation and parole and have instead focused supervision on those most in need of it and only for the time period they require supervision without negatively impacting public safety").

[18] We note that an additional administrative benefit: the fewer terms of supervised release imposed by a court on the front end, the fewer modification, early termination, or revocation proceedings the court must deal with on the back end.

likelihood of removal after completion of their sentence, meant that imposing supervision on this group is generally unnecessary.[19] This remains true today, as these individuals will "face prosecution for a new offense under the federal immigration laws if they were to return illegally to the United States."[20] Yet §5D1.1(c)'s guidance is apparently inadequate: out of the noncitizens sentenced in fiscal year 2023 who received a term of imprisonment, 72% received terms of supervised release to follow.[21] In our experience, courts are relying on the last sentence of Application Note 5 as a reason to impose supervised release. However, as Application Note 5 also recognizes, if the potential for a new federal prosecution will not deter this group, a potential revocation sanction is even less likely to do so.[22]

Finally, in response to IFC 4 on the impact of the amendment on an individual's eligibility to benefit from First Step Act earned time credits, Defenders request that the Commission add language to the commentary of §5D1.1(a) stating that courts should consider the imposition of a nominal term of supervised release for people who do not otherwise require post-incarceration supervision in order to incentivize their participation in recidivism-reduction programming and productive activities in prison.

The First Step Act of 2018 created a time credit system to reduce recidivism and promote rehabilitation.[23] Under this system, eligible individuals participate in evidence-based recidivism reduction programming or productive activities to earn time credits for early transfer to prerelease

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[19] USSG, App. C, Amend. 756, Reason for Amendment (2011).

[20] *Id.*

[21] USSC, FY 2023 Individual Datafiles.

[22] Thomas Nosewicz, *Watching Ghosts: Supervised Release of Deportable Defendants*, 14 Berkeley J. Crim. L. 105, 121 (2009) ("[W]hen someone ostensibly serving a term of supervised release is deported, the supervision becomes 'an empty gesture.'" (quotation and citation omitted)). Supervised release in these cases also becomes a costly endeavor: frequently a non-citizen returning after removal is arrested in a different district than imposed the supervised release term. He then faces the unlawful reentry prosecution in the arresting district, after which he is removed to the first sentencing district for a quick revocation, adding extra, unnecessary costs to the system.

[23] First Step Act of 2018, Pub. L. 115—391, § 3632(d)(4), 132 Stat. 5194, 5198.

custody or supervised release.[24] People may receive the early transfer to supervised release benefit only if "the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to [§ 3583]."[25] If "a term" of supervised release is required, the BOP can transfer the individual "to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits" under the statute.[26]

In light of this condition, and to ensure the full benefits of the First Step Act are realized, Defenders recommend the Commission add the following language to the Commentary of §5D1.1(a):

> **Nominal term of supervision to allow early transfer under First Step Act:** To realize the full benefits of the First Step Act, and to reduce recidivism, support rehabilitation, and protect the public, a nominal term of supervised release may be appropriate in some instances. The First Step Act of 2018, Pub. L. 115—391, created a time credit system that incentivizes individuals in custody to take programming designed to reduce recidivism and promote rehabilitation. Eligible individuals who successfully participate in evidence-based recidivism reduction programming or productive activities can earn time credits that "shall" apply "toward time in prerelease custody of supervised release." *See* 18 U.S.C. § 3632(d)(4)(C). A nominal term of supervised release would ensure that a person who earns credits as a result of successful participation can apply those credits towards a term of supervised release, not to exceed 12 months. *See* 18 U.S.C. § 3624(g)(3).

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[24] *See* 18 U.S.C. § 3632(d)(4)(C).

[25] 18 U.S.C. § 3624(g)(3).

[26] *Id.*

We believe this language would guard against unintentional unwarranted disparity resulting from people who fall in low-risk categories (and thus not given any supervision based on an individualized assessment) being held in custody up to 12 months longer than people given a term of supervision.

B. §5D1.2: The proposal rightly removes minimum supervised release term lengths, giving courts discretion to impose an appropriate term, which can be modified later, if needed.

Continuing with the theme of individualization, the proposed §5D1.2 would give judges more discretion to impose the supervised release term length they see fit, not to exceed the relevant statutory maximum. Not only is this sound policy, but the Guideline's current language, phrased in mandatory terms, also contravenes *Booker*—an independent reason to jettison that language.[27] The proposal then recommends courts state on the record the reasons for the length imposed, which would aid appellate review as well as later decisions at the district level to determine whether to modify, extend, or terminate supervision early. Defenders support these improvements.

Supervision terms are too long, on average.[28] And in Defenders' experience, judges are hesitant to vary from the supervised release guideline ranges, perhaps because this portion of the sentencing hearing has become so rote. On balance, shorter supervised release terms will make sense in many cases.[29] Unnecessarily long terms, combined with numerous and onerous

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[27] *See United States v. Booker*, 543 U.S. 220 (2005) (rendering the Guidelines advisory).

[28] In fiscal year 2023, individuals who received prison and supervised release terms, on average, received 62 months in prison, followed by 47 months supervision. USSC, FY 2023 Individual Datafiles.

[29] *See* Lopoo et al., at 37 (2023) (discussing incremental reforms such as "shortening supervision terms to no more than 18 months or two years with allowance of earned-time credit to further shorten them"); Malcolm Wiener Center (recommending "[r]educing lengths of stay under community supervision to only as long as necessary to accomplish the goals of sentencing").

conditions, increase reincarceration rates for violations,[30] which can threaten, rather than promote, public safety.[31] And as the Commission has recognized, individuals who violate their conditions of supervision typically do so within the first two years.[32] If a court determines these early struggles warrant

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[30] Underhill, *Supervised Release Needs Rehabilitation*, at 9 ("The purposes of [the Guidelines' supervised release] conditions are varied, but the effect is consistently to facilitate the reimprisonment of the person on supervised release."); DOJ Report on Resources, at 1 ("[S]upervision may also run the risk of imposing overly lengthy supervision terms, numerous and potentially burdensome requirements, and frequent surveillance, which, if too restrictive, can lead to unnecessary violations and reincarceration."); Lopoo, et al., at 36 (noting studies demonstrating that "more intensive or longer supervision terms do not improve recidivism," and "find[ing] evidence that community supervision may be increasing incarceration rates" without improving public safety such that jurisdictions should "experiment[] with supervision downsizing"); Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, 2004 Topics in Community Corrections 3, 5–8 (2004) (discussing meta-analyses and individual studies showing that more intensive correctional interventions can increase reincarceration rates for people identified as "low risk").

[31] PEW Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision* 45 (2020) ("Research shows that incarceration is no more effective than noncustodial sanctions at reducing recidivism and can deepen illegal involvement for some people, inducing the negative behaviors it is intended to punish. One meta-analysis found that, compared with community-based alternatives, incarceration either has no impact on reducing re-arrests or actually increases criminal behavior. This finding was further supported by a study showing that using jail stays to punish supervision violations did not improve probation and parole outcomes and offered no benefits over community-based sanctions."); Jennifer L. Doleac, *Study after study shows ex-prisoners would be better off without intense supervision*, The Brookings Institution (2018) (collecting studies showing that reducing the intensity of community supervision is a "highly cost-effective strategy" to maintain, and possibly even improve, public safety); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Institute, 2 (2017) (discussing how "there may be an 'inflection point' where increases in state incarceration rates are associated with higher crime rates"); DOJ, Five Things About Deterrence 1 (2016) ("[P]rison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment."); Harding et. al, at 17 ("The current focus on surveillance over support is . . . counterproductive from a public safety perspective. Research shows that we can improve public safety and reduce crime by focusing on integration rather than punishment.").

[32] USSC, Federal Probation and Supervised Release Violations 4 (2020).

longer supervision, it can extend the term up to the statutory maximum.

We do have one suggestion related to Application Note 3: we appreciate its individualized assessment, but we suggest that the Commission replace the word "sufficient" with "sufficient, but not greater than necessary." This would highlight the parsimony principle embodied in § 3553(a), further urging courts to resist imposing counterproductive, needlessly long supervised release terms in every case.

C. §5D1.3: The Commission should remove the "standard" conditions label in favor of "examples of common conditions," and it should prune the list of common conditions to better promote rehabilitation and public safety.

The Commission proposes modest changes to §5D1.3, which lists conditions of supervised release. Most importantly, it brackets the possibility of jettisoning the "standard" conditions language, in favor of listing "examples of common" conditions. This may be a step in the right direction since the term "standard" inaccurately suggests that this long list of burdensome conditions is appropriate in the "standard," or typical, case (and of course, there is no standard or typical case in light of § 3553(a)'s individualized sentencing scheme). But the Commission should do more to ensure courts impose only those conditions necessary to promote rehabilitation and public safety.[33]

Unlike other aspects of this proposal, the long list of standard conditions does not lend itself to differentiation in case supervision based on an individualized assessment of risk and needs. Busy courts often reflexively impose the same numerous standard conditions without tailoring them to the individual being sentenced,[34] and without considering the relevant statutory mandate to impose "no greater deprivation of liberty than reasonably necessary" to afford adequate deterrence, protect the public, and provide the person with needed training, medical care, or other treatment.[35] This leads to

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[33] *See, e.g.*, Lopoo et al., at 37 (discussing reforms including "elimination of supervision conditions irrelevant to the person's criminal charge").

[34] Liman Center, at 10–12.

[35] 18 U.S.C. § 3583(d)(2).

unwarranted uniformity. No doubt this is a product of the guideline's one-size-fits-all approach to standard conditions, which is incompatible with evidence-based, social science research "emphasiz[ing] that effective interventions follow the principles of 'risk,' 'need,' and 'responsivity.'"[36]

Some individuals do have specific needs that conditions can address, such as mental health/substance use disorder, or difficulty with employment skills. However, others leave custody ready to get back on their feet. Far too often, numerous, unnecessary conditions hinder recovery and rehabilitation, resulting in needless revocations and reimprisonment, which does not promote public safety.[37] What's more, decades of research show "that overly supervising (by number of contacts, over-programming, or imposing unnecessary restrictions) low-risk [individuals] is likely to produce worse outcomes than essentially leaving them alone."[38]

Defenders appreciate what we assume to be the intention behind the proposed rebrand of §5D1.3(b)(2), and out of the two options, we prefer

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[36] Admin. Off. of the U.S. Courts, Probation & Pretrial Servs. Off., Overview of Probation and Supervised Release Conditions, at 10 (July 2024). Although this report goes through each of the standard conditions and purports to identify a relevant statutory purpose the condition serves, those purposes need not be furthered in every case and, as was indicated at the supervised release roundtable, many of the conditions do a poor job of promoting the purposes identified. *See* Statement of Marianne Mariano on behalf of Defenders to USSC on Compassionate Release and Conditions of Supervision, at 3–4 (Feb. 17, 2016) ("According to the evidence-based practices that the Office of Probation and Pretrial Services encourages local district offices to use, conditions of supervision should be directed toward the particular criminogenic needs and responsivity of the individual, while the intensity of supervision is based upon the person's actuarial risk score. If conditions of supervision are to be consistent with that approach, there should be few standard conditions. All conditions should be specifically targeted to the needs and responsivity of the individual who should be directly involved in the creation of the supervision plan rather than treated as a passive participant." (cleaned up)).

[37] *See supra* n.31.

[38] Vera Inst. of Just., *The Potential of Community Corrections to Improve Safety and Reduce Incarceration*, at 13 (July 2013); *see also* Latessa & Lowenkamp, *What Works in Reducing Recidivism?*, at 522–23 ("[R]esearch has clearly demonstrated that when we place low-risk [individuals] in our more intense programs, we often increase their failure rates (and this reduces the overall effectiveness of the program)" by needlessly exposing them to anti-social behaviors and disrupting pro-social networks).

"examples of common conditions" over the misleading "standard" label. But even the "common conditions" label is unsatisfying. In reality, these conditions are "common" only because the Guidelines and Judgment form list them as "standard," and judges mechanically impose them as such, often without objection from the defense. And we fear that even with the "individualized assessment" requirement, without more, inertia will compel decisionmakers to do what they have always done: impose a blanket set of conditions that, at best, go beyond what the individual needs, and at worst, set people up to fail in ways counterproductive to rehabilitation and community protection.

With this in mind, and in response to IFC 5, we suggest another approach: pruning the list of "examples of common" conditions, which is overbroad and not particularly individualized.[39] Presently, the Manual's list of discretionary conditions for supervised release (not designed as punishment) is even broader than the statutory list of discretionary conditions for probation (punishment).[40] And as Defenders articulated to the Commission in 2016:

> (1) A limited number of standard conditions is consistent with the statutory provisions at 18 U.S.C. §§ 3563(a) and 3583(d) which require the court to make specific findings when imposing conditions not mandated by statute; (2) There is no evidence the proposed list of standard conditions serves the purpose of facilitating the reintegration of the [individual] into the community; (3) An extensive list of standard conditions is counterproductive because it may increase re-incarceration and even the most technical of violations extends the term of imprisonment for the original offense; and (4) A lengthy list of standard conditions has a disproportionately negative impact on the poor.[41]

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[39] We also encourage the Commission to include in the Commentary the discretionary factors in § 3583(d) to remind decisionmakers of the statutory restrictions on imposing discretionary conditions.

[40] 18 U.S.C. § 3563(b).

[41] Mariano Statement, at 1.

Therefore, the Commission should maintain the conditions at proposed §5D1.3(b)(2)(A), (B), (E), (F), and (M), and identify the rest as special conditions or remove them entirely.[42] The conditions we suggest excising often run afoul of § 3583(d)(2)'s requirement that discretionary conditions impose "no greater deprivation of liberty than is reasonably necessary."[43] For example, prohibiting out-of-district travel makes no sense in smaller districts where one can easily cross district lines without even realizing it.[44] And for individuals who live in rural areas or whose best job prospects involve interstate travel (such as truck driving or seasonal oil and gas work), the travel restriction hurts their ability to find and maintain employment. Likewise, the boundaries of tribal nations often span multiple states—or even countries, making this restriction particularly problematic for our Native clients.[45]

Additionally, the non-felony association condition ignores that many individuals in overpoliced, low-income communities end up with felony records, which might include our clients' family members and neighbors, resulting in isolation instead of reintegration. And the full-time employment requirement will be difficult, if not impossible, for some individuals who have disabilities, are trying to complete intensive substance use programs, are in

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[42] *See* Liman Center, at 19, 27–28 (Appx. D) ("One jurist has determined that, in general, six of the thirteen standard conditions are not to be used, and seven are often appropriate in many cases." Those seven are: 1) report within 72 hours; 2) report as instructed to PO; 3) answer truthfully questions asked by PO; 4) live at place approved by PO; 5) allow PO to visit home; 6) lawful employment or try to find it; 7) follow instructions of PO related to conditions).

[43] *See* Mariano Statement, at 5–10 (pointing out problems with 10 of the Commission's standard conditions).

[44] At least one court has declined to impose this condition where it would be inappropriate. *See United States v. Shacquille Jackson,* No. 3:23-cr-00065-SRU, Judgment, ECF No. 64 (D. Conn. Jan. 9, 2025) (no travel condition, no felony association restriction, among others); *United States v. James Bowers*, No. 3-22-cr-00067-SRU, Judgment, ECF No. 114 (D. Conn Jan. 30, 2025) (no travel condition, no felony association restriction).

[45] *See* Mariano Statement, at 5–6.

school, or are older.[46] It also "overlooks that the availability of employment varies tremendously."[47]

In addition to these three objectionable conditions, in 2016 Defenders identified problems with several other then-standard conditions.[48] Not all our concerns were addressed by Amendment 803. We urge the Commission to review our 2016 statement, as well as Yale Law School's recent Liman Center study of supervised release in Connecticut, and revisit these standard conditions.

Many of the current special conditions should also be removed.[49] And we oppose the proposed "special" condition requiring completion of a high school or equivalent diploma in the proposed §5D1.3(b)(3)(I). While we understand the good intentions behind it, this could result in yet another revocation trapdoor for our clients—many who have disabilities that make educational attainment difficult, or are indigent and lack sufficient transportation, internet access, or free time after work to complete this requirement.

Trimming the list of discretionary conditions would not only simplify this guideline, but it would also promote judicial discretion to tailor conditions to needs, rather than enable institutional inertia.

D. §5D1.4: The new policy statement provides helpful guidance to courts on how to tailor lengths and conditions of supervision to a person's evolving needs.

Defenders support the proposed §5D1.4, which reinforces that courts can—and perhaps, *should*—revisit terms and conditions of supervision over time. Below we offer minor suggestions to better advance the goals of the amendment.

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[46] *See infra* II.C. (discussing medical model of supervision).

[47] Mariano Statement, at 8.

[48] *Id.* at 5–12.

[49] In particular, the "support of defendants," "debt obligations," "access to financial information," required participation in a program for the "treatment and monitoring of sex offenders," and "unpaid restitution" conditions can be onerous and add little value in terms of rehabilitation.

1. Modification of Conditions

On supervision, an individual's needs are dynamic and necessarily change over time, and they may even change significantly between sentencing and release.[50] Therefore, the proposed language on modification of conditions helpfully reminds courts that they should be prepared to right-size the number of conditions soon after a person's release from BOP. In this provision, Defenders support the use of the word "may," which tracks the statutory language of § 3583(e) and makes clear that the decision to modify, reduce, or enlarge conditions is discretionary, subject to an individualized assessment.

2. Early Termination

Early termination for individuals who no longer need supervision is sensible and conserves probation and court resources without threatening community safety.[51] Given the statutory goals of supervision and the evidence-based research on the harms of over-supervision, it is in everyone's best interest for terms not to exceed what's necessary.[52]

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[50] Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders under Federal Supervision*, 78 Fed. Prob. 41, 53 (2014) ("[M]any [individuals] initially classified at the highest risk levels moved to a lower risk category over time and . . . these changes were mostly driven by improvements in [individuals'] employment and substance abuse-related dynamic factors.").

[51] Thomas H. Cohen, *Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety*, at 21–22 (2025) ("In findings mirroring research conducted by Baber and Johnson (2013) and work focusing on early termination at the state level, this study found that early termination did not endanger community safety. Specifically, when matched on a range of criteria associated with the risk of recidivism, supervisees with early terminations manifested post-supervision arrest rates that were two percentage points lower for any offenses than those of their regular-termed counterparts. Moreover, the post-supervision arrest rates for violent offenses were relatively similar for the early- and regular-termed groups." (citing studies)).

[52] *See, e.g.*, *United States v. Roman et al.*, No. 3:06-cr-268-26 (JBA), Order Granting Defendant's Motion for Early Termination of Supervised Release at 1–2 (ECF No. 1883) (D. Conn. Jan. 4, 2023) (acknowledging the "significance to defendants of 'being off the papers' and becoming one's own person without reporting requirements and without having to request permission to engage in travel or other

On balance, Defenders support the proposed language in §5D1.4(b), telling courts they *"should"* terminate supervision early when warranted, and listing criteria to help guide judges' discretion. The use of the word "should" in (b) makes sense, from a policy perspective, because it provides important guidance, while still promoting discretion. Encouraging early termination does not mean it will happen automatically. Under (b), a court should terminate supervision only if appropriate under the factors in the guideline and statute. On the other hand, the word "may," would offer little guidance, would be too permissive, and would not change the culture in many districts, which rarely ever reconsider long terms of supervision.

Supervised release was not designed to be imposed as punishment, which is why the statute allows for termination after one year "in the interest of justice," after considering the relevant factors.[53] It makes sense to end supervision early for individuals who no longer have rehabilitative needs. This should, in fact, be the ultimate goal: remove people from community supervision once they've demonstrated successful reintegration. Unfortunately, the current rate of early termination varies by district, and is extremely low in some places, resulting in geographic disparity.[54] In our view, the proposed new §5D1.4(b)—with use of the word "should" and with the listed non-exhaustive criteria included to help guide judges' discretion—would go a long way toward remedying this disparity and promoting early termination in districts that do not regularly grant it.

With that said, we have suggestions to ensure the amendment does not inadvertently make early termination practices more restrictive in certain districts and to ensure it is uniquely responsive to some courts' failure to consider early termination in all but the most compelling cases.

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activities. Thus, terminating supervision, i.e., 'the papers,' represents a form of freedom . . . .").

[53] 18 U.S.C. § 3583(e)(1).

[54] Cohen, *Early Termination*, at 17 (finding "substantial disparity regarding the use of early terminations at the district level . . . even when they are adjusted to account for factors driving the use of early termination" and speculating this is "likely the result of cultural differences and policy preferences about how this method of case closure should be applied at the local level.").

a. The §5D1.4(b) factors

In response to IFC 3, Defenders suggest ways to refine the list of §5D1.4(b) factors to better advance the purposes of, and processes for, early termination. In discussing the proposed §5D1.4, some Defenders raised concern that the list of factors could be perceived as more restrictive than the Judicial Conference's Guide to Judiciary Policy ("the Guide"), which judges rely on to frequently grant early termination motions in their district. We do not believe the Commission intended this proposal to be more limiting than the Guide, given that IFC 3 states that the Commission drew from the Guide, as well as the Safer Supervision Act, in crafting the proposed early termination language. Accordingly, we recommend removing one factor and hewing more closely to the Guide for some of the other proposed factors.

First, for factor (1), we suggest focusing on any court-reported violations over a 12-month period, rather than "any history" of violations, no matter how remote they may be. This tracks the language of the Guide and is particularly important for individuals on lengthy terms of supervision. This would capture only a person's more recent conduct, and would avoid stale events that might reflect growing pains as someone adjusts to liberty and moves toward stability.

Next, for factor (5), we suggest the Commission refine the "demonstrated reduction in risk level" criteria because some people will start in the lowest possible risk category and are therefore unable to demonstrate any reduction, and others may be perfectly suitable for early termination but unable to reduce their risk level due to factors outside their control, such as age and criminal history.[55] To account for this, we suggest the Commission

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[55] We also note, as we have in the past, that risk assessment tools, which are often group-based risk predictors, cannot provide truly individualized predictive results, and may entrench racial disparities by overly relying on criminal history and using rearrest, instead of reconviction or reincarceration, as the metric of recidivism. *See* Roland Neil & Michael Zanger-Tishler, *Algorithmic Bias in Criminal Risk Assessment: The Consequences of Racial Differences in Arrest as a Measure of Crime*, 8 Ann. Rev. of Criminol. 97, 98 (2025) ("Arrest is used as a proxy of crime, which has long been known to be flawed . . . . Whether due to discrimination or other causes, people of different races with similar patterns of criminal behavior may differ in their chances of being arrested."); Laurel Eckhouse et. al., *Layers of Bias: A Unified Approach for Understanding Problems With Risk Assessment*, 46 Crim. Just.

hew more closely to the Guide on this criteria, and suggest instead that the factor provide for "a low risk level or a demonstrated reduction in risk level over the period of supervision for defendants in higher risk categories who are able to reduce their risk level."

Finally, as for factor (6), we suggest removal of this compound factor because it is redundant and overly complex. Courts already must consider public safety under the statutory framework, and more importantly, it is highly unlikely that a person who meets most of the first five factors will pose a risk to public safety. If the Commission feels it cannot remove this bulky factor, we suggest streamlining by cutting everything except for the core concern: "whether termination will jeopardize public safety."

The §5D1.4(b) factors would read as follows:

(1) whether the defendant remained free from court-reported violations over a 12-month period;

(2) the ability of the defendant to lawfully self-manage beyond the period of supervision;

(3) the defendant's substantial compliance with all conditions of supervision;

(4) the defendant's engagement in appropriate prosocial activities and the existence or lack of prosocial support to remain lawful beyond the period of supervision;

(5) that the defendant is in a low risk category or has demonstrated a reduction in risk level over the period of supervision for defendants in higher risk categories who are able to reduce their risk level~~;~~.

~~(6) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's record while incarcerated, the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information~~

& Behav. 1, 14 (2018) ("The risk-assessment instrument uses information about a group of people that does not include the defendant and provides a score based on others' behavior.").

~~provided by the victims of the offense, and other factors the court finds relevant.~~

b. Additional suggestions

Based on Defenders' experience both in districts with a robust early termination practice, and others with virtually none, we offer more ways to improve this provision.

First, the Commission should add commentary recommending that courts grant early termination if warranted by the statutory and guideline criteria, even if the individual is unable to show extraordinary, unforeseen, or changed circumstances. Some courts have held that individuals must make this type of showing to be afforded relief.[56] But this requirement is not supported by § 3583(e)(1) or by the criteria the Commission proposes to include in this section. The Safer Supervision Act, on which some of the Commission's language is based, disavows any need to show exceptional circumstances to justify early termination.[57]

Second, the Commission should strike the proposed language in subsection (b) that requires "consultation with the government and the probation officer," before granting early termination. This language suggests *ex parte* communications that weigh against appointing defense counsel and

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[56] *See, e.g.*, *United States v. Wesley*, 311 F. Supp. 3d 77, 81-82 (D.D.C. 2018) (concluding that an individual's mere compliance with the conditions of his supervised release is not enough to warrant early termination because courts in the district have required exceptional circumstances); *United States v. Bouchareb*, 76 F. Supp. 3d 478, 480 (S.D.N.Y. 2014) ("Having considered Bouchareb's motion, the circumstances of his conviction, and all other relevant factors under 18 U.S.C. § 3553(a), the Court concludes that Bouchareb has not presented an exceptional case warranting early termination of supervised release."); *United States v. McKay*, 352 F. Supp. 2d 359, 361 (E.D.N.Y. 2005) (requiring "exceptionally good behavior" to justify early termination of supervised release); *cf. United States v. Caruso*, 241 F. Supp. 2d 466, 469 (D.N.J. 2003) (denying motion for early termination of probation where movant was unable to show unusual or extraordinary circumstances). *But see United States v. Melvin*, 978 F.3d 49, 53 (3d Cir. 2020) (vacating district court opinion holding early termination is proper only upon a showing of new, unforeseen, or exceptional circumstances, finding no support for such requirement in the statute's text).

[57] The Safer Supervision Act of 2023, S.2681, 118th Cong. (1st Sess. 2023); The Safer Supervision Act of 2023, H.R. 5005, 118th Cong. (1st Sess. 2023).

involving the person on supervision. Plus, it's not needed. Federal Rule of Criminal Procedure 32.1(c) provides sufficient procedural guidance. [58] Nor is this one-sided consultation contemplated by the Guide. The government and probation will be notified of any early termination request made by an individual, and they can weigh in accordingly. Districts can also craft their own local rules on consultation requirements.[59]

Third, the Commission should add an application note to mirror the Guide explaining that the "existence of an outstanding financial penalty should not adversely affect early termination eligibility, as long as the person under supervision is in compliance with the payment plan for the prior 12 months."[60] Some fine or restitution amounts are large enough to be extremely challenging—if not impossible—to pay completely during any period of supervision. This should not be a barrier to early termination. Once a court terminates supervised release, the balance of any fine or restitution reverts to a civil judgment enforceable under civil procedure rules.

Our final suggestions respond to discrete IFCs. In response to IFC 6, the Commission should not at this time tie early termination to successful completion of a reentry program. Some courts already grant early termination to individuals who complete reentry court. More importantly, as helpful as reentry courts can be, their availability varies dramatically by district and by administration. And some reentry courts automatically exclude individuals convicted of certain offenses. We are concerned that the unavailability of, or inability to enroll in, a reentry program would inadvertently undercut an otherwise sound request for early termination and could lead to a disproportionate rejection rate in districts without these programs.[61]

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[58] *See* 18 U.S.C. § 3583(e)(1) (court may terminate supervised release "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation").

[59] *See* D. Conn. Local R. Crim. Pro 47 (2015) (when filing motion concerning supervised release, counsel shall identify the "probation officer assigned to the case and whether the officer objects to the relief sought in the motion").

[60] Guide to Judiciary Policy, Chapter 3, § 360.20(e).

[61] If the Commission decides to add this criteria, it should make clear that the lack of an accessible reentry court program or restrictive admission criteria should not be used against individuals moving for early termination.

In response to IFC 7, we do not believe that further procedural guidance is necessary, beyond the processes already outlined in Rule 32.1. More importantly, attempting to guide procedure may prove difficult or controversial given that different districts have differing resources and needs, and vary widely in protocol as a result. Procedures that might make sense in a smaller, low-volume district like Connecticut would make no sense in a larger, high-volume district like Arizona. Likewise, individual circumstances and cases vary; some requests for early termination might be contested, while others can be stipulated to by the parties to streamline the process. Stakeholders can work together to develop standing orders and best practices for their own district as some districts already have. As for notice to victims, we see no need to include additional layers of procedure beyond the suggested commentary text, given their statutory right to be reasonably heard in the Crime Victims' Rights Act.[62] To reduce the administrative burden, we suggest removal of the bracketed text requiring notification to victims of "any violation of a condition of supervised release," because, as discussed above, conditions can be extensive, technical, and only marginally related to the original offense.[63]

II. PART B: Chapter 7

Part B would bring much-needed change to Chapter Seven, a long-neglected area of the Guidelines Manual. Defenders appreciate that the proposed amendment highlights alternatives to incarceration for vulnerable individuals returning to society to address issues of non-compliance. We are particularly heartened that the amendment offers an option for revocation only when required by statute and that permits a revocation sentence to run concurrently with any new criminal sentence. Likewise, we welcome the introduction of Grade D violations, which appropriately recognize that these are the least serious types of violations.

Chapter Seven was envisioned as a "first step in an evolutionary process," and promulgated as a flexible policy statement that would soon be

[62] 18 U.S.C. § 3771.

[63] U.S. Attorney Office victim-witness coordinators also often provide support to victims and can inform them of their rights and notice.

amended.[64] But stakeholders have called for supervised release reform for decades, and for 35 years no meaningful changes have been made.[65] Instead, districts have developed their own cultures around revocations of supervised release. And despite the fact that that supervised release was intended to be rehabilitative,[66] many districts treat reincarceration as the only option to address non-compliance.[67] For these reasons, we are particularly excited by the new introductions to Chapter Seven, including Part C, which clearly establish that the objective of supervised release is rehabilitation, which is hindered by incarceration. Of course, rehabilitation fosters community safety as well.[68]

While we appreciate that the Commission proposes to emphasize the rehabilitative aspect of supervised release, we caution against focusing too heavily on the punitive aspects of probation. With probation, a sentence imposed after revocation must serve all § 3553(a) purposes—just like an initial prison sentence.[69] Defenders are concerned that the introduction to

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[64] USSG Chapter 7, Introduction ("Moreover, the Commission anticipates that, because of its greater flexibility, the policy statement option will provide better opportunities for evaluation by the courts and the Commission . . . After an adequate period of evaluation, the Commission intends to promulgate revocation guidelines.").

[65] *See* Proposed Amendment, at 33 ("In the three decades since the promulgation of those policy statements, a broad array of stakeholders has identified the need for more flexible, individualized responses to violations of supervised release.").

[66] *Pepper v. United States*, 131 S. Ct. 1229, 1248 n.15 (2011) ("Supervised release follows a term of imprisonment and serves an entirely different purpose than the sentence imposed under § 3553(a)" (citing *United States v. Johnson*, 529 U.S. 53, 59 (2000) ("Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration")).

[67] *See* Underhill, *Supervised Release Needs Rehabilitation*, at 3–4 ("For decades now, statutes, court decisions, and the actions of hundreds of probation officers and judges have fostered the goal of protecting the public by reincarcerating supervisees and have all but eliminated the goals of assisted reentry and rehabilitation.").

[68] *Id.* at 5 ("[T]he dual purposes of rehabilitation and protection of the public reinforce each other when the principal focus of supervised release is on rehabilitation. After all, a rehabilitated offender poses no risk to the public.").

[69] *See* 18 U.S.C. § 3565(a)(1) & (2) ("If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable— continue him on probation . . . or revoke.").

Chapter Seven ("Updating the Approach" p. 33), as currently written, erroneously suggests that probation is solely punitive, which it is not, and could lead to misapplication of the law. Accordingly, for the introduction to "Updating the Approach," Defenders suggest the following language: "The Commission determined that violations of probation and supervised release should be addressed separately to reflect their different purposes. While probation serves all the purposes of sentencing set forth in 18 U.S.C. § 3553(a), *see* 18 U.S.C. § 3565(a), supervised release "fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000)."

A. Section 7B: The Commission should add Grade D violations to the probation revocation table.

Defenders support the Commission's proposal to separate the Probation and Supervised Release policy statements to emphasize the rehabilitative nature of supervised release. But we urge the Commission to add the concept of Grade D violations for non-criminal "technical" violations to the probation section in addition to the supervised-release section, providing for lower ranges in both. Technical violations are the least serious category of violation, regardless of whether someone committed a technical violation while on probation or on supervised release. More, mirroring the violation grades simplifies application of these policy statements.

B. Section 7C1.1: The Grade D category for technical violations of supervised release better promotes the dual purposes of rehabilitation and protecting the public, particularly for those struggling with recovery and access to resources.

The Commission has proposed a new Grade D violation category for supervised-release revocations which would encompass "technical" violations of conditions–the most common type of violation.[70] Defenders support this

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[70] Underhill, *Supervised Release Needs Rehabilitation*, at 15–16 ("[T]he largest portion of those revocations—at least half and recently more than two-thirds—involved technical violations rather than the commission of a new criminal offense."). Technical violations typically involve behavior that would not otherwise be considered illegal such as traveling to a different district without permission,

change, as the amendment rightly treats these minor infractions differently than new criminal conduct. Many technical violations result from mental health conditions, including substance use disorders.[71] Others stem from poverty, limited work or educational history, and related struggles. In essence, these violations reflect the many barriers to rehabilitation that are often beyond our clients' control.[72] As we discuss below, these violations should not result in prison time.

C. Section 7C1.3: The proposed language appropriately encourages alternatives to revocation and reflects courts' legal options, but the Commission should go further to discourage revocations and imprisonment for minor and technical violations.

We support the proposed new §7C1.3, which would encourage intermediary steps to address allegations and findings of non-compliance. At the roundtable the Commission heard feedback "identifying the need for more flexible, individualized responses to . . . violations." Administrative Office data from fiscal years 2021 and 2022, as reported by DOJ, support this need: "technical violations [made] up the majority of federal revocations—approximately two-thirds," and revocations for these minor violations "almost always resulted in a sentence of incarceration (approximately 99%), with the average sentence over 9.5 months long."[73] This amendment responds to this feedback and data, and would help shift the culture in many districts around

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violating curfew, failing to pay court fees, associating with another person who has a criminal record, or missing meetings with a probation officer.

[71] *Id.* at 22–23 ("[T]he formerly incarcerated are beset by a medley of problems that most of us cannot imagine: the stigma of a felony conviction, lack of education, minimal work history, drug addition, poverty, childhood trauma, housing restrictions, and an absence of pro-social role models . . . When we add to these common barriers to reentry the burdens of reporting to probation, submitting to location monitoring, restricting travel out of state, providing periodic urine samples for drug tests, allowing searches of residences and automobiles, and avoiding contact with other felons, it is hardly surprising that a large number of supervisees are unable to maintain complete compliance.").

[72] *See id.*

[73] DOJ Report on Resources, at 20.

handling non-compliance on supervision.[74]

For §7C1.3(a) (allegations of non-compliance), we support including the proposed bracketed language (including the bracketed Application Note 2) offering options other than revocation proceedings to handle allegations of non-compliance when warranted by an individualized assessment.[75] As was discussed at the roundtable, in some districts, courts and probation officers already avail themselves of these more rehabilitative options. But in others, nearly every allegation of non-compliance results in revocation proceedings. In the latter districts, rather than assisting vulnerable individuals recently released from incarceration with strategies for successful reentry, supervised release has come to center around monitoring and surveillance, leading to disruptive reincarceration instead of rehabilitation.

For §7C1.3(b) (finding of a violation), we support Option 1, which lists the same intermediary options to address violations and states that revocation is mandatory only if statutorily required under § 3583(g),[76] for

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[74] There is considerable variation in violation and revocation rates across districts, with some districts far more oriented to rehabilitation than others. *See* USSC, Federal Probation and Supervised Release Violations, at 18 (2020) (reporting that the district with the highest proportion of violations, the Southern District of California, was at 42%, while the district with the lowest proportion of violations, Connecticut, was at 5%); *see also* Underhill, *Supervised Release Needs Rehabilitation*, at 9 ("[S]ome [federal probation offices] are more law enforcement-oriented, and others are more focused on social services."). In Connecticut, the district with the lowest proportion of violations, tools such as compliance hearings, modifications of supervised release, Support and Reentry Courts, and early termination are used with ease and efficiency.

[75] To avoid future confusion and for consistency in application, the Commission should clarify that, when considering termination under §§ 7C1.3(a)(3) and 7C1.3(b)(3), the one-year period spent on supervised release can include periods on supervised release predating earlier revocations. *See* 18 U.S.C. § 3583(e)(1) (stating that a court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . .").

[76] Specifically, revocation is only mandatory if an individual on supervision 1) possesses a controlled substance 2) possesses a firearm in violation of federal law or his or her supervised release conditions; 3) refuses to comply with drug testing imposed as a supervised release condition; or 4) tests positive for illegal controlled substances more than three times within a year. § 3583(g). Notably, courts are

four primary reasons. First, Option 2, which purports to *require* revocation for Grade A and B violations (like the current §7B1.3(a)(1)), contravenes *Booker*. Because the guidelines are advisory, the Commission cannot tell courts that they "shall" revoke when revocation is not otherwise required by law.

Second, Option 1 better aligns with the Commission's goal to encourage greater individualization and discretion to respond to violations, moving courts away from unnecessary reincarceration, even for Grade A and B violations. As with responding to simple allegations of non-compliance, responding to proven instances of non-compliance with intermediary sanctions would help avoid the destabilizing and criminogenic effects of incarceration,[77] fostering personal growth and community safety.

Third, moving courts away from revocation for Grade A and B violations would help alleviate invidious racial disparities. For instance, DOJ recently observed, in fiscal years 2021 and 2022, Black supervisees had "the highest rates of revocations based on a new arrest charge."[78] In that time frame, "Black supervisees were sentenced to the longest terms of incarceration for revocations, averaging 11.3 months in 2021 and 11.5 months in 2022."[79] If courts are encouraged to think more creatively about how to respond to all types of violations, it is likely that fewer people under

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allowed to consider whether "the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception" to § 3583(g) "when considering any action against a defendant who fails a drug test." 18 U.S.C. § 3583(d).

[77] *See supra* n.31.

[78] *See* DOJ Report on Resources, at 16. This is not necessarily surprising given the research showing low-income African-American communities are overpoliced, and that Black individuals are more likely to be stopped and arrested than any other demographic group. *See also* Jessica Eaglin & Danielle Solomon, *Reducing Racial Disparities in Jails: Recommendations for Local Practice*, Brennan Ctr. for Just., at 17 (2015) ("A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every type of crime. At least 70 police departments arrested black people at a rate ten times higher than non-black people. In a suburb of Dearborn, Mich., the disparity in arrest rates for blacks was a staggering 26 times the rate for other races.").

[79] DOJ Report on Resources, at 17.

supervision would be reincarcerated, hopefully with a particularly pronounced positive impact on Black individuals and their communities.

Finally, many probation offices and courts treat a positive drug test as a Grade B violation.[80] Mandatory revocation language for Grade B violations pushes courts in the direction of prison time to address substance use disorder and relapse. Yet, even DOJ suggests avoiding carceral sentences for drug use, urging: to reduce the cycle of supervision, relapse, and incarceration and encourage pathways to substance use treatment, "courts, and/or USAOs, could establish a policy to no longer seek revocation for individuals based on drug use."[81] Indeed, using incarceration to address drug use contravenes the medical and scientific communities' understanding of substance use disorders as neurologically-based chronic conditions where relapse is a recognized feature of the recovery process, not a moral failing.[82] Addiction, the most severe form of substance use disorder, "is characterized by *compulsive* drug seeking and use, despite harmful consequences. It is considered a brain disease because drugs change the brain—they change its structure and how it works."[83]

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[80] *See, e.g., United States v. Crace*, 207 F.3d 833, 835 (6th Cir. 2000) (upholding district court's mandatory revocation of supervised release term based upon positive drug test and admission of use of a controlled substance).

[81] DOJ Report on Resources, at 20.

[82] *See* Brief for Mass. Med. Soc'y *et al.* as Amicus Curiae Supporting Pet., *Commonwealth v. Eldred*, 480 Mass. 90 (2018) (No. SJC-12279), 2017 WL 4273995, at *22–36; *see also id.* at *45 ("Scientific breakthroughs have revolutionized the understanding of substance use disorders. For example, severe substance use disorders, commonly called addictions, were once viewed largely as a moral failing or character flaw, but are now understood to be chronic illnesses characterized by clinically significant impairments in health, social function, and voluntary control over substance use."); *see also* Reena Kapoor, M.D., Comment on USSC 2025 Supervised Release Proposed Amendment, at 1 (on file with author) ("When considering what conditions of release to impose, courts and probation officers should recognize that a substance use disorder is not a moral failing, but rather a treatable illness.").

[83] Nat'l Inst. of Drug Abuse, *Drugs, Brain, and Behavior: The Science of Addiction*, at 5 (rev. 2014) (emphasis added); *see also* U.S. Dep't of Health & Human Servs., *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health*, at 2-1 (2016) ("[S]evere substance use disorders, commonly called addictions, were once viewed largely as a moral failing or character flaw, but are

Relapse is common among those recovering from a substance use disorder. The Surgeon General's 2016 Report, "Facing Addiction in America," advised that "[m]ore than 60 percent of people treated for a substance use disorder experience relapse within the first year after they are discharged from treatment, and a person can remain at increased risk of relapse for many years."[84] Medical and public health policy experts inveigh against incarceration as a sanction for relapse, warning: prison time "does not have the intended deterrent effect," "can undermine the rehabilitative purpose of punishment" by exacerbating the preexisting condition, creates an even greater risk for relapse and overdose death upon release, and "undermine[s] public health by reinforcing stigma associated with substance use disorder."[85]

Surely the Commission would not recommend imprisonment to treat diabetes, asthma, or hypertension. But substance use disorders share features in common with these other chronic illnesses.[86] "Although the mechanisms may be different . . . [a]ll of these disorders are chronic, subject to relapse, and influenced by genetics, developmental, behavioral, social, and environmental factors. In all of these disorders, affected individuals may have difficulty in complying with the prescribed treatment."[87] The Commission is charged with "reflect[ing], to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process[.]"[88] An advanced society is simply not one that sends people

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now understood to be chronic illnesses characterized by clinically significant impairments in health, social function, and voluntary control over substance use.").

[84] Surgeon General's Report, at 2-2; *see also* ACLU Comment on USSC 2025 Proposed Supervised Release Amendment, at 4 (on file with author) ("Relapse is a common and expected part of recovery.").

[85] *Mass. Med. Soc'y Amicus Br.*, 2017 WL 4273995 at *39, *42 (cleaned up); *see also* ACLU Comment, at 5 ("[R]evocation and incarceration . . . is detrimental to successful treatment and increases the risk of overdose for people with SUD—underscoring the importance of avoiding unwarranted incarceration for these individuals." (citation omitted)).

[86] *Mass. Med. Soc'y Amicus Br.*, 2017 WL 4273995 at *45–46; *see also* NIDA, *Science of Addiction*, at 5 ("Addiction is a lot like other diseases, such as heart disease. Both disrupt the normal, healthy functioning of the underlying organ, have serious harmful consequences, and are preventable and treatable, but if left untreated, can last a lifetime.").

[87] *Mass. Med. Soc'y Amicus Br.*, 2017 WL 4273995 at *45–46.

[88] 28 U.S.C. § 991(b)(1)(C).

back to prison for suffering a chronic, debilitating, neurological illness. To that end, we urge the Commission to issue commentary guiding courts away from treating drug use as "possession," and from revocation and incarceration as a response to a positive drug test.[89]

In addition to the language already proposed, the Commission asks in IFC 5 whether it should issue more specific guidance on the appropriate response to Grade D violations. Yes: The Commission should explain that revocation is not ordinarily appropriate for Grade D violations. As with drug use, DOJ acknowledges that reducing the use of carceral sanctions for technical violations helps "provid[e] a potential pathway to promote successful reentry."[90] Likewise, in his recent doctoral dissertation, Joseph DaGrossa studied the public safety and specific deterrent effects of different responses to technical supervision violations. He determined that people "incarcerated for technical violations of supervision are more likely to commit new crimes post-sanction (and sooner) than [people] subjected to intermediate sanctions."[91] He also found, "the greater the intensity of the intermediate sanction . . . the more likely an [individual] will be charged with

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[89] 18 U.S.C. § 3583(d) (giving judges discretion to avoid mandatory detention to accomplish a "treatment purpose"); *see also, e.g.*, *United States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1997) (concluding that a court may find possession based on a positive drug test, but is not required to do so; this is a discretionary decision); *cf. United States v. Crace*, 207 F.3d 833, 836 (6th Cir. 2000) (noting the former Assistant General Counsel of the Administrative Office of the Courts stated that: (1) her office had recommended that probation officers classify positive drug tests as Grade C violations; (2) positive drug tests were evidence of, but not determinative of, drug possession; and (3) courts should have discretion to decide whether a positive drug test constitutes possession for revocation purposes); ACLU Comment, at 3 ("The Commission should advise courts to treat substance use and mental health disabilities as public health matters outside of the criminal-legal system."); Kapoor Comment, at 1 ("[I]f an individual uses drugs or alcohol while on supervised release, revocation and/or incarceration should not be the first step . . . As the adage in substance use disorder treatment goes, 'Relapse is part of recovery.' In many cases, an individual can be referred to a higher level of care for their substance use disorder, such as an intensive outpatient program or an inpatient facility.").

[90] *Id.* at 20.

[91] DaGrossa, at 149.

subsequent technical violations during service of the sanction (often eventually resulting in incarceration)."[92]

By creating the new Grade D, the Commission correctly recognizes that technical violations are qualitatively different than new criminal offenses. They often stem from poverty and related struggles individuals face after prison.[93] "Reincarceration for technical violations of supervised release is obviously not rehabilitative."[94] Even if a revocation sentence is short, it will nonetheless upend the individual's life, potentially leading to loss of employment, housing, government benefits, treatment opportunities, parental custody,[95] and, as just discussed, could lead to increased recidivism.[96] It essentially resets the path to rehabilitation back to the beginning once the person is again released. And reducing reliance on incarceration for technical violations would help alleviate another kind of harmful demographic disparity, given that in fiscal years 2021 and 2022, "American Indians/Alaska Natives had the highest revocation rates for technical violation supervisees," at 80% and 82%, respectively.[97]

Although including this language in the Manual for Grade D violations would be a great start, the Commission should go a step further by adding

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[92] *Id.*

[93] Indeed, the reasons not to revoke and send someone to prison for drug use strongly support adding language to this section that discourages revocation for Grade D violations, given that some probation offices and courts treat a positive drug test as a technical violation.

[94] Underhill, *Supervised Release Needs Rehabilitation*, at 5.

[95] *See*, *e.g.*, Fiona Doherty, *The Revocation of Community Supervision: A Reform Project*, 20 Ohio St. J. Crim. L. 1, 6 (2023) (determining from study that 79% of Connecticut parolees lost their jobs as a result of being remanded into custody; 47% permanently lost their housing, and "[m]any also lost their property when they lost their housing"); *United States v. Faison*, No. 19-cr-27, 2020 WL 815699, *1 (D. Md. Feb. 18, 2020) ("[T]he difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family. Thus, it is crucial that judges give careful consideration to every minute that is added to a defendant's sentence. Liberty is the norm; every moment of incarceration should be justified.").

[96] *See* DaGrossa, at 149.

[97] DOJ Report on Resources, at 16. This is not surprising; in Defenders' experience, these individuals often live far from probation offices, their contracted treatment providers, and other services that may be mandated by the court.

similar guidance for Grade C violations. Misdemeanors, like technical violations, are often intertwined with economic instability, mental illness, and substance use disorders. For example, misdemeanor larceny often stems from poverty or substance use. DWIs or low-level substance-related offenses are often the result of struggles with a substance use disorder. And driving on a suspended license typically results from an individual's inability to pay a fine. Of course, nothing prevents a court from choosing to revoke upon a finding of a Grade D or C violation if it determines revocation is appropriate.[98]

Finally, while not contemplated by any of the IFCs, Defenders strongly urge the Commission to add language to §7C1.3 encouraging the use of summonses to bring people to court on violation petitions. The application note could read: Courts are encouraged to issue summonses rather than arrest warrants for supervised release violation petitions when an individual has regularly met with their probation officer and does not appear to present a serious risk of immediate danger to others. In cases where a warrant is issued, the warrant should be a matter of public record to facilitate the defendant's ability to appear voluntarily.

When an individual is brought to court on a summons, as opposed to an arrest warrant, that person has a much greater chance of being released on bond, which, in turn, allows for continued employment, health care, housing, access to public benefits, and child custody.[99] On the other hand, an arrest

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[98] In further response to IFC 5, the Commission should not state that revocations are appropriate for Grade D violations (or for any other grade of violations) simply because there have been multiple violations. There is simply too much disparity in the "various aspects of the work and procedure implementation" of U.S. Probation offices across the 93 districts to implement such sweeping language. DOJ Report on Resources, at 3. For example, in some districts, probation officers may list every possible violation in a violation report, while other districts only list the most concerning ones. There is simply no cohesive national policy to warrant this additional language. More, it's unclear if the Commission is referring to instances of multiple Grade D violations in one petition or situations where one person has been revoked multiple times.

[99] Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 Fed. Probation 13, 18 (Sept. 2018) (finding that the use of a summons resulted in a pretrial release rate of more than 90% in the federal system); Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, at 103 (July 2020).

has a profoundly detrimental impact on a person's life, hampering successful community reintegration. Our clients have been arrested on violation warrants and removed from inpatient drug treatment.[100] Some have lost housing and jobs—all because of a decision to issue an arrest warrant for a violation petition, rather than a summons. Discouraging arrests warrants when a person under supervision is maintaining contact with his probation officer, even if he is struggling to fully comply, would promote the broader goals of this amendment to give courts greater discretion to impose alternatives to incarceration and to support the rehabilitative function of supervised release.

D. Section 7C1.4: The Commission should acknowledge the full range of courts' authority and discretion in imposing sentences after revocation of supervised release.

Section 7C1.4 Option 1 calls for a flexible, individualized approach to revocation sentencing when multiple prison sentences are imposed or a person is already serving another sentence of imprisonment. Defenders support this option for two reasons.

First, the current policy statement, §7B1.3(f), suffers the same flaws as the current §7B1.3(a)(1). It is written in mandatory terms ("shall be ordered"),[101] purporting to tie the courts' hands when it comes to the

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[100] One AFPD shares the following story: "My client was struggling with a substance use disorder and voluntarily checked himself into an inpatient drug treatment program after he relapsed. Nevertheless, Probation obtained an arrest warrant from the district court for a supervised release violation petition based on the relapse. He was detained on the warrant. Months later, the district judge sentenced him to time served and added a requirement that he complete the very program he had been at when he was arrested for the violation. Unfortunately, he wasn't immediately released because the State took him into custody for failing to complete the treatment program that the federal warrant pulled him out of. After another months' long delay, the State Parole Board released him with a requirement that he comply with the federal court order to complete the program. Unfortunately, that initial arrest halted his momentum in treatment, undermined his perception of fairness in the federal justice system, and stifled his desire for change."

[101] USSG §7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release *shall be ordered to be served consecutively* to any

consecutive versus concurrent sentencing decision. But under 18 U.S.C. § 3584(a) and *Booker*, district courts have the discretion to impose *consecutive or concurrent sentences* "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." By conforming §7C1.4 to § 3584(a), Proposed Option 1 eliminates the conflicting language in §7B1.3(f) that suggests courts have no discretion to impose a concurrent sentence when, in fact, they do.[102]

Second, encouraging courts in every instance to impose consecutive revocation sentences, as Option 2 would, is poor policy and limits judicial discretion. With initial sentences, §5G1.3 and its commentary acknowledge that when an individual has multiple sentences arising from different cases, there are some circumstances where consecutive sentences are more appropriate and others where concurrent sentences are more appropriate. The same is true here. Courts are in the best position to decide whether concurrent, partially concurrent, or consecutive sentencing is appropriate based on an individualized assessment of the circumstances of the individual and the case. Option 1 properly acknowledges the necessary prominence of the sentencing court's role in this decision, where Option 2 wrongly contemplates that consecutive sentencing will always be appropriate irrespective of what mitigating factors may be present.

Regarding IFC 1(b), Defenders request that the Commission delete instructions on violations related to community confinement from §7C1.4's commentary. Community confinement, intermittent confinement, and home detention offer alternatives to incarceration that provide structure for individuals struggling on supervision, while still allowing these individuals to work, attend mental health and substance abuse treatment, and maintain prosocial relationships. Minor violations, particularly those involving the

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sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release." (emphasis added)).

[102] *See United States v. Taylor*, 628 F.3d 420, 424–425 (7th Cir. 2010) (finding plain error and remanding where the district court failed to appreciate its discretion to impose a supervised release violation concurrently or consecutively with a new sentence); *see also United States v. Salinas,* 365 F.3d 582, 588 (7th Cir. 2004) ("Although [supervised release] policy statements are nonbinding, they are to be given 'great weight' by the sentencing judge.").

illegal use of substances, should not prevent future placement in community confinement or a less restrictive sanction. Relapse is an expected part of the recovery process, and it is contrary to the goal of rehabilitation to deprive individuals of alternatives to incarceration (that allow continuation of substance use disorder treatment) due to a positive drug test or other minor violation while in community confinement or on home detention.[103]

E. Section 7C1.5: The Commission should recalibrate all revocation ranges down.

The Commission suggests in IFC 3 that it may consider getting rid of the Supervised Release Revocation Table. Defenders encourage the Commission to study the utility of the supervised release revocation table and its ranges. Replacing the table with different guidance may eventually prove to be the best path forward. But it seems premature to eliminate the table at this time. So, in this section we focus on what the table should look like, assuming that there is a table.

To summarize, we support adding a Grade D category for technical violations, as noted above. But we also support going much further: no Grade D category—indeed no category at all in the revocation table—should start above zero. One goal of this set of amendments is to give judges more discretion. Judges should always be permitted to consider non-carceral sentences; there is no directive requiring tight numerical ranges.[104] Thus, as long as the Commission retains a table that is based on the grade of violation and criminal history category, only the upper end of the ranges needs to progress upward, not the lower end. Further, Defenders urge the Commission to also lower the high end of the Grade C and D ranges and eliminate the

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[103] Human Rights Watch & ACLU, at 177. As an alternative to deleting this section, the Commission could replace the current language with the following: A court can consider community confinement, intermittent confinement, or home confinement for revocation sentences even if a previous violation specifically pertained to such alternative housing options, depending on the relevant 3583(c) factors involved in the case.

[104] *Compare* 28 U.S.C. § 994(b)(2) (in the initial-sentencing context, stating, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months").

higher ranges for Class A felonies. Together, these revisions would create a table that looks like the below:

Supervised Release Revocation Table
(in months of imprisonment)
Criminal History Category

Grade of Violation	I	II	III	IV	V	VI
Grade D	**0-3**	**0-4**	**0-5**	**0-6**	**0-7**	**0-8**
Grade C	**0-7**	**0-8**	**0-9**	**0-10**	**0-11**	**0-12**
Grade B	**0-10**	**0-12**	**0-14**	**0-18**	**0-24**	**0-27**
Grade A	**0-18**	**0-21**	**0-24**	**0-30**	**0-37**	**0-41**
~~**Class A/Grade A***~~	~~**0-30**~~	~~**0-33**~~	~~**0-37**~~	~~**0-46**~~	~~**0-57**~~	~~**0-63**~~

*Note: In response to IFC # 3, Defenders encourage the Commission to eliminate the higher set of ranges for Class A/Grade A Violations.

Finally, the Commission should specifically allow retroactively applicable guideline amendments to apply to reduce the criminal history category used in this table.

1. **Section 7C1.5's ranges should all start at zero and the upper end of the Grade C and D ranges should be lowered.**

Defenders appreciate that the Commission proposes recommending revocation sentences of less than one month for those who are in Criminal History Category I and found to have committed a Grade D violation. The Commission has an opportunity to go further, however, and adopt reduced revocation ranges that begin at less than one month for all grades of violations and to decrease ranges for individuals charged with the lowest level offenses.

Regardless of the grade of violation, when courts revoke supervised release, they almost always order incarceration.[105] This is unsurprising: the lowest revocation range in the current table starts at three months.[106] In contrast, the Sentencing Guidelines Table at Chapter 5, Part A, starts many imprisonment ranges at zero months—even where the criminal history category is a VI. Beginning the revocation tables with higher sentences than original federal criminal conduct makes no sense; indeed, a person could face a more serious sentence for a revocation of supervised release than for their underlying offense.[107]

Accordingly, the bottom end of revocation ranges should be lowered to zero for all grades of violations. This might look strange at first, but that's because we have grown acclimated to the Sentencing Guidelines Table, where a directive requires very narrow ranges that restrict judicial discretion beyond what is sensible.[108] Here, there is no directive that prohibits the Commission from offering broad sentencing ranges for each category of case (starting at zero but with the top end of ranges getting progressively higher). Judges are in the best position to determine when a particular case raises a public safety concern and, when it does, whether incarceration is the best way to address that concern. And where incarceration is imposed, regardless of the grade of violation or criminal history, it need not be lengthy. It is axiomatic by this point that the certainty of being caught is a vastly more powerful deterrent than the length of the sentence.[109] And extended periods

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[105] DOJ Report on Resources, at 17 ("The AO reported that revocations almost always resulted in a sentence of incarceration (approximately 99%)" in FY 2021 and 2022); Federal Probation and Supervised Release Violations, at 35 fig. 13 (reporting violation hearing outcomes from FY 2013–2017; 95% of Grade C violations resulted in a sentencing imposed involving a term of imprisonment).

[106] *See* §7B1.4.

[107] Underhill, *Supervised Release Needs Rehabilitation*, at 22 ("Thus, for example, a person on supervised release following a two-month sentence for a misdemeanor, who has no other criminal history but failed to report to his probation officer as instructed, faces a Guidelines policy statement recommended sentence of three to nine months of imprisonment.").

[108] *See* § 994(b)(2).

[109] DOJ, Five Things, at 1.

of incarceration only make it harder for people to re-enter their communities and increases the likelihood they will recidivate.[110]

Moreover, revocation hearings offer few procedural protections.[111] This is particularly concerning for Grade A and B new law violations where a person faces significant penalties. And Grade A and B violations typically involve conduct that is already being prosecuted by a state or federal court; if convicted, that court will punish the individual appropriately, given all the relevant facts and circumstances.

In addition to starting all ranges at zero, the Commission should also considerably lower the high end of revocation ranges for Grade C and D violations. We join in Judge Underhill's suggested ranges of 0–3, 0–4, 0–5, 0–6, 0–7, and 0–8 months for Grade D violations.[112] The Commission should then move the high-end ranges for Grade Cs to the currently recommended high-end ranges for Grade D violations.

2. Class A/Grade A revocation ranges should be eliminated.

In further response to IFC 3, the Commission should eliminate the higher revocation ranges for people on supervised release as a result of a sentence for a Class A felony. Courts should not—or at least, need not—impose longer sentences after revocation solely because of the underlying conviction. In the supervised release context, the violation, not the

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[110] *See supra* nn.31 & 91.

[111] Human Rights Watch & ACLU, at 4 ("Basic rights in criminal proceedings, such as the exclusion of illegally obtained evidence and burden of proof beyond a reasonable doubt, generally do not apply during 'revocation hearings.'"); Underhill, *Supervised Release Needs Rehabilitation*, at 8–9 ("[T]he combination of statutory amendments and decisional law has resulted in near-meaningless procedures governing supervised release violation proceedings: no right to indictment, no right to a jury trial, no requirement of proof beyond a reasonable doubt, and no right to confront adverse witnesses.").

[112] Stefan R. Underhill Comments on USSC 2025 Supervised Release Proposed Amendment, at 4 (on file with author).

underlying offense, is the focus.[113] Courts also recognize that these higher revocation ranges, some of which reach over five years in prison—that is, above the statutory maximum sentence for many cases—are too harsh.[114] Between fiscal years 2013 and 2017, courts sentenced 56% of all Class A/Grade A violations *below* the recommended revocation range.[115]

The impact of the heightened Grade A ranges falls most heavily on those convicted of drug-trafficking offenses. Some of the most common of these convictions result in statutory maximums of life, which establish a Class A felony.[116] And the majority of overall Grade A violations—52%—were committed by individuals convicted of drug offenses.[117] This result is particularly incongruous as the Commission is currently seeking comment on a proposed amendment to §2D1.1 in an effort to calibrate sentences down for many federal drug offenses.

Equally ironic is the resulting disparity between the two revocation tables for probation and revocation.[118] The Commission untethered probation from supervised release to emphasize supervised release's non-punitive purpose, but, at the same time, eliminated Class A/Grade A ranges from the probation table.[119] Now, under the proposed amendment, the supervised release table at §7C1.5 includes the far more punitive ranges for Grade A/Class A violations while the probation revocation table at §7C1.4 does not. Given the Commission's goal of prioritizing rehabilitation in the supervised

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[113] *Id.* at 5 ("The only effect of considering the seriousness of the underlying conviction when revoking supervised release is to add an additional punishment for the original conviction. The double jeopardy problems with that approach are obvious.").

[114] *See* 18 U.S.C. § 3583(e)(3).

[115] Federal Probation and Supervised Release Violations, at 37 fig. 15.

[116] For example, 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B) (if a notice under 21 U.S.C. § 851 is filed) can result in the life maximum that constitutes a Class A felony. *See also* 18 U.S.C. § 3559(a)(1).

[117] Federal Probation and Supervised Release Violations, at 31–32 fig. 10.

[118] *See* Proposed Amendment at 38–39 (§7B1.4); 49 (§7C1.5).

[119] *See id.* at 38–39.

release context, it should eliminate Class A/Grade A violations in the supervised release revocation table as well.

3. Applying retroactive amendments to supervised release violations makes sense and would not be difficult.

In response to IFC 6, Defenders support permitting courts to apply retroactively applicable guideline amendments, such as status points, or any potential future change to the criminal history calculation, to reduce a person's criminal history category in the revocation table.[120] For status points, the Commission has already determined "that the policy reasons underlying the prospective application of the amendment apply with equal force to individuals who are already sentenced."[121] Moreover, implementing retroactive amendments that reduce a person's criminal history score should be relatively straightforward, requiring only a simple reduction of the individual's criminal history points and recalculation of their criminal history category.

At this time, Defenders need additional data from the Commission to study the implications of recalculating an individual's entire criminal history category at the time of the supervised release revocation. Unfortunately, despite the Commission having access, and possibly the duty, to gather annual data on probation and supervised release revocation sentences, it does

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[120] *See* USSC, App. C, Amend. 821, Amend. 825 (2023). Presumably, an individual on probation, who is actively serving their sentence, would be able to seek retroactive application under 18 U.S.C.§ 3582(c)(2).

[121] *See* Amend. 825, Reason for Amendment; *see also United States v. McNeal*, No. 2:20-CR-00099, 2025 WL 104551,*4 (S.D.W. Va. Jan. 15, 2025) ("The Court finds that the retroactive change to the calculation of status points should apply to the calculation of [Mr. McNeal's] criminal history category for purposes of his revocation hearing. The criminal history category applicable at his original sentencing is properly adjusted based on the retroactive amendment to the Guidelines. Should the United States prove that Mr. McNeal violated the conditions of his supervised release, his criminal history category will be II, based on the three criminal history points attributable to him at his original sentencing, without consideration of the no longer applicable status points.").

not provide this data to academics, researchers, or the public.[122] Such proceedings make up a large proportion of courts' caseloads and can result in lengthy terms of imprisonment, yet relatively scarce data are available on them. The Defenders accordingly request that the Commission release datasets with probation and supervised release revocation and sentencing data publicly every year as it does with substantive offenses.

[122] *See* 28 U.S.C. 995(a)(12)-(16); *see also* Federal Probation and Supervised Release Violations, at 1–2 ("As part of its continuing duty to collect, analyze, and report sentence data, the Commission has previously published two reports that focused on probation and supervised release. . .").

Federal Public and Community Defenders
Comment on Drug Offenses

(Proposal 2)

March 3, 2025

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As a matter of law, public policy, and practice, one thing is clear: Drug sentences are too high. Though not alone in blame, §2D1.1 contributes significantly to these sentencing excesses. As Defenders have detailed prior, drug sentences have achieved ignominious results. They have exploded the federal prison population. They have contributed to a prison population whose racial makeup bears little resemblance to the country as a whole. And they have, at best, co-existed with and, at worst, contributed to a drug supply that is cheaper, more broadly available, and more deadly than before the Sentencing Reform Act.

But there is a silver lining—the outsized role that §2D1.1 played in the harmful explosion of drug-sentence lengths also makes §2D1.1 an ideal target to redress harms. Defenders commend the Commission for proposing several significant steps towards remediating harms. We urge the Commission to adopt the most expansive version of its guideline-range-reducing proposals and reject changes that would increase guideline ranges.

This Comment starts with the problem at hand: §2D1.1's flawed, myopic focus on drug quantity and type. We explain how this has contributed to an explosion in the U.S. prison population and to multiple crises in the Bureau of Prisons that the Sentencing Guidelines must account for. Thereafter Defenders address each of the Commission's proposals, identifying the approaches most likely to alleviate some of §2D1.1's harms and proposing alternate language where warranted.

For Part A, this means adopting Option 3, setting 30 as the highest quantity-related base offense level (BOL). And it also means adopting the broadest version of the specific offense characteristic (SOC) for low-level trafficking offenses by: (1) using language that bridges the divide between Options 1 and 2, (2) further capping BOLs for those receiving the SOC, and (3) focusing on the "defendant's primary function in the offense."

As for the other parts, Defenders enthusiastically support the Commission's proposal to eliminate meaningless distinctions between different types of methamphetamine, making the current meth-mixture guideline the standard (Part B); we oppose Part C (reducing the mens rea required to apply the §2D1.1(b)(13) enhancement) and Part D (creating a new enhancement for a specified type of firearm); and we support and appreciate

the Commission's proposal to clarify operation of the safety valve that applies to drug offenses (Part E).

I. It is essential that the Commission's amendments to §2D1.1 result in meaningfully lower guidelines ranges.

In the Commission's organic statute, Congress required that the new entity it was creating "establish sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process . . ."[1] and that it ensure that penal practices are "effective in meeting" the purposes of sentencing.[2] Significantly, Congress also mandated that the Commission's system of federal sentencing guidelines be "formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ."[3] Indeed, Congress adopted § 994(g) over contemporaneous objection.[4]

Unfortunately, §2D1.1 has long rested on an anachronistic, disparity-driving foundation, resulting in sentences far greater than necessary to achieve the statutory sentencing purposes. And in significant part due to overlong drug sentences, the BOP is in crisis, many years into being fundamentally unable to safely and humanely handle the population in its custody. The Commission should seize this opportunity to bring the Guidelines Manual closer to meeting Congress's mandates and to relieve some of the catastrophic conditions in BOP.

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[1] 28 U.S.C. § 991(b)(1)(C).

[2] 28 U.S.C. §§ 991(b)(1)(A) & (b)(2).

[3] 28 U.S.C. § 994(g).

[4] *See* Statement of Ass't Att'y Gen. Stephen S. Trott, Hearings before the Subcomm. On Crim. Justice of the Comm. on the Judiciary House of Representatives on H.R. 2013, H.R. 3128, H.R. 4554, and H.R. 4827 at 827, 98th Cong. (May 3, 1984) (arguing that § 994(g)'s requirement to formulate guidelines to avoid exceeding prison capacity was "[a] major problem" with the legislation).

A. Section 2D1.1 reflects a policy choice by the original Commission to base §2D1.1 on politics instead of data and experience, and calls for sentences that are too high.

As Defenders,[5] judges,[6] stakeholders,[7] and academics[8] have long noted, §2D1.1 has been flawed since its inception. While the inaugural Commission generally took an empirical, data-based approach to establishing guidelines, it departed from that approach for certain provisions, including §2D1.1.[9] Instead, the Commission opted to shape the guideline around quantity-based, mandatory minimums enacted as part of the Anti-Drug Abuse Act of 1986 (ADAA).[10] The ADAA's mandatory minimum provisions provided for

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[5] *See, e.g.,* Defenders' Comment on Proposed Priorities for the 2022–2023 Amendment Cycle, at 12–18 (Sep. 14, 2022); Defenders' Comment on Certain Controlled Substances, at 2–5 (Mar. 10, 2017); Statement of James Skuthan on Behalf of Defenders, at 2–17 (Mar. 17, 2011); Defenders' Comment on Proposed Priorities for the 2006–2007 Amendment Cycle, at 25–33 (July 19, 2006).

[6] *See generally, e.g., United States v. Johnson*, 379 F. Supp. 3d 1213, 1217–18 (M.D. Ala. 2019); *United States v. Diaz*, No. 11-CR-00821-2, *3–*18 (JG), 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013); *United States v. Genao*, 831 F. Supp. 246, 248 (S.D.N.Y. 1993) (criticizing §2D1.1's emphasis on quantity instead of culpability); Joint Statement of 31 U.S. district judges on Revised Sentencing Guidelines enclosed with Letter from Hon. William C. Conner, U.S. District Judge to Hon. William W. Wilkins, Jr., Chair USSC at 2–3 (Mar. 16, 1987) (expressing concern with post-ADAA, weight-driven draft Guidelines Manual resulting in prison term for fact pattern where probation appropriate).

[7] *See, e.g.,* The Sentencing Project Comment on Proposed Priorities, 2024–2025 Amendment Cycle, at 2–3 (July 15, 2024); Statement of Alan J. Chaset on behalf of the Nat'l Assoc. of Crim. Def. Lawyers to the USSC, at 2 (Mar. 22, 1993) ([W]e share the view of many that the current version of the guidelines overemphasizes drug quantities . . . and provides insufficient emphasis on who the offense is and what function he/she may have played in the offense.").

[8] *See, e.g.,* Peter Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy Recommendations from a Working Group*, 85 Am. J. Pub. Health 1059, 1062 (1995) ("The U.S. Sentencing Commission should review [§2D1.1] to allow more attention to the gravity of the offense and not simply the quantity of the drug."); Albert W. Altschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chicago L. Rev. 901, 920 (1991) ("[I]n the area of drug crime . . . , Congress and the Commission appear to have pursued their goals of 'uniformity' and 'proportionality' by placing cases in strangely defined groups and plucking numbers from the air.").

[9] *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

[10] *See id.*

minimums of ten and five years in prison for offenses based solely on the quantity of certain types of drugs.[11]

It is by now axiomatic that Congress adopted these mandatory-minimum quantities as proxies for "kingpins" or "major drug dealers" (the ten-year minimum) and "serious drug traffickers" (the five-year minimum).[12] It is likewise firmly established that Congress chose those quantities without first determining that the quantities would actually achieve that goal of differentiating high-level drug trafficking individuals from the far greater-in-number, easily fungible, low-level workers.[13]

Congress enacted the ADAA in the time between the SRA's passage and the Commission's statutory 1987 deadline for promulgating the first Guideline Manual. Presumably relying on the SRA's requirement to promulgate guidelines "consistent with all pertinent provisions of any Federal statute,"[14] the Commission decided to build the structure of §2D1.1 around the mandatory minimum scheme, to create a quantity-based guideline.[15]

Defenders and stakeholders have, for years, emphasized both that the Commission was not legally obligated to take this approach and that this

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[11] *See id.* at 95.

[12] *See, e.g., id.* at 95 ("Congress sought to link the ten-year mandatory minimum trafficking prison term to major drug dealers and to link the five-year minimum term to serious traffickers." (internal quotation omitted)).

[13] *See* PBS Frontline, Tr. of Interview with Eric Sterling (air date Jan. 12, 1999) (quoting former Congressional staffer who was tasked with initial drafts of ADAA's mandatory minimums as saying the legislation was "kind of cobbled together with chewing gum and baling wire. Numbers are picked out of the air."); *See also* USSC, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 23–24 (2011) ("Because of the heightened concern and national sense of urgency . . . , Congress bypassed much of its usual deliberative process. As a result, Congress held no committee hearings and produced no reports related to" the ADAA).

[14] 28 U.S.C. § 994(a)(1) (requiring, *inter alia*, that guidelines be consistent with federal statutes). Defenders say "presumably" because the historical record is virtually devoid of any contemporaneous explanation of the rationale. *See Diaz*, 2013 WL 322243, at *6 ("The original Commission was far from forthright about the role of its own data in formulating Guideline ranges for drug trafficking offenses.").

[15] *See Kimbrough*, 552 U.S. at 96–97.

approach has proved to be a fatal flaw in §2D1.1.[16] Defenders largely refer the Commission back to those prior criticisms and incorporate them here in support of the Commission's amendments beginning to step back from the quantity scheme. We note just two additional points here.

First, relying upon the ADAA's quantities has served to lock in place an anachronistic vision of the drug-trafficking marketplace. Congress enacted the ADAA at the height of a politically fraught uproar over a then-emerging drug: crack cocaine. Crack's primacy has long since faded as a parade of other substances have gained prominence, from home-cooked methamphetamine to prescription opiates, to heroin, and, more recently, to lab-produced meth and fentanyl.[17] So too has the nature of drug trafficking shifted, becoming increasingly global in nature with each passing year. We cannot fathom what the drug market will look like in one, five, or ten years. So long as §2D1.1 relies on quantity and type, it will lag perpetually behind the times. In contrast, the relevance to sentencing of an individual's role within a trafficking organization is evergreen.[18]

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[16] *See, e.g.,* Defenders' Comment on Proposed Priorities for the 2022–2023 Amendment Cycle, at 12–18 (Sep. 14, 2022); Defenders' Comment on Proposed Priorities for the 2006–2007 Amendment Cycle, at 25–33 (July 19, 2006). *See also, e.g., Diaz*, 2013 WL 322243 at *14–16.

[17] Drug crackdowns themselves have played a part in this series changing of substances prevalence. *Cf., e.g., generally* Julia Dickson-Gomez *et al.*, *The effects of opioid policy change on transitions from prescription opiates to heroin, fentanyl and injection drug use: a qualitative analysis*, 17 Subst. Abuse Treat., Prev., and Policy 55 (July 21, 2022) (finding evidence that reduced availability of prescription opiates after changes in prescribing practices led to individuals beginning to use heroin and/or fentanyl).

And the evolution of the market does not stop—presently, the DOJ is urging criminalization of xylazine. *See, e.g.,* DEA, *Xylazine Information* (accessed Feb. 26, 2025) (insisting legislative scheduling is needed for xylazine notwithstanding DEA's statutory authority to schedule substances). It is also raising alarms about emerging synthetic opioids, like nitazine. *See, e.g.,* DEA, *New Dangerous Synthetic Opioid in D.C., Emerging in Tri-State Area* (June 1, 2022).

[18] An aside by Judge Thompson underscores this consistency of culpability based on role even as the years pass and the type of drug changes. In criticizing the current §2D1.1 scheme, Judge Thompson "dr[e]w on the popular imagination" noting that "it is the Pablo Escobars, Stringer Bells, Tony Montanas, and Walter Whites of the world who bear the greatest culpability." *United States v. Johnson*, 379 F. Supp. 3d 1213, 1221 (M.D. Ala. 2019). Judge Thompson's examples are effective and

Second, focusing on mandatory minimum quantities is unduly myopic. The SRA requires that the Commission make guidelines "consistent with *all* pertinent provisions of Federal law."[19] Yet the Controlled Substances Act (CSA) extends beyond 21 U.S.C. §§ 841(b)(1)(A) and (B). The vast majority of controlled substances don't trigger mandatory minimums under those provisions,[20] and the CSA includes many criminal laws devoid of quantity thresholds for whatever substances, including the immediately succeeding provision, § 841(b)(1)(C).[21] And the relevant statutory scheme extends beyond the CSA. For example, subsequent to the ADAA, Congress enacted the statutory safety valve, which relieves certain people from otherwise-applicable mandatory minimums.[22] Tellingly, none of the safety valve's significant constraints consider the quantity or type of drugs involved in the offense, focusing instead on role and conduct.[23] Hinging §2D1.1 on role in the offense is fully consistent with the text of the safety valve, which the SRA gives no less or greater importance than other provisions in its requirement to align sentences with the law.

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understandable although Escobar (actually) and Montana (fictionally) trafficked cocaine in the 1980s, Bell (fictionally) led Baltimore heroin trafficking in the early 2000s, and White (again, fictionally) sold methamphetamine in the late 2000s.

[19] § 994(a) (emphasis added).

[20] *See* DEA, *Schedule of Controlled Substances* (Dec. 31, 2014) (listing hundreds of scheduled chemicals across a 21-page list).

[21] *See also, e.g.,* 21 U.S.C. §§ 841(b)(1)(E) (providing maximum sentence for schedule III substances without reference to quantity), 960(b)(3) (mirroring § 841(b)(1)(C), in the CSA's import/export subchapter). Section 841(b)(1)(C) is particularly notable given that it is a primary statute under which §2D1.1 sentencings arise. Significantly, at the time the Commission promulgated §2D1.1, the Commission would have considered a § 841(b)(1)(C) conviction to be for the same crime as a conviction under §§ 841(b)(1)(A) and (B). *See United States v. Hodges*, 935 F.2d 766, 769 (6th Cir. 1991) ("It is clear that the great weight of authority (if not all cases) holds that the quantity of the drug involved . . . is only relevant to the sentence that will be imposed and is not part of the offense."). However, after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 US 99 (2013), it is unquestionable that § 841(b)(1)(C) constitutes a separate crime. *See, e.g., United States v. Pizarro*, 772 F.3d 284, 292 (1st Cir. 2014) ("Under . . . *Alleyne*, each of the subsections of 21 U.S.C. § 841(b)(1), with its associated drug quantities and sentencing ranges, is a separate crime.").

[22] *See* 18 U.S.C. § 3553(f).

[23] *See id.*

Linking §2D1.1 to quantity and type has yielded dramatic, consistent harms. Driven in part by §2D1.1's sentencing ranges, the federal prison population has exploded in recent decades. In FY87, the last full fiscal year before the Commission promulgated the first Guidelines Manual, the federal prison population was 49,378 people.[24] In FY23, the federal prison population was 158,424 people, an over-200% increase.[25] And drug-trafficking sentences, mandated by §2D1.1 before *Booker* and anchored by §2D1.1 since, have helped drive that increase, with 43.8% of individuals in BOP custody as of February 22, 2025 serving time for drug offenses.[26]

This massive expansion in prison population has occurred in a racially disparate fashion. Black and Hispanic individuals comprise 70% of the people sentenced pursuant to §2D1.1[27] and, related to this, federal prisons are primarily filled with Black and Hispanic people.[28] This has hollowed out some low-income minority neighborhoods, destabilizing families and communities—factors that are linked to *increased* crime and *increased* demand for drugs.[29]

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[24] Bureau of Prisons, Past Inmate Population Trends (last visited Feb. 26, 2025).

[25] *Id.* Significantly, this 200% increase exists *after* consistent yearly prison population drops between FY13 and FY20. While our nation's population has grown, its growth pales in comparison to the prison population increase. *See* U.S. Census, Historical Population Change Data (Apr. 26, 2021) (noting 1980 population of 226,545,805 rising to 331,449,281 in 2020, which is a 46% increase).

[26] Bureau of Prisons, Offenses (last visited Feb. 27, 2025).

[27] The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023. The Commission's "Individual Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, Commission Datafiles.

[28] USSC, *Individuals in the Federal Bureau of Prisons Quick Facts* (Jan. 2024) (noting that Black and Hispanic people make up 34.8% and 31.1% of BOP population, respectively).

[29] Becky Pettit & Carmen Gutierrez, *Mass Incarceration and Racial Inequality*, 77 Am. J. Econ. & Sociol. 1153, 1153–82 (Oct. 29, 2018) ("By removing large numbers of young men from concentrated areas, incarceration reduces neighborhood stability. The cycling of men between correctional facilities and communities may even begin to trigger higher crime rates within a neighborhood, a process [one researcher] describes as 'coercive mobility.'"); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. of Justice, at 2 (2017) (discussing a neighborhood's "'tipping point,'" at which incarceration rates are so

Unsurprisingly, given all §2D1.1's flaws, judges are overwhelmingly rejecting that guideline's sentencing ranges. Over the past five fiscal years, only 29.4% of individuals sentenced under §2D1.1 received within-guidelines sentences.[30] Nearly everyone else received a below-guidelines sentence.[31]

B. The Commission is statutorily obligated to address the crises within the Bureau of Prisons, which are inseparable from the drug-sentence-fueled explosion in the federal prison population.

The explosion in the federal prison population, fueled in part by §2D1.1, has left the Bureau of Prisons in "crisis," with systemic inadequacies in staffing and infrastructure and no clear end in sight.[32] The Department of Justice's own words make plain how sentencing practices, including §2D1.1, are failing "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ."[33]

The Office of the Inspector General's 2024 report on challenges facing the DOJ paints a grim picture.[34] The report explains that "the long-standing

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high that they "break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system").

[30] Even excluding individuals who received §5K1.1 or §5K3.1 departures, 40.3% of people sentenced pursuant to §2D1.1 received below-guidelines sentences. Defenders note, however, that excluding individuals who received those departures necessarily excludes people who received other departures or variances because the Commission's data does not identify whether a person received more than those §5K departures.

[31] Only 1.6% of people sentenced pursuant to §2D1.1 received above-guidelines sentences. USSC, FY 2019 to 2023 Individual Datafiles.

[32] *See, e.g.,* DOJ Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice—2024*, at 1 (Oct. 10, 2024) ("Among the most important challenges facing [DOJ] is the long-standing crisis facing [BOP]."); Walter Pavlo, *Federal Prison Director on Record About Her Two Years At Helm*, Forbes (Aug. 6, 2024) (quoting then-Director Colette Peters as saying that concern with halfway house capacity is "almost as significant of a problem as [BOP's] recruitment and retention crisis and our infrastructure crisis . . . .").

[33] § 994(g).

[34] *See generally* DOJ OIG Report. Since January 20, 2025, a significant number of Executive branch documents have been removed from agency websites. As of this

crisis" at BOP is "[a]mong the most important challenges facing the U.S. Department of Justice . . . ."[35] And these problems are not new. Indeed, the OIG has issued over 100 reports in the past 20 years that "have identified recurring issues that impede the BOP's efforts to consistently ensure the health, safety, and security of all staff and inmates within its custody."[36]

Two of the OIG's primary concerns are particularly relevant to the Commission's § 994(g) directive: staffing and infrastructure. First, BOP has found itself unable to effectively recruit and retain sufficient employees to handle the prison population, which "create[s] security and safety issues" that "have a cascading effect on institution operations."[37] To make matters worse, BOP has addressed this problem in part through "augmentation": requiring non-corrections staff (*e.g.,* maintenance or teaching staff) to fill in as corrections officers.[38] BOP has also resorted to extensive overtime, which "can negatively affect staff morale and attentiveness and, therefore, institution safety and security."[39]

The harms of this staffing crisis are not merely possible, they are occurring. For example, last year, OIG described how understaffing of Health and Psychology Services positions impaired BOP's ability to "reduce the risk of inmate deaths."[40] And reporting beyond OIG has questioned whether even more inmates are dying than DOJ has acknowledged as a result of BOP's

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comment's filings, the documents cited herein were available online. Defenders maintain copies of the documents in case they become unavailable and are needed by the Commission or its staff.

[35] *Id.* at 1.

[36] *Id.*

[37] *Id.* at 2. The OIG identified these concerns before recent upheavals of the federal executive workforce, which have also reached BOP. *See, e.g.,* Walter Pavlo, *Trump's 'Deferred Resignation' Causes Concern At Bureau Of Prisons*, Forbes (Jan. 30, 2025) (discussing email sent to most of Executive branch purporting to offer continued pay in exchange for resignations, and noting concerns that both new and tenured BOP employees may resign) and Walter Palvo, *Bureau Of Prisons To Cancel Staff Retention Bonuses*, Forbes (Feb. 26, 2025).

[38] DOJ OIG Report at 2. This practice unsurprisingly impacts other matters—like prison maintenance and education programming, including First Step Act programs.

[39] *Id.*

[40] *Id.* at 3.

reporting practices. In 2024, OIG released a report examining 344 "non-natural" deaths in BOP custody between FY2014 and FY2021, finding "several operational and managerial deficiencies, which created unsafe conditions prior to and at the time of a number of these deaths . . . ."[41] Yet, as an NPR article explained one month prior, BOP has categorized "at least three-quarters of all federal prison deaths since 2009" as natural, and thus not subject to compulsory investigation.[42] But 70 percent of the people who died were under age 65, an age not primarily associated with natural deaths.[43]

Second, infrastructure. BOP's present facilities are crumbling, and BOP lacks any realistic plan or ability to prevent further deterioration let alone address existing problems.[44] This problem could not be more widespread; an OIG audit found that "*all 123 of the BOP's institutions required maintenance*—finding among other things, multiple facilities with seriously damaged and leaking roofs."[45] OIG's unannounced 2023 inspection of FCI Tallahassee provides one example. During that inspection, OIG discovered that people lived in housing units with leaking roofs.[46] Yet as of the end of 2024, FCI Tallahassee had not even yet "requested or received funding" to replace those roofs, let alone actually replaced them.[47] Infrastructure has likewise led BOP to close three of its facilities, which increases the strain on other facilities.[48]

And BOP is doubly impaired in its ability to address these infrastructure problems. First, it "lacks a well-defined and comprehensive

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[41] *Accord* DOJ Office of the Inspector General, *Evaluation of Issues Surrounding Inmate Deaths in Federal Bureau of Prisons Institutions* at i (Feb. 2024), *with id.* at 3 n.6 ("[O]ur evaluation examined nonnatural inmate deaths . . . we therefore did not examine inmate deaths resulting from natural causes.").

[42] Tirzah Christopher, *There is little scrutiny of 'natural' deaths behind bars*, NPR (Jan. 2, 2024).

[43] *See id.* (noting that "natural deaths" are those that happen "either solely or almost entirely because of disease or old age.").

[44] *See* DOJ OIG Report at 4.

[45] *Id.* (emphasis added).

[46] *See id.*

[47] *Id.*

[48] *See id.* at 1.

infrastructure strategy."[49] Second, it is unlikely to obtain sufficient funds to address its issues as "each year the Executive Branch requests a facilities budget for the BOP that is grossly inadequate to meet the BOP's needs."[50] For example, despite the $3 billion *backlog* in infrastructure needs, the Executive's fiscal year 2025 budget requested a total of only $260 million—a 91.3% shortfall—for buildings and infrastructure.[51]

Perhaps no individual facility puts a finer point on BOP's crises more than FCI Waseca. In May 2023, OIG chose FCI Waseca, a minimum-security women's prison, as the site of its first unannounced inspection—specifically because it was classified as a "low risk" facility from which OIG could "establish a baseline against which to compare the operations of other BOP institutions."[52] Despite that low-risk rating, OIG uncovered problems consistent with the overall agency crises. FCI Waseca was "struggling to maintain a staffing complement consistent with the BOP's determination of the needs of the institution."[53] At the time of the inspection, the facility was missing 25% of its total positions allotted, with vacancies "particularly acute" among correctional officers.[54] The Health Services and Psychology Services departments were both at least 25% below their staffing needs.[55] At the same time, the inmate population was "13 percent over capacity."[56]

OIG likewise identified "serious facility infrastructure issues that negatively affect the conditions of confinement for inmates and the work conditions for staff."[57] There were people in custody "liv[ing] in basements, with beds positioned in close proximity to pipes that occasionally leak" and

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[49] *Id.* at 4.

[50] *Id.*

[51] *See id.*

[52] DOJ Office of the Inspector General, *Inspection of the Federal Bureau of Prisons' Federal Correctional Institution Waseca*, at 1, Evaluation & Inspections Division (May 2023).

[53] *Id.* at 3.

[54] *Id.*

[55] *See id.*

[56] *Id.*

[57] *Id.* at 4.

roofs that "routinely leak" in the "food service area, health services area, recreation area, and Special Housing Unit . . . ."[58]

And things appear to be getting worse at BOP, not better. BOP "is currently experiencing significant upheaval, with a wave of leadership departures leaving the agency without clear direction during a critical time."[59] BOP's most-recent Director, Colette Peters, was recently terminated.[60] And her termination has been followed by the ensuing Acting Director announcing his retirement, "accompanied by the resignations of five other senior leaders, including [BOP's] General Counsel . . . and two regional directors."[61] BOP was already ill-equipped to handle the population entrusted to its care and is moving further from that minimum.

In such an atmosphere, it is perhaps not surprising that abuse is rampant. No abuse case is presently more prominent than that of the recently closed FCI Dublin, where BOP staff sexually assaulted dozens of people in custody, eventually resulting in eight officials (including the former warden and the former chaplain) being charged with crimes.[62] But Dublin was far from alone in mistreatment, "a 2022 Senate investigation found that bureau staff have sexually abused [people detained in federal women's prisons] in at least two-thirds of those facilities over the past decade."[63] And while these women's facilities garner headlines, BOP's male facilities are likewise rife with mistreatment.[64]

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[58] *Id.*

[59] Walter Pavlo, *Bureau of Prisons Executives Announce Retirement Ahead of New Director*, Forbes (Feb. 17, 2025).

[60] *See id.* Even the separation is chaotic, with the former Director having challenged as unlawful her removal to the Merit Systems Protection Board. *See* Tom Temin, *A Biden appointee sues to keep her job under Trump*, Federal News Network (Feb. 21, 2025) (interviewing former Director Peters's attorney in complaint before MSPB).

[61] *Id.*

[62] *See, e.g.,* Lisa Fernandez, *Feds Closed a Prison Notorious for Abuse, Things Only Got Worse*, Rolling Stone (June 5, 2024).

[63] Cecilia Vega, *Inside the Bureau of Prisons, a federal agency plagued by understaffing, abuse, disrepair*, 60 Minutes (Jan. 28, 2024).

[64] *See, e.g.,* Askia Afrika-Ber, *Hunger and Violence Dominate Life at USP McCreary, Where Men are Incarcerated*, Washington City Paper (Jan. 19, 2024)

In short, it is painfully evident that BOP lacks the capacity to safely and humanely hold the people sentenced to federal prison.[65] Defenders encourage the Commission to follow its § 994(g) mandate and to reformulate §2D1.1 in a manner that will materially reduce BOP's overcapacity.[66]

(detailing the "house of horrors" at USP McCreary where "Prisoners are hungry [and v]iolence is everywhere" due to Warden's "policy of collective punishment); *accord* D.C. Corrections Information Council, *USP McCreary Report on Findings and Recommendations*, at 5 (noting "[k]ey themes" of interviews with detained persons being "staff conduct (including allegations of physical abuse of inmates . . .), the frequency of lockdowns and commissary restrictions, and the lack of hygiene supplies in the Special Housing Unit"; and also noting that staff indicated it would not investigate assault reports unless anonymous survey respondents' identities were disclosed).

[65] These issues cannot be depicted as some quirk in the most recent Presidential administration's handling of BOP, for example by blaming it for ending many private prison contracts. The OIG identified identical staffing and infrastructure concerns prior to the most recent administration as well. *See, e.g.,* DOJ Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice—2019*, at 3–5 (Oct. 18, 2019) (detailing in 2019 BOP's problems with staffing, healthcare, and infrastructure).

[66] Following the first Guidelines Manual's promulgation, litigants contended that the Commission's projection of a likely 10% increase in prison populations revealed a violation of § 994(g). While courts rejected those arguments, they did so on questionable grounds—to say nothing of the fact that the Commission itself profoundly underestimated the increase. For example, the first appellate court to reject this argument relied in significant part on a Senate Report that it said clarified that § 994(g) did not mandate that the Commission try to avoid overcrowding. *See United States v. White*¸ 869 F.2d 822, 828 (5th Cir. 1989) (quoting S. Rep. 98-225, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358); *see also United States v. Erves*, 880 F.2d 376, 380 (11th Cir. 1989) (relying upon *White*, 869 F.2d at 829). But Senate Report 98-225 was written in August 1983, regarding a Senate bill containing a version of § 994(g) *that did not yet contain the relevant language*: it did not require that the guidelines be "formulated to minimize the likelihood that the Federal prisons population will exceed" prison capacity. *See* Comprehensive Crime Control Act of 1983 § 994(g), S.1762 (Sep. 20, 1983) (containing language materially different than current 28 U.S.C. § 994(g)). This directive language did not emerge until a later date, as a provision in a separate House precursor to the enacted SRA. *See* Sentencing Act of 1983 § 3791(d), H.R. 4554 (Nov. 18, 1983) (including the "formulated to minimize" requirement).

Regardless, in the present day § 994(g) could easily provide reason for courts to vary even more frequently. *Cf., e.g., United States v. Colucci*, 743 F. Supp. 3d 452 (E.D.N.Y. 2024) (varying downward based on conditions of confinement despite

II. PART A: Defenders urge the Commission to remove at least all base offense levels over 30 and to provide a six-level role-based reduction that is clear and simple to apply.

Given its foundational problems, §2D1.1's flaws are best addressed with a start-from-scratch approach. But Defenders fully endorse both subparts of Part A as meaningful steps toward a more-rational guideline. If the Commission takes the most fulsome steps that it is currently considering, it can make a significant dent—perhaps larger than ever prior—in the excessive influence that quantity and type exert on sentences.

A. The Commission should, at minimum, remove all base offense levels over 30.

The Commission's data supports capping §2D1.1 BOLs well below 30—perhaps at 20. And, of course, the lower BOLs are capped, the more significantly the Commission will be able to reverse course from a regime that currently calls for unduly harsh sentences in most cases and which has contributed to a crisis within federal prisons. Certainly, the Commission should at the very least adopt its lowest proposed top offense level of 30.

According to Commission data, judges are not imposing guideline sentences across most of §2D1.1's base offense levels. In FY23, at every BOL from 18 up, most individuals sentenced under §2D1.1 received any below-guideline-range sentences.[67] And for BOL 18 and higher, over 40% of individuals received below-range sentences for reasons other than reductions under §5K1.1 or fast-track programs.[68]

As the Commission explained in its introduction to this proposal, average sentences imposed at the highest §2D1.1 base offense levels diverge the most from the guideline minimums.[69] This is why the lowest BOL cap

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having "reasons to question the depth of [defendant's] remorse"), which is further reason for the Commission to rely upon § 994(g) as it fixes §2D1.1.

[67] USSC, *Public Data Briefing Proposed Amendments on Drug Offenses*, at 6.

[68] *Id.*

[69] USSC, *Proposed Amendment to the Sentencing Guidelines*, at 57 (Jan. 24, 2025). Defenders note that it is hard to determine why this is so, as Commission data do not allow us to determine how many people who received either a §5K1.1 or

option is set at 30. And Defenders do support this option as a minimum change. But while the highest offense levels certainly have the highest gap between sentences imposed and guideline minimums, the Commission's data shows substantial variation even at BOLs below 30. Specifically, when including cases receiving §5K1.1 and §5K3.1 adjustments, with only one exception, at every BOL from 20 up, courts have been imposing sentences at least 20% lower on average than the guideline minimum.[70] Even when excluding §5K1.1 and §5K3.1—which disregards cases in which, along with applying those provisions, the court varied or departed further—BOLs 20, 22, and 24 all have sentences that, on average, fall below the guideline minimum.[71]

Commission data demonstrates the potential for a reduced maximum BOL to decrease racial disparities in the federal prison population. Racial disparities are present at every offense level, with white individuals never comprising more than 33.7% of individuals sentenced although they make up a majority of the U.S. population.[72] Hispanic people constitute the largest demographic group at every §2D1.1 drug quantity-based BOL above 28, and make up a majority of those with BOLs of 34 and higher.[73] While Hispanic people will still make up a disproportionate number of the people sentenced at a new, 30-capped BOL, they will garner significantly lower guideline ranges. In order to meaningfully reduce sentences for Black individuals, the proposal would need to go further, since Black individuals are disparately represented, and the most frequently sentenced people, at all BOLs below 28.[74]

The Commission's proposals come after an extended history of criticism of the current drug quantity table, and at a time when it is clear

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§5K3.1 departure also received another departure or variance. Defenders routinely represent clients who receive variances in addition to either departure.

[70] *See* *Public Data Briefing—Drug Offenses*, at 7 (showing average actual sentence imposed versus average guideline minimum at each quantity base offense level). That lone instance where the 20% level requires rounding is BOL 24, where the rate is 19.7%. *Id.*

[71] *Id.* at 8.

[72] USSC, FY 2019 to 2023 Individual Datafiles.

[73] USSC, FY 2019 to 2023 Individual Datafiles.

[74] USSC, FY 2019 to 2023 Individual Datafiles.

that the BOP cannot now, and has no plan that will enable it in the future to, handle a prison population in line with current sentencing trends. Defenders urge the Commission, in taking its approach of capping base offense levels, to go as low as the data provides, and certainly not higher than 30.[75]

B. The Commission should adopt a broad, six-level, role-based reduction for individuals involved in low-level trafficking.

Defenders especially welcome the Commission's proposal for a new, low-level trafficking SOC. Defenders encourage the Commission to take the broadest steps possible in adopting this SOC as doing so will help to substantially reduce §2D1.1's overreliance on drug quantity and type for many individuals, and will remediate some of the reason for §2D1.1's too-high (and often-rejected) sentencing ranges.

Hoping to most efficiently convey Defenders' thoughts on how to accomplish these goals, we start by illustrating how all of our suggestions would look as a complete SOC. As the Commission can see in our illustration, we work from the structure of Option 1 but borrow conceptually from Option 2. The big difference between the options is Option 1 provides an exhaustive list of roles warranting a reduction while Option 2 provides a non-exhaustive list of roles as examples of circumstances that may (but do not necessarily) warrant a reduction. Defenders oppose an exhaustive list of roles warranting a reduction; inevitably there will be cases involving especially low-level trafficking that the Commission has not contemplated. But while flexibility is key, so are clarity and consistency. Defenders predict (and fear) that if the Commission merely provides an optional list of examples, the result will be widely disparate treatment of similar conduct.

In this illustration, the Commission's proposed language is in black (ordinary typeface); Defenders' choices among Commission-created options

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[75] The Commission also seeks comment on whether to make changes to §2D1.11's chemical quantity tables, which are "generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1." *Proposed Amendments* at 69. For consistency, the Commission should strike as many of the top base offense levels in §2D1.11's tables as it strikes in §2D1.1.

are in **bold**; and Defenders' suggestions for additional language and subtractions are in red.

(b)(17) If—

~~(A) subsection (b)(2) does not apply;~~

~~(B) [the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; and]~~

~~(C)~~ **the defendant's primary function in the offense was performing a~~**~~ny of the~~** **low-level trafficking function**~~s~~**,** including any of the below—

(i) carried one or more controlled substances (regardless of the quantity of the controlled substance involved) On their person, vehicle, vessel, or aircraft for purposes of transporting the controlled substance, without holding a significant share of the ownership interest in the controlled substance or claiming a significant share of profits from the offense;

(ii) performed any low-level function in the offense other than the selling of controlled substances (such as running errands, sending or receiving phone calls or messages, scouting, receiving packages, packaging controlled substances, acting as a lookout, storing controlled substances, or acting as a deckhand or crew member on a vessel or aircraft used to transport controlled substances) without holding a significant share of the ownership interest in the controlled substance or claiming a significant share of profits from the offense;

(iii) distributed retail or user-level quantities of controlled substances to end users **or similarly situated distributors** and **one or more of the following factors is present**: (I) 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 event; (II) the defendant was motivated primarily by a substance use disorder; (III) the defendant was engaged in the distribution of controlled substances infrequently or for brief duration; (IV) the defendant received little or no compensation from the distribution of the controlled substance involved in the offense; **(V) the defendant had limited knowledge of the distribution network**;

decrease by **6** levels. This reduction shall apply regardless of whether the defendant acted alone or in concert with others.

* * *

(e) Special Instructions

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(2) If the defendant receives the reduction at (b)(17) of this guideline, do not apply §3B1.2 (Mitigating role) to any portion of the defendant's guideline calculated under §2D1.1;

* * *

Commentary

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21. Application of Subsection (b)(17).—

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~~(B) If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by the defendant's actual criminal conduct, a reduction under subsection (b)(17) ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense.~~

(B) The Commission intends that Subsection (b)(17) be liberally construed to decrease the potential that the Drug Quantity Table will be the sole driver of sentencing for individuals who are not the "major drug traffickers" or "serious drug traffickers" envisioned by the Anti-Drug Abuse Act of 1986's mandatory minimum scheme. *See Kimbrough v. United States*, 552 U.S. 85, 95 (2007) (discussing purposes of the mandatory minimum quantities).

* * *

To summarize, our revised proposal provides for a six-level reduction for anyone whose primary role in the drug-trafficking market was one of several enumerated roles or a similarly low-level role. If the primary role was

a qualifying low-level role, no other factors are automatically disqualifying. Courts are instructed to apply this reduction liberally, to achieve meaningfully lower sentencing ranges. People who get this reduction have a BOL cap (at 17). And while they cannot also get the Chapter 3 mitigating-role reduction for their drug offenses if they get the (b)(17) reduction, they are eligible to get the mitigating-role reduction otherwise.

Expanding upon this summary, here we discuss each decision point for the proposed amendments, in the order in which they appear in the proposal:

Proposed (b)(17)(A) & (B). *If an individual otherwise qualifies for the low-level-trafficking SOC, neither violence nor weapon possession should automatically disqualify him.* Violence and the use of weapons are quintessential considerations for sentencing judges.[76] But both are misplaced as disqualifiers within the new SOC for three reasons. First, including these disqualifiers will not further the purpose of the amendment. The Part A proposals are inspired by long-pending criticisms of §2D1.1's overreliance on quantity and drug type instead of role in the offense. Whether a person used violence or a weapon is a relevant fact (that is addressed in other SOCs), but it does not alter that person's role in the offense.

Second, including the proposed disqualifiers would result in problematic double-counting. Section 2D1.1 already includes two separate, two-level enhancements for possession of a weapon and using violence.[77] If the Commission promulgates the SOC with either (or both) disqualifiers, two otherwise-identical couriers would have guideline ranges separated by as many as *eight levels* based solely on the presence of violence or a gun.[78] This

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[76] Defenders have no doubt that courts will factor in any violence or weapons when choosing where within (or beyond) the guideline range to sentence a person. Defenders here simply contend that those factors should only shape the guideline range via the already-in-place corresponding SOCs, not an additional preclusion.

[77] §§2D1.1(b)(1), (b)(2).

[78] An example puts this in perspective: If the Commission adopts both the 30 BOL cap and the six-level SOC option, a CHC I person with the highest BOL and a weapon enhancement would have an offense level 32, for a 121–151 month range, while a person equal in all ways except the weapon would have a level 24, for a 51–63 month range. That 70-month increase to the bottom of the guideline range attributable solely to the weapon is almost two years longer than the average

double-counting could even become triple-counting when combined with the Commission's proposal (as currently written) to foreclose §3B1.2 for §2D1.1 in light of the new low-level trafficking SOC. Presently, violence or weapons do not bar a role reduction, and thus a person would simultaneously lose access to §3B1.2 while also being blocked from the new SOC. The better approach is simply to keep the low-level trafficker SOC as it is: a reduction meant to reflect the mismatch between drug quantity and a person's role, and to rely on the long-existing enhancement SOCs to create marginal punishment increases for violence or weapons.

Third, the Commission's data reveal that the current drug sentencing ranges are too high even for individuals who received an enhancement for violence, a weapon, or both. Over the last five fiscal years for which data is available, people receiving the §2D1.1(b)(1) dangerous weapon SOC received sentences below the guideline range in 63% of cases, including 40% of cases in which neither a §5K1.1 nor §5K3.1 departure applied.[79] Likewise, among people receiving the §2D1.1(b)(2) violence enhancement, 67% received below-range sentences, including 45% of people who received neither §5K1.1 nor §5K3.1 departures.[80] Even people receiving *both* SOCs mostly received below-range sentences, with 67% of people who received both sentenced below the range, including 46% for reasons other than §5K1.1 or §5K3.1.[81] In short, judges are telling the Commission that drug sentencing ranges are too high even in weapon and violence cases.

Proposed (b)(17)(C) introductory language. *The SOC should turn on a person's primary function, rather than allowing a single aberrant action in an offense to set aside a person's low-level function.* By focusing on a person's "primary function," the SOC will better fulfill its promise: decreasing the near-total impact that drug quantity and type have on sentencing ranges. If a person can fairly be said to have had a primary role of a low-level trafficker, it makes little sense to leave that person in the mid- or high-level trafficker pool based upon as little as one identified aberration in their

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firearm sentences. *See* USSC, *2023 Annual Report*, at 17 (noting 49-month average sentence for firearms offenses in FY23).

[79] USSC, FY 2019 to 2023 Individual Datafiles.

[80] USSC, FY 2019 to 2023 Individual Datafiles.

[81] USSC, FY 2019 to 2023 Individual Datafiles.

conduct. Aberrant, beyond-primary-role behavior will of course remain fair ground for courts choosing ultimate sentences.

Also, the SOC should provide a clear list of qualifying conduct but leave open the possibility of qualifying conduct that is not specifically listed. As flagged at the top of this subsection, Defenders' revision effectively merges Option 1 with Option 2: offering a list of qualifying conduct (as Option 1 does) but also using language that makes clear that other, unlisted conduct of a similar variety may qualify as well (as Option 2 does).[82] As discussed, this balances the need for flexibility with the need for clarity and consistency.

Even now we have questions about circumstances where this reduction should—but perhaps might not—apply. For example, how would these categories work with inchoate offenses?[83] And what about individuals who played a role that would be consistent with the "broker/steerer" category that the Commission has identified as less culpable than street-level dealers?[84] But we also don't know what questions we have not thought of yet; thus, the most sensible approach would allow for flexibility. As for the need for clarity and consistency, our experience with the Commission's 2015 amendment to the mitigating-role reduction shows that if the Commission permits discretion in the kinds of cases courts consider low-level, we will see judge-based disparities in similarly situated cases.[85]

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[82] To accomplish this, we add the phrase "including any of the below" to the opening clause of Option 1. And according to the Commission's rules of construction, "[t]he term '***includes***' is not exhaustive[.]" USSG §1B1.1 App. N. 2.

[83] If we are dealing with a conspiracy that never came to fruition, the person may never have "performed any low-level function" in the offense, although they would have conspired to perform such a function.

[84] *See* USSC, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 167.

[85] *See* USSG App. C, Amend. 794, Reason for Amendment (2015) (amending §3B1.2 because mitigating role was "applied inconsistently and more sparingly than the Commission intended"), *see also, e.g., id.* (noting substantial interdistrict disparity for couriers receiving role reduction with low of 14.3% in one district and high of 97.2%). Even after the Commission's 2015 Amendment, Defenders continue to encounter dramatically different applications of §3B1.2 among and between districts. *Cf. Proposed Amendment: Drug Offenses*, at 57 ("[C]ommenters have raised concerns that the mitigating role adjustment . . . is applied inconsistently in drug trafficking cases . . . .").

Defenders are hopeful that by enumerating a list of roles that qualify for the reduction and also allowing for the possibility of other, unenumerated low-level roles, the Commission can ensure that courts actually apply the SOC to reach the numerous people currently convicted for low-level trafficking roles.[86]

Proposed (b)(17)(C)(i), (ii). *The SOC should only exclude people who possess a "significant share" of the ownership interest in controlled substances.* In both Option 1 and Option 2, the Commission excludes from the first two categories of low-level traffickers any individual who held "an ownership interest in the controlled substance." This is unduly broad. While the Commission is certainly right that low-level traffickers are unlikely to be the sole owners of large quantities of substances, Defenders routinely have cases in which a client's payment for their low-level trafficking consists solely or partially of some amount of the controlled substances.[87]

The solution to this problem is found only a few words later in the same sentence. When it comes to the profit from trafficking, the Commission's proposal only excludes those individuals who "claim[] a substantial share" and not those who claim any share. The same logic of preserving the SOC for those whose interests pale in comparison to the overall industry works for substances as well. Defenders thus propose adding "a significant share of the" before "ownership interest in the controlled substance."

Proposed (b)(17)(C)(iii). *The Commission should require only one additional factor, if any, for street-level retailers or distributors to obtain the low-level trafficking SOC.* With (b)(17)'s other enumerated drug-trafficking

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[86] The Commission's data make clear that a substantial portion of the numerous people sentenced for drug offenses are low-level actors. *See* *Public Data Briefing—Drug Offenses*, at 12 (identifying as street level dealer, broker, courier, or employee/worker 46.8% of a sample of individuals sentenced in FY22 for methamphetamine); *id.* at 15 (identifying as street level dealer, broker, courier, or employee/worker 60.8% of sample of sentenced individuals in FY19 for fentanyl and fentanyl analogue offense).

[87] *See, e.g., United States v. Stibbe*, 337 F. App'x 575, 575-76 (7th Cir. 2009) (affirming sentence of individual solely alleged to have regularly transported others to and from drug purchases in exchange for $20 of heroin for personal use each time).

roles, the focus is solely on an individual's role, not their motivation. But the Commission parts ways with that approach when it comes to individuals who "distributed retail or user-level quantities . . . to end users or similarly situated distributors." For these individuals, the Commission lists a series of motivations for engaging in the activity, including substance use disorder, familial ties, or coercion, making it harder for an individual to obtain the SOC from a sales-related offense.

To be clear, street-level dealers ought to be included in the SOC without any greater requirements than other people who perform low-level functions. At bottom, the Commission's proposal is addressing the overreliance on weight and quantity, a flaw that holds just as true for street dealers as for other low-level individuals. Indeed, it remains beyond reasonable dispute that street dealers were not Congress's target with its quantity-based scheme. The Commission has recognized that these are not high-culpability cases.[88] And the very criticisms that have inspired the SOC have included street dealers among low-level activity.[89] Further, the prosecution of street dealers, as one judge complained back in 1993, is "simply a matter of taking minnows out of a pond."[90] Long sentences in these cases accomplish nothing—they have "absolutely no effect on the life of the pond" these individuals previously inhabited.[91]

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[88] Statement of Judge Patti B. Saris, Chair, USSC, for the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences," Comm. on the Judiciary, U.S. Senate, at 5 (Sept. 18, 2013) (describing "street level dealers" as "many steps down from high-level suppliers and leaders of drug organizations").

[89] *See, e.g., United States v. Johnson*, 379 F. Supp. 3d 1213, 1220 (M.D. Ala. 2019) ("To draw on the popular imagination, it is the Pablo Escobars, Stringer Bells, Tony Montanas, and Walter Whites of the world who bear the greatest culpability, *not the street peddlers, middlemen*, and mules . . . ." (emphasis added)). Defenders' retail-level clients are routinely barely (if at all) making ends meet and are often foreclosed from garnering lawful employment (including due to convictions like those triggering §2D1.1).

[90] Hon. Whitman Knapp, *The War on Drugs*, 5 Fed. Sent. R. 294, 295 (1993).

[91] *Id.*

Because including any extra barrier is at odds with this reality and the SOC's purpose, the Commission should, at most, require only one of the additional listed mitigators for street-level dealers.[92]

Proposed (b)(17) concluding language. *The low-level trafficker SOC should result in a six-level decrease and, for the same reasons, the Commission should amend §2D1.1(a)(5) to cap at 17 the BOL for a person receiving the low-level trafficking SOC.* Consistent with our overarching point that drug sentences are far too high and that BOP is not equipped to handle the present number of people within its custody, Defenders submit that the Commission should adopt its highest proposed reduction, six levels—though going even higher would be fully merited. For related reasons, either the SOC itself or a modified §2D1.1(a)(5) should cap the base offense level for a low-level trafficking case at 17.

Defenders would not be surprised if, at first blush, a BOL cap set at 17 seems like a decrease too far.[93] But a study by the DOJ supports this proposal. In 2018, DOJ looked at the nationwide average time served by offense category for people sentenced in state courts across the nation.[94] For drug-trafficking offenses—distinct from possession offenses—the average length of sentence served was 26 months, with the median at 17 months.[95] It would make sense for the Commission to cap the BOL at a level that would

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[92] While Defenders are confident that a substantial portion of street-level dealers are motivated by the mitigating factors the Commission has chosen, Defenders are particularly worried about courts splitting hairs over what constitutes "little . . . compensation." Courts will of course remain authorized to factor into their § 3553(a) decision the rare instances where an individual facing sentencing was well compensated or was drug trafficking by actual choice.

[93] Admittedly, arriving at a cap that will make sense to more than the defense community has proved a difficult task. The Commission appears unlikely to consider pre-1984 data to determine this level. But at the same time contemporary federal sentencing data is irreparably tainted because of the too-high guideline's anchoring effect. *See Peugh v. United States*, 569 U.S. 530, 541, 543–44 (2013) (discussing how post-*Booker* guidelines anchor sentences).

[94] DOJ Office of Justice Programs, Bureau of Justice Statistics, *Time Served in State Prison, 2018* at (March 2021).

[95] *See id.*

place this national average time-served for drug trafficking within the CHC I guideline range.[96]

This BOL cap change addresses the current crises within the BOP with the level of boldness that circumstances require, but it would also address a disparity that this body rarely considers but is always top of mind for our clients: the disparity between state and federal sentences.

Proposed (e)(2). *A §3B1.2 mitigating-role reduction should remain available to individuals who do not get the §2D1.1(b)(17) reduction.* Defenders do not object generally to the Commission's effort to establish that a person cannot be both a minor participant and a low-level trafficker, to prevent double-counting—as many hypothetical examples where low-level trafficking is present would also trigger the role reduction for the same reasons. However, there are recurrent circumstances that do not exhibit that concern.

There will be people who could receive a role adjustment but aren't able to get the (b)(17) SOC despite their offense level being set by §2D1.1. We have already flagged earlier in this Comment one category of people potentially in that situation: individuals convicted of inchoate offenses.[97] And consider fictitious stash house robberies—a deeply problematic category of cases in which federal law enforcement officers have persuaded people to rob non-existent stash houses and have then pursued sentences based on inflated

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[96] Defenders' proposed level 17 cap errs on the side of *higher* sentences. Section 2D1.1's BOL cap applies only if the person received the low-level trafficking SOC and fell in CHC I. But the DOJ's study average was not limited to people in low-level positions or to people with limited criminal histories; it necessarily also included people convicted of mid- and high-level activities and people with more-extensive criminal histories. Inevitably, the Study's average sentence determination would be even lower if it looked only at apples-to-apples low-level trafficking cases with limited criminal history.

[97] In addition, Commission data identify at least one category of drug-trafficking role that occasionally obtains a role reduction, but that is unlikely to obtain the Commission's proposed SOC: wholesalers. As part of the data presentation for this proposal, the Commission coded for role from a sample of methamphetamine and fentanyl cases from FY22 and FY19, respectively. The Commission determined that 2.8% of the methamphetamine wholesalers sample received a mitigating role adjustment, as did 2.3% of the fentanyl wholesalers sample". *See* *Public Data Briefing—Drug Offenses* at 13, 16. To entirely preclude both the SOC and mitigating role for wholesalers would constitute a de facto increase in sentences for the small but apparently extant number who receive mitigating role.

quantities of non-existent drugs.[98] It is hard to see how a person convicted for planning a fictitious stash house robbery could qualify for a (b)(17) reduction, given that the offense isn't about trafficking per se, although it often comes within §2D1.1. But it is not hard to imagine the same person meeting §3B1.2's requirements. At best, this would be the subject of litigation.

Relatedly, there are individuals whose offense level would be determined under some other guideline but with significant offense-level increases coming from §2D1.1's drug quantity table—*e.g.,* money laundering under §2S1.1. A person involved in laundering trafficking proceeds, but not trafficking itself, wouldn't seem to be capable of getting the (b)(17) SOC. But under the Commission's current (e)(2) language—"if the defendant's offense level is determined under this guideline"—it appears that they would nevertheless be excluded from the §3B1.2 mitigating-role reduction. Again, at best, this would be the subject of litigation.

There will also be individuals who are convicted of a drug-trafficking offense and some other offense where grouping rules come into play. It is important that §2D1.1 not preclude courts from applying the mitigating-role reduction to the other offense that's calculated under some other guideline, if that reduction is appropriate.

Proposed application note 21(B). *The Commission should not include language that ordinarily forecloses the low-level trafficker SOC where the individual was "convicted of a significantly less serious offense than warranted by the defendant's conduct."* The Commission proposes to incorporate certain commentary from §3B1.2 into the low-level trafficker SOC. Most concerningly, this would include Application Note 3 of §3B1.2,

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[98] *See, e.g, Conley v. United States*, 5 F.4th 781, 787 (7th Cir. 2021) (discussing prior circuit opinions describing fictitious stash house stings as "tawdry" and "troubling" in that they targeted mostly "poor people of color" who might have otherwise stayed out of trouble and gave "law enforcement free rein to manipulate sentences by setting imaginary drug amounts," among other concerns); *United States v. Evans*, __ F. Supp. 3d __, 2024 WL 5080545, at *2 (S.D. Fl. Dec. 10, 2024) ("Although the ATF's [reverse stash-house] sting operations have withstood challenges on the grounds of entrapment . . . , reviewing courts . . . have expressed deep concerns about the extensive use of deception, and the methods by which targets are selected.").

which provides that the mitigating role reduction is "ordinarily not warranted when the defendant received a lower offense level by virtue of being convicted of a significantly less serious offense." Defenders urge the Commission not to incorporate this commentary, which could largely undermine the new SOC.

The primary purpose of the proposed §2D1.1(b)(17) is deemphasizing to some extent drug type and quantity while elevating a better measure of culpability: function in the offense. Unfortunately, the Controlled Substances Act defines offense seriousness almost exclusively with reference to drug type and quantity (under the deeply flawed structure set by the ADAA back in 1986).[99] Thus, in the mine-run of cases, the very reason the individual could have been convicted of a more serious offense will be precisely because of the quantity and type of drug involved in the offense—the precise factor the SOC is intended to deemphasize.[100] Indeed, in a case where the individual was convicted of the highest possible mandatory minimum permitted by the facts, the new SOC wouldn't be useful anyway, because the mandatory minimum would override a lower guideline range.[101] Thus, the proposed Application Note 3 text could effectively cancel out the new (b)(17).

Application Note 3 to §3B1.2 was designed for a different purpose. Section 3B1.2 is an applicable-to-all-guidelines mitigation provision that calls on courts to compare individuals who have engaged in the same or similar conduct to determine who is more or less culpable. In that context, a judge could reasonably find that the applicable statutory sentencing ranges already sufficiently account for the mitigating circumstance. The proposed §2D1.1(b)(17) isn't really about "mitigation" (although individuals who come within it will often be said to have engaged in mitigated conduct), and it's not about comparing the individual being sentenced with others. The low-level trafficking SOC is designed to account for offense conduct bearing on

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[99] *See, e.g.,* 21 U.S.C. § 841(b).

[100] *See, e.g., United States v. Ware*, No. 22-10674, 2024 WL 1993482, at *2 (11th Cir. May 6, 2024) (affirming denial of mitigating role adjustment pursuant to Application Note 3 where person convicted of five-year mandatory minimum instead of ten-year minimum). It makes even less sense when one considers that we would expect a prosecutor to offer this sort of plea deal when the prosecutor agrees that the individual had a low-level role.

[101] *See* USSG §5G1.1(b).

culpability beyond drug type and quantity. In this context, the focus is on conduct regardless of the statute of conviction.

What's more, importing this application note into the new context places unnecessary additional power in the hands of prosecutors: they could leverage harsher statutes to force pleas while also seeking to use that exchange to foreclose an SOC designed to remedy a key flaw in §2D1.1.[102]

Defenders' proposed application note 21(B). *To avoid overly narrow construction like §3B1.2, the Commission should include commentary encouraging liberal construction of the SOC.* Defenders' experiences, and the Commission's data, show that even when the Commission has openly sought to improve the uptake of a role-based reduction, courts have nonetheless narrowly construed the provision. We are hopeful that by expressing the intent of this provision in the Guidelines Manual itself (not only in a "reason for amendment"), the Commission can ensure full uptake of this important amendment.

III. PART B: Defenders support the Commission's efforts to eliminate purity distinctions in the methamphetamine guidelines.

Part B of the proposed amendment addresses unwarranted disparities created by overlapping drug categories that trigger dramatically different sentences: "Methamphetamine," "Methamphetamine (Actual)," and "Ice."[103] Subpart 1 would eliminate references to "Ice" from the Guidelines while

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[102] In *United States v. Stibbe*, a woman was sentenced after pleading guilty to a distribution causing death and the corresponding 20-year mandatory minimum. 337 F. App'x 575, 575–76 (7th Cir. 2009). The government alleged that her sole conduct had been regularly driving others to and from heroin purchases, being paid each time with $20 worth of heroin for her personal use. *Id.* Despite pleading to a 20-year mandatory minimum and having only served as a driver on trips in which she herself was obtaining drugs along with passengers, the Seventh Circuit held that Application Note 3 made her ineligible for a role reduction because while she could have been charged for numerous other trips, she was charged only with the one. *Id.* at 578. Indeed, the Seventh Circuit not only affirmed the mitigating-role denial but also indicated that it might have constituted plain error if the district court had granted the reduction, in light of Application Note 3. *Id.*

[103] *See* USSC, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, at 14 (June 13, 2024) (describing the legal distinctions among the three categories).

providing for a two-level reduction for methamphetamine in non-smokable, non-crystalline form. Subpart 2 would eliminate the 10:1 ratio between methamphetamine-actual and meth-mixture, presenting two options for setting quantity thresholds. Defenders strongly support both proposals and specifically urge the Commission to adopt Option 1 under Subpart 2.

As Defenders said before the start of this amendment cycle: "The time has come to fix the methamphetamine offense levels."[104] There is no empirical basis for punishing meth-actual and "Ice" ten times more harshly than meth-mixture.[105] Purity-based distinctions in methamphetamine sentencing fail as a reliable measure of culpability and harm.[106] And if purity-based distinctions ever made sense, today's market realities have thoroughly undermined them. As the Commission's 2024 Report on Methamphetamine Trafficking Offenses finds, meth seized in federal cases is "highly and uniformly pure," with minimal variation in purity between meth-actual, "Ice," and mixture cases.[107] Thus, as we have noted before, meth sentencing has become "a game of chance,"[108] with guideline ranges tied to disparate district practices—not actual purity, much less meaningful distinctions in culpability and harm.

What's more, guideline ranges for all meth cases—but especially "Ice" and meth-actual cases—are far too high, with courts imposing below-guideline sentences in the vast majority of cases.[109] Under the current

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[104] *See* Defenders' Annual Letter to the USSC, at 2 (May 15, 2024).

[105] *See id.* at 5 & n.11; Defenders' Annual Letter to the USSC, at 9–10 (May 24, 2023). Commissioners should not interpret Defenders' relatively concise discussion of Part B as suggesting anything less than its critical importance. We have addressed this issue extensively in previous submissions and simply wish to avoid unnecessary repetition while emphasizing our continued strong advocacy for these changes.

[106] *See* Defenders' 2024 Annual Letter, at 2–10; Defenders' 2023 Annual Letter, at 8–13 (Aug. 1, 2023).

[107] 2024 Meth Report, at 4 (providing that, "[t]he methamphetamine tested in fiscal year 2022 was uniformly highly pure regardless of whether it was sentenced as methamphetamine mixture (91.0% pure on average), methamphetamine actual (92.6%), or Ice (97.6%).").

[108] Defenders' 2024 Annual Letter, at 7.

[109] *See id.* at 51 (indicating that within-range sentences are 26.1% for meth-mixture cases, 23% for meth-actual cases, and 21.3% for "Ice" cases). As we have noted before, pure meth is not more dangerous (and may even be less dangerous)

framework, street-level meth dealers and couriers are routinely subject to guideline penalties designed for kingpins, creating an unwarranted disparity between offense seriousness and punishment.[110]

Part B of the Commission's §2D1.1 amendments appropriately recognizes that "purity is no longer an accurate measure of offense culpability."[111] Subpart 1 does this by striking "Ice" from the Guidelines Manual. We support this wholeheartedly: the "Ice" designation is an obsolete relic that fails to distinguish between more and less serious offenses. As for the related proposal to include a two-level reduction for methamphetamine in non-smokable, non-crystalline forms, this should adequately address any concerns related to the decades-old congressional directive that spawned the "Ice" guideline.[112]

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than many other major drug types. *See* Defenders' 2024 Annual Letter, at 4 (citing Defenders' 2023 Annual Letter, at 12).

[110] *See also United States v. Havel*, No. 4:21-CR-3075, 2023 WL 1930686 at *5 (D. Neb. Feb. 10, 2023) ("[T]he ready availability of methamphetamine (actual) to everyone in the chain of distribution, from the kingpin to the mule to the end user, has utterly severed any connection between the purity of the drug and the defendant's position in the criminal enterprise—and as a result, contrary to § 3553(a), the guideline is treating all of them like kingpins."); *United States v. Johnson*, 379 F. Supp. 3d 1213, 1224 (M.D. Ala. 2019) ("Given that the Guidelines treat actual methamphetamine and ice more harshly than methamphetamine mixture, the national average of more than 90% purity meant that the sentencing Guidelines would treat the average individual convicted of a crime involving methamphetamine as a kingpin or leader, even though that simply is not true . . . . In other words, the high purity of methamphetamine in a specific case does not reliably indicate the offender's role in the drug trade, given that methamphetamine throughout the U.S. market is highly pure.") (cleaned up). While courts are charged with avoiding unwarranted disparities in sentencing similarly situated people, it is also important to avoid "unwarranted *similarities*" among differently situated people. *See Gall v. United States*, 552 U.S. 38, 55 (2007) (emphasis in original).

[111] *Proposed Amendment: Drug Offenses*, at 80.

[112] *See* 2024 Meth Report, at 14 ("Ice is not a statutorily defined substance but is included in the guidelines in response to a congressional directive in 1990 that offense levels in cases involving smokable crystal methamphetamine (popularly known as 'Ice') be two levels above those for other forms of methamphetamine." (citing Crime Control Act of 1990, Pub. L. No. 101–647 (Nov. 29, 1990), 104 Stat 4789)). As Defenders have explained in the current and prior Amendment Cycles' Simplification comments, the Commission's ongoing obligations under § 991 and § 994 mean that the Commission is not handcuffed permanently by *ad hoc*

Subpart 2 takes the other necessary step: it eliminates references to "methamphetamine (actual)" from the Manual, as distinct from "methamphetamine" (meth-mixture). Defenders also wholeheartedly support this proposal, as presented in Option 1, which maintains the current meth-mixture quantity levels. Meth-mixture cases already trigger harsh penalty ranges that result in longer sentences than any drug except "Ice" and meth-actual—including cocaine, heroin, and fentanyl.[113] Furthermore, while variance rates are high across all meth cases, individuals sentenced under the meth-mixture guideline received guideline-range sentences more frequently than those sentenced under the "Ice" or meth-actual guidelines.[114] Adopting the mixture threshold would align with current sentencing practices that seek to avoid excessive penalties.

Option 2 of Subpart 2 is a non-starter. It would set all meth offenses at the current meth-actual levels, purporting to resolve purity-based disparities while pushing guideline ranges even further from sentences that judges are finding appropriate under § 3553(a). This option would also exacerbate existing problems by almost certainly increasing variance rates, as evidenced by higher rates of within-guideline sentences for meth-mixture cases compared to meth-actual or "Ice" cases.[115] Additionally, it would create new disparities, as some judges adhere closely to the guidelines while others are more willing to vary based on § 3553(a) factors. Simply put, there is no empirical or policy justification for elevating offense levels for all meth cases.

Finally, one of Part B's issues for comment asks about the 18:1 quantity ratio between powder cocaine and cocaine base. Defenders encourage the Commission to eliminate this unwarranted disparity in a future amendment cycle. The Fair Sentencing Act of 2010 made important progress in reducing what was originally a 100:1 ratio to 18:1. But there is no pharmacological justification for maintaining any disparity between these

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directives. However, the Commission need not engage with that argument here, as its proposal complies with the decades-old directive.

[113] *Compare* *id.* at 5, 50 (showing that in FY2022, meth-mixture cases received an average sentence of 83 months), with USSC, *Drug Trafficking Offenses Quick Facts* (FY 2022) (showing that in fiscal year 2022, the average sentences for crack, powder cocaine, heroin, and fentanyl were 70, 68, 66, and 65 months, respectively).

[114] *See* 2024 Meth Report, at 51.

[115] *See* 2024 Meth Report, at 51.

substances[116] and no legal reason that the Guidelines must maintain this disparity.[117] Moreover, this continued disparity perpetuates documented racial disparities.[118] The time has come for the Commission to eliminate the arbitrary distinction between powder and crack cocaine entirely.

IV. PART C: The Commission should maintain meaningful mens rea requirements for the fentanyl misrepresentation enhancement.

Defenders oppose Part C of the proposed amendment, which would weaken the mens rea requirements under §2D1.1(b)(13), providing either a

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[116] *See* C.L. Hart, J. Csete, D. Habibi, *Methamphetamine: Fact vs. Fiction and Lessons from the Crack Hysteria*, at 2 (Feb. 2014) (explaining that there are no pharmacological differences between crack and powder cocaine to justify their differential treatment); D.K. Hatsukami & M.W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580 (1996) (concluding that the "physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base)"). For instance, in *Kimbrough* and *Spears*, the Supreme Court held that it was reasonable for the court to disregard § 2D1.1's guideline range that resulted from a quantity-based offense level applied to crack-cocaine offenses that lacked any empirical basis, even in the mine-run case—instead, the range was simply keyed to Congress's mandatory minimum scheme and based on politics. *See Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 261 (2009).

[117] [CITE PART A discussion of ADAA does not require this].

[118] *See* Regina LaBelle, Acting Dir., Off. of Nat'l Drug Control Policy, *Testimony Before the S. Judiciary Comm. on Examining Federal Sentencing for Crack and Powder Cocaine* at 3 (June 22, 2021) (observing that the crack-powder sentencing disparity reflects a broader system of separate and unequal treatment of people of color and white people who use drugs or have substance use disorders); *see also* Office of Sen. Cory Booker, *Booker, Durbin, Armstrong, Jeffries Announce Re-Introduction of Bipartisan Legislation to Eliminate Federal Crack and Powder Cocaine Sentencing Disparity* (Feb. 17, 2023) (highlighting the widespread recognition among lawmakers that the crack-powder sentencing disparity has driven racially disparate outcomes in the justice system and calling for the elimination of the disparity as a critical step toward addressing racial injustice in sentencing); *cf.* USSG, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 132 (Nov. 2004) (noting that the crack-powder ratio contributed more to racial disparities in sentencing between Black and white offenders than any other factor and that revising the thresholds would significantly reduce the gap and improve fairness).

two- or four-level increase for misrepresenting or marketing as another substance, a mixture or substance containing fentanyl or a fentanyl analogue.[119] Each option presented would effectively gut a mens rea requirement that the Commission deemed appropriate after extensive comment and public hearings.[120]

Indeed, the history of §2D1.1(b)(13) tells an important story. In 2018, after a comprehensive study including multiple public hearings, the Commission established a four-level enhancement requiring knowing misrepresentation, explicitly stating this mens rea requirement was necessary "to ensure that only the most culpable offenders are subjected to these increased penalties."[121] In 2023, the Commission modified this mens rea to include willful blindness, over Defenders' objection, to address "fake pills."[122] Now, just over a year after the 2023 amendment went into effect, the Commission proposes to dilute further or potentially eliminate mens rea—the very approach it rejected in 2018. This is a huge step backward, with no evidence that weakening the mens rea in 2023 has improved public safety or reduced overdoses. It is also out of line with recent Supreme Court decisions stressing the importance of mens rea in assessing criminal culpability.[123]

The rationale for this new proposal is that some commenters complained that courts rarely apply the §2D1.1(b)(13) enhancement, suggesting that the enhancement may be vague and causing "application

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[119] *See* §2D1.1(b)(13).

[120] USSG App. C, Amend. 807, Reason for Amendment (2018).

[121] *Id.*

[122] *Compare* USSG App. C, Amend. 818, Reason for Amendment (2023) (providing for new 2-level enhancement to "reflect[ ] the increased culpability of an individual who acted with willful blindness or conscious avoidance of knowledge that the substance the individual represented or marketed as a legitimately manufactured drug contained fentanyl or a fentanyl analogue."); *with* Statement of Michael Caruso on Behalf of Defenders to USSC on Counterfeit Pills, at 15–21 (Mar. 7, 2023) (opposing the 2023 willful blindness amendment on the grounds that the amendment lacked empirical support, contravened established Supreme Court precedent emphasizing the importance of adequate mens rea and swept broader than necessary to capture the most serious individuals).

[123] *See* Defenders' Comment on the USSC's Proposal on Firearms, at B-3 & n.13 (Feb. 3, 2025) (noting that the Supreme Court has reaffirmed the importance of mens rea in recent years and collecting cases).

issues."[124] Defenders are unaware of widespread concerns about this enhancement. We are aware of DOJ's claim that the enhancement has "proven not to be very useful"—a claim they based on data showing a similar number of enhancement applications during a mere two-month period in late 2023 compared to the same brief period in 2022.[125] From this limited sample, DOJ speculates about the reason for the lack of uptick in the enhancement's application, suggesting—with no supporting evidence—that it may be because drug traffickers either speak in code or make no explicit representations at all, letting the appearance of the pills speak for itself.[126]

Defenders have not found evidence that courts are struggling to apply the enhancement for any reason, including those that DOJ speculates.[127] Moreover, the premise that an enhancement requires amendment because it applies in relatively few cases fundamentally misunderstands the purpose of SOCs, which are meant to differentiate more serious conduct from the baseline case.[128] If the Commission wants to increase base offense levels for fentanyl cases, that specific proposal would deserve robust debate and thorough public comment.[129] But that's not the proposal on the table. Rather,

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[124] *Proposed Amendment: Drug Offenses*, at 104.

[125] *See* DOJ Annual Letter to the USSC, at 5 (July 15, 2024).

[126] *See id.* at 5–6.

[127] While not exhaustive, Defenders have been unable to identify any case in which a court has expressed difficulty applying §2D1.1(b)(13). In contrast, in several cases examined, courts have easily applied the enhancement. In *United States v. Wiley*, 122 F.4th 725, 731 (8th Cir. 2024), the court straightforwardly applied the enhancement where an individual advertised counterfeit pills as "perks" (the accepted name for Percocet) while knowing they were not. Similarly, in *United States v. Allen*, No. 21-3900, 2022 WL 7980905, at *3 (6th Cir. Oct. 14, 2022), the court had no difficulty applying the enhancement based on hearsay evidence that an individual had been directly informed that the heroin he was selling contained fentanyl.

[128] *See* USSG, Ch. 1, Pt. A (Basic Approach) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."); *see also United States v. Ziesel*, 38 F.4th 512, 516 (6th Cir. 2022) ("Enhancements are a type of specific offense characteristic and are promulgated for distinct and separate acts of violence in order to impose punishment based on the severity of the individual's conduct.") (cleaned up).

[129] Defenders do not deny the human suffering that comes from fentanyl addiction and overdoses. But as we (and many others) have said over and over, raising sentences does not actually help reduce drug trafficking, drug addiction, or

what's being suggested would expand an SOC to capture a larger percentage of fentanyl cases, functioning as a sort of back-door elevation of base offense levels and fentanyl sentences generally, based on speculation.

Instead of this unsound approach, Defenders encourage the Commission to pause and first study how courts actually apply the current enhancement before making changes. If evidence shows that courts are struggling to apply the enhancement as intended, the Commission could then develop and propose a precise, tailored amendment to capture the individuals the Commission believes should receive the enhancement. The Commission's 2018 decision to establish a mens rea requirement for the enhancement followed comprehensive study, public hearings, and careful deliberation to ensure the enhancement targets "only the most culpable" individuals.[130] Any further weakening of the enhancement's knowledge standard should undergo the same rigorous process of study, public input, and evidence-based analysis that led to its adoption.

V. PART D: If the Commission wants §2D1.1(b)(1) to meaningfully distinguish between more and less serious conduct, it should not focus on "machineguns"; instead, it should amend that SOC's overbroad application standard.

Defenders oppose Part D of the proposed Amendment, which would add a four-level enhancement in §2D1.1(b)(1) for drug offenses involving the possession of a machinegun, as defined in 26 U.S.C. § 5845(b). Section §2D1.1 already suffers from factor creep, empirically unsupported expansions, racial disparity, and overly harsh sentence recommendations.[131] This proposed

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drug overdoses. *See* Defenders' 2024 Annual Letter at 2–3 & nn.4 & 5 (explaining that, "research overwhelmingly shows that increased drug-crime prosecutions and ever-stiffening drug penalties have utterly failed to curb drug dealing or use, or overdose deaths.").

[130] USSG App. C, Amend. 807, Reason for Amendment (2018).

[131] *See* Defenders' Annual Letter to the USSC, at 6 (July 15, 2024) ("2024 Defenders' Letter") (noting original §2D1.1 guideline had only one special offense characteristic enhancement, whereas today it has expanded to 16); Statement of Molly Roth on behalf of Defenders to USSC on Proposed Amendments to the Guidelines for Drug Offenses, at 20 (Mar. 13, 2014) (discussing several of the unsupported SOC increases); *see* § 2D1.1 (Nov. 1 2024) (including 16 enhancements); USSC, Quick Facts Drug Trafficking Offenses (reporting that among individuals sentenced for drug trafficking in FY23, "43.5% were Hispanic, 27.6% were Black,

enhancement would further exacerbate those problems. And if the Commission is looking to draw meaningful distinctions within §2D1.1(b)(1), it is looking in the wrong place.

1. It makes no sense to call for a higher offense level for a drug offense based on whether a weapon meets the NFA definition of "machinegun."

This proposal arises from DOJ concerns about dangers posed by machineguns—which it claims is particularly acute now because of an increased prevalence of machinegun conversion devices ("MCDs"), which make regular firearms operate like machineguns.[132] But the Commission's data identify only 148 cases that received the §2D1.1(b)(1) enhancement involving a machinegun, which is too small of a sample size on which to base national policy.[133] With such limited data, the Commission should obtain more information on how these cases are sentenced and their offense characteristics to determine whether the existing guideline adequately captures the seriousness of this conduct. Until then, we continue to urge the Commission to listen to the gun safety and public health experts who warn that we cannot incarcerate our way out of gun violence and increases in punishment will not have a deterrent effect.[134]

25.8% were white, and 3.0% were Other races"); *see also United States v. Diaz*, No. 11-cr-821-2, 2013 WL 322243, at *10 (E.D.N.Y. Jan. 28, 2013) ("[T]he Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.").

[132] *See* USSC, *Proposed Amendment: Drug Offenses*, at 108 (Jan. 24 ,2025); *see also* DOJ 2024–2025 Priorities Letter, at 2–5 (July 14, 2024).

[133] USSC, *Public Data Briefing Proposed Amendments on Drug Offenses*, at 32.

[134] *See* Defenders' Comment on the USSC's Proposal on Firearms, at A-1–2 (Feb. 3, 2025) (discussing how "public health and firearms safety experts warned that protecting communities from gun violence demands systemic solutions beyond increased incapacitation of individual downstream actors"); *cf.* Defenders' Comment on the USSC's 2023 Firearms Proposed Amendments, at 26 (March 14, 2023) ("While DOJ requested the serial-number increase to 'provide stronger deterrence and better reflect the harm of these offenses', since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value.").

The idea here is that there's a need to distinguish between machineguns (defined to include MCDs) and other weapons.[135] But as far as we know, no guideline distinguishes between specific firearm types other than guidelines dealing with firearm-based offenses.[136] In non-firearm-offense guidelines, to the extent that there is a distinction related to firearms, it is based on conduct: *how* the firearm was used rather than the specific type involved.[137] It does not make sense to break new ground here by creating an especially high sentence enhancement for §2D1.1 simply because this type of firearm is currently (or at least was recently) a DOJ priority.[138]

Introducing this unprecedented distinction would only exacerbate the problems already present in §2D1.1. As discussed above in Part A, the drug trafficking guideline already produces ranges that judges and commentators have criticized as "excessively severe,"[139] meaning that guideline ranges need

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[135] *See* DOJ 2024–2025 Priorities Letter, at 4 (claiming that it makes "little sense" to treat all firearms identically).

[136] *Compare, e.g.,* USSG §2B1.1(b)(2) (providing enhancements for firearms without reference to type), *with, e.g.,* USSG §§2K2.1(a)(3) (providing different base offense level for offenses involving firearms described in 26 U.S.C. § 5845(a)), 2K2.4 (similar). The Commission's introduction to this proposal compares §2D1.1 with § 924(c), which *does* distinguish between firearms. *Proposed Amendment: Drug Offenses*, at 108. But this just underscores that §2D1.1 is a guideline for offenses that don't distinguish between types of firearms while firearm-focused offenses (and their corresponding guidelines, such as §2K2.4) do just that. And indeed, this reference to § 924(c) is a reminder that if the government is concerned about a particular type of firearm, it has statutory tools for addressing that, making an increase to the drug trafficking guideline unnecessary. *See also* § 922(o) (unlawful possession of a machinegun).

[137] *See, e.g.*, USSG §§2A2.2(b)(2) (aggravated assault), 2B3.1(b)(2) (robbery).

[138] We have a new federal executive since DOJ submitted its priority letter regarding machineguns, so it remains to be seen if this will remain a priority. *See* Exec. Order No. Order 14,206, 90 Fed. Reg. 9503 (Feb. 7, 2025) (ordering that within 30 days, the Attorney General shall review all actions and positions of executive departments "to assess any ongoing infringements of the Second Amendment rights of our citizens"); *see also United States v. Brown*, No. 3:23-cr-123, 2025 WL 429985, at *5 (S.D. Miss. Jan. 29, 2025) (finding a § 922(o) prosecution unconstitutional under the Second Amendment after finding that the government failed to identify a sufficient historical tradition justifying dispossession of machineguns).

[139] *See, e.g., Diaz*, 2013 WL 322243, at *1; USSC, Results of Survey of United States District Judges January 2010 through March 2010, Question 3 (2010) (finding 58% of judges surveyed believe the guidelines should be "delinked" from

to go down, not up. Furthermore, this proposal undermines the goal of simplification.[140] Countless distinctions could be drawn between different types of weapons—after all, §2D1.1(b)(1) currently encompasses weapons ranging from walking sticks to firearms to rocket launchers.[141] But doing so would only add unnecessary complexity to a guideline already burdened with 16 SOC enhancements.[142] And it would also shift focus away from the core offense at issue: drug trafficking.

Making matters worse, the proposal would lead to absurd results. By incorporating the National Firearms Act definition in 26 U.S.C. § 5845(b) ("NFA"), the four-level increase would apply to unattached MCDs. As we've emphasized in earlier comments this Amendment Cycle, MCDs are firearm parts, not standalone firearms. [143] They can resemble innocuous items like a Lego piece or bottle opener. On their own, they are harmless. Yet, under this proposal, an unattached MCD (which cannot cause injury) would be punished more severely than a fully manufactured firearm (which can cause death). This defies common sense, as it would mean that the weapon on the left warrants only a two-level enhancement, while the harmless item on the right results in a four-level enhancement:

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statutory mandatory minimum, which would reduce severity while only 22% disagreed); Peter Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) ("Federal sentences for drug offenders are often too severe; they offend justice . . . .").

[140] *See* R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) ("complexity of the guidelines" has created a "facade of precision" that "undermines the goals of sentencing").

[141] Under the current framework, §2D1.1(b)(1) makes no distinction among dangerous weapons—whether they are fake guns, knives, handguns, sniper rifles, or something else. *See United States v. Dayea*, 32 F.3d 1377, 1379 (9th Cir. 1994) ("[C]ourts have found that, in the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes, irons, and stink bombs.").

[142] *Compare with* USSG §2D1.1(b) (1987) (containing just one specific offense characteristic: (b)(1)—the SOC addressed by this proposal). It is worth emphasis here: the current proposal would alter the only SOC that has been with us from the very start, extending §2D1.1's "factor creep" problem to (b)(1) internally).

[143] *See* Defenders' 2025 Firearm Comment, at A-12–13.

2-level enhancement (50-caliber sniper rifle)	4-level enhancement (MCD)
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2. If the goal is to draw meaningful distinctions within §2D1.1(b)(1), Defenders urge the Commission to focus on the standard underlying that SOC, which currently fails to distinguish between personal and vicarious weapon possession.

Section 2D1.1(b)(1)'s two-level enhancement applies anytime "a dangerous weapon (including a firearm) was possessed," regardless of whether the individual being sentenced personally possessed the weapon.[145] It does not require that the individual even be aware of another person's possession of the weapon, so long as it was reasonably foreseeable.[146] In drug cases, courts frequently conclude that firearms and drug activity are inherently linked, effectively making weapon possession almost always foreseeable and the enhancement almost always applies when drugs and guns are found.[147] Contrast this standard with Congress's assessment of

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[144] The image of the 50-caliber sniper rifle does not depict the actual size of a 50-caliber sniper rifle; the picture of the MCD attempts to approximate the size of numerous, actual MCDs.

[145] *See United States v. Hernández*, 964 F.3d 95, 105 (1st Cir. 2020) (discussing how it is enough that someone involved with the offense possessed the weapon, so long it as it is reasonably foreseeable).

[146] *See id.* (rejecting without disputing Defendant's contention that his lack of awareness of firearm foreclosed SOC).

[147] *See, e.g., United States v. Miranda-Martinez*, 790 F.3d 270, 276 (1st Cir. 2015) ("[W]e have often observed that firearms are common tools in drug trafficking conspiracies involving large amounts of drugs . . . ." (quotation omitted)); *United States v. Ramirez*, 783 F.3d 687, 690–91 (7th Cir. 2015) ("We have said that 'the

when possession of a firearm makes a drug offense more serious: where "*the defendant* . . . possess[ed] a firearm or other dangerous weapon (or induce[d] another participant to do so) in connection with the offense."[148]

And taking §2D1.1(b)(1)'s already broad standard further, guideline commentary provides that the enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."[149] This "clearly improbable" standard is unique—it appears nowhere else in the guidelines or criminal law. The Eighth Circuit views it as setting an extremely "low bar for the government" to establish the weapon's connection to the drug offense,[150] while others treat it as imposing an (extremely high) burden on the defense to disprove the connection.[151] Either way, this standard ensures that the enhancement applies in nearly every case where a weapon is found, no matter how attenuated its connection to the drug offense.[152] In *United States v. Anderson*, for example, the Eighth Circuit affirmed the two-level enhancement where the firearm was never seen in the

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drug industry is by nature dangerous and violent, and a reasonable fact-finder is permitted to use his or her common sense in concluding that in a drug deal involving sizable amounts of money, the presence of firearms is foreseeable.'" (citation omitted)); *United States v. Garcia*, 909 F.2d 1346, 1350 (9th Cir. 1990) (applying enhancement where individual had no knowledge of co-conspirator's firearm, after finding he "should reasonably have foreseen that [co-conspirator] would possess a gun during the execution of such a major drug sale").

[148] 18 U.S.C. § 3553(f)(2) (emphasis added); *see also* USSG §5C1.2 (safety valve guideline based on § 3553(f)), §4C1.1(7) (zero-point offender exclusion).

[149] USSG §2D1.1 App. N. 11(A).

[150] *See, e.g.*, *United States v. Anderson*, 618 F.3d 873, 877 (8th Cir. 2010) ("The [§2D1.1(b)(1)] enhancement creates a very low bar for the government to hurdle.").

[151] *See, e.g.*, *United States v. Montenegro*, 1 F.4th 940, 945–46 (11th Cir. 2021) (placing on defendant burden to "negate any possible connection" between firearm and drug offenses); *see also United States v. Denmark*, 13 F.4th 315, 318 (3d Cir. 2021) (noting defendant bears the burden of proving a lack of connection after the government makes its initial showing that a dangerous weapon was possessed); *United States v. Lee*, 966 F.3d 310, 328 (5th Cir. 2020) (same); *United States v. Kennedy*, 65 F.4th 314, 318 (6th Cir. 2023) (same).

[152] *See, e.g., United States v. Drozdowski*, 313 F.3d 819, 822 (3d Cir. 2002) (noting that "defendants have rarely been able to overcome the 'clearly improbable' hurdle"); *United States v. Garcia*, 925 F.2d 170, 173 (7th Cir. 1991) (interpreting the enhancement to apply in all but very rare cases, with exceptions limited to those where the facts are "nearly identical to those" of the Application Note's hypothetical unloaded rifle in the closet).

individual's possession and was instead secured in a locked safe, within a locked storage unit, located miles away from the residence where he was trafficking drugs.[153] Likewise, in *United States v. Lucas*, the Sixth Circuit upheld application of the enhancement to a driver found with a firearm, even though the stop occurred at a location unrelated to the drug trafficking conspiracy, on a date with no evidence of drug sales, and in a vehicle with no drug paraphernalia (the vehicle was pulled over solely because it had expired plates and excessive window tint).[154]

The flaws with §2D1.1(b)(1)'s standard have not gone unnoticed by the bench or legal commentators.[155] In his concurrence in *Anderson*, for example, Judge Kornmann minced no words:

> The Sentencing Commission should immediately revise in a logical fashion Application Note [11(A)] to the guideline in question . . . . We are told to apply the enhancement "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." What does it mean to "be present"? Apparently, it is sufficient if the weapon is present somewhere or perhaps anywhere . . . . There is something fundamentally wrong with this state of the law. What ever happened to the common requirement that all the evidence against the defendant at a sentencing hearing must meet at least a preponderance of the evidence standard? Should

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[153] *Anderson*, 618 F.3d at 877; *see also* Appellant's Br. in *Anderson*, No. 09-1733, 2009 WL 2003609 (8th Cir. June 29, 2009) (discussing how the trial testimony established that "pistol was located in a Sentry brand safe in a locked storage unit rented by defendant's girlfriend," which was located "several miles from Anderson's apartment," and no witness "testified to observing a pistol on Anderson's person at any time or at his apartment").

[154] *Cf. United States v. Lucas*, 529 F. App'x 463, 464–65 (6th Cir. 2013) (describing circumstances of arrest), *with id.* 466 (holding that possessing firearm during the time period of a conspiracy sufficed to apply enhancement).

[155] *See, e.g.*, *Anderson*, 618 F.3d 873, 886 (Kornmann, J., concurring); Brian R. Christiansen, Comment, *The Clearly Improbable Intent of United States Sentencing Guideline Section 2D1.1(b)(1): Imposing Additional Prison Time Whenever a Weapon 'Is Present Somewhere, Perhaps Anywhere*,*'* 34 Hamline L. Rev. 331 (2011); Ellen E. Cranberg, Note, *A Definition Out of Reach*, 105 Iowa L. Rev. 1799 (2020).

> enhancements be levied based on "might haves" or "could haves" or something similar? I submit not . . . . A "not clearly improbable" standard, in effect, shifts the burden of proof to the defendant. This should not be permitted under our system of justice.[156]

These criticisms may help explain why, in fiscal year 2023, over 65% of cases sentenced under §2D1.1 that received the (b)(1) enhancement received sentences that fell *below* the guideline range.[157]

This standard would create additional and unique problems if applied to MCDs—problems that would be magnified if MCDs garnered an even higher enhancement. By permitting an enhancement based on the relevant conduct of others, there is a substantial risk that individuals will face a 4-level increase despite being wholly unaware that an MCD was involved. MCDs come in many forms and can be difficult to recognize without specialized firearms training. For example, they can resemble innocuous objects like a Lego piece, coat hanger, or bottle opener, as shown below:

These devices are not only easy to overlook when they are unattached to a firearm, but their small and low-profile design make them easy to overlook

[156] *Anderson*, 618 F.3d at 886 (Kornmann, J., concurring).

[157] USSC, FY 2023 Individual Datafiles.

when affixed to a firearm—even by those who are familiar with firearms, and especially by those who are not.[158]

In short, §2D1.1(b)(1)'s incredibly broad, nearly automatic application fails to distinguish between more and less culpable conduct, or even between firearm possession that was truly connected to drug-trafficking rather than any of the reasons non-drug-trafficking Americans possess firearms—which is important, considering that this guideline is intended to address drug trafficking, not firearms offenses. Defenders anticipate these problems will worsen with the inclusion of MCDs.

For the above reasons, the Defenders urge the Commission to reject Part D of the proposed amendment. If the Commission believes action is necessary, the proposed enhancement should, at a minimum, (i) be tailored to the individual's conduct, (ii) include a mens rea requirement, and (iii) avoid capturing unaffixed MCDs because they represent less of a danger than a fully manufactured firearm. And regardless of what the Commission does with the Part D proposal, Defenders urge the Commission to revisit §2D1.1's application standard, by amending the text of this enhancement so that it mirrors § 3553(f)(2)—focusing on whether "the defendant" possessed a dangerous weapon or induced another participant to do so, "in connection with the offense" and also eliminating the "clearly improbable" language from guideline commentary.

VI. PART E: The Commission should promulgate this part of the proposal, to help clarify the law and reduce unwarranted disparities.

Defenders thank the Commission for Part E of the proposed amendment, which provides a much-needed clarification to U.S.S.G. §5C1.2's "safety valve" provision by confirming that eligibility does not require an in-person meeting with law enforcement. Nothing in the text of 18 U.S.C. § 3553(f) imposes such a requirement. Yet, in some districts, a practice has developed in which our clients must meet with law enforcement or an Assistant U.S. Attorney before the government will acknowledge their

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[158] *See* Erin Wise, *ATF sees rise in quarter-sized switch that turns handguns into machine guns*, WBMA (May 19, 2022) (describing police officer not recognizing Glock switch on seized weapon before submitting as evidence).

truthful statements, and the court will grant safety-valve relief. This unwarranted practice has created an extra-statutory hurdle, resulted in geographic sentencing disparities, and exposed our clients to safety risks.

As the Commission recognizes in its introduction to Part E, there is no legal basis for requiring in-person meetings. Section § 3553(f)(5) simply mandates that, "not later than the time of the sentencing hearing, the defendant has truthfully provided the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." As courts have recognized, the "safety valve statute does not specify the form, place, or manner of disclosure."[159] All that matters is that the individual provide complete and truthful information.

Even so, an informal survey among Defenders revealed stark inconsistencies across jurisdictions. Some U.S. Attorney's Offices mandate in-person meetings before they will agree that § 3553(f)(5) is satisfied, while others do not. Even within the same office, some prosecutors impose the requirement, while others do not. These inconsistencies create arbitrary sentence disparities based purely on where a case is prosecuted or which prosecutor is assigned. And requiring an in-person meeting prioritizes form over substance, imposing an unnecessary barrier that distracts from the core statutory requirement: a complete and truthful disclosure.

Section 3553(f)(5) is not a tool for extracting cooperation, akin to §5K1.1 substantial assistance. The purpose of the safety valve is to allow individuals with limited criminal history who are convicted of low-level, non-

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[159] *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999); *see also, e.g.*, *United States v. Mejia-Pimental*, 477 F.3d 1100, 1107 n.12 (9th Cir. 2007) ("That the proffer was written and not oral is of no consequence, because the safety valve allows any provision of information in any context to suffice, so long as the defendant is truthful and complete." (quotation omitted)); *United States v. Montanez*, 82 F.3d 520, 522 (1st Cir. 1996) ("Nothing in the statute, nor in any legislative history drawn to our attention, specifies the form or place or manner of the disclosure" to satisfy the safety valve disclosure requirement); *United States v. Altamirano-Quitero*, 511 F.3d 1087, 1092 n.7 (10th Cir. 2007) (Section 3553(f) "does not specifically mention debriefing," nor does it "further prescribe how the defendant must convey this information to the government. . . . There may be many ways that a defendant could provide the Government with information sufficient to satisfy § 3553(f)(5)").

violent drug offenses to avoid mandatory minimums, so long as they are honest about their offense; it is not an investigative tool for prosecuting others. Congress enacted § 3553(f) "to remedy an inequity in the old system, which allowed [§5K1.1] relief from statutory minimum sentences to those defendants who rendered 'substantial assistance to the Government'—usually higher-level offenders, whose greater involvement in the criminal activity resulted in their having more information—but effectively denied such relief to the least culpable offenders, who often 'had no new or useful information to trade."[160] Thus, § 3553(f)(5) explicitly says that an individual's inability to provide relevant or useful information does not disqualify them from receiving safety-valve relief.[161] By contrast, §5K1.1 explicitly ties sentencing reductions to an individual's cooperation in investigating or prosecuting others. The two provisions serve distinct purposes[162] and attempts to conflate them undermines Congress's intent.

And where prosecutors require in-person meetings with law enforcement, safety concerns arise. Indeed, as the Commission's proposal recognizes, many of our clients forego seeking safety-valve relief due to these concerns. Requiring an in-person meeting often necessitates transporting an individual from a detention facility to a U.S. Attorney's Office, which immediately marks the individual as a potential cooperator and places them at significant risk of harm. Further, clients fear a report of that safety valve meeting's information will be disclosed to other individuals once they are charged, labeling them as "cooperators" when they really did not – all the risk with none of the benefit and given only with the hope of receiving less than the mandatory minimum.

By clarifying that in-person meetings are not required, the Commission will help protect the safety of our clients, curb this improper

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[160] *United States v. Reynoso*, 239 F.3d 143, 148 (2d Cir. 2000) (cleaned up)).

[161] § 3553(f)(5) ("[T]he fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.").

[162] *See United States v. Acosta-Olivas*, 71 F.3d 375, 379 (10th Cir. 1995) ("Section 5K1.1 concerning substantial assistance operates very differently from § 5C1.2.").

practice, and ensure that safety-valve relief is applied consistently, as Congress intended.

March 3, 2025

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
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RE: Practitioners Advisory Group Comment on Proposed Amendments to the Sentencing Guidelines, January 24, 2025

Dear Judge Reeves:

The Practitioners Advisory Group (PAG) submits these comments regarding the Commission's proposed multi-part amendments to: (1) the guidelines related to supervised release in Chapters 5 and 7 of the Guidelines Manual; and (2) U.S. Sentencing Guidelines §2D1.1 and §5C1.2, related to drug offenses.

I. Supervised Release

The Commission has proposed amendments to Chapters 5 and 7 of the Guidelines Manual to give sentencing courts greater discretion to determine terms and conditions of supervised release, and to respond to violations of a condition of probation or supervised release. The PAG supports these amendments and offers its views on both parts of these proposals below.

A. Chapter Five Amendments

Part A of the Commission's proposal directs sentencing courts to make an "individualized assessment" of the statutory factors under 18 U.S.C. §§ 3583(c)-(e) to assist courts in deciding whether supervised release is necessary, and, if so, the duration of the term and the conditions of supervision.[1] The PAG addresses each of the Commission's issues for comment.

[1] *See* U.S.S.C., Proposed Amendments to the Sentencing Guidelines ("Proposed Amendments") at 4-23 (Jan. 24, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf.

1(a). Guidance Provided by an Individualized Assessment of Statutory Factors

The PAG supports this amendment and believes it is consistent with several Supreme Court decisions. In *Koon v. United States*, the Court noted that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge *to consider every convicted person as an individual and every case as a unique study in human failings* that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[2]

Four years after *Koon*, the Court addressed the propriety of imposing a further term of supervised release after the original term was revoked. The Court explained that:

> [S]upervised release departed from the parole system it replaced by giving district courts the freedom to provide post-release supervision for those, and only those who needed it. . . . Congress aimed, then, to use the district court's discretionary judgment to allocate supervision to those releasees who needed it most."[3]

This proposed amendment highlights one of the foundations for supervised release – it should not be needlessly imposed, and precious probationary resources should not be "wasted on supervisory services for releasees who do not need them."[4] This is nothing new as this individualized assessment requirement has, at least impliedly, long been part of the federal sentencing process. It has informed, and will continue to inform, sentencing courts on issues including whether a supervised release term is appropriate, the length of the term, as well as the conditions of supervision.

1(b). Defendants' Criminal and Substance Abuse Histories

The Commission asks whether it should retain the commentary in §5D1.1 directing courts to consider, among other factors, a defendant's criminal history and substance abuse history when determining whether to impose a term of supervised release.[5] Given that this commentary incorporates the individualized sentencing factors under 18 U.S.C. § 3553(a),[6] these factors are already part of any individualized assessment. Maintaining criminal history and substance abuse history separate from the 3553(a) factors serves to highlight two factors among many that courts typically consider, and the PAG does not believe that it is necessary to single these out for specific attention in every case. Accordingly, the PAG does not support maintaining the factors of criminal history and substance abuse in the commentary to §5D1.1.

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[2] *Koon v. United States*, 518 U.S. 81, 113 (1996) (emphasis added).

[3] *Johnson v. United States*, 529 U.S. 694, 709 (2000).

[4] S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983).

[5] *See* Proposed Amendments at 6-7, 23-24.

[6] *See* Proposed §5D1.1 n.1, Individualized Assessment, Proposed Amendments at 6-7.

2. Supervised Release Should Not Be Imposed in Cases Involving Deportable Aliens

Under §5D1.1(c) and its commentary in §5D1.1 n.5, courts are generally discouraged from imposing terms of supervised release in cases where the defendant is a deportable alien.[7] The Commission has not specifically proposed an amendment to this guideline and its commentary, but seeks input on whether these provisions should be amended to "further discourage the imposition of supervised release for individuals who are likely to be deported."[8]

The PAG supports amending the guideline and/or the commentary to make clear that terms of supervised release for deportable aliens are: (1) inconsistently imposed across the country; (2) generally unnecessary since most aliens are deported; and (3) divert resources that are better allocated to other defendants who need more intensive assistance while on supervision.

To further discourage courts from imposing terms of supervised release in cases involving deportable aliens, the PAG proposes that §5D1.1(c) be amended as follows:

> Absent extraordinary circumstances, the court should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

In addition, the PAG recommends that the commentary in §5D1.1(c) n.5 be amended to be consistent with this, and that the last sentence of the existing commentary be excised.

3. Early Termination and the Proposed §5D1.4

The Commission proposes adding §5D1.4 to the Guidelines Manual, which provides a non-exhaustive six-factor checklist to consider in adjudicating motions for early termination of supervised release. The PAG supports this amendment as it provides courts, practitioners, and releasees a framework of issues to address and evaluate in determining the propriety of early termination. Furthermore, these considerations are consistent with the Commission's emphasis on making an "individualized assessment" of a releasee's performance on supervised release.

In the commentary to §5D1.4, the PAG suggests that the Commission encourage courts to grant early termination of supervised release if the only articulable ground for supervision is the collection of outstanding special assessments, fines, and/or restitution. In the PAG's experience, far too often releasees are not terminated early because of unretired financial obligations imposed as part of the original sentence. The PAG believes that probation offices should not serve as collection agencies, holding the cudgel of revocation over the heads of releasees to collect outstanding debts. Keeping a releasee on supervision for this sole purpose wastes finite supervision services on releasees who do not need them.

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[7] *See* §5D1.1(c) & n.5; see also Proposed Amendments at 6 & 8 (renumbering note 5 as note 6).

[8] *See* Proposed Amendments at 24.

Importantly, there is a well-funded mechanism already in place to efficiently and effectively collect these debts. Once a judgment memorializing fines, restitution and special assessments is filed, it becomes a collectible judgment. Each United States Attorney's Office's Financial Litigation Program (FLP) is staffed and equipped to collect these obligations without any assistance from a United States Probation Office.

4. Transfer of Earned Credits to Inmates Sentenced to Complete Supervised Release

In this issue for comment, the Commission has identified language in the First Step Act ("FSA") that allows the Director of the Bureau of Prisons ("BOP") to transfer earned time credits to inmates sentenced to complete terms of supervised release. This transfer could result in an inmate's early release, transition to an alternative form of incarceration, or placement on supervised release. The express language of this provision, 18 U.S.C. § 3624(g)(3), however, does not allow the transfer of these credits to inmates with no terms of supervision to complete.

FSA credits can be earned by all inmates who are eligible under 18 U.S.C. § 3632(d)(4)(D).[9] Thus, these credits are not contingent on an inmate's need to complete a term of supervised release; rather, these credits are predicated on an inmate fulfilling the statutory eligibility requirements and his or her successful participation in BOP programming. The potential for disparate treatment arises with the transfer of earned credits to inmates with supervised release terms; such transfer cannot occur to inmates without terms of supervised release. There are other statutory provisions outside of the FSA that can accomplish the same result for inmates without terms of supervision.

For example, the Director of the BOP

> shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.[10]

Unlike 18 U.S.C. § 3624(g)(3), this broad grant of authority is not limited to prisoners sentenced to a term of supervised release. Eligibility for early release under 18 U.S.C. § 3624(c)(1) is not automatic, but neither is it automatic under 18 U.S.C. § 3624(g)(3). Both provisions require the

[9] *See* 18 U.S.C. § 3632(d)(4)(D) (identifying approximately 68 statutes of conviction making an inmate ineligible to receive time credits under this provision).

[10] 18 U.S.C. § 3624(c)(1).

Director of the BOP to make an individualized assessment of the inmate, both before and after sentence was imposed, to determine if early release is appropriate.[11]

There is no tangible difference in the custodial status for those released pursuant to either 18 U.S.C. §§ 3621(g)(3) or 3624(c)(1). Inmates falling under the umbrella of 18 U.S.C. § 3624(g)(3) would be placed on supervised release in "prerelease custody," which could take the form of either "home confinement"[12] or placement in a "residential reentry center."[13] Similarly, inmates falling within the ambit of 18 U.S.C. § 3624(c)(1) would be released to "prerelease custody," which consists of "home confinement"[14] or "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community" and which "may include a community correctional facility."[15]

There are three distinctions that can be made for prisoners released under 18 U.S.C. § 3624(g)(3) and those released under 18 U.S.C. § 3624(c)(1). First, if a prisoner is placed on supervised release under 18 U.S.C. § 3624(g)(3) and s/he violates a condition of supervision while in prerelease custody, a supervised release violation hearing would be convened. For inmates released under 18 U.S.C. § 3624(c)(1), any violation while in prerelease custody would result in their return to the BOP. That is because the individual would still be a ward of the BOP, not subject to court supervision, during prerelease custody when the violation occurred. Second, an important component for release under 18 U.S.C. § 3624(c)(1) is the sentencing court's recommendation,[16] whereas this is not a consideration under 18 U.S.C. §§ 3624(g)(1) & (3). Finally, 18 U.S.C. § 3621(b)(5) requires the Director of the BOP to consider the Commission's relevant policy statements, whereas 18 U.S.C. § 3624(g)(3) lacks a similar requirement.

The PAG believes the unintended consequence identified by the Commission in its issue for comment can be addressed by adding commentary to §5D1.2, reminding sentencing courts of three important points. First, all FSA credits will be awarded to eligible inmates who earn them. Second, these earned credits can be transferred to inmates with terms of supervised release and might result in their early release and placement on supervision; however, these credits will not be similarly transferred to inmates without terms of supervised release. Third, for those inmates without terms of supervised release, 18 U.S.C. § 3624(c)(1) authorizes the Director of the BOP to place eligible inmates in prelease custody.

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[11] Under 18 U.S.C. § 3624(g)(3), the Director of the BOP must consult criteria found in 18 U.S.C. § 3624(g)(1). In contrast, in making a judgment to release under 18 U.S.C. § 3624(c)(1), the Director must consult the factors listed in 18 U.S.C. § 3621(b).

[12] *See* 18 U.S.C. § 3624(g)(2)(A).

[13] *See* 18 U.S.C. § 3624(g)(2)(B).

[14] *See* 18 U.S.C. § 3624(c)(2).

[15] *See* 18 U.S.C. § 3624(c)(1).

[16] *See* 18 U.S.C. § 3621(b)(4)(B).

5. Reframing Conditions of Supervised Release in §5D1.3

The Commission's proposed amendments to §5D1.3 primarily involve a change in the nomenclature referencing "standard" and "special" conditions of supervised release.[17] The PAG supports the proposed amendment to rename "standard conditions" to "examples of common conditions." This modification is consistent with the Commission's emphasis that an individual's needs, not the rote application of standardized guidelines, should guide a court's decision on the appropriate conditions of supervision. Because supervisees are individuals, conditions of supervision should be tailored to their needs, not a laundry-list of "standards."

As part of the amendment, the Commission also adds a proposed "special condition" for a defendant to participate in a program to obtain either a high school or equivalent diploma. The PAG supports this special condition, but asks the Commission to add commentary indicating that a supervisee's failure to obtain either a high school or equivalent diploma, alone, should not be the basis for revocation of supervised release.

6. Completion of Reentry and Treatment Programs Should Be Included as Factors for Consideration in Determining Whether Early Termination of Supervised Release is Warranted

In addition to the factors listed under the proposed policy statement in §5D1.4(b), the PAG urges the Commission to include successful completion of reentry and similar programs. The completion of a reentry program fulfills many of the purposes promoted by the six factors already contained in §5D1.4. Moreover, given the intense nature of these programs, with the participation of judicial officers, probation officers, federal prosecutors and federal defenders, successful completion is a good predictor of rehabilitation and lower incidences of recidivism.[18]

At the time of sentencing, courts do not have a crystal ball. There is no way of knowing whether a defendant with substance use issues will be admitted to the BOP's Residential Drug Abuse Treatment Program ("RDAP"), and, even if admitted, there is no way of knowing whether the defendant will be an RDAP "Completer" or a "Participant."

In 2022, the Commission published a study analyzing the recidivism rates of inmates who participated in RDAP and were released in 2010.[19] Over the eight-year period studied, 48.2% of those who completed RDAP were rearrested, while 59.2% of those who merely participated in

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[17] *See* Proposed Amendments at 10-17.

[18] *See* S.G. Lawson et al., *Does Reentry Court Completion Affect Recidivism Three Years After Exit? Results from a Retrospective Cohort Study*, Corrections: Policy Practice and Research at 23 (2021).

[19] *See* U.S.S.C., *Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010* (May 2022) ("Recidivism and RDAP Report"), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf.

RDAP were rearrested. The recidivism rate for "RDAP Eligible Non-Participants" was 68%.[20] Completing RDAP and sobriety while on court supervision are reliable predictors of rehabilitation. For those defendants who both participated in RDAP and have demonstrated sobriety while on supervised release, §5D1.4 also should include these as factors for courts to consider when determining whether early termination of supervised release is warranted.

7. Procedures in Early Termination Cases

The Commission seeks comment on what guidance, if any, should be given to courts adjudicating motions for early termination under §5D1.4. The PAG believes this guidance is not within the purview of the Commission. Instead, this direction should come from the Judicial Conference's Standing Committee on Rules of Practice and Procedure ("Standing Committee"). This body advises the Judicial Conference on changes to federal court procedural rules and recommends proposed rule changes to the Judicial Conference. This committee is comprised of federal judges, practicing lawyers, law professors, state chief justices, and DOJ representatives. As the national policymaking body for federal courts, the Judicial Conference is the appropriate body to establish the procedural/due process guardrails for early termination cases.

It is noteworthy that the Standing Committee admirably performed this function in Federal Rule of Criminal Procedure 32.1, which carefully considered the due process rights afforded to defendants when their terms of supervised release are revoked or modified.

Despite a preference to defer to the Standing Committee to establish the procedural requirements, the PAG believes that the Commission should encourage courts to appoint counsel to assist indigent releasees in drafting motions for early termination. In the PAG's experience, when indigent clients approach courts for early termination, they are proceeding *pro se* and their filings are parochial. Typically, the "motion" takes the form of a handwritten letter that does not come close to synthesizing the six factors that may become the cornerstone of §5D1.4(b)(1)-(6). Because a releasee must shoulder the burden of demonstrating that the interests of justice and the releasee's conduct justify early termination,[21] courts should be encouraged to appoint counsel to assist indigent defendants in properly preparing and litigating motions for early termination after a *pro se* "motion" is received.

B. Chapter 7 Amendments

The Commission proposes to amend Chapter Seven, which addresses how courts are to consider violations of terms of probation and supervised release. The Commission has proposed an approach that: (1) gives courts and probation officers more guidance and flexibility when addressing violations of probation and supervised release; (2) clarifies the fundamental differences between the two; and (3) re-emphasizes the individualized nature of federal sentencing. The PAG supports this approach.

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[20] *See* Recidivism and RDAP Report at 20.

[21] *See* 18 U.S.C. § 3583(e)(1).

1. The Individualized Approach

First, the PAG supports the Commission's decision to adopt an "individualized" approach to addressing violations of probation and supervised release. A court's duty "to make a particularized assessment (based on the facts presented) of the [18 U.S.C.] § 3553(a) concerns" is "considered the hallmark of 'individualized' sentencing" under the Sentencing Reform Act of 1984 (SRA), as amended by *United States v. Booker* and *Gall v. United States*.[22] The PAG sees no reason why this same individualized approach should not be used when addressing violations of probation and supervised release.

Second, the PAG supports the Commission's decision to adopt new policy statements that specifically address violations of supervised release, thereby separating the guidelines' treatment of probation violations from violations of supervised release. Separating the two will remind all stakeholders that probation and supervised release are fundamentally different and serve different purposes in the sentencing process.[23] To that end, and in response to the Commission's sixth issue for comment regarding the second part of the amendment, the PAG suggests that a defendant's criminal history score at the time of sentencing should play *no* role in a court's response to alleged violations of that defendant's supervised release. The PAG views the defendant's criminal history score as nothing more than a criterion to assist a court in determining what type and amount of punishment should be imposed at the defendant's sentencing hearing. Since supervised release has nothing to do with punishment,[24] the PAG views the criminal history score as largely irrelevant in proceedings to address violations of supervised release but recognizes that it should still play a role in probation revocation proceedings.

2. Promoting Judicial Discretion

The PAG also supports how the proposed amendment increases judicial discretion for courts responding to violations of supervised release. For example, the PAG supports the Commission's decision to include commentary for the new policy statement in §7C1.3 for responding to violations of supervised release that provides sample guidance for how non-compliant behavior should be addressed. However, instead of merely referring to "additional resources" that a defendant may need to regain compliance, the PAG recommends adding

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[22] *United States v. Flores-Gonzalez*, 86 F.4th 399, 422 (1st Cir. 2023) (discussing *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007)).

[23] *See United States v. Lewis*, 90 F.4th 288, 294 (4th Cir. 2024) (discussing "the nature of supervised release" and how it is "a post-incarceration program intended to assist individuals in their transition to community life") (citation and internal quotation marks omitted); *United States v. Wright*, 607 F.3d 708, 714 (11th Cir. 2010) (observing that "probation is a sentence in and of itself" and that it "may be used as an alternative to incarceration, provided that the conditions imposed serve the statutory purposes of sentencing").

[24] *See* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release* ("Shadow Sentencing"), 18 Berkeley J. Crim. L. 180, 191 (2013) (discussing the origins of supervised release and how it was never "intended to be imposed for the purposes of punishment or incapacitation").

language that provides a non-exhaustive list of what the typical resources might be, *e.g.*, substance abuse treatment (outpatient and inpatient), mental health treatment, or vocational training. Including specific examples will leave no doubt that the Commission wants courts to be open-minded and flexible when responding to violations of supervised release. Again, the primary goal at this stage of the case is not to punish offenders but instead "to rehabilitate persons discharged from prison and to assist their law-abiding return to society."[25]

With respect to the Commission's proposed §7C1.3 which presents two options for how courts are to respond to violations of supervised release, the PAG encourages the Commission to select Option One, as that option is more consistent with the Commission's stated priority of encouraging courts to adopt an "individualized" approach when responding to violations of supervised release. In contrast, a blanket mandatory revocation rule for Grade A or B violations (Option Two) is not at all individualized, and the PAG believes such a rule would be inconsistent with the proposed amendment's goal of promoting judicial discretion in revocation proceedings. The PAG also believes that the Commission should *refrain* from providing further guidance about when revocation is appropriate and simply leave courts with discretion to conduct individualized assessments in each case.

To that end, the PAG recommends that the Commission replace the Supervised Release Revocation Table with more limited, general guidance. Such guidance could provide, for example, the statutory limits for minimum and maximum terms of imprisonment that may be imposed upon revocation, re-emphasize the importance of the individualized nature of the sentencing process, and remind district courts that they are in the best position to decide what should happen to a defendant who violates supervised release.[26] Such guidance would be consistent with the Commission's proposed approach for how courts should respond to non-compliant behavior in §7C1.3.

3. <u>The Bottom Line: The PAG Supports Increased Flexibility and Re-focusing on Rehabilitation of the Defendant</u>

Under the SRA, "the main purpose of supervised release was rehabilitation."[27] Since that time, however, commentators have observed that "the primary purpose of supervised release has

[25] *United States v. Neal*, 810 F.3d 512, 519 (7th Cir. 2016).

[26] *See, e.g.*, *United States v. Sandoval-Velazco*, 736 F.3d 1104, 1107 (7th Cir. 2013) (noting that "the sentencing court is in the best position to determine the role that a defendant had" in criminal activity.).

[27] *See* Shadow Sentencing at 191.

[evolved into a desire] to protect the community from an offender presumed to be dangerous."[28] That, however, is the primary purpose of imprisonment, rather than supervised release.[29]

With the proposed amendment, the Commission redirects the focus of all stakeholders to the primary purpose of supervised release and how it differs from probation and imprisonment. The PAG wholeheartedly supports the amendment and recommends that it be promulgated via an approach that gives courts and probation officers increased options and flexibility when responding to *individual* violations of supervised release.

II. Drug Offenses

The Commission has proposed several amendments to the drug guideline in §2D1.1: (1) amending the Drug Quantity Table in §2D1.1(c); (2) adding a new specific offense characteristic for low-level trafficking functions at §2D1.1(b)(17); (3) deleting references to Ice in the Drug Quantity Table and amending the 10:1 ratio between methamphetamine and methamphetamine (actual); (4) revising the enhancement for marketing fentanyl and fentanyl analogues; (5) including a new enhancement for machineguns; and (6) amending the safety-valve provision. The PAG addresses each of these amendments in turn below.

A. Lowering the Drug Quantity Table

The PAG is grateful to the Commission for proposing amendments that would shift the focus of sentences for drug offenses away from the weight or quantity of drugs involved to the function a person performs in an offense. The Commission has studied this issue for decades, and the research has repeatedly demonstrated that drug quantity is a poor proxy for culpability. Indeed, even if the proposed amendments are enacted, quantity would still play an oversized role in the length of a person's sentence. But the proposals would move the guidelines in the right direction, and for that reason the PAG wholeheartedly supports them.

With respect to the options presented in Part A, Subpart 1 of the Drug Offenses Amendment, the PAG recommends that the maximum base offense level in the Drug Quantity Table in §2D1.1 be reduced to 30. To the extent the Commission is considering setting the highest base offense level in §2D1.1 at a lower level, the PAG agrees that the base offense level should be set significantly lower. Years worth of Commission data supports such a reduction.

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[28] *Id.* (citing Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 Fed. Sent. R. 204, 205 (1994)).

[29] *See* Franklin Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime*, New York: Oxford University Press (1995).

1. Congressional and Commission History Support a Focus on Function, Not Quantity

The stated purpose of the Anti-Drug Abuse Act of 1986 ("ADAA") was to increase penalties for, and focus law enforcement resources on, "serious" and "major" drug traffickers.[30] Then-Senate Minority Leader Robert Byrd explained the legislation's purpose as follows:

> For the kingpins — the masterminds who are really running these operations — and they can be identified by the amount of drugs with which they are involved — we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail — a minimum of 5 years for the first offense.[31]

Congress repeatedly expressed its intent to focus on the function a person performed in an offense and to target those at the helm of drug trafficking operations. Unfortunately, in setting mandatory minimum sentences, the ADAA used a poor proxy for function: drug quantity. As a result, defendants charged with trafficking the requisite type and quantity of drugs were subjected to the same five- or ten-year mandatory minimum, regardless of whether they were "running the[] operations" or merely acting as a lookout or other low-level employee.[32]

That the ADAA would be incorporated wholesale into the guidelines was not a foregone conclusion. Before the first set of guidelines was promulgated, the Commission collected and analyzed federal sentencing data to anchor the guidelines to real world experience.[33] The Commission relied on the data to set the guidelines for most other offenses, but not drug

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[30] U.S.S.C., *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* ("2011 Mandatory Minimum Report"), at 24 (2011), available at: https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[31] *Id.* (first quoting 132 Cong. Rec. 27,193-94 (Sept. 30, 1986); and then citing 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.")).

[32] *Id.*; *see United States v. Diaz*, No. 11-CR-821, 2013 WL 322243, at *5 & n.38, *12–13 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.).

[33] *See* U.S.S.C., *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987), available at: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf.

trafficking.[34] Instead, the Commission "employed the [ADAA's] weight-driven scheme."[35] This decision would have severe consequences, particularly for those less involved in operations involving large drug quantities.[36]

The ADAA was only intended to impose enhanced penalties on the managers and leaders of drug trafficking operations. The Commission could have limited the ADAA's influence on the guidelines by disregarding the mandatory minimums in the guidelines while "stipulat[ing] that whenever a mandatory minimum exceeds the applicable range, the statutory sentence controls," or by incorporating the mandatory minimums into the role-based adjustments.[37] Instead, the Commission disregarded the sentencing data it relied on in setting the guidelines for other offenses and inexplicably extended the ADAA's drug quantity scheme to *all* drug trafficking offenses.[38] This decision "had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes," even for those with low-level functions.[39]

Many years of application have proven that drug quantity is a poor metric for assessing culpability. In 1994, a United States Department of Justice report showed that although "[o]ne may have expected that larger drug quantities would be associated with the higher level functional roles[, t]his was not the case." Rather, "those with a peripheral role were involved

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[34] *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports," but "[t]he Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.").

[35] *Id*.

[36] *See Diaz*, 2013 WL 322243, at *5; Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return*, at 4–6 (2015).

[37] *Diaz*, 2013 WL 322243, at *5.

[38] *See* U.S.S.C., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("Fifteen Years of Guidelines Sentencing"), at 49 (2004); accord Diaz, 2013 WL 322243, at *6.

[39] Fifteen Years of Guidelines Sentencing, at 49; U.S. Dep't of Just., *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, at 3 (1994) ("Even among low-level drug offenders, sentences have increased 150 percent above what they were prior to the implementation of Sentencing Guidelines and a significant sentencing legislation which established mandatory-minimum sentences for primarily drug and weapons offenses."); *id.* ("Even for low-level defendants, the most significant determinant of their sentence was drug quantity. The defendant's role in the offense had only a small influence on the length of the eventual sentence.").

with more drugs than couriers and street-level dealers and almost as much as high-level dealers."[40]

As early as 2004, the Commission itself acknowledged that drug quantity may be "a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making."[41] At the same time, the Commission noted that drug quantity may "*under*estimate offense seriousness, and promulgated commentary encouraging upward departure in these situations."[42]

The Commission reiterated this conclusion in its 2011 report on mandatory minimums, writing, "Commission analysis indicates that the quantity of drugs involved in an offense is not as closely related to the offender's function in the offense as perhaps Congress expected," because even "offenders who performed lower-level functions such as Couriers and Mules also were convicted of drug offenses carrying a mandatory minimum penalty in a significant proportion of their cases (49.6% and 43.1%, respectively)" in the sample studied by the Commission.[43]

And in 2015, the then-Chair of the Commission, Judge Patti B. Saris, testified before Congress that "drug quantity is often not a reliable proxy for the function played by the offender, as Congress may have envisioned," noting that "over half of all drug offenders – 5,721 of 10,966 – who were convicted of an offense carrying a mandatory minimum penalty in fiscal year 2014 were convicted of an offense carrying a 10-year mandatory minimum, a penalty Congress intended to reserve for 'major' traffickers."[44]

For more than two decades now, the Commission has recognized that the guidelines' focus on drug quantity does not adequately reflect defendants' culpability. The Commission's proposed amendments in Part A seek to address this problem, and the PAG wholeheartedly supports their adoption.

2. Judicial Sentencing Behavior and Commission Data Support a Shift Away from Quantity and Towards Function

Federal judges, too, have repeatedly expressed in survey responses their concerns about the drug trafficking guidelines being linked with statutory mandatory minimums and the outsized effect of drug quantity on the guidelines' application. In a 1996 survey by the Federal Judicial Center, nearly eighty percent of district judges strongly agreed or somewhat agreed that the "Sentencing Guidelines should be 'de-linked' from the statutory mandatory minimum sentences," with

[40] U.S. Dep't of Just., An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories, at 45.

[41] U.S.S.C., Fifteen Years of Guidelines Sentencing, at 50.

[42] *Id.*

[43] U.S.S.C., 2011 Mandatory Minimum Report, at 350.

[44] *Hearing on H.R. 3713, Sentencing Reform Act of 2015, Before the H. Comm. on the Judiciary*, 114th Cong. (Nov. 18, 2015) (statement of Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n).

"[c]ircuit and district judges ranking the use of quantity as a sentencing factor first and second, respectively, as an area requiring substantive change."[45]

In a 2003 Commission survey, judges were asked, "For those cases where you believe that the guideline punishment levels do not reflect the seriousness of the crime, was it because the punishment was generally less than appropriate, more than appropriate, or sometimes greater/sometimes less?"[46] Judges provided responses for seven offense categories, including drug trafficking. More than 73% of the 354 responding judges said that the punishment for drug trafficking crimes was generally greater than appropriate, with the accompanying report noting that drug policy was the judges' top concern and greatest challenge to the guidelines, and that many judges expressed concern "regarding the harshness of penalties for minor drug offenders (particularly mules)."[47]

Again in 2010, the Commission surveyed federal district court judges for their views on sentencing practices and the guidelines. One question asked judges whether the "sentencing guidelines should be "de-linked" from statutory mandatory minimum sentences."[48] Fifty-eight percent strongly agreed or somewhat agreed, and another 19% were neutral on the issue.[49]

Many judges also have spoken out in their written orders and in written testimony about the perverse results of the drug trafficking guidelines and their reliance on the ADAA's quantity-based mandatory minimums.[50] Other judges have expressed – and continue to express – their

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[45] Federal Judicial Center, The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey ("FJC 1996 Survey Results"), at 12 (1997).

[46] U.S.S.C., Survey of Article III Judges on the Federal Sentencing Guidelines, App'x D (2003) ("2003 Judges Survey").

[47] *Id.* at 44-46.

[48] U.S.S.C., Results of Survey of United States District Judges: January 2010 Through March 2010, at 9 (2010) ("2010 Judges Survey").

[49] *See id*.

[50] *See, e.g., United States v. Robinson*, No. 21-CR-14, 2022 WL 17904534, at *3 & n.2 (S.D. Miss. Dec. 23, 2022) (Reeves, J.); *United States v. Carrillo*, 440 F.Supp.3d 1148, 1152–57 (E.D. Cal. 2020); *United States v. Johnson*, 379 F.Supp.3d 1213, 1219–22 (M.D. Ala. 2019); *United States v. Ibarra-Sandoval*, 265 F.Supp.3d 1249, 1253, 1256–57 (D.N.M. 2017); *United States v. Hayes*, 948 F.Supp.2d 1009, 1015–18 (N.D. Iowa 2013) (collecting cases); *Diaz*, 2013 WL 322243, at *12–14; *United States v. Hubel*, 625 F.Supp.2d 845, 853 (D. Neb. 2008); Statement of Chief Judge Robert J. Conrad, Jr., Before U.S. Sent'g Comm'n, at 4 (Feb. 11, 2009) ("Statutory mandatory minimum punishments and the guidelines written to implement them achieve the goals of uniformity at the cost of sometimes unjust sentences. This is so because the most common mandatory minimums are triggered solely by drug type and quantity and/or criminal history. Such a myopic focus excludes other important sentencing factors normally taken into view by the guidelines and deemed relevant by the Commission, such as role in the offense, use of violence, and use of special skill.").

policy disagreements through their sentencing practices.[51] As the Commission recently observed in its Public Data Briefing on these proposed amendments, only "[a]bout one-quarter or fewer of the individuals at base offense levels 30 through 38 received a within range sentence," while "between 43% and 49% of individuals at base offense levels 30 and above received a below range sentence."[52]

Others outside the judiciary also have urged the Commission to shift the guidelines' focus from drug quantity to function.[53] A task force created by Congress to provide evidence-based recommendations for justice reforms urged the Commission to revise the drug trafficking guidelines "to better account for role and culpability and to rely less on imprecise proxies such as drug quantity," in part by considering "[r]evenue or profit derived from drug trafficking," having "[c]learly defined aggravating and mitigating role factors," and providing "[a]lternatives to incarceration for lower-level drug trafficking offenses."[54] These recommendations were made in conjunction with a recommendation that Congress "repeal the mandatory minimum penalties for drug offenses," aside from those reserved for "drug kingpins as defined in the 'continuing criminal enterprise' statute."[55] If implemented, the task force's evidence-based recommendations would provide for more just, individualized sentences, reduce prison populations, and enhance public safety.[56]

The PAG strongly supports Option 3 of the Commission's proposal, which would set the highest base offense level in the Drug Quantity Table at level 30. By adopting Option 3, the Commission would take its first important step toward bringing the drug trafficking guidelines

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[51] *See, e.g.*, *Johnson*, 379 F.Supp.3d at 1226–30.

[52] U.S.S.C., Proposed Amendments on Drug Offenses, Data Briefing ("Drug Offenses Data Briefing"), Video Transcript at 2 (2025), available at: https://www.ussc.gov/education/videos/2025-drug-offenses-data-briefing.

[53] *See generally* Jonathan J. Wroblewski, *A Better Federal Drug Guideline*, Sentencing Matters Substack (Oct. 14, 2024), available at: https://sentencing.substack.com/p/a-better-federal-drug-guideline; Kevin Lerman, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. Irvine L. Rev. 679 (2017); Dan Honold, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 Harv. J. on Legis. 389 (2014); Stephen J. Schulhofer, *Excessive Uniformity – And How to Fix It*, 5 Fed. Sent'g Rep. 169 (1992); Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3. Fed. Sent'g Rep. 63 (1990).

[54] Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections*, at 23 (2016).

[55] *Id.* at 22.

[56] *Id.* at 17–23.

into alignment with "empirical data and national experience," thus fulfilling its statutory duties to promulgate guidelines that meet the sentencing objectives set forth in 18 U.S.C. § 3553(a).[57]

3. Issues for Comment

Issue 1: The Commission should set the highest base offense level in §2D1.1 no higher than 30

The PAG recommends that the Commission set the highest base offense level as low as possible, and in any case, no higher than 30, because drug quantity is a "poor proxy for culpability."[58] As the Commission itself noted, "[a]s the base offense level increases, the gap between the average guideline minimum and average sentence imposed also increases."[59] Between base offense levels 26 and 38, the average sentences imposed are no more than 77% of the average guidelines minimums.[60] At the highest base offense levels, the average sentences imposed are approximately two-thirds of the average guidelines *minimums*.[61]

In short, the current guidelines recommend sentences for drug trafficking defendants that are far harsher than sentencing judges deem appropriate, particularly when the quantity of drugs involved is higher. As a result, there are significant disparities between the guidelines' recommendations and the sentences that judges impose, with the greatest disparities occurring at the base offense levels applying to the greatest number of defendants.[62] For these reasons, the PAG recommends that the highest base offense level be set no higher than 30.

[57] *Kimbrough*, 552 U.S. at 109; *see Rita v. United States*, 551 U.S. 338, 348–50 (2007); 28 U.S.C. §§ 991, 994.

[58] *Johnson*, 379 F.Supp.3d at 1220.

[59] Drug Offenses Data Briefing, Video Transcript at 2.

[60] Drug Offenses Data Briefing, Slide 7. This figure includes defendants who received a departure under § 5K1.1 or § 5K3.1. But even excluding those defendants, the disparities are only slightly less pronounced. *See id.*, Slide 8.

[61] *See id.*, Slides 7 & 8.

[62] Commission data shows that 13,011 of the 17,173 defendants sentenced under §2D1.1(a)(5) in Fiscal Year 2023 were assigned a base offense level between 26 and 38. *See id.*, Slide 7.

Issue 2: The Commission should reduce all base offense levels in the Drug Quantity Table

As discussed at length above, the Commission erred when it disregarded its data and instead used the ADAA's mandatory minimums to create the Drug Quantity Table.[63] Accordingly, the PAG recommends that the Commission de-link the guidelines from the ADAA's quantity-based mandatory minimums altogether. Barring that, the Commission should reduce all base offense levels in the Drug Quantity Table as much as possible, regardless of drug type, because decades of experience have proven that drug quantity is not a good proxy for culpability.[64] Under the current guidelines, kingpins and low-level employees in the same scheme are treated the same when it comes to calculating the initial base offense level. Even if an employee "manage[s] to escape [a] mandatory sentence[,]" regardless of any minor adjustments that may apply, s/he will still be "subjected to excessively severe Guidelines ranges linked directly to those harsh mandatory sentences," just like the kingpin.[65] This is not the sentencing regime that Congress intended.[66] The PAG therefore supports a reduction of all base offense levels in the Drug Quantity Table.

Issue 3: The mitigating role cap should be reduced as much as possible

The PAG supports de-linking the guidelines from the ADAA's quantity-based mandatory minimums altogether. In addition, the PAG urges the Commission to reduce the mitigating role cap as much as possible, and at minimum, reduce the mitigating role cap by the same amount as it reduces the highest base offense level in the Drug Quantity Table. For defendants who are not subject to a mandatory minimum, reducing the mitigating role cap will reduce the impact of drug quantity on sentencing and result in fairer sentences for the least culpable drug trafficking defendants. For defendants who are subject to a mandatory minimum, reducing the mitigating role cap will not necessarily result in a fairer sentence, but will make clear at the time of sentencing that the Commission views the defendant as deserving a lesser sentence than that prescribed by Congress. "State sentencing commissions confronted with mandatory minimum

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[63] *See, e.g.*, *Robinson*, 2022 WL 17904534, at *2 ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, ... [t]he Guidelines use a drug quantity table based on drug type and weight to set base offense levels for drug-trafficking offenses.") (quoting *Kimbrough*, 552 U.S. at 96); *United States v. Pereda*, No. 18-CR-228, 2019 WL 463027, at *3 (D. Colo. Feb. 6, 2019) (Arguello, J.) ("[T]he Sentencing Commission deviated from the empirical approach when setting the Guideline ranges for drug offenses. Rather, the Commission chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for those crimes.") (collecting cases).

[64] *See Robinson*, 2022 WL 17904534, at *3; *Pereda*, 2019 WL 463027, at *4 ("[P]unishing low-level offenders as if they had played a prominent role in drug trafficking 'can lead to perverse sentencing outcomes.'") (collecting cases); *Diaz*, 2013 WL 322243, at *1; *Johnson*, 379 F.Supp.3d at 1219–22; 2010 Judges Survey at 9; 2003 Judges Survey at 44-46; FJC 1996 Survey Results at 12.

[65] *United States v. Leitch*, No. 11-CR-39, 2013 WL 753445, at *2 (E.D.N.Y. Feb. 28, 2013) (Gleeson, J.).

[66] *See* 2011 Mandatory Minimum Report, at 23–25.

statutes have largely adopted this approach, which has the advantage of 'mak[ing] clear when sentences uniquely result from application of mandatory penalty statutes.'"[67]

Given the Commission's past advocacy for Congress to reduce the ADAA's mandatory minimums, the Commission should not look to the mandatory minimums when determining the level at which the mitigating role cap should be set. At minimum, the Commission should reduce the mitigating role cap by the same number of levels as it reduces the highest base offense level, but the PAG believes that judicial sentencing behavior and Commission data support setting the mitigating role cap even lower.

Issue 4: The Commission should reduce the highest base offense level in the chemical quantity tables at §2D1.11

As discussed at length above, drug quantity is not a good proxy for culpability. Therefore, regardless of whether and to what extent the Commission reduces the highest base offense level in §2D1.1, the Commission should reduce the corresponding base offense levels in §2D1.11's chemical quantity tables as much as possible. Should the Commission reduce the highest base offense level in §2D1.1, the Commission should reduce §2D1.11's corresponding base offense levels by the same number of levels.

Issue 5: The Commission should reduce the impact of drug quantity on sentences for methamphetamine offenses and set the methamphetamine quantity thresholds at the current level for methamphetamine mixture

The proposed amendments relating to methamphetamine would delete all references to "Ice" in the Drug Quantity Table and would set the methamphetamine quantity thresholds at either the current level for methamphetamine mixture or the current level for methamphetamine (actual). The PAG strongly recommends that the Commission reduce the guidelines' reliance on quantity in favor of function, because quantity is a poor measure of a defendant's culpability. To the extent that quantity remains the trafficking guidelines' defining factor, the PAG recommends that the Commission set the methamphetamine quantity thresholds at the current level for methamphetamine mixture.

B. Low-Level Offense Functions

Subpart 2 of Part A of the Drug Offense amendment creates a new specific offense characteristic that offers a reduction for low-level trafficking functions that may be used in place of the mitigating role reduction in §3B1.2. This proposal suggests a 2-, 4-, or 6-level role reduction depending on the defendant's relative culpability among multiple participants.[68]

Both options for the low-level-trafficker specific offense characteristic describe functions analogous to a minimal participant under §3B1.2. Commentary to §3B1.2 describes a minimal

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[67] *Diaz*, 2013 WL 322243, at *5 (quoting Michael Tonry, *Sentencing Matters* 79, 96–98 (1996)).

[68] *See* Proposed Amendments at 70-77.

participant as a "defendant[] who [is] plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant."[69] The proposed low-level trafficker amendment likewise describes defendants who expressly lack knowledge of any broader conspiracy or lack knowledge by way of inference from the low-level tasks performed. For this reason, the adjustment under the proposed amendment should be no less than a 4-level reduction.

The PAG recommends a 6-level reduction for all qualified defendants given the many specific requirements in the proposed amendment, the extraordinarily high base offense levels in drug cases, and the specific acknowledgment that the defendant is a "low-level trafficker." Simply put, a continuation of the smaller reductions in §3B1.2 will not address the larger problem of unnecessarily high sentences in drug trafficking cases.[70]

The PAG finds that the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions, and it supports Option 2 because it provides a list of examples of conduct that may qualify for the reduction, rather than a rigid checklist of requirements that a defendant must meet. This offers sentencing courts more flexibility in tailoring the application of this role reduction to individual defendants and the circumstances in their cases. The dynamics of the drug trade change regularly, and the drug trade differs across the country. Individual judges and litigants are best suited to identify what qualifies as low-level trafficking.

The PAG is not opposed to including 17(B), which requires that the defendant "not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." The PAG, however, encourages the Commission to confirm in commentary that "possession" as used for this reduction is determined under the same standard for safety-valve eligibility at §5C1.2 (actual possession by the defendant) as opposed to the enhancement found at §2D1.1(b)(1) (reasonably foreseeable possession by any member of the conspiracy). A low-level trafficker, for example, acting out of fear, should not be disqualified from the benefit of this reduction because he or she was aware that a more culpable co-defendant possessed a firearm during a drug conspiracy.

With respect to the Commission's question for comment regarding the distribution of retail or user-level quantities of controlled substances, the PAG believes that this merits a reduction when certain mitigating circumstances are present. Commission data supports this proposal. In Fiscal Year 2023, only 11.8% of individuals sentenced under §2D1.1 received the mitigating role cap found at §2D1.1(a)(5), whereas 30.2% of defendants in a sample of methamphetamine cases fell into the two lowest levels of offenders as "couriers" or "employee/worker."[71] These figures

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[69] §3B1.2 n.4.

[70] *See, e.g., Diaz*, 2013 WL 322243, at *7 (stating that existing role reductions "mitigate sentences slightly but still leave low-level offenders facing prison terms suitable for a drug boss.").

[71] *See* Drug Offenses Data Briefing, Slides 9 & 12.

suggest that the mitigating role reduction is failing to identify all low-level drug trafficking defendants.

In the PAG's experience, some of the mitigating factors with respect to role reductions that judges routinely consider include a defendant's age, particularly where younger individuals are manipulated by older members of a group; and a defendant's particular vulnerabilities, such as learning disabilities, dire economic circumstances, familial or intimate relationship connections, or a defendant's own addiction that drives their participation in the offense. These factors are typical of lower levels of culpability among drug trafficking defendants, and the PAG encourages the Commission to include these as factors for courts to consider when applying this specific offense characteristic.

Further, the PAG urges the Commission not to remove additional decreases to the base offense level under the mitigating role adjustment in §3B1.2. It should keep both decreases for mitigating roles as well as the option for a low-level trafficking reduction. These reductions are meant to reduce unnecessary reliance on drug quantity as a predictor of culpability. In some cases, there may be a perfect overlap between the mitigating role adjustments found at §3B1.2 and the proposed low-level trafficker amendment, but this is not always the case. The mitigating role reduction is comparative, meaning that different members of a drug conspiracy are compared for culpability purposes. The low-level trafficker reduction could be applied in the absence of multiple participants. It is conceivable that certain defendants in multi-participant cases would not be considered "low-level traffickers," but would still be entitled to an appropriate reduction under §3B1.2. The PAG recommends that the mitigating role adjustment at §3B1.2 remain in §2D1.1 along with the proposed low-level trafficker specific offense characteristic.

The Commission asks for comment on whether the "mitigating role cap" in §2D1.1(a)(5) should be amended if the low-level trafficking functions amendment is adopted. The mitigating role cap has varied from 30 to 32 under prior Commission amendments. The stated purpose in those prior amendments was to "respond[] to concerns that base offense levels derived from the Drug Quantity Table in §2D1.1 overstate the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under §3B1.2."[72]

The PAG supports the continued use of a mitigating role cap to avoid situations where high drug quantity alone overstates the culpability of otherwise low-level traffickers. The PAG further supports lowering this cap back to 30 or less, given the reality that drug quantity still overstates culpability notwithstanding the mitigating role cap.

For the same reasons, the PAG does not support a special instruction limiting the availability of the mitigating role adjustment in §3B1.2 when a defendant's offense level is determined under §2D1.1. Given the outsized impact that drug quantity has on even a low-level defendant's base

[72] *See* §2D1.1 Amends. 640 & 668.

offense level, these combined reductions are necessary to ensure that the guidelines sentencing ranges accurately reflect, and do not overstate, a defendant's culpability.

Finally, the PAG believes that it is appropriate to include guidance in §2D1.1 that tracks guidance currently contained in the commentary to §3B1.2. The policy reasons supporting §3B1.2 and the low-level trafficker amendment are similar as a general concept, and the PAG believes that this guidance applies to the proposed amendment. The PAG defers to the Commission on how it incorporates the guidance contained in §3B1.2.

C. Methamphetamine

Part B of the Commission's proposed amendment to the drug guideline has two subparts. Subpart 1 addresses offenses involving Ice, and Subpart 2 addresses the present purity-based distinction in the drug quantity table which differentiates actual methamphetamine from methamphetamine that is part of a mixture, and Ice.[73]

The present statutory structure for crimes relating to methamphetamine trafficking, 21 U.S.C. §§ 841 and 960, sets statutory mandatory minimums based on either the gross quantity of a substance containing a mixture of methamphetamine, or the actual amount of methamphetamine in a substance as determined by its purity.[74] The distinction between Ice and other kinds of methamphetamine is not addressed by statute.

The guidelines set different base offense levels based on both the quantity and type of methamphetamine at issue. Specifically, §2D1.1(c) differentiates between methamphetamine, which is defined as the entire weight of a mixture or substance containing a detectable amount of methamphetamine; methamphetamine (actual), which is defined as the actual weight of the methamphetamine contained within a mixture or substance (as determined by purity analysis); and Ice, which is defined as "a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity."[75]

These distinctions have a significant impact on a defendant's offense level. The guidelines contain a 10:1 ratio between methamphetamine and methamphetamine (actual). That same 10:1 ratio is applied between methamphetamine and Ice. So, for example, a defendant needs only to be responsible for 2 grams of methamphetamine (actual) or Ice to be at offense level 18, whereas the same defendant would have to have at least 20 grams of methamphetamine attributed to him or her to be at the same offense level.

The Commission's data over the past two decades shows that the number of methamphetamine cases has remained stable, whereas the number of methamphetamine (actual) and Ice cases have exploded. Methamphetamine (actual) cases have risen by 299%, and Ice cases have risen by

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[73] *See* Proposed Amendments at 80-102.

[74] *See* 21 U.S.C. §§ 841(b)(1)(A)(viii), (B)(viii), 960(b)(1)(H), & 960(b)(2)(H).

[75] *See* §2D1.1(c), nn. A, B & C.

881% during the same period. Methamphetamine mixture cases now account for only 35.4% of all methamphetamine cases, while 63.6% involve methamphetamine (actual) or Ice.[76]

Whatever purity or type distinctions may have existed in the past, the Commission's present data establishes that almost all recent methamphetamine cases – whether they are sentenced as mixture, actual, or Ice cases – involve almost pure methamphetamine. The average purity of methamphetamine involved in these cases was 93.2%, and the median purity was 98.0%.[77] For all three types of methamphetamine, average sentences fell far below the minimum of the recommended guideline range: 37 months lower in methamphetamine cases; 44 months lower in methamphetamine (actual) cases, and 50 months lower in Ice cases. Only 26.1% of methamphetamine cases, 23% of methamphetamine (actual) cases, and 21.3% of Ice cases were sentenced within the guidelines range.[78]

Differentiating between the type or purity of the methamphetamine attributed to a defendant, and increasing the offense level through the 10:1 ratio in the Drug Quantity Table, no longer makes sense. In the late 1990s and early 2000s, when most methamphetamine was created domestically in homemade labs, the drug often was diluted substantially as it made its way down the distribution chain from manufacturer to distributor to dealer to consumer. Additionally, since methamphetamine "cooking" operations were notoriously amateurish and used a wide variety of "recipes," the possession of pure methamphetamine often denoted the existence of a more sophisticated, large-scale domestic lab. Thus, a defendant caught with pure methamphetamine was perceived as someone higher in the distribution network or part of a more sophisticated operation. Now, "garden variety" methamphetamine is the same purity as Ice. Possession of Ice or high purity methamphetamine says nothing about the culpability or sophistication of the defendant. In sum, purity and type no longer act as proxies for relative culpability related to where a defendant sits in a distribution network's hierarchy.

For these reasons, the PAG endorses the Commission's proposal in Subpart 1 to delete all references to Ice, but the PAG recommends the Commission eliminate all distinctions between methamphetamine, methamphetamine (actual), and Ice. Given the high levels of purity of all types of methamphetamine currently being distributed, these distinctions no longer accurately predict the seriousness of a defendant's conduct or culpability. And sentencing data reflects this – only about a quarter of all methamphetamine cases are sentenced within the guidelines range, and most sentences are the result of below-range departures or variances.

The PAG also supports the Commission's proposal to add a new specific offense characteristic at §2D1.1(b)(19) providing a 2-level reduction if the offense involved non-smokable, non-crystalline methamphetamine because of the reduced potency of this form of the drug. The PAG defers to experts in the fields of pharmacology and the relevant scientific and behavioral

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[76] *See* Proposed Amendments at 80.

[77] U.S.S.C., *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, at 4 (June 2024), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

[78] *See* Drug Offenses Data Briefing, Slides 21 & 22.

sciences, the questions regarding this form of methamphetamine's pharmacological effects, its potential for addiction and abuse, and patterns and harms of abuse associated with use of the drug and its trafficking.

With respect to Subpart 2 of this proposal, the PAG supports Option 1, which treats methamphetamine and methamphetamine (actual), as methamphetamine, instead of applying the 10:1 ratio presently used in the Drug Quantity Table. This is supported by the Commission's sentencing data, reflecting the extensive use of downward variances and departures in methamphetamine cases. This suggests that the guideline ranges are far too high, and that a greater drug quantity should be used to set the base offense level in methamphetamine cases. The PAG does not support the inclusion of the 10:1 ratio between methamphetamine and Ice which remains in this proposal, given that nearly all methamphetamine is of high purity and meets the definition of Ice. Eliminating these distinctions and treating all methamphetamine as methamphetamine will promote the goals of uniformity and fairness. It will remove the present disparities that are based on antiquated distinctions in the type and purity of methamphetamine, distinctions that fail to accurately reflect differences in culpability or responsibility.

The Commission also asks whether, given this proposal regarding methamphetamine, it should reconsider the 18:1 ratio between crack and powder cocaine.[79] In light of the extensive data that the Commission and other stakeholders have collected over the years regarding the lack of any meaningful difference between crack and powder cocaine, the PAG supports eliminating this disparity in the treatment of crack and powder cocaine under the guidelines.[80]

D. Fentanyl & Fentanyl Analogues

The Commission proposes revising the enhancement for knowingly misrepresenting or marketing as another substance a mixture or substance containing fentanyl or a fentanyl analogue.[81] The proposal is the result of commenters urging the Commission to revise this enhancement because "courts rarely apply" it and it is "vague and has led to disagreement on

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[79] *See* Proposed Amendments at 103.

[80] *See* U.S.S.C., *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 198 – 200 (Feb. 1995) ("strongly recommend[ing] against a 100-to-1 quantity ratio" and explaining reasons for this finding), available at: https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf; U.S.S.C., *Amendments to the Sentencing Guidelines for the United States Courts*, 60 Fed. Reg. 25075-25077 (1995) (proposing to reduce the crack/powder quantity ratio from 100-to-1 to 1-to-1); *see also* The Office of the Attorney General, Memorandum for all Federal Prosecutors, *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases* at 4 & n.3 (Dec. 16, 2022), available at: https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf ("the crack/powder disparity is simply not supported by science, as there are no significant pharmacological differences between the drugs: they are two forms of the same drug, with powder readily convertible into crack cocaine.").

[81] *See* Proposed Amendments at 105-106.

when it should be applied."[82] At this time, the PAG believes that any revision to this enhancement requires additional information and data about how the enhancement is applied. As a result, the PAG does not support this proposal, but if the Commission must act, then the PAG supports Option 2, which maintains a *mens rea* requirement for this enhancement.

First, with respect to the criticism that this enhancement is vague, the PAG does not agree, and does not understand what portion of this enhancement can be considered vague. Further, this enhancement has been considered repeatedly in recent years, in 2018 and in 2023, and in the comments, the PAG is not aware of criticism that this enhancement is vague.

Second, if, as suggested, this enhancement is not being applied frequently, then sentencing data should reflect upward departures or variances to account for this. Instead, the Commission's data show that even when this enhancement is applied, the average sentences imposed by courts are well below the average guideline minimum.[83]

The PAG believes this enhancement is clear, and that it is applied appropriately. Were it not, the data would reflect upward departures and variances across the board in these cases. Instead, the data reflects that even in those cases where this enhancement is applied, courts are imposing sentences below the minimum guideline. And, to the extent that commenters suggest the *mens rea* requirement is causing this enhancement to be applied insufficiently, that, too, is not supported by the sentencing data. If that were the case, then one would expect to see upward departures and variances in these cases. Accordingly, the PAG does not support this proposal, but as noted above, if the Commission acts, the PAG finds Option 2 the least objectionable, since it maintains the *mens rea* requirement.

E. Enhancement for Machineguns

The Commission proposes a new, 4-level enhancement under §2D1.1(b)(1) if a machinegun was possessed in connection with a drug trafficking crime.[84] Currently, a 2-level enhancement is applied if a dangerous weapon was possessed.[85] The reasons for this amendment are that the dangerous weapon enhancement does not distinguish between machineguns and other weapons, and, to reflect the increased presence of machinegun conversion devices ("MCDs").[86] The PAG does not support this enhancement.

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[82] Proposed Amendments at 104.

[83] *See* Drug Offenses Data Briefing, Slides 29-30.

[84] *See* Proposed Amendments at 108.

[85] *See* §2D1.1(b)(1).

[86] *See* Proposed Amendments at 108.

As discussed earlier in this letter, over the years, the drug guideline has been criticized for being "deeply and structurally flawed. As a result, it produces ranges that are excessively severe across a broad range of cases[.]"[87]

> The flaw is simply stated: the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.[88]

As a result, Commission data shows that the average sentences imposed in cases adjudicated under §2D1.1 are below the minimum of the applicable guideline range. In other words, courts frequently vary and depart downward in cases sentenced under the drug guideline.[89] And this appears to be the reason that the Commission is currently proposing to reduce the highest base offense level in the Drug Quantity Table.[90]

Given the excessively high sentencing ranges that already exist under §2D1.1, the PAG does not support the current proposal for a "tiered" approach to the dangerous weapon enhancement under §2D1.1(b)(1). If courts already are imposing sentences below the minimum of the guideline range in drug trafficking cases, this suggests that there is no need to provide for an increased enhancement related to machineguns. If the circumstances of an offense are significantly serious that the danger of the presence of a machinegun is not adequately reflected in the recommended guidelines range, then the court has the discretion to vary upward to account for that conduct.

F. Safety-Valve

The "safety valve" under 18 U.S.C. § 3553(f) allows courts to sentence defendants without regard to any statutory minimum when five listed conditions are met.[91] The fifth condition requires the defendant to provide to the government "all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."[92] The guidelines mirror the safety valve statute.[93] The Commission raises the concern that defendants otherwise eligible for safety valve relief may decline to

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[87] *Diaz*, 2013 WL 322243, at *1.

[88] *Id*.

[89] *See* Drug Offenses Data Briefing, Slides 6-8.

[90] *See* Proposed Amendments at 57; *see also* discussion above in Section II(A) regarding this proposal.

[91] *See* 18 U.S.C. § 3553(f)(1)-(5).

[92] 18 U.S.C. § 3553(f)(5).

[93] *See* §5C1.2.

provide the required information to the government out of fear for their safety, thereby foregoing the benefit of the safety valve. The Commission's concern is well founded.

For example, a PAG member currently represents a 19 year old defendant who pled guilty to possessing with the intent to distribute 500 grams or more of cocaine, an amount that triggers a 5 year mandatory minimum sentence.[94] The defendant has no criminal history, the case does not involve violence, firearms or injury, and the defendant did not play an aggravating role. Thus, the defendant easily satisfies the first four safety valve conditions. But this defendant is afraid for his safety. He is convinced that if he reports to federal prison after receiving a safety valve reduction, he will be labeled a "snitch" and will be assaulted. With the safety valve, this defendant's guideline range would be 30-37 months. But the defendant has declined to provide information pursuant to the safety valve and will receive a sentence of at least 60 months. The PAG sees cases like this with some degree of frequency.

The only way to completely solve this problem is to amend the statute and remove the fifth safety valve condition currently codified at 18 U.S.C. § 3553(f)(5), requiring the defendant to provide information to the government. This fifth condition, it seems, has little practical value to the government since the information provided by the defendant need not be new, relevant, or useful. Some say that the fifth condition is necessary to force defendants to face up to their conduct by admitting it to the government – a sort of extra mea culpa. But this is unnecessary given that in most cases, a safety valve-eligible defendant has pled guilty. The Commission has the authority to recommend to Congress modifications of grades/maximum penalties for which an adjustment appears appropriate and to make data-based recommendations for legislation.[95] The PAG suggests that it is appropriate for the Commission to recommend to Congress that the fifth safety valve condition be deleted from the statute.

As long as the fifth condition remains, the Commission's proposed addition to the Application Note to §5C1.2, specifying that a defendant need not meet in person with representatives of the government but may provide the required information in writing, is fully supported by the PAG. Although this will not solve the problem of otherwise eligible defendants declining safety valve benefits in every case, it will solve the problem, at least in some cases. And a partial fix is better than no fix at all.

[94] *See* 21 U.S.C. § 841(b)(1)(B)(ii)(II).

[95] *See* 28 U.S.C. §§ 994 (r) and (w)(3).

III. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding the Commission's proposed amendments. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

March 3, 2025

The Honorable Carlton W. Reeves
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (the Commission) regarding the proposed amendments issued on January 24, 2025.

Supervised Release

(A) Imposition of a Term of Supervised Release

POAG appreciates the Commission's review of the importance of supervised release. United States Probation Officers throughout the country are dedicated to our mission to create and support a system that "facilitates the fair administration of justice, enhances public safety, and positively impacts the lives of individuals who become involved with the federal courts."[1] The goal of supervision is the successful reentry into the community, coupled with compliance of court conditions for the purpose of community safety. Probation officers play a crucial role in that success and are, in many cases, one of the few, if not the only, prosocial relationships in the life of a person under supervision. On a daily basis, probation officers are tasked with balancing the sometimes competing functions and values of law enforcement with social work, to ensure public safety, while also providing supportive services to those under supervision. The United States Probation Office is continuously focus on research to help improve outcomes and core correctional practices. We have evolved over the past century to incorporate these best practices and the results

[1] United States Courts. (2025, February 25). Probation and Pretrial Services. https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services

of scientific research to execute our duties and responsibilities to the people we supervise, our stakeholders, as well as the community at large.

Imposition of a Term of Supervised Release (USSG §5D1.1)

POAG was split regarding the noted changes to both USSG §5D1.1(a), removing the requirement for supervised release in cases in which it is not required by statute, and §5D1.1(d), noting that the reasons for imposing or not imposing supervised release should be stated for the record. Those in favor of keeping the language in §5D1.1(a)(2) noted the benefit of having the opportunity to supervise individuals for a minimum amount of time, allowing the United States Probation Office to complete an initial determination if supervision is necessary past 12 to 18 months. Additionally, a minimum term of supervision provides the United States Probation Office, supervisee, and the community with a safety net; allows for receipt of First Step Act benefits while in the custody of the Bureau of Prisons; and assists those individuals transitioning into or from a Residential Reentry Center.

Those in favor of removal of the §5D1.1(a) language believe it allows for a more individualized approach for the court to determine if supervision would be beneficial for the defendant and allow for the allocation of limited resource of the United States Probation Office and their outside stakeholders towards those most in need of services.

Furthermore, those in favor of adding (d) to §5D1.1, noted that this is already occurring in court. In contrast, those who were against adding (d) indicated that this may appear to be an acceptable practice, but adding the language into the guidelines may result in unintended consequences and continually invite ligation on both sides of the aisle. Additionally, as the practice is already occurring in most cases, the inclusion of the language in the Guideline Manual could have the unintended consequence of suggesting what is being done is insufficient. POAG recommends that, should the Commission choose to amend this language, the bracketed statement of "or not imposing" be utilized.

Regarding §5D1.1(b), POAG unanimously opposed the updated language pertaining to the imposition of a term of supervised release when not required by statute. The language is problematic, specifically pointing out "when, and only when" will give rise to numerous appellate issues and definitional challenges. This change may ultimately cause issues with articulating what is already deemed procedurally good practice within each court. The phrasing also makes it seem as if the Commission is suggesting that supervision is unnecessary when the court should make that decision independently. POAG believes that supervision of defendants after their release from custody produces a substantial benefit to the defendant and the community. POAG also observes that it is difficult to determine which defendants fall within the slim minority of cases that would experience no benefit from the added stability supervision provides. Defendants who appear stable may have unforeseen obstacles in life that then disrupt that stability. A defendant may look

relatively stable at sentencing, but they may leave custody months or years later in a substantially less stable posture than they entered.

Finally, POAG was in favor of the Commission adding the sentencing statute citations to the Commentary, as it creates consistency within the manual and appropriate statutory authority references.

Overall, POAG did express some concern regarding the "individualized assessment" language utilized in the proposed changes throughout Chapters 5 and 7. In the parlance of probation officers, assessments are often written evaluations of a person's risk of recidivism (i.e. the Post Conviction Risk Assessment (PCRA)) or a person's mental health or substance abuse diagnoses and treatment needs. To our knowledge, there are presently no individualized assessment tools which are used to determine the need for supervised release or the appropriate conditions for supervised release.

At the presentence stage, there is no formal assessment tool utilized; however, the presentence investigation itself, including interviewing a defendant, interviewing an individual with close knowledge of the defendant, and reviewing relevant records (i.e. criminal history, education, medical) on the defendant, and, therefore, does lend itself to making an individualized determination of whether or not a person needs, or could benefit from, a term of supervised release. Defendants with greater needs or risk factors for recidivism that are discovered during the presentence investigation would typically be recommended for a longer term of supervision, to ensure ample time to address the identified risks and needs. And, if it is determined supervised release is necessary, that same investigation reveals what conditions of supervised release are appropriate for the defendant and his/her personal circumstances.

Furthermore, while under supervised release, probation officers are routinely engaging in case planning and making what would be considered individualized determinations, regarding the risks and needs of a person under supervion. Probation officers often begin working with, and assessing, persons soon to be under supervision while they are still under the custody of the Bureau of Prisons in the halfway house environment. As part of that initial case planning, probation officers are required to conduct a risk assessment using the PCRA tool, along with an initial case plan within 30 days of that individual's release (or 60 days in cases in which the person is directly released from prison and not the halfway house). The individual's case and risk level are continuously assessed throughout the term of supervision and are formally done so within six months and one year later at eighteen months, and every year thereafter. Said case planning may result in recommended modifications of the conditions of supervised release or even the consideration of early termination. In many districts, probation officers recalculate the PCRA prior to proceeding with a violation of probation or supervised release. Case planning could also reveal that the person should be transferred to a low risk, administrative, or inactive case load, requiring little to no interaction with the probation office. Therefore, while these determinations are regularly made by probation officers, they are often not a formalized assessment, based upon a written tool. With this

in mind, members of POAG believe changing the term "individualized assessment" to "individualized determination" may be more appropriate.

Term of Supervised Release (USSG §5D1.2)

In reviewing the requested changes to this section of the guideline manual, similar concerns were raised as those noted in USSG §5D1.1, with emphasis on conducting an individual assessment to determine the length of term of supervised release.

Regarding §5D1.2(a), as noted above, POAG has concerns with the term "individualized assessment" and again note that "individualized determination" may be more appropriate. In the parlance of probation officers, assessments are often written evaluations of a person's risk of recidivism (i.e. PCRA) or a person's mental health or substance abuse diagnoses and treatment needs. For supervision officers, "determinations" are processes while "assessments" are tools in that process. Additionally, the majority of POAG members were opposed to changing the language of §5D1.2(a), for the same noted reasons under §5D1.1.

POAG unanimously agreed that striking the language in §5D1.2(b) was an appropriate determination; however, POAG was unanimously against the updated language noted in §5D1.2(c). This language, although appearing procedurally appropriate, would likely cause unintended consequences and give rise to more litigation at sentencing, increased length of sentencings to achieve largely the same result, and appeals from defendants.

Finally, POAG agrees that the commentary changes should be adopted, as it aligns with POAG's noted position on this guideline.

Conditions of Supervised Release (USSG §5D1.3)

Beginning in the mid-2010s, there were a flurry of cases in the Seventh Circuit Court of Appeals which began to call into question the imposition of various conditions of supervised release.[2] The conditions which were initially debated were more specialized conditions pertaining to the supervision of sexual offenders; however, case law continued to evolve in this previously little reviewed area and then turned to more "standard" conditions, including those required by law (i.e. mandatory conditions). This has resulted in a landscape in the Seventh Circuit in which the reasons for applying a term of supervised release and each of the conditions needs to be carefully described and detailed on the record. This has necessarily resulted in sentencing hearings lasting for longer than they previously did. For instance, an officer in the Seventh Circuit observed that sentencing hearings - without any issues or objections - lasted on average of two hours. It was not until 2019 that it was settled that the recitation of each of the imposed conditions, along with the rationale for each condition being imposed - for even undisputed conditions - could be waived by the

[2] See, *United States v. Goodwin*, 717 F.3d 511 (7th Cir. 2013); *United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014); *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015); and *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015).

defendant.[3] While such debate regarding the conditions of supervised release is mostly confined to the Seventh Circuit, members of POAG expressed concerns that requiring an individualized assessment of the conditions of supervised release will result in such practice spreading to the other circuits. Additionally, concerns were expressed that, if the court were to inadvertently miss some of the necessary steps, not make a full record of why supervised release was imposed for that length of time and with those specific conditions, it could result in an appellate issue and remand, perhaps requiring a full re-sentencing hearing.[4] Those who work in already overburdened courts are concerned that the additional time requirements will further mire the court docket. While POAG agreed that the use of resources to achieve a better outcome is well worth it, POAG does not believe this approach produces a better result.

POAG has observed that the proposed Application Note 1 of USSG §5D1.3, pertaining to the individualized assessment appears to imply that an officer is to assess the need for all conditions, including mandatory and standard conditions, as well as special conditions. Many of the mandatory and standard conditions listed encompass administrative conditions, which are the statutory requirements of a probation officer.[5] If certain conditions, such as reporting requirements, are excluded, that prohibits the probation officer from being able to supervise the individual and meet their statutory obligations. In addition, standard conditions of supervised release are geared towards accountability, leading a law-abiding lifestyle, promoting stability and pro-social activity, reducing the risk to the community, and allowing for effective supervision. As these are all important hallmarks of supervision and post-offense rehabilitation, POAG believed these conditions should remain unchanged in most cases. As an aside, members of POAG have expressed concern that changing the basic expectations of a term of supervised release, in addition to reducing probation officer's ability to effectively supervise individuals, could result in difficulties in performing academic studies on supervised release, as it may become too variable to make for meaningful comparison and study. While that may seem like a relatively collateral concern, the probation system works to refine their effort based on social science research, and erosion of the comparisons that science focuses on may have a long-term impact on that effort.

Members of POAG and supervision officers we represent did express trepidation regarding what we believe could be an unintentional consequence of what were often considered standard conditions of supervised release being subject to individualized assessments, including by other parties in the courtroom. Specifically, officers are concerned that the probation office's discretion could be hampered by this procedure. For the past 100 years, the federal probation system has crafted their policies and procedures, based upon the social science, correctional best practices, and evidenced based practices research. While these practices and research may be well known to the probation office, it is not anticipated that the parties would be as well versed. Furthermore, in recent lean budget years, probation offices have become well skilled at doing more with less and

[3] See, *United States v. Flores*, 929 F.3d 443 (7th Cir. 2019).
[4] See, *United States v. Kemp*, 88 F.4th 539 (4th Cir. 2023).
[5] See, 18 U.S.C. § 3603.

focusing our offices' limited resources on those supervisees who need them the most, not only for the supervisee's own rehabilitation but to protect the public. It is important for the probation office to maintain its discretion in how to best supervise persons under supervision, while also not burdening the courts with additional hearings regarding how the probation office should execute their statutory authorities in individualized cases. Anecdotally, in the Seventh Circuit in which the supervised release conditions have been debated for the past decade, those which provide discretion to the probation officer (i.e. where a supervisee can be visited, participation in substance abuse and mental health treatment, third party risk notification) are some of the most often debated conditions. Sometimes in the resolution of the objection, it can result in conditions that are difficult to execute. For example, a probation officer being unable to visit a person at their home or place of employment but being permitted to execute searches of those same places with reasonable suspicion. Another example is when a supervisee being placed under home detention, but with no monitoring technology imposed (i.e. a location monitoring bracelet) to ensure the court's orders are being followed. Furthermore, when courts specifically tailor or modify the wording of the conditions of supervised release, it can result in vast differences among various judges within the same district, let alone across districts and circuits. This could result in disparities in how supervised release looks on a national level. It could also have unintended consequences in terms of other districts being unwilling to accept the supervision of a case, as the conditions with which that person under supervision has been placed may not comport with the preferred conditions and wording of those conditions in the other district.

POAG members expressed concerns that such individualized tailoring of conditions of supervised release and modifying the wording of the conditions, to the satisfaction of the parties, could lead to circumstances in which there is greater liability for the probation office and officers. Officers will need to carefully and routinely review the imposed conditions on each of their many cases, in order not to inadvertently infringe upon the supervisees' civil rights by overstepping what was imposed by the court. While caseloads can vary a great deal nationally and within individual probation offices (i.e. those who supervise higher risk offenders or specialty populations may have a lesser caseload than those who supervise low-risk cases), imagine a probation officer who supervises sixty-five individuals and would need to review sixty-five potentially very different sets of conditions of supervision on a routine basis. Under this structure, the differences between those cases could be very nuanced. For instance, what would happen if the probation office conducted a drug test which exceeded the maximum number of annual tests ordered by the court and that drug test was the basis of a violation? Or, what would happen if the probation officer were to visit a supervisee at his community service location, in order for him to not have to request time off of work to visit with the probation officer, but visits at the community service location were not permitted? Or, if the home visits could only be done when scheduled in advance, and the officer having scheduled a visit with the person under supervision arrives a little late or early to the scheduled appointment, due to unforeseen circumstances, resulting in litigation against the officer for acting to supervise the supervisee outside the scope authorized by the court? Regularly needing

to review each supervisee's imposed conditions could serve to overburden an already burdened system.

As to the proposed wording changes, POAG unanimously prefers the Commission retain the longstanding language of "standard" conditions, rather than change the language to "examples of common" conditions. No concerns were presented regarding the deletion of "additional conditions" and those conditions being included under "special conditions," as the term "special conditions" has been used for many years.

POAG largely supports the inclusion of a high school or equivalent diploma as a potential special condition of supervised release. Some remarked that the obtainment of a high school diploma or equivalency may be most appropriate in cases in which the supervisee is otherwise not employed. There are often many requirements placed upon a person following his or her release from imprisonment, at the same time the person is trying to reintegrate into the community, from which he or she may have been removed for a significant period of time. Many people are released from prison with limited financial means and necessarily need to focus on employment. However, obtainment of the minimal education requirement may be an appropriate condition for some persons under supervision, or an appropriate modification to include should a supervisee struggle to obtain employment due to educational deficits. In addition to including participation in education as a special condition, the Commission may also wish to consider including participation in vocational training, as well as job skills training. Some persons under supervision have little to no work history and, in addition to obtaining an education, may need to acquire basic soft skills to help them obtain employment and gain a better understanding of how a formalized work environment operates. Furthermore, some persons under supervision, while they may struggle with formalized education, may be better adept at vocational skills and could complete that type of program in lieu of education.

Modification, Early Termination, and Extension of Supervised Release (USSG §5D1.4)

The inclusion of modifications, early termination, and extension of supervised release is an appropriate addition to the Guidelines Manual. POAG is appreciative of the Commission's efforts to include statutory authority into the Guideline Manual to provide further guidance on modifications, early termination, and extension of supervised release; however, there are concerns that the changes may contradict the Guide to Judiciary Policy. Modification of conditions are common and happen fluidly as a supervision tool. Probation officers utilize PCRA to assess the risks and needs of the person under supervision. According to the responsivity principle, intervention strategies should be administered in the modality that is most effective in the reduction of criminal behavior. Further, the delivery of treatment services must also align with the individuals' learning styles. Probation officers are trained annually on the utilization of PCRA and are in the best position to apply the results along with an individualized determination of the appropriate conditions necessary for a positive outcome. Additionally, on-going assessments are

made during the period of supervision with personal and collateral community contacts, written reports, and other observed behaviors. Officers routinely work directly with defense counsel, the U.S. Attorney's Office and the court to ensure that conditions are structured to equip the person on supervision with the tools needed for a successful reintegration into society and further ensuring a decreased likelihood of reoffending. In the current structure, a violation of supervision is not necessary to request a modification of conditions. POAG suggests utilizing the language of "may," rather than "should," and striking the last sentence which encourages the court to conduct an assessment after the defendant's release from imprisonment. The Probation Office would like to continue to take the lead on modification requests given our firsthand knowledge of the person under supervision's unique needs.

The Guide to Judiciary Policy provides a presumption in favor of recommending early termination at 18 months of supervision for individuals that meet a specific criterion and are not classified as violent or career offenders. This internal policy directs probation officers to closely review all cases at the eighteen-month mark, to assess if the case is eligible for early termination. This date coincides with the third mandatory case review of each case on probation or supervised release. Initial case plans are completed within 30 to 60 days of the onset of probation or supervised release. A second case review is required at six months. As a part of the case planning activities, probation officers are completing the PCRA. Factors such as antisocial attitudes, antisocial associates, impulsivity, substance abuse, deficits in education, and vocational and employment skills are directly associated with the probability of recidivism. These areas drive the criteria set forth in the Guide to Judiciary Policy. In discussion, POAG found that officers frequently review cases for early termination during annually required case staffings which occur between officers and their supervisors. During the case review period, officers are reviewing compliance of court-ordered conditions, employment and residence stability, along with running a record check to ensure that no new criminal behavior has occurred. This may also be a time when modifications of conditions of supervised release may be considered and the transfer of the individual to a low risk or administrative caseload occurs. While these practices are common, POAG does acknowledge that the probation office work-funding structure needs re-evaluation as it pertains to early termination, and it is our understanding that the Administrative Office is engaged in an effort to rebalance the work-funding formula on this issue. Notwithstanding, officers and districts are still working to early terminate cases that present a sustained pro-social development and a low risk to the community. The data on this reflects that of the 52,042 cases in which supervision was closed in 2024, 9,580 of those cases were early terminated (18.4%).

A recent study entitled Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety (2025) published by Thomas H. Cohn, Probation and Pretrial Services Office of the Administrative Office of the U.S. Courts, substantiated that the current structure and usage of early termination in federal probation did not threaten community safety. The study examined approximately 296,023 cases that were closed via early or regular termination between 2014-2023. "Specifically, when matched on a range of criteria associated with the risk of

recidivism, supervisees with early termination manifested post-supervision arrest rates that were two percentage points lower for any offenses than those of their regular termed counterparts."[6] Another study finding revealed that the greatest indicator as to whether a case would be early terminated was the district of supervision. Perhaps the Commission's inclusion of early termination within the Guideline Manual, coupled with the Administrative Office's recent study, will encourage more probation offices across the country to more regularly consider, recommend, and support early termination. The inclusion of this language could also encourage the USAO and the court as well. If the Commission incorporates instructive guidance for early termination, it should mirror the current counsel advised in the Guide to Judiciary Policy, particularly as it relates to the timing (18 months versus 12 months).

Many individuals on supervision are aware of the possibility of early termination and often inquire about it during the initial phases of supervision. Early termination can be a useful incentive to motivate and facilitate compliance with conditions and the development of sustainable prosocial activities. Additionally, the practice of early termination helps to reduce the heavy workload experienced by many officers. If individuals that are less likely to recidivate and have shown the ability to self-manage are released from supervision, officers can focus their attention on high-risk supervisees. The risk-needs-responsivity model dictates that recidivism can be reduced if the level and type of treatment services are proportional to the risk level of the person on supervision.

If early termination appears to be appropriate, officers are working in conjunction with defense counsel and the U.S. Attorney's office to file a request for early termination to the court. Officers value their ability to make independent decisions with careful consideration. They continuously serve the court by providing factual information based on their close proximity to persons under supervision. In some instances, probation officers serve as one of (or the sole) prosocial model in a person under supervision's life. There is a strong bond which forms between probation officers and persons under supervision, which may sometimes last beyond the term of supervision. Studies have shown that the relationship which is built between the probation officer and person under supervision can factor heavily into the success of the person under supervision.[7] It is through this unique relationship that change is encouraged, fostered, and supported.

Some districts offer re-entry court programs, such as the one noted by the Commission in the Eastern District of Pennsylvania. There is also a similar program in the Northern District of Illinois. Individuals who complete the program requirements are referred for early termination. Persons under supervision who complete such programs not only have abided by the terms and conditions of supervised release initially imposed by the court at the time of sentencing but have shown further

[6] Cohen, 2025

[7] DeLude, B., Mitchell, D., Barber, C. (2012). The probationer's perspective on the probation officer-probationer relationship and satisfaction with probation. Federal Probation, 76(1), 35-39.

determination and compliance by completing the re-entry court program's requirements. Such individuals are appropriately recommended for and receive early termination.

POAG had mixed opinions regarding whether a formal court proceeding for early termination is necessary, but the majority favored an informal process. On the one hand, a formal proceeding would allow for any victims to participate and continue to have his or her voice heard. The role of victim notification relies with the U.S. Attorney's Office as referenced in the Crime Victims' Rights Act. Those offices are equipped with Victim Witness Coordinators who have established protocols for maintaining contact with victims, to include pertinent notifications. Probation officers do have a duty to notify third parties if there is a risk to their safety and to monitor restitution payments if so ordered; however, ongoing contact with victims is often unnecessary. In some instances, victim notification may even become impractical because of the length of time that has transpired since the offense or deleterious to the victim due to the continued reminders of the offense. In addition, if a formal proceeding occurs, counsel may need to be re-appointed or re-retained to represent the supervisee, which might hinder the process.

Repeat and Dangerous Sex Offender Against Minors (USSG §4B1.5)

It appears the Commission has suggested that when making an individualized assessment of the conditions of supervised release, that would also result in a conforming change to USSG §4B1.5. USSG §4B1.5 pertains to enhanced criminal punishments for those convicted of certain sex offenses who have a prior conviction for a sex offense or have otherwise engaged in a pattern of activity involving prohibited sexual conduct. The background commentary indicates these are "persons who present a continuing danger to the public." Therefore, POAG unanimously believes that treatment and monitoring should remain compulsory, and not a discretionary consideration, for these recidivist sexual offenders. POAG would discourage the Commission from striking Application Note 5 in entirety, as well as discourage changing the wording from "should" to "may." POAG believes Application Note 5 should remain unchanged due to the dangers posed by repeat and dangerous sex offenders who are not being monitored or treated.

(B) Revocation of Supervised Release

POAG recognizes that Chapter 7 has predominately been untouched for decades and may be in need of changes. POAG observes that there is a case pending before the Supreme Court of the United States, *Esteras v. United States*, 145 S. Ct. 413 (*Cert.* granted), which centers around the factors that can be used to revoke supervised release and whether judges are able to consider factors such as the seriousness of the original offense and promoting respect for the law within the context of the supervised release violation. As this case may change the landscape of violation considerations, POAG believes it may be prudent to revisit this issue in a later amendment cycle. Further, because this area of the guidelines has been largely untouched for decades, POAG recommends that the Commission consider bringing in working groups and roundtables on these

issues to discern any possible unintended consequences. However, POAG has also provided our views of the proposed amendments as they currently stand.

POAG opposes the introduction of a Grade D violation structure, and, as a result, POAG remains neutral on the creation of a new Part C in Chapter 7 to address violations of supervised release. POAG recognizes that supervised release and probation serve different purposes; probation is intended to provide just punishment and promote rehabilitation, whereas supervised release is intended to promote rehabilitation and ease a defendant's transition back into the community. However, POAG also recognizes that the supervision strategies that are employed during supervision are similar, whether the individual is under a term of probation or a term of supervised release. This is particularly true when responding to noncompliance and violation issues. Supervision officers rely upon risk assessments, evidence-based practices, and professional discretion in determining the risks and needs of a person under supervision, the required level of supervision, and the appropriate responses to violations and noncompliance. Risk assessments, in particular, are performed as early as the pre-release planning stage and routinely thereafter, as noted in our response to Part A. As the risks and needs of a person under supervision change, adjustments are made by the supervising officer, in consultation with others within their district, including the frequency of personal and collateral contacts, the intensity of treatment and the request for condition modifications. Further, supervision officers regularly conduct case plans, collaborate with treatment providers, and assess compliance. When certain violations occur, specialty caseloads, including mental health, sex offender, or substance abuse, are utilized as needed. For example, a defendant whose violation is a result of a mental health condition that was previously unknown or well-controlled, may be transferred to a supervision officer with specialized training in supervising persons under supervision with mental health issues. Part C, which appears to be an attempt to codify these routine efforts, may unintentionally undermine the professional discretion of supervision officers and the guidance provided by evidence-based risk assessments.

As previously noted in POAG's response to the amendments proposed in §5D, for persons under supervision, the term "assessment" typically equates to a formal tool or evaluation used during the supervision process to determine risk and/or need, and therefore, referring to a "process" as an "assessment" may cause some confusion. Therefore, the Commission may also wish to use a different term in §7C, such as "individualized determination." Additionally, as reflected above, POAG would note that often during the prerelease stage and continuing throughout the term of supervised release, such individualized determinations are regularly being completed by the supervision officer, particularly in response to noncompliance, resulting in changes to supervision strategies, condition modifications, and adjustments to treatment. POAG has concerns regarding the language of the proposed amendment, which seems to reduce the discretion of the probation officer to make such determinations and adjustments, and instead, requires the court to make a formal determination in each case.

The majority of POAG was not in favor of separating technical violations of supervised release into Grade D violations. Many POAG members noted that at times, technical violations can be as serious, if not more serious, than a misdemeanor offense. For instance, a convicted sex offender who has unapproved contact with a minor, or a person under supervision with a history of bank fraud who opens multiple lines of credit without approval, would likely be viewed as more serious than a person under supervision who committed a minor traffic misdemeanor offense. Further, it was noted that there are inconsistencies across districts as to what constitutes a technical violation. For example, in most districts, a positive urinalysis is considered a technical (Grade C) violation. However, in some districts, those violations are considered a Grade B violation because the conduct required possession of a controlled substance, which is typically a felony offense. Additionally, it was observed that oftentimes, a petition for a technical violation is filed due to the exhaustion of other options. By the time a petition for a technical violation is presented to the court, there have likely been numerous attempts to address noncompliance, such as discussions and counseling related to the court-ordered conditions, increased contacts to help mitigate risk or ascertain areas where problems are occurring, condition modifications, changes to treatment, and a multitude of other supervision strategies.

Responses to Violations of Supervised Release (§7C1.3)

POAG has no position regarding the proposed amendment under §7C1.3(a), which addresses the responses to supervised release violations. POAG does observer that, while providing a list of available options may be helpful, those options are well-established. Therefore, it does not appear this addition would result in significant changes in procedures or outcomes.

Regarding mandatory violations, a slight majority of POAG was in support of Option 2 under §§7C1.3(b) and (c). Those in favor noted that Grade A and B violations involve serious, criminal, felony-level conduct that should result in a mandatory violation. And, similar to technical violation petitions, often by the time a petition for a Grade A or B violation is filed, other noncompliance issues have surfaced and interventions have failed. Those in favor of Option 1 believe it provides more flexibility and allows for professional discretion when responding to violations of supervised release, including Grade A and B violations. Under Option 1, other interventions, including increased treatment and supervision contact can be utilized, rather than mandatory revocation.

Revocations of Supervised Release (§7C1.4)

Regarding supervised release revocations, a slight majority of POAG was in favor of Option 1 under §7C1.4, which allows the term of imprisonment imposed to be served either concurrently, partially concurrently, or consecutively to any other term of imprisonment. Those in favor noted that Option 1 allows for more discretion and flexibility, depending on the individual case. However, those in favor of Option 2, which indicates the term of imprisonment imposed for a revocation should be imposed consecutively to any other term of imprisonment, believe it provides more accountability and incremental punishment for any violations. Further, as previously noted,

often by the time a revocation occurs, there have been several instances of noncompliance and violation conduct that has not been curtailed through supervision strategies, interventions, or modifications.

Grade D Violations and Recalculation of Criminal History Category (§7C1.5)

Regarding the term of imprisonment under §7C1.5, as noted above, POAG is not in favor of separating technical violations of supervised release into Grade D violations. Therefore, POAG does not endorse the proposed changes to the revocation table. In addition, POAG does not believe the defendant's criminal history should be recalculated at the time of revocation for a violation of supervised release. Criminal history scoring is a technical, complex application of the guidelines, and the court and attorneys rely on probation officers who specialize in presentence investigations to determine criminal history scoring. Most supervision officers who prepare violations are not familiar with the scoring rules, let alone retroactive amendments or changes to the scoring rules between when the presentence report was authored and when the violation petition was prepared, which could result in complications, inaccurate calculations, and inconsistencies. Another complication would be if a defendant sustained a new conviction prior to the supervised release violation, which may increase the criminal history score. Such a result could de-incentivize defendants from resolving pending charges. And, as a practical issue, when applicable, all violation reports would need to reflect the changes to the criminal history scoring, including any new arrests, which may result in objections from the parties, the need to file addendums defending the scoring, and hearings related to these issues. Finally, there does not appear to be a mechanism in place that would allow for the recalculation of criminal history for a violation. Currently, with few exceptions, §1B1.11 allows for only the use of the Guideline Manual in effect at the time of the sentencing; §1B1.10 only applies to a term of incarceration imposed on the original sentence; and as Application Note 1 of §7B1.4 states, "the criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision." It seems like that kind of undertaking would better be executed as its own separate amendment, focusing on that singular purpose and adjusting the various guidelines that would be impacted.

POAG appreciates the opportunity to provide feedback regarding the proposed amendments to Chapter 7. However, as noted above, POAG encourages the Commission to delay implementing any of the proposed changes until working groups or roundtables can be conducted with supervision officers to determine any further unforeseen outcomes.

Drug Offenses

(A) Recalibrating the Use of Drug Weight in §2D1.1

POAG acknowledges the Commission's efforts to address concerns that the Drug Quantity Table overly relies on drug type and quantity as a measure of offense culpability, which may result in

sentences that are greater than necessary to meet the goals and objectives of sentencing. Below are our comments on issues relating to the Drug Quantity Table and §2D1.1(b)(17).

Drug Quantity Table (§2D1.1(c))

POAG supports the amendment to §2D1.1 to lower the highest base offense level in the Drug Quantity Table. POAG largely believes that Options 1 or 2, base offense levels 34 or 32, would be appropriate. A base offense level of 34 or 32 is also a meaningful decrease from 38. POAG observed career offender levels currently result in lower offense levels than the higher base offense levels under §2D1.1(c), and they generally include a drug conviction as the instant offense. For instance, the highest offense level for a career offender, where the statutory maximum sentence is life, is 37, while the highest base offense level under §2D1.1(c) is currently 38. The reduction in the highest base offense level under §2D1.1(c) will allow for an appropriate realignment in the Guidelines, and likely result in the individual who is characterized as a career offender to face greater punishment given the seriousness of their criminal history, over an individual who is not a career offender but is being held responsible for the highest quantities of drugs.

POAG was unanimously opposed to Option 3, which establishes a base offense level of 30 as the highest offense level, because it seems low as a starting place for serious drug offenses. POAG recognizes that adjustments that may also apply, such as safety-valve eligibility, acceptance of responsibility, mitigating role, and zero-point offender, will further significantly reduce the offense level.

POAG was also largely not in favor of applying further reductions to all the drug types and offense levels. There were members of POAG who have concerns that the removal of the higher tiers of the drug table will reduce the delineation between defendants, specifically those who are responsible for substantially more drugs than others. In such an instance, a defendant who is operating a drug trafficking organization could distribute 5,000 kilograms of cocaine, and he or she would receive the same base offense level as a defendant who alternatively distributes 50 kilograms of cocaine. There was also a further concern that significant adjustments of the drug quantity table may cause more instances when the statutory minimum mandatory overshadows the guideline range, providing the courts with less meaningful guidance from the calculation.

Mitigating Role Cap to the Base Offense Level (§2D1.1(a)(5))

With regard to the mitigating role cap at USSG §2D1.1(a)(5), POAG was largely in favor of eliminating the §2D1.1(a)(5) reductions. If applied, the decrease in the highest base offense level would represent a marked reduction and benefit to defendants, and the mitigating role cap may largely be rendered moot. For example, if the highest base offense level is reduced to 32, only one current provision of §2D1.1(a)(5) would apply. POAG believes a defendant's function and role will otherwise be captured through deeper analyses, specifically under §3B1.2 or the proposed amendment at §2D1.1(b)(17). POAG does not believe that a further reduction to the base offense level is necessary. POAG observes that the §2D1.1(a)(5) adjustment adds a level of complexity, which adds a risk of being overlooked, and we believe that with the other proposed amendments

identified in Part A, there are other opportunities for reductions through a more simplified mechanism.

Parity between §2D1.1(c) and §§2D1.11(d) and (e)

With regard to §2D1.11 and the two chemical quantity tables, given that the tables are tied to, but are less severe than, the base offense levels in §2D1.1 for offenses involving the same substance, POAG believes that if the base offense levels in §2D1.1 are reduced, the chemical quantity tables at §2D1.11 should also be amended for consistency.

Proposed Trafficking Functions Adjustment (§2D1.1(b)(17))

With regard to Subpart 2, POAG acknowledges that the proposed low-level trafficking functions adjustment may capture additional individuals who would not otherwise receive a reduction under §3B1.2 mitigating role. POAG discussed that the application of mitigating role is not consistently applied across districts or even within districts. This may be because the defendant is arrested by themselves and charged individually or are arrested along with similarly situated individuals who are all performing a similar function.

Some members of POAG also expressed that the functions represent much of the same conduct that is currently considered for a mitigating role adjustment and that many of these functions are already captured under Chapter Three. Despite the similarity, POAG largely believes that capturing function distinctions would be more suitable as an alternative Chapter Three consideration, perhaps in the same section as Mitigation Role considerations at §3B1.2. If this reduction was placed in Chapter Three, it may also resolve the issue when a defendant is sentenced under another guideline other than §2D1.1 but the offense level is determined under §2D1.1. POAG observed that if functions become a reduction mechanism that the Commission is later wishing to expand, Chapter Three would provide that further flexibility.

Nonetheless, as a format to adopt into Chapter Three, POAG would recommend a version of Option 2 of the proposed amendments, which lists the low-level trafficking functions as examples, rather than Option 1, which provides a list of factors to consider when determining if a defendant was performing low-level trafficking functions. In the alternative to putting a version of this language into Chapter Three, if the Commission is inclined to place functions exclusively in §2D1.1, POAG would support Option 2.

With regard to the bracketed language, POAG was unanimously in favor of using "the defendant's primary function in the offense was performing a low-level trafficking function because…" as compared to "most serious conduct…" This is because this determination is fact-dependent and will allow courts to consider the totality of the circumstances surrounding the defendant's action and the extent of their involvement.

POAG believes this approach will allow for more ease and frequency of application in order to capture those individuals who fit the description of a low-level trafficker. It also will give the courts more flexibility in making those function determinations, empowering them to exclude

cases that may have other factors that outweigh that function consideration. Even if the individuals are engaged in some preparation and repetition, their primary purpose does not change – they are recruited to facilitate the distribution of controlled substances from a source of supply to a mid-level trafficker, they are recruited to perform a specific task, or they engage in the hand-to-hand street-level drug sales to end users at the behest of high-ranking members.

POAG was largely in favor of maintaining the examples listed under sections (A) and (B), except for a few functions. In Example A, the concept of a "significant share" is somewhat subjective and likely to result in a wide variety of interpretations. POAG discussed that even if drug traffickers are compensated incrementally higher for riskier endeavors, their function within the drug scheme does not change. Furthermore, while some defendants are compensated through monetary means, other defendants are compensated through non-monetary payments such as payment in drugs or payment of illegal entry into the United States. As such, POAG is also concerned that the "share of profits" and "holding an ownership interest" language is vague, and it is sometimes difficult to ascertain the relationship a payment has within the transaction as to the ownerships interest or the total profits.

A concern with Example B is that the phrase "other than the selling of controlled substances" may preclude individuals for whom the function adjustment is intended to apply. "Selling" can have the connotation that the individual is involved in the negotiation of the amount of drugs and price for the drugs. However, there is concern that an individual who is tasked with trading a package of drugs for a package of drug proceeds, without having an ownership in either or involvement in the negotiations, may be viewed as having been involved in a sale, when in fact they are simply continuing their function by exchanging one illicit item for another.

Regarding Example (C), in districts that do not generally have cases where defendants are engaged in the street-level hand-to-hand drug transactions directly to users, the phrase "retail or user-level quantities of controlled substances" is vague and is likely to result in a wide variety of interpretations. POAG suggests that the Commission provide further clarification as to this phrase to better capture those whom this example was intended to capture. Along the same lines, if this example is applied broadly, POAG was concerned that several mitigating circumstances listed in Example (C) are common for many drug traffickers, not just low-level drug traffickers, and could be universally applied. POAG observes that the "two or more" bracketed language could work to narrow the broad application of this example. Finally, we believe that "being motivated by an intimate or familial relationship," along with the other mitigating circumstances, is sufficiently captured in the proposed §2D1.1(b)(18) guideline and is not necessary to include.

POAG also observed circumstances in which a defendant might qualify for a function reduction and an aggravating role enhancement under §3B1.1. For instance, in Example A, the defendant's primary function could serve as transporting drugs from one location to another, but he or she could have also recruited other couriers. Similarly, Example B, cites "sending or receiving phone calls or messages" as a low-level trafficking function, but the content of these messages could reflect a manager or organizer level action. Using the messages to receive directions may be a low-level trafficking function but sending messages to broker drug transactions or directing the conduct

of others would not appear to be a low-level trafficking function. That person could instead be viewed as a supervisor or manager of the couriers, worthy of an aggravating role enhancement in addition to a function reduction. However, the example introductory paragraph involving the consideration of the scope and structure of the criminal activity allows the court to balance these factors. POAG also considered the prospect that the bracketed language of "most serious conduct" may also resolve this issue but recognizes that the most serious conduct has a subjectivity that could create a new challenge. For instance, transporting hundreds of kilograms across the ocean may be considered more serious than recruitment of a co-participants, who is making an introduction to a higher-level trafficker. Alternatively, this may be resolved by including a Special Instruction that §3B1.1 does not apply.

Firearm Possession within Function Considerations (§2D1.1(b)(17)(B))

POAG was in favor of eliminating §2D1.1(b)(17)(B), which excludes a defendant who possesses a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense from receiving the reduction. Those in favor of eliminating this exclusion noted those defendants would not only receive the two-level dangerous weapon enhancement under §2D1.1(b)(1), but the defendant would be disqualified from safety-valve and zero-point offender consideration. Additionally, the majority of POAG does not believe that the possession of a firearm is a good proxy for determining an individual's function or role in the drug trade and including this exclusion would be another reduction that an individual who otherwise served as a low-level trafficker would not receive. Those in favor of keeping the firearm possession exclusion believed that the seriousness of possessing a firearm while engaging in drug trafficking activities is not akin to low-level trafficking conduct.

Other components not captured (§2D1.1(b)(17))

POAG discussed other aspects that the Commission may wish to consider as rendering a function reduction as inapplicable. For example, should a defendant whose conduct resulted in serious bodily injury or death be eligible for this reduction? As we have discussed in previous guideline amendment cycles, sometimes a defendant who distributes fentanyl that resulted in death does not plead guilty to the element of having caused the death, insulating them from the higher base offense level consideration.

(B) Methamphetamine

POAG appreciates that the Commission is addressing §2D1.1's methamphetamine purity distinction.

POAG has seen an increase in the types of methamphetamine trafficked, including liquid, powder, crystals, and pills. POAG observed that the unique nature of methamphetamine has led to difficulties when applying the guidelines and recommending sentences.

Laboratory reports are relied upon to determine the base offense level at the Drug Quantity Table at §2D1.1(c) because the purity of the substance and the type of methamphetamine involved in the offense impacts the base offense level. POAG observed that the availability of laboratory reports, as well as testing practices, vary between districts and even within districts based on which agency is conducting the analysis. When laboratory reports are available, the reports do not always identify the purity of the methamphetamine. Further, the laboratory reports do not consistently reflect the molecular structure of methamphetamine to determine between "Ice" and other forms of methamphetamine.

POAG recognizes that varied testing practices has led to unwarranted sentencing disparity, and that the growing policy disagreements regarding purity as an indication of culpability (discussed in further detail below) has resulted in inconsistent guideline application.

Subpart 1 ("Ice" Methamphetamine)

Regarding Subpart 1, POAG was unanimously in favor of amending the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to §2D1.1 to delete all references to "Ice," largely because of inconsistency in testing practices.

With respect to "Ice," USSG §2D1.1(c), Note (C) provides that "Ice… means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity." POAG noted confusion and disparate treatment over methamphetamine when laboratory analysis identifies the substance as methamphetamine of at least 80% purity. Some districts reported considering all methamphetamine of at least 80% purity as "Ice," whereas other districts reported only considering methamphetamine of at least 80% purity as "Ice" if the laboratory analysis reflects "d-methamphetamine hydrochloride" as opposed to Methamphetamine Hydrochloride, Methamphetamine HCl, or another molecular structure of methamphetamine.

POAG also observed that the overwhelming majority of "Ice" is highly and uniformly pure, such that there is typically not a significant difference between the calculation of methamphetamine (actual) and "Ice." It is rare that the net weight of the "Ice" and the pure weight of the methamphetamine (actual) fall on the cusp of different offense levels. Therefore, the base offense level is almost always the same whether the "Ice" or methamphetamine (actual) amount is used.

Non-Smokable, Non-Crystalline Form Reduction (§2D1.1(b)(19))

POAG also unanimously opposed including a new specific offense characteristic at subsection (b)(19) that would provide a two-level reduction if the offense involved methamphetamine in a "non-smokable, non-crystalline form," without further clarification. POAG observed that the referenced phrase is vague and broad. There is concern that without further definition, it is unclear what evidence is needed to support its application, and there will be unnecessary litigation to

determine if the reduction applies. Therefore, the reduction may not adequately capture the conduct the specific offense characteristic was intended to capture.

Subpart 2 (Methamphetamine Purity Distinction)

Regarding Subpart 2, POAG unanimously supported reducing the disparity between the treatment of methamphetamine mixture and methamphetamine (actual).

As discussed above, there are inconsistent testing practices that have caused disparity when calculating the base offense level, as the base offense level is reliant in part on the methamphetamine purity. When laboratory reports are unavailable, or the purity level is not identified, the base offense level is routinely determined based on a methamphetamine mixture.

For instance, in a case where a defendant is responsible for three kilograms of methamphetamine (actual), the base offense level would be 36 because the offense involved at least 1.5 kilograms but less than 4.5 kilograms of methamphetamine (actual). If the court were to employ the base offense level for the mixture quantity of methamphetamine rather than the actual amount, the base offense level would be 32 for an offense involving at least 1.5 kilograms of methamphetamine but less than 5 kilograms of methamphetamine. Absent any other adjustments, with a criminal history category of I, the corresponding guidelines range that would have been 188 to 235 months is instead 121 to 151 months.

Moreover, the premise underlying the Guidelines' higher base offense levels for pure methamphetamine is that purity "is probative of the defendant's role or position in the chain of distribution." USSG §2D1.1, comment. (n.27(C)). This was because, historically, methamphetamine was cut as it worked its way down to the street-level dealer or user. While purity may have been reflective of one's culpability in a drug trafficking organization, there has been a shift in methamphetamine offenses as the substance is almost all of a high purity.[8]

POAG notes that because of the factors identified herein, individual judges in several circuits have adopted policy disagreements with the treatment of methamphetamine (actual) and "Ice," such that they are already treating these substances as methamphetamine mixture. Some courts recalculate the guidelines based on the mixture amount and are adjusting the sentence based on aggravating or mitigating factors, while other courts are adjusting the sentence with that same objective but vary downward on policy grounds.

[8] The Methamphetamine Trafficking Offenses in the Federal Criminal Justice System report published by the Commission on June 13, 2024; https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

Based on the foregoing, to promote uniformity with how methamphetamine is considered under the guidelines, POAG believes methamphetamine (actual) and methamphetamine mixture should be treated the same.

However, POAG was uncertain as to what measure would be appropriate. Only a few districts expressed support for either of the threshold options set forth by the Commission, and even that feedback was fairly split between the two options. In general, POAG did not support either option and believes, for the most part, the appropriate ratio may lie somewhere in between the current level of methamphetamine mixture and the current level of methamphetamine (actual).

POAG notes that methamphetamine (actual) and "Ice" have a converted drug weight that is one of the highest in the drug table, at 1 gram to 20 kilograms, eight times higher than fentanyl, a similarly problematic substance, in terms of prevalence and lethality, and twice as high as fentanyl's more potent analogues.

On the opposite side of the spectrum, methamphetamine mixture has a converted drug weight of 1 gram to 2 kilograms. As noted above, most of the methamphetamine we are seeing across the country is highly pure. Adopting the methamphetamine mixture conversion rate, which is below that of fentanyl, does not seem appropriate. However, POAG also believed the threshold methamphetamine (actual) is too high.

In sum, POAG believes the offense levels and conversion rates associated with methamphetamine (actual) and methamphetamine mixture should be equalized but believed the resulting conversion rate should be somewhere in between the two options proposed by the Commission; POAG believes substantial deference should be given to the opinions of experts on the effects and impact of methamphetamine in determining an appropriate conversion ratio.

With respect to the latter two issues for comment, POAG believes the Commission should make conforming changes to the quantity thresholds at §2D1.11(d) for consistency. POAG also believes the Commission should re-assess the disparity between the treatment of powder cocaine and crack cocaine in future amendment cycles.

(C) Misrepresentation of Fentanyl and Fentanyl Analogues

As to the proposed changes to §2D1.1(b)(13), POAG appreciates that the Commission is revisiting this enhancement, as it has been applied inconsistently since it was implemented. There have been different interpretations of the *mens rea* requirement, as there is little guidance from the text of the Guidelines or from caselaw defining the terms "willful blindness" and "conscious avoidance."

Consistent with our position from 2023, the majority of POAG prefers Option 1 which sets forth an offense-based enhancement with no *mens rea* requirement. POAG discussed that in practice, it is difficult to prove that the defendant knew that the specific pills that they trafficked contained

fentanyl, as required for the enhancement. Defendants often claim that they do not know the substance they were distributing contained fentanyl. There are frequently sparse records of communication, if available at all. When communication is available, drug traffickers use vague, coded language that makes it difficult to establish that the defendant was discussing fentanyl. Given the elevated level of danger these counterfeit drugs represent, the mere possession for distribution or distribution of the counterfeit drugs containing fentanyl or a fentanyl analogue should be sufficient to trigger the enhancement. This is consistent with the Commission's finding that most of the fake pills seized containing fentanyl held a potentially lethal dose of the substance.[9]

If the Commission does intend to adopt a *mens rea* standard, POAG would prefer Option 3, which provides graduated punishment based on a defendant-based enhancement with a *mens rea* requirement and an offense-based enhancement with no *mens rea*. This tiered approach holds a defendant more accountable if it can be shown they had knowledge of the fentanyl content of the drugs in question, while also recognizing the seriousness of the offense.

Within the bracketed options for Option 3, the group preferred the language of "knowledge or reason to believe" as to the content of the substance. While there would still be evidentiary obstacles, this standard is a familiar one and likely to be easier to apply then some of the other *mens rea* standards. POAG further suggests that the guideline could provide information to consider when making this evaluation, including the source of the pills, the quantity involved, and other factors that would suggest that the pills were not actually a legitimately manufactured drug.

"Representing" and "Marketing" Terminology

Regarding the use of the terms "representing" and "marketing," POAG believes that the enhancement might apply more regularly to a street-level dealer who sells the fake pills directly to consumers, rather than to the individuals who manufacture and distribute fake pills without making any representations about their content. This is because some jurisdictions have interpreted that marketing has not occurred until the pills enter the stream of commerce. As such, a defendant convicted of possessing a large quantity of fake pills, with intent to distribute, may not be subject to any enhancement if there is insufficient information to establish that the fake pills have been marketed or misrepresented to consumers. POAG believes that the individuals operating the pill press are equally, if not more culpable, than the street-level dealer and should be subject to the same enhancement.

To address those concerns, POAG supports any effort to clarify the terms "represented" and "marketed" because these terms have a variety of meanings and, in practice, are difficult to apply.

[9] USSG, App. C. amd. 818 (effective Nov. 1, 2023). https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2024/APPENDIX_C_Supplement.pdf

It is also noted that Option 1 or 3, which provides for an offense-based enhancement may make it easier to apply, as the "represented" or "marketed" could be based on a co-participant's conduct.

POAG further supports that the proposed amendments remove the language "as a legitimately manufactured drug," and instead replace it with "as any other substance." It is common for the fake pills to have markings that are similar to the markings of a legitimate prescription drug. For example, legitimate 30 milligram oxycodone pills are generally blue, with the marking "M 30." Counterfeit pills might have a similar "M 30" marking but be different in color or have a non-specific marking. This may not be considered sufficient to apply the enhancement due to differences from legitimate prescription manufactured drugs, but consumers purchasing the fake pill may nonetheless reasonably believe that they are purchasing a legitimately manufactured drug.

(D) Machineguns

POAG overwhelmingly supports the proposed amendment to revise USSG §2D1.1 to include the four-level upward adjustment for the possession of a machinegun (as defined in 26 U.S.C. § 5845(b)). As noted in POAG's February 2025 submission to the Commission, Machinegun Conversion Devices (MCDs) present an extraordinary threat to public safety, and POAG has received feedback that districts have seen a sharp increase in the production, possession, and distribution of MCDs. Amongst the members of POAG, there was some concern that a four-level enhancement could be assessed based on a standalone MCD, unattached to a firearm and possessed by a co-participant, and such an assessment may over represent the weight of such an aggravating factor. There was also discussion that because MCDs are small and easily concealable, a defendant may not be aware that a co-participant possessed a MCD. However, in the heartland of cases, this greater upward adjustment would capture the clear and present danger to the community when an individual possesses a firearm capable of automatic fire through the use of a MCD or a traditional machinegun. POAG also discussed an adjustment to the proposal towards defendant-specific language rather than offense specific. The defendant would still receive a two-level increase under the proposed §2D1.1(b)(1)(B), which is offense specific.

POAG observes that 26 U.S.C. § 5845(a) provides a list of other dangerous firearms besides machineguns (i.e., sawed-off shotgun or a short-barreled rifle). POAG collectively agrees that the upward adjustment should capture all firearms listed under subsection (a) of 26 U.S.C. § 5845, not just machineguns under subsection (b). For context, the base offense level in §2K2.1(a)(1), (3), (4)(B), and (5) of the Guidelines is already determined using these criteria. Therefore, POAG believes any specific offense characteristic in §2D1.1(b)(1) should use subsection (a) from 26 U.S.C. § 5845 instead of just subsection (b).

(E) Safety Valve

Regarding the proposed amendment to the safety-valve at §5C1.2, POAG received feedback that a written disclosure may not provide sufficient information to make a determination if the

defendant complied with the requirements of §5C1.2(a)(5). POAG believes that courts should handle this on a case-by-case basis, rather than treating written submissions and in-person meetings as equivalent.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group
March 2025

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

March 3, 2025

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Amendments to the Federal Sentencing Guidelines, Policy Statements and Official Commentary approved by the U.S. Sentencing Commission on January 30, 2025, and published in the Federal Register on January 2, 2025. See 90 Fed. Reg. 8968 (February 4, 2025); see also 28 U.S.C. § 994(o).

Proposed Amendment No. 1—Supervised Release

Part A: Proposed Amendments to Part D of Chapter 5 addressing the Imposition of a term of Supervised Release.

The Commission seeks comment on amendments which are designed to provide the sentencing courts with greater ability to tailor supervised release decisions such that the final decision on supervision is based on a complete individualized assessment of the defendant. TIAG supports the initiative behind

the Commission's proposed amendments. We believe that for all defendants a "one size fits all approach" to supervision can result in injustice and that this injustice is magnified for Indians who are convicted of offenses arising in Indian Country. TIAG believes that the adverse impact in Indian Country occurs when the sentencing court fails to take into full consideration the defendant and the cultural, economic, and nature of Indian Country. We agree with the Commission that the purpose of imposing a period of supervised release in any individual case is not to punish the defendant but to aid in the successful reintegration of the offender into the community while doing what is possible to reduce the likelihood of the offender to relapse into criminality. In doing so, supervision and supervised release conditions should promote both the betterment of offenders who are being reintroduced to society and protect the public by reducing the risk of recidivism.

1.A Directing sentencing courts to base decisions on an "individualized assessment" of the 18 U.S.C. §3583(c)–(e) factors.

The Commission seeks comment on whether the inclusion of an individualized assessment is sufficient to provide both discretion and useful guidance. TIAG is of the view that the proposed language is sufficient, but it could be much improved by reminding sentencing courts that they are to consider both the facts related to the individual defendant and the resources available in the community into which the defendant is likely to be released following the service of a custodial sentence.

TIAG's experience with Indian Country defendants is that sentencing courts often unintentionally set conditions that make it more likely for native offenders to fail because the court is insufficiently aware of the resources and limitations that may exist in Indian Country. For example, we have experience with conditions of supervision that require a supervisee to complete a treatment program that is only available 3 hours away and which requires weekly attendance. Given that many Indian nations are rural, remote, and poverty-stricken, many programs that judges in urban areas assume are available are simply not available on the reservation or near enough to reasonably be accessible. Likewise, transportation opportunities in rural areas are often limited, and newly released supervisees are not often financially

equipped to undertake extensive travel to comply with conditions of supervision that require attendance at meetings that are hours away. TIAG also notes that many conditions that relate to work can be difficult to comply with on many reservations as they are places where the labor force participation rate can run well below 50%. The unemployment rates for Indian Country frequently are 3 or more times the rates for the states in which they are situated. Worse yet, the official unemployment statistics frequently understate the problem. Economists frequently call people who have simply quit looking for work because there are no jobs are available in their communities that they are qualified to perform as "discouraged workers." In TIAG's experience, such discouraged workers are more common among supervisees in Indian Country because the areas are remote, are economically challenged with few available jobs, and what few jobs are available will be taken by people without criminal pasts. Thus, a condition that requires that a supervisee be employed or perform community service is far preferable to one that simply requires gainful employment.

But even in imposing a condition of community service, the sentencing court needs to be cognizant of the resources that are available in the community. For example, on many reservations community service is much less formal and regularized than is found in community service programs run by states, local communities, and charitable organizations. In many Indian Country situations, a burden is placed on the probation officer to arrange community service programming as few formal programs our available. TIAG believes, and our experience confirms, that supervising officers in Indian Country are extremely committed in the face of significant headwinds in arranging a way to comply. That said, the imposition of conditions that fail to take into consideration the resources in the community creates problems for both supervising officers and supervisees.

A second consideration that TIAG believes should be emphasized in the new guidance on individualized assessment is a direct reminder that the supervising court should have a routine practice of reviewing conditions of supervision whenever a defendant is released to supervision after serving a significant term of incarceration. Currently, many individuals who are released

to supervision have spent years, sometimes decades, in custody. Their individual circumstances, and circumstances in their communities, have likely changed significantly, for example, the composition of the household may have changed as a result of births and deaths, treatment resources in the community may have changed—for better or for worse—and the individual's health and employment prospects may look very different from when they went into custody. Thus, we agree that in order to provide the greatest possibility of successful reentry a review of conditions should be performed.

We find that probation officers frequently sit down with newly released individuals and seek revisions to the conditions by stipulation and that the resulting agreements are simply submitted to the court and that this process could be improved in ways that would improve outcomes both for the person and for the public. TIAG believes that a more direct and hands-on approach by the supervising court would be much more beneficial—and that re-tailoring of the conditions at the time of release should be the norm, rather than an exception. When reviewing how the person being released has performed in custody, we often have a more complete and comprehensive picture of the supervisees areas of strength and concern. Courts will accommodate a more successful integration and protect the public more fully by imposing revised conditions that meet the current needs of the public and the supervisee. Of nearly equal importance, an initial meeting with the judge sends a message to the supervisee that supervision is of importance to the court and that compliance is in the supervisee's best interest.

Finally, TIAG believes that if a review of terms of conditions is going to be undertaken at the time of release, the greater the buy-in by all parties the higher the success rate will be. To accommodate this, TIAG is of the opinion that when a re-entry review is undertaken the team reviewing the conditions should include the Court, prosecution, defense counsel, defendant and the probation officer. Each person brings a unique view to the review and all opinions are of value in crafting a plan that has the greatest possibility of success.

1B. Retention of language related to criminal history and substance abuse and inclusion of the non-exhaustive list of factors in the Commentary to §5D1.1 (imposition of a Term of Supervised Release).

TIAG believes that as a part of the development of an individualized assessment it is appropriate to take into consideration the defendant's criminal history and substance abuse history. In order to succeed on any supervision plan, it is necessary to address the areas of particularized need presented by the supervisee and clearly recurring criminality and addiction or abuse of substances are areas that are necessarily addressed in a plan that seeks to both successfully reintegrate a defendant and protect the public.

TIAG has somewhat divided views about creating a non-exhaustive list of factors to be considered when a court is making decisions related to imposition of a term of supervised release and appropriate conditions. As a general principle, TIAG believes that providing more guidance to sentencing judges related to the types of factors that can and perhaps should be considered in making an individualized assessment is important and can provide helpful assistance in putting together a supervision plan that is best poised for success. That said, TIAG is concerned that the non-exhaustive list is not culturally normed for non-dominant cultures and nothing in the list directs sentencing judges to consider how the non-exhaustive factors might be framed and applied in light of cultural norms. For example, most in Indian Country would have a broader view of prosocial activities than might be apparent to sentencing judges and would include things like traditional spiritual practices, sweats, drumming, dance, traditional arts, and powwows as important prosocial activities—practices that are often beyond the scope of a sentencing judge's experience but which might have significant predictive value on the supervisee's ability to remain law abiding without additional supervision.

2. Supervised release as regards deportable defendants

TIAG has no position on this matter as it only rarely arises in Indian Country cases.

3. Inclusion of non-exhaustive list of factors to be considered in early termination or extension of term of supervised release.

The Commission seeks comment on whether the Part A proposed amendment to §5D1.4 which sets forth a non-exhaustive list of factors for courts to consider when determining early termination of supervision. The Commission identifies the list as a bill entitled the Safer Supervision Act which was introduced in the 118th Congress. TIAG has the same views as regards the non-exhaustive list for this as it does in Section 1B above.

4. Application of time credits for successful completion of evidence-based recidivism reduction programming or productive activities under The First Step Act of 2018.

TIAG is aware that the Bureau of Prisons' (BOP) policies in application of the governing statutes allow for sentence credits for successful completion of evidence-based recidivism programming while in custody. As applied by the BOP, such credits may only be "cashed in" if the defendant is going to be released to supervision. With the adoption of a more individualized assessment and the concomitant policy that persons who are not in need of supervision should not be placed on supervised release, there is a possible unintended consequence that by not placing a defendant on supervision the person is subject to serving more actual in-custody time.

Because the BOP bases its current determination on the statutory language and is not bound by the Sentencing Guidelines or its commentary, TIAG is of the view that the Commission has limited ability to control this outcome. The Commission could suggest amendment of the statutory language, but such amendments are difficult to shepherd through the bill process and the likelihood of success is unknown.

TIAG believes that the best solution to this problem is by providing a short statement in the Commentary that indicates that the current policy adopted by the BOP is that First Step Act credits are likely unavailable unless some term of supervision is imposed and with this understanding the court should consider imposing at least 1 day of supervision to comply with the BOP policy for time of service credit. That should be followed up with instruction

when the Sentencing Commission participates in educational programming, especially the training for New Judges (affectionately, "Baby Judges School") and the district court educational conferences.

5. Conditions of Supervised Release Categories: Standard & Special

The Commission seeks comment on whether the sentencing guidelines should continue to include two general conditions of supervised release, the "Standard" and "Special" Conditions in §5D1.3 of the guidelines. TIAG believes that continuing to call a class of conditions the "standard" conditions operates in a manner at odds with the general principle of individualized assessment and may lead some sentencing judges to default to the imposition of some conditions as standard that would actually be at cross purposes with the individualized assessment approach. For example, boundaries of tribal communities do not always align perfectly with state—or even national—boundaries. The Navajo Nation alone occupies portions of three separate states. A requirement that the supervisee obtain permission of a probation officer to cross the river to shop at the nearest grocery store, go to the nearest medical facility, or go to work may be impracticable in such an environment. Likewise, a work requirement is different in a place with high unemployment than in places with full employment.

TIAG believes these concerns can be ameliorated by calling the standard conditions "commonly imposed conditions" and continuing to emphasize individualized assessment and tailoring of the conditions imposed.

6. New Policy Statement at §5D1.4 related to the completion of reentry programs.

TIAG has no position other than to note that at present reentry programs are very rare in Indian Country.

7. Potential new policy statement at §5D1.4.

The Commission seeks comment on whether the policy statement should provide guidance on appropriate procedures to employ when deciding whether to terminate supervised release early. TIAG is of the opinion that such guidance

is unnecessary, and that there is a risk that such guidance would overly complicate the proceedings. The most common practice for early termination at this time in TIAG's experience is that the probation officer notifies the judge and counsel of record that it would seek to early terminate supervision. Hearings are only held if the Judge believes such a hearing is necessary. Such hearings are rarely held. Merely noting that a hearing can be held at the discretion of the court would be sufficient to let the judge and parties know that they could request a hearing. TIAG fears that establishing a practice where hearings are routinely held would be expensive, burdensome for the court, and would not likely result in better decisions than decisions made on the paper reports and requests.

Part B: Revocation of Supervised Release

Chapter Seven (Violations of Probation and Supervised Release) of the *Guidelines Manual* addresses violations of probation and supervised release. The Commission has proposed various structural reforms of the process which are designed to afford both courts and supervising probation officers greater discretion in their ability to manage non-compliant behavior and seeks comment on specific issues.

1A. Use of individualized assessment in the revocation process

TIAG supports the Commission's proposed amendment throughout Chapter Seven, Part C to reflect a recommendation that the court facing a revocation petition undertake an individualized assessment based on the statutory factors listed in 18 U.S.C. § 3583(e). TIAG believes that this direction, consistent with what it has said previously above, is appropriate and sufficient to provide both guidance and encourage the exercise of discretion in responding to non-compliant behavior by supervisees. The use of an individualized approach is consistent with the understanding that the purpose at this stage of proceedings is to address the supervisee's breach of trust and confidence placed in the supervisee but not to punish any new criminal activity. By focusing on the non-compliance and the rehabilitative and reintegration aspect of supervision the individualized assessment will allow the supervising court a broad spectrum of tools to modify behavior, improve outcomes, and to

protect the public. This discretion allows the court to focus on what works and encourages positive outcomes rather than on punishment.

1B. New Policy statement §7C1.3 (Responses to Supervised Release Violations) Policy Statement regarding graduated response short of the more formal options listed in 18 U.S.C. § 3583(e) and community confinement in §7C1.4.

TIAG supports the inclusion of the bracketed language in §7C1.3 which, after directing the court to perform the individualized assessment, lists a number of options short of revocation and incarceration. TIAG believes that by more closely monitoring non-compliant behavior and imposing more modest interventions than long-term incarceration, the odds are greater that supervisees will have a more successful outcome—meaning more positive rehabilitative outcomes and greater protection of the public. All too often, by not taking affirmative steps to address early non-compliance courts send the wrong message to supervisees. When courts tolerate low level violations without any court intervention the person on supervision often assumes that the court is untroubled by low-level non-compliance. But multiple lesser violations can and frequently does result in revocation and an imposition of a substantial incarcerative sentence.

TIAG believes that the current manner of dealing with initial low-level non-compliance is resulting in unnecessary incarceration that could be avoided by early, swift, and meaningful court intervention. We believe that a person under supervision is far more likely to respond positively and comply to a lesser but more immediate sanction. Many, if not most, people on supervision suffer from cognitive behavioral deficits. Science teaches us that many of these people fail to recognize the consequences of their acts and the way that they are likely to be perceived by the outside world when they fail to comply. Early and swift intervention greatly increases the possibility that such people will come to recognize the inappropriate nature of their conduct and be more successful in moderating their behavior. TIAG perceives that our system of supervision is all too frequently designed to deal with normal people who would understand that a warning from a probation officer is a serious "wake up call." People with cognitive behavior deficits are less likely to pick up on such cues. TIAG believes

that these sort of warnings are more likely to be accepted and accounted for by the supervisee if they are coming directly from a judge, who is an identifiable authority figure. Sometimes merely reminding the defendant that the person deciding on whether or not he should be returned to prison thinks the conditions are important is enough to gain compliance.

TIAG also believes that early intervention at low levels of non-compliance will create an environment where the interactions between the judge and the offender are more likely to be viewed by both as collaborators in an effort to have the supervisee succeed. This sort of collaboration fosters an understanding by the supervisee that he is a person with input in the decision-making process, is in some control over their own destiny, and that the court is concerned about making their lives better. All too often, a system that overlooks some minor violation and then imposes a very punitive penalty based in part on repeated non-compliance that appeared to be unimportant acts to impair rehabilitation. Given the nature of most people under supervision, it is important to provide sufficient structure and guidance that leaves little room for misunderstanding. Non-incarerative and short-term intervention options are important in getting the message through to supervisees that their conduct is unacceptable and that increasing graduated penalties are likely to result if they do not modify their behaviors.

TIAG favors Application Note 1 to §7C1.4. As to Application Note 3 to §7C1.4 which provides that if revocation is based, at least in part, on a violation of condition specifically pertaining to community confinement, intermittent confinement, or home detention the imposition of the "same or a less restrictive sanction is not recommended," a majority of TIAG takes no position. A minority of TIAG believes that while the language is sufficiently discretionary for the court to impose an individually assessed penalty, they believe that the language could be clarified to note that by adding an additional condition (such as additional counselling or treatment) that returning the person the same non-custodial environment is not the same sanction.

2. Options to address when revocation is required or appropriate under new §7C1.3

TIAG is strongly of the opinion that adoption of the individualized assessment will both increase the likelihood of a positive rehabilitative outcome and do more to protect the public long term than providing for mandatory revocation. We believe that whenever the statute allows for an individualized assessment prior to revocation, it should be encouraged by the guidelines. Indian Country defendants frequently complain to their counsel and the courts that they feel like they are simply chaff being ground in the gears of justice without any regard to their individual circumstances and in a way that would not happen in state courts to non-Indians. While Grade A and Grade B violations are usually serious and would merit a consideration of revocation and incarceration, there are circumstances that arise with some regularity in supervision cases that are unusual and might point towards leniency in even these cases. There also may be significant lesser sanctions that are well-supported in the community that might accomplish the end goals without revocation. In addition, the underlying criminal behavior is capable of, and frequently is, a parallel path of litigation. TIAG generally favors the greatest discretion possible to achieve the best outcomes possible for both the supervisee and the public.

3. Retention of the Revocation Table set forth in §7C1.4

While TIAG understands why the elimination of the Revocation Table might encourage greater individualized assessment, we take the position that its absolute elimination would likely introduce too much disparity in revocation sentences. If, after an individualized assessment is completed, the Revocation Table is retained it has the ability to help inform the sentencing court of the types of penalties that might ordinarily be appropriate. This suggestion will likely have the impact of ameliorating sentences that are outside of the bell curve. The implied boundaries of the Revocation Table serve a useful purpose, especially for new judges, and it should be retained. TIAG does believe that if the Revocation Table is retained the manual should make plain that it should be consulted only after the individualized assessment is completed.

4. How a Retained Supervised Release Revocation Table should recommend dealing with criminal history.

TIAG believes that the most appropriate approach would be to use the criminal history determined at the time of the original sentence after modifying the criminal history score to exclude prior sentences that are no longer countable under the rules in §4A1.2.

5. Grade D violations

TIAG is concerned that the creation of a new category of violations, the Grade D violation may have the impact of actually increasing the likelihood that a supervisee will have his supervision revoked for a Grade C violation—an outcome it believes is likely an unintended consequence by the Commission. That said, it generally supports a Grade D violation if the Commission makes plain that its intention is not to increase the perceived seriousness of the other violation categories on the Revocation Table. Since Grade D violations are limited to "a violation of any other condition of supervised release" the type of violations are often non-compliance with technical conditions such as failing to meet with their probation officer, keep treatment appointments, or the like. We believe that these non-criminal violations are more important in a system based on individualized assessment. TIAG believes that the new approach to supervision anticipates that courts will have more hands-on contact with people on supervision and that early intervention should be more common. As such we think that for many Grade D violations non-revocation approaches are going to be more appropriate and when revocation is appropriate the more appropriate response is less likely to include a need for incarceration.

It is TIAG's position that creation of a Grade D violation is appropriate so long as the manual provides additional guidance directing that its presence should not be viewed as a basis for treating Grade C violations more severely.

6. Recommended ranges of imprisonment

Consistent with its previous statements, TIAG believes that a defendant's criminal history score should be recalculated to reflect the changes in §1B1.10(d) if the amendments would have had the effect of lowering the

defendant's criminal history category. TIAG also would support having a single table for both probation and revocation.

However, TIAG is opposed to the lengths of sentences contemplated under Grade D on the Revocation table. TIAG believes that a non-incarcerative sentence should always be both available and considered when applying the individualized assessment to the Revocation Table for Grade D offenses, which are by their nature non-criminal violations. We suggest that the following table is more appropriate and urge the Commission to consider adopting it.

Revocation Table
(in months of imprisonment)

Grade of Violation	Criminal History Category					
	I	**II**	**III**	**IV**	**V**	**VI**
Grade D	0–2	0–3	0–4	0–5	0–6	0–7
Grade C	3–9	4–10	5–11	6–12	7–13	8–14
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A	(1) Except as provided in subdivision (2) below:					
	12–18	15–21	18–24	24–30	30–37	33–41
	(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:					
	24–30	27–33	30–37	37–46	46–57	51–63

Proposed Amendment No. 2—Drug Offenses

a. Recalibrating the Use of Drug Weight in §2D1.1

TIAG supports the Commission's efforts to amend the Guidelines to reduce the overreliance on drug quantity as a proxy for culpability. Our collective experience mirrors that reflected in the data briefing,[1] which is that many, perhaps even most, courts appear to consider the drug tables to be unduly harsh as concerns "heartland" defendants and that the distance between the most appropriate sentence and the Guidelines-recommended sentence tends to increase as an individual moves to higher and higher quantity-based base offense levels.

TIAG also recognizes that quantity often substantially overstates culpability, in part because individuals who are found in personal possession of largest quantities of drugs are often among the lowest-level participants in the overall drug trafficking scheme. TIAG has seen that the existing available mitigating role reduction, while undoubtedly helpful, has often been inadequate to sufficiently mitigate the harshness of the Guidelines, particularly at these higher base offense levels.

For these reasons, TIAG welcomes the Commission's proposal to amend the drug guidelines, in particular to recalibrate their use of drug weight as a proxy for culpability.

A number of the Commission's Issues for Comment ask for feedback on the number of levels by which various parts of the drug guidelines should be recalibrated. TIAG struggled, at times, to identify precise numbers in response to these queries, in part because many of the proposed amendments are interdependent. For example, while TIAG supports both substantial downward revisions to base offense levels and also supports robust mitigating role reductions, TIAG recognizes that, for example, a substantial reduction in base offense levels across all quantities might justify a more modest specific offense characteristic ("SOC") reduction for low-level participants. By contrast, a more

[1] United States Sentencing Commission, Proposed Amendments on Drug Offenses, Public Data Briefing (hereinafter "Data Briefing"), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf.

limited reduction in base offense levels militates in favor of a more robust reduction for low-level participants.

With this limitation in mind, with respect to Part A, subpart 1 of the drug amendment, TIAG supports a reduction in the drug table that would set the highest base offense level at 30 and effect a similar reduction to other existing offense levels, *e.g.*, by recasting current offense level 36 as new offense level 28, and so on down the table. TIAG bases this opinion on our collective experience, which accords with the data briefing, that tends to show that quantity, while not wholly irrelevant to the analysis of culpability, increases with a more gentle slope than the current drug tables do.[2]

TIAG is also in favor of retaining the mitigating role cap under §2D1.1(a)(5) and applying the existing reductions to the new (reduced) base offense levels. TIAG supports this option because the current mitigating role adjustment under Chapter 3 is generally only capable of partially accounting for the often wide disparity in culpability as between "average" and "minor" participants in a drug trafficking scheme. This is particularly true at higher offense levels.

With respect to Part A, subpart 2 of the drug amendment, TIAG supports creation of a new SOC for low-level participants to replace the minor role reduction under §3B1.2. TIAG's members represent diverse geographic areas, and we have seen inconsistent application of the current mitigating role adjustments between and even within districts, and this inconsistent application contributes to a lack of uniform application and creates unwarranted disparities between similarly situated defendants.

Between the options listed, TIAG prefers Option 2 because it believes that the examples provided will assist judges in implementing the new SOC in a more uniform manner. TIAG also believes the new SOC should be available to defendants whose "primary function" in the offense was low-level because we believe that primary function more closely accords with overall culpability. TIAG is additionally concerned that an invitation to identify and punish the "most serious conduct" will lead to unnecessary litigation regarding the scope of peripheral conduct and may unfairly disqualify individuals whose primary function is low-level but who on one occasion have engaged in an isolated act that might be viewed more seriously.

[2] Data Briefing at 7, 8.

As noted above, the appropriate number of levels for this new SOC should be determined within the context of other, related reductions that the Commission may adopt. TIAG supports a new SOC that contains a reduction at least significant enough to mirror the one currently available under §3B1.2 but would also support a more substantial reduction in the event, for example, that the mitigating role cap under §2D1.1(a)(5) is reduced or eliminated, or in the event overall adjustments to the quantity-based offense levels are modest.

In sum, TIAG welcomes the Commission's proposals to modify the §2D1.1 to incorporate feedback from data that has shown that the existing Guideline is, on the whole, unnecessarily punitive and increasingly divorced from the reality of how the majority of judges view these cases.

b. Methamphetamine

The Commission seeks comment on two, not mutually exclusive subparts relating to the treatment of methamphetamine under §2D1.1. TIAG recognizes the concerns raised regarding the continued relevance of purity distinctions in methamphetamine sentencing and generally agrees with the assertion that all methamphetamine is effectively "pure" in contemporary cases, as noted by judicial and practitioner perspectives. This position aligns with the reality that purity distinctions may no longer serve a meaningful sentencing function.

For tribal defendants, the purity-based framework may disproportionately impact individuals involved in lower-level offenses who do not have significant control over the drug's composition. The presence of liquid methamphetamine further complicates the existing guidelines. Liquid methamphetamine is being more frequently encountered and poses risks comparable to smokable forms yet it does not have analogous consequences. For these reasons TIAG believes the directives are outdated, fail to address the evolving method of drug distribution and consumption and they should be revised.

TIAG supports consolidating the current three-tiered approach to methamphetamine sentencing—distinguishing between methamphetamine (actual), Ice, and methamphetamine mixture—into a single, unified category. In each instance, the combined guideline quantity should be situated at the methamphetamine mixture guideline. Additionally, this new consolidated category should align with the broader amendments aimed at lowering all drug-quantity offense levels, as previously discussed.

TIAG supports incorporating a Specific Offense Characteristic to capture the two-level directive for differentiation of non-smokable methamphetamine. A Specific Offense Characteristic approach wherein a two-level downward decrease would be applied if the methamphetamine was in a non-smokable form provides a streamlined approach to addressing this issue, ensuring alignment with congressional intent and directive while modernizing the guidelines to reflect practical application. While this adjustment may afford a break to defendants involved with liquid meth, judges would retain the ability to upwardly vary sentences in cases where necessary. This modification better aligns sentencing with contemporary drug trends and avoids anachronistic distinctions that do not reflect the conditions in tribal communities or anywhere else across the country.

Due to the infrequency of cases that would be impacted by the Issue For Comment numbered (3) in tribal jurisdictions, TIAG takes no position on this issue.

Crack and powder cocaine are chemically the same drug, yet they continue to be treated drastically differently under federal sentencing guidelines, perpetuating an outdated and unjust disparity. Similarly, while methamphetamine and cocaine are distinct substances, they often function as effective substitutes for one another, with meth being significantly cheaper—and in that way mirrors the crack versus powder cocaine divide. These sentencing differences do not reflect pharmacological science but instead serve to disproportionately punish those who live in economically disadvantaged communities which tend to have methamphetamine as a drug of choice. The proposed amendment would minimize inequities and address substance use in a fairer and more effective manner.

c. Misrepresentation of fentanyl and fentanyl analogue

Part C of the proposed amendment two involves misrepresentation of fentanyl and fentanyl analogues. The Commission seeks comment on two issues: (1) whether any of the three options set forth in the proposed amendment to §2D1.1(b)(13) is appropriate and if not, if there is an appropriate alternative approach; and (2) whether any of the proposed amendment to §2D1.1(b)(13) are appropriate to address the concern for individuals who purchase fentanyl believing they are purchasing a different substance.

As to Issue 1, TIAG endorses Option 2 which would impose a *mens rea* requirement for application of §2D1.1.(b)(13). As to the choices set forth in

Option 2, TIAG believes that the "with knowledge or reason to believe" version is superior. TIAG is concerned that the "reckless disregard" option might exclude instances in which an individual turned a blind eye to the content of the substance being trafficked. TIAG believes that "with knowledge or reason to believe" properly imposes heightened culpability on those who know or should know that they are distributing products known to contain fentanyl. Within Option 2, TIAG also supports the four-level enhancement option given the well-documented dangers of fentanyl and the frequency of cases in which unwitting overdose occurs because of the misrepresented nature of the substance.

Issue 2 seeks general comment as to whether the terms used in §2D1.1(b)(13) such as "representing" and "marketing" are sufficient. TIAG believes that when used in the context of Option 2 of Issue for Comment 1, these terms are sufficient. Both terms are commonly used and understood. TIAG believes that it is clear that someone is "representing" a substance when they provide a description of it or its composition. In the context of drug distribution, a person would be "representing" if they told a potential buyer, "this is meth," or responded to an inquiry of whether there was another substance included. If such representation falsely disclaimed the presence of fentanyl or fails to note that fentanyl is included in the substance, the enhancement would be triggered. TIAG likewise believes that it is clear someone is "marketing" if they are making such representations in the context of a sale or other transaction surrounding a controlled substance. No choice of words will be perfect, but TIAG believes that these choices are appropriate and adequate for the purpose of this amendment.

d. Machineguns

The Commission seeks comment on a proposed amendment to §2D1.1(b)(1) to add an additional 4 levels to the base offense level if a machinegun is possessed and should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Per Commission Data, during the FY2023 application of §2D1.1(b)(1) (weapons enhancements) was applied in 3,906 cases. Of those cases 3.8 % involved a machinegun. TIAG recognizes the seriousness of possessing a machinegun during a drug offense. That said, given the small number of cases in Indian Country that involve machineguns, TIAG takes no position on the proposed amendment to §2D1.1(b)(1).

e. Safety Valve

TIAG supports the proposed amendment to §5C1.2, which clarifies that a defendant's provision of truthful information and evidence to the Government is not limited to in-person meetings. This amendment is particularly important for tribal defendants, as safety concerns and logistical barriers may deter them from engaging in direct meetings with prosecutors.

TIAG recognizes that written disclosures, such as letter proffers, are already widely used by the Department of Justice (DOJ) to conserve resources and focus investigative efforts on individuals with substantive knowledge of criminal activities. Allowing written disclosures to satisfy the safety valve requirement ensures that eligible defendants are not unjustly denied relief due to unnecessary procedural constraints. This approach aligns with current DOJ practices in certain jurisdictions and provides a fairer and more efficient process for determining eligibility under §5C1.2.

Therefore, TIAG supports the inclusion of the application note explicitly stating that the manner of disclosure—whether written or in-person—should not preclude a determination of compliance, as long as the information provided is complete and truthful.

Sincerely yours,

Ralph R. Erickson

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

March 3, 2025

United States Sentencing Commission
One Columbus Circle, N.E.
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Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to the Sentencing Guidelines

Dear Chair Reeves, Vice-Chairs, Members of the Commission:

The Victims Advisory Group ("VAG") appreciates this second opportunity this year to provide information to the Sentencing Commission ("Commission") regarding its proposed amendments to the Sentencing Guidelines ("Guidelines"). Our advisory group responsibility is to assist you in fulfilling your statutory responsibilities under 28 U.S.C. § 994(o) and to provide our views on how your proposed amendments may and will affect federal crime victims.

The VAG's review begins with three premises: First, victim survivors are harmed by criminal offenders and seek to have that harm righted in a fair and just manner. Second, victim survivors are important stakeholders in the federal criminal court process, possessing federal legal rights under the Crime Victim Rights Act (CVRA), 18 U.S.C. § 3771, that must be respected and enforced. Third, will the proposed amendments, if approved by the Commission, be applied retroactively, which application will reopen victim survivor wounds, require victim survivor notification and the right to be heard, and may undermine victim survivor faith in the fairness, justice and finality of the federal criminal court process? From this foundation, the VAG respectfully submits the following for your consideration.

SUPERVISED RELEASE

PART A: IMPOSITION OF SUPERVISED RELEASE

The imposition of a term of supervised release should be considered by a sentencing court in every federal case where there is a victim. The VAG agrees with the Commission's stated goal of having the sentencing court consider "whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety." Supervised release benefits defendants and communities through a supervised transition into the community from incarceration and supervised defendant rehabilitation. Victim survivors, as part of the community, particularly benefit from the promotion of public safety as they may be at a heightened risk of danger when a defendant is released from incarceration.

The Commission proposes guideline amendments addressing the imposition of supervised release, including its length and conditions, modification and revocation. The VAG supports the Commission's stated goals of providing greater discretion to sentencing courts to ensure that the supervised release decisions "fulfill rehabilitative ends, distinct from those of incarceration." *See United States* v. *Johnson*, 529 U.S. 694, 709 (2000).

The VAG agrees with the Commission's proposal that supervised release decisions be based upon individual assessments that consider a wide range of factors, including those at 18 U.S.C. §3553(a). This will help ensure that supervised release decisions are focused on rehabilitative needs and the need to protect the public. The changes proposed should allow courts to tailor their supervised release decisions to the specific needs of the defendants. However, the proposed amendments and the Guidelines are essentially silent about crime victim survivors.

By the time courts are addressing sentencing, victim survivors have suffered the stress and trauma inherent in crimes; suffered the stress inherent in criminal investigations; and the stress and trauma that arises during the duration of criminal prosecutions. Our criminal justice system is taken for granted by those involved in the system. To most victim survivors, however,

the "system" is foreign and difficult to understand and a source of more anxiety, stress, and trauma.

To assure that victim survivors are fully considered by the court in imposing or modifying supervised release, victim rights pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S. Code § 3771,[1] and the Victims' Rights and Restitution Act (VRRA), 34 U.S.C. § 20141, must be acknowledged and applied.

In the imposition and modification of supervised release, essential victim rights include: to be protected from the defendant; to be reasonably and timely notified of court hearings; to be reasonably heard at any public proceeding in the district court involving release, plea or sentencing; to full and timely restitution; and the right to be treated with fairness and with respect for the victim's dignity and privacy.

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[1] 18 U.S. Code § 3771(a) reads:

> (a)Rights of Crime Victims.—A crime victim has the following rights:
> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
> (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
> (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

Significantly, as to protecting victim survivors from a defendant, and consistent with the deterrence and public safety considerations required by 18 U.S.C. §3553(a)(2)(B) and (C), the Commission's proposed "Individualized Assessment" conducted before the imposition or modification of supervised release must include contacting and receiving input from the victim survivor as to the risks and safety concerns that they suffer from the defendant and whether a term of supervised release should include a "no contact" provision.

Crime victim survivors personally suffered through the defendant's offense. Many also know their offender, placing them in a unique position to provide significant insight to the court regarding the circumstances of the offense and the nature and character of the defendant, which is a required consideration of 18 U.S.C. §3553(a)(1). With the victims' input, supervised release decisions will be better informed and will more intelligently address what supervision time and conditions will be necessary to best rehabilitate the defendant and deter future criminal conduct, thereby protecting the victim survivor and the public.

The VAG offers two different approaches for the Commission to include victim input as part of the Individualized Assessment. The first is a simple reorganization, with an addition, to the proposed § 5D1.1. Commentary Application Notes. The second, a proposed Policy Statement.

§ 5D1.1. Commentary Application Notes

The Commission's proposed "Individualized Assessment" in § 5D1.1. Commentary Application Note 1 is too restrictive, limiting itself only to statutory references of 18 U.S.C. § 3583(c) and 18 U.S.C. § 3553(a). The "Individualized Assessment" should also include the additional factors currently listed in proposed § 5D1.1 Commentary Application Notes 2-6, as each have strong relevance for the court's consideration of whether and how to impose supervised release. Those additional factors, Criminal History, Substance Abuse, Domestic Violence, Community Confinement/Home Detention, and Deportation currently exist as "Factors to be Considered" in imposition of supervised release. Those factors should specifically be included as factors for Individualized Assessment.

Excluding Application Note 2-6 factors from the "Individualized Assessment" description, also excludes those factors from Individualized Assessment consideration in the proposed amendments to: § 5D1.2 Terms of Supervised Release, App. n. 3; § 5D1.3 Conditions of Supervised Release, App. n. 1; § 5D1.4 Modification, Early Termination and Extension of Supervised Release (Policy Statement), App. n. 1; 7C1.3 Responses to Violations of Supervised Release (Policy Statement), App. n. 1; and 7C1.4 Revocation of Supervised Release, App. n. 1.

Including all of those factors, however, in the Individualized Assessment will make the Individualized Assessment completer and more accurate for the imposition and other aspects of supervised release consideration.

In addition to the continued logic of including Application Notes 2-6, as part of an "Individualized Assessment," the VAG asks the Commission to also include a new Application Note 7 to its proposed § 5D1.1. Commentary Application Notes, noted here in italics, which will read:

> *7. Crime Victim.—In a case in which there is/are victim(s), as part of the individualized assessment the court shall order the probation office to contact each victim and obtain a statement, either written or oral, addressing the circumstances of the offense, the nature and character of the defendant, the impact of the offense upon the victim, and any threat or danger perceived by the victim from the defendant, unless the victim previously requested not to be notified or contacted.*

The addition of this proposed Note 7, as part of the Individualized Assessment, gives focus to victims, including victims of crimes of violence, fraud or financial crimes. The addition of proposed Note 7 will recognize the CVRA right to protection from a defendant that a victim possesses and is wholly consistent with § 5D1.1. Commentary Application n. 1(B), referencing "the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant [...] (18 U.S.C. § 3553(a)(2)(B)-[(C)]." The addition of this proposed Note 7 also is wholly consistent with § 5D1.1. Commentary Application n. 1(A), referencing "the nature and circumstances of the offense and the history and characteristics of the defendant (18 U.S.C. § 3553(a)(1))."

Adding this proposed Application Note 7, and then including Application Notes 1-7 in the description of an Individualized Assessment in § 5D1.1 (with corrected references in: §§ 5D1.2, App. n. 3; 5D1.3, App. n. 1; 5D1.4, App. n. 1; 7C1.3, App. n. 1; and 7C1.4, App. n. 1), will support and clarify the Individual Assessment. The Individual Assessment will then serve a stronger foundation for determining the imposition, terms, conditions and the modification, early termination, extension or revocation of supervised release.

Policy Statement

If the Commission chooses not to adopt the above proposal to add an Application Note 7, and include Applications Notes 1-7 as describing an "Individualized Assessment," the VAG proposes that the Commission use the same language of proposed Application Note 7, above, as a Policy Statement to assure that victim rights under the CVRA are protected. As a Policy Statement, victim input would then be included in Individualized Assessments by virtue of § 5D1.1. Commentary Application Note 1(D), which includes Commission policy statements as a consideration in determining supervised release.

§ 5D1.3. Conditions of Supervised Release

To ensure the CVRA right of protection of the victim from the defendant, and consistent with the requirements of 18 U.S.C. § 3583(d), the VAG asks the Commission to make the following addition, noted here in italics, to proposed § 5D1.3(b)(2)(L):

> *If the probation officer determines that the defendant poses a risk to the victim, or the victim wants no contact from the defendant, the defendant shall have no contact with the victim.* If the probation officer determines that the defendant poses a risk 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 the instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

To ensure the CVRA right of protection of the victim from the defendant, and consistent with the requirements of 18 U.S.C. § 3583(d), the VAG also asks the Commission to make the following addition, noted here in italics, to proposed § 5D1.3(b)(3)(G):

> *(G) SEX OFFENSES*
> *[...]*
> *(iv) A condition requiring the defendant to have no contact with the victim.*

§ 5D1.4. Modification, Early Termination, and Extension of Supervised Release

In proposed § 5D1.4(a) and (b), the VAG asks the Commission to adopt the bracketed language "may" rather than "should" to give the court clear direction that a decision on the modification or early termination of supervised release is discretionary with the court.

The VAG believes that the non-exhaustive list of factors in § 5D1.4(b), appear appropriate and should certainly include the proposed clause in § 5D1.4(b)(6) "any statements or information provided by the victims of the offense".

The VAG is in agreement with the proposed language of Application n. 2, regarding timely notification of a victim and the victim's right to be heard, and the inclusion of the bracketed clause "and of any violation of a condition of supervised release."

§ 5B1.3 Conditions of Probation

The VAG asks the Commission to add a subsection to § 5B1.3(d)(7) that reads: "A condition requiring the defendant to have no contact with the victim."

PART B: REVOCATION OF SUPERVISED RELEASE

The VAG finds no reference to timely notification of victims, or the right to be heard, which are rights provided by the CVRA, in any of these proposals regarding revocation of either probation or supervised release. Victims have the right to notified and the right to be heard. Probation or supervised release violations may be offenses specifically directed to the

victim, affect ordered restitution payments or otherwise affect the victim. These Guidelines need to address victim notification and the right to be heard.

Additionally, as to specific proposed amendments:

§ 7C1.3 Responses to Violations of Supervised Release (Policy Statement)

The Commission should approve Option 2 (Mandatory Revocation when Statutorily Required and for Grade A and B Violations). This option directs the court to revoke supervised release when statutorily required and for the most serious violations but leaves discretion on the sanction to impose for lesser violations. This option encourages the defendant on supervised release to abide by the terms imposed and better protect public and victim safety.

§ 7C1.4 Revocation of Supervised Release (Policy Statement)

The Commission should approve Option 1 (Concurrent or Consecutive Sentences). This option requires the court to conduct an Individualized Assessment, which if the Commission accepts the VAG's proposal above will include victim input in § 5D.1.1, and allows the court to exercise discretion as to whether the sentence imposed for a revocation of supervised release should be concurrent or consecutive. With victim input required as part of the Individualized Assessment, the court will be better informed as to whether a concurrent or consecutive sentence will better protect public and victim safety.

DRUG OFFENSES

As important stakeholders with recognized statutory rights in the federal criminal court process, victims deserve fair, just and predictable outcomes in the criminal justice process. Communities, also real victims of the burgeoning drug pandemic, are equally victimized by dangerous drugs, like fentanyl and methamphetamine.

PART B: METHAMPHETAMINES §2D1.1

Drug Offenses Part A, subpart 2:

The VAG has no objection to the addition of § 2D1.1(b)(17) to add a low-level offense reduction for certain low-level drug trafficking offenders. However, the VAG disagrees that this

reduction should be available to all low-level traffickers. Specifically, where the low-level trafficker is involved in a conspiracy with an offender (1) who has an aggravating role against a victim, as defined by §2D1.1(b)(16)(B), or (2) who commits, or attempts to commit, a sexual offense against a victim, as described in §2D1.1(e)(1), the low-level trafficker should not receive the benefit of a reduction as defined in §2D1.1(b)(17). If this type of conduct constitutes a §2D1.1(b)(2) use of violence, credible threat of violence or directing the use of violence, then the proposed amendment to § 2D1.1(b)(17) will not apply. This comports with the understanding of criminal responsibility.

If this is the case, the VAG recommends that the Commission approve Option 1, with the bracketed language of proposed § 2D1.1(b)(17)(B) ("the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense") and the first clause of the bracketed language of § 2D1.1(b)(17)(C) ("the defendant's most serious conduct in the offense was limited to performing any of the following low-level trafficking functions.") These bracketed clauses appear to be able to exclude more serious conduct of violence or the threat of violence in relation to the drug trafficking offense.

PART C: MISREPRESENTATION OF FENTANYL AND FENTANYL ANALOGUES §2D1.1

One pill can kill.

Before the Commission is the opportunity to amend the Guidelines overly restrictive two- or four-level adjustment for traffickers of fentanyl who represent or market the drug as any other substance. The Victims' Advisory Group asks that you adopt the third option, with the second set of bracketed language. That language would increase the base offense level where a substance containing fentanyl is nefariously marketed or represented[2] as another substance and the defendant knows or recklessly disregards the actual content of the substance.

[2] The Victims' Advisory Group provides no additional guidance regarding whether "represents" and "markets" are sufficient to achieve the intended purpose of the proposed amendment. If other commentors provide recommendations, we encourage the Commission to consider that feedback with the purpose of accurately capturing the proscribed conduct.

How is fentanyl so deadly? It is made by killers.

Fentanyl has made it clear: drug crimes are victim crimes. The fentanyl epidemic has created a terrifying scenario where drug dealers commit deadly fraud on their victims. Fentanyl is the leading cause of death for 18- to 45-year-old Americans.[3]

Some overdose victims are users aware they are using fentanyl – but are sold a violently potent pill.[4] Those deaths are tragic.

More tragic, though, are overdoses that are the result of lies. Unlike cocaine, methamphetamine, and heroin, fentanyl may not appear to be an illegal drug. The pressed pills are disguised to look like an FDA-approved pharmaceutical drug or an over-the-counter pill taken to remedy menstrual cramps or headaches.[5] [6]

Unlike medically used fentanyl, illicit fentanyl is the result of a global effort to make money at the risk of death. The precursor chemicals for illicit fentanyl often originate in China.[7] The chemicals are received in Mexico where the chemicals are crudely mixed with cutting agents.[8] The resulting powder or liquid is often either smuggled to the United States as raw powder or pressed into pills in Mexico before arriving in the United States.[9]

Many fake pills are made to look like prescription opioids – such as oxycodone (Oxycontin®, Percocet®), hydrocodone (Vicodin®), and alprazolam (Xanax®); or stimulants

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[3] Fentanyl Supply Chain | DEA.gov; https://www.dea.gov/resources/fentanyl-supply-chain (last visited February 11, 2025).

[4] Facts about Fentanyl; https://www.dea.gov/resources/facts-about-fentanyl (last visited February 11, 2025).

[5] Fake Prescription Pills; https://www.dea.gov/factsheets/fake-prescription-pills (last visited February 11, 2025).

[6] 'It's just everywhere': Seattle police seize thousands of fentanyl pills, guns in ongoing operation; https://www.police1.com/drug-interdiction-narcotics/articles/its-just-everywhere-seattle-police-seize-thousands-of-fentanyl-pills-guns-in-ongoing-operation-vff3x2W0zhyEUWg4/ (last visited February 11, 2025).

[7] China continues to subsidize fentanyl ingredients bound for US : NPR; https://www.npr.org/2024/04/16/1244964595/fentanyl-china-precursor-overdose (last visited February 11, 2025).

[8] The shadowy 'brokers' smuggling fentanyl chemicals for Mexican cartels; https://www.reuters.com/investigates/special-report/drugs-fentanyl-brokers/ (last visited February 11, 2025).

[9] Fentanyl Supply Chain | DEA.gov; https://www.dea.gov/resources/fentanyl-supply-chain (last visited February 11, 2025).

like amphetamines (Adderall®) – but contain unknown amounts of fentanyl. The user believes they are consuming a drug approved by our FDA and prescribed by licensed doctors. These fake pills are widely available and are more lethal than ever before. DEA lab testing revealed that two out of five pills with fentanyl contain a potentially lethal dose.

The United States's drug laws, years ahead of this epidemic, proscribed trafficking this schedule II substance – specifically with a statute the addresses those drug dealers whose trafficking results in death.[10]

The DEA's Family Summit on the Overdose Epidemic is a system of meetings held throughout the country gathering the surviving families and friends of fentanyl overdose death victims.[11] Conference rooms around the country fill with people mourning their overdose victims. Their tragic stories tell of athletes and students who died making what should have been a small mistake – taking a pill not prescribed to them, but a pill prescribed to *someone*. But instead, they consume a *fake* pill, usually pressed in Mexico, that contained a lethal amount of fentanyl.

Victims suffer from fentanyl dealers, regardless of the mental state of the defendant.

Mens rea requirements with drug trafficking limits convictions to defendants who act with knowledge their conduct involves a federally controlled substance. That is, it has never been required that the government prove the defendant knew *which* drug they were distributing – as long as the defendant knows they are distributing a drug, and that drug is federally prohibited.[12]

When a defendant is charged with distribution of fentanyl in violation of Section 841 of Title 21 of the United States Code, the government must prove each of the following elements beyond a reasonable doubt: (1) the defendant knowingly distributed a measurable or detectable amount of fentanyl; and (2) the defendant knew that it was fentanyl *or some other federally controlled substance*.

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[10] 21 U.S.C. § 841(b)(1)(C).

[11] https://www.dea.gov/familysummit (last visited February 24, 2025).

[12] *See* 21 USC § 841.

If the distribution results in death, the government faces an uphill battle in proving to a jury that the death was a result of the use of the fentanyl distributed. In other words, the government must prove that that "but for" the use of the fentanyl that the defendant distributed, the victim would not have died.[13] The government need not prove that the death was a *foreseeable* result of the distribution of the controlled substance.[14]

The issue of causation is decided by the jury "[b]ecause the 'death results' enhancement increased the minimum and maximum sentences to which [the defendant] was exposed … [and] must be submitted to the jury and found beyond a reasonable doubt."[15] "[A] phrase such as 'results from' imposes a requirement of but-for causation."[16] In *Burrage*, the Supreme Court declined to accept or reject a special rule allowing the government to satisfy the causation requirement by showing that use of the controlled substance was an independently sufficient cause of death or bodily injury.[17]

The third option related to the misrepresentation of fentanyl and fentanyl analogues, with tiered enhancements, harmonizes with both the existing law and the reality that the harms suffered by victims is not one-size-fits all. The third approach most harshly punishes a defendant when they actually know, have reason to know, or recklessly disregard that the substance they are trafficking contains fentanyl. Even with that knowledge, the defendant provides the substance to a user as something else. Today, with the efforts to communicate the dangers of fentanyl, any criminal defendant who is aware of the presence of that drug and hides it to his customer should face the harshest penalty.

The third approach recognizes that although the defendant's mental state may not be the same when they don't know the drug contains fentanyl, the harm to the victim is not reduced.

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[13] Crm. Rev. Jury Instr. 12.4 (Rev. June 2024).

[14] *United States v. Houston*, 406 F.3d 1121, 1125 ("Cause-in-fact is required by the 'results' language, but proximate cause, at least insofar as it requires that the death have been foreseeable, is not a required element.").

[15] *Burrage v. United States*, 571 U.S. 204, 210 (2014).

[16] *Id.* at 214.

[17] *Id.* at 214-15; *See Id.* at 218-19 ("a defendant cannot be liable under the penalty enhancement provision of 21 U. S. C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.").

In this instance, the government will have shown that the defendant knows it contains a federally prohibited drug, and they present that unknown substance as if it were not fentanyl.

For all these reasons, we ask that the Commission adopt the thoughtful approach outlined in the third option.

PART D: MACHINEGUNS §2D1.1

The VAG supports the proposed amendment to subsection (b)(1) of §2D1.1, which would create a tiered enhancement based on whether a machine gun was possessed. The 4-level enhancement would hold traffickers who possess machine guns accountable, deter use, and protect the public. Machine guns are extraordinarily dangerous compared to other types of weapons including other firearms. There is increased fire power, it is more lethal than other types of firearms and will fire rapidly and continuously as long as the trigger is pulled and until the magazine is empty. There is a lack of control and accuracy due to the rapid rate of fire and increased recoil. There is an increased risk of injury or death when large amounts of ammunition can be fired in a short period of time eliminating any opportunity that a victim may have to flee, to find cover, or to attempt to defend themselves. There is an increased potential for mass casualties when used in public or crowded places. Thus, when a drug trafficker possesses a machine gun, the offense becomes far more dangerous. Thus, the 4-level enhancement is justified.

Conclusion

The VAG appreciates the opportunity to comment upon these proposals. The VAG seriously takes its commitment to advise the Commission, share victim perspectives on the sentencing process and respect the rights of victim survivors.

Respectfully yours,

The Victims Advisory Group
Christopher Quasebarth, Chair

cc: Advisory Group Members

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

March 3, 2025

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attn: Public Affairs – Proposed Amendments

ACLU Comments on Proposed Supervised Release Amendment

Dear Chairman Reeves and Members of the Commission,

Thank you for the opportunity to comment on the Proposed Amendment regarding supervised release ("Amendment"). The ACLU and undersigned organizations applaud the Commission's commitment to improving the supervised release system. The stated aim of supervised release is to advance rehabilitation, but all too often, lengthy supervision terms, onerous conditions, and frequent revocations *impede* reentry. The consequences of these overly burdensome conditions and revocation are especially stark for the large number of people on supervision with substance use disorders ("SUD"), mental health conditions, and other disabilities, who routinely wind up back in prison for conduct related to their health conditions. The Amendment is a meaningful step toward closing the revolving door of incarceration and helping people to remain at home in their communities.

I. COURTS SHOULD CONSTRAIN THE USE OF SUPERVISED RELEASE.

A. Limiting the Imposition of Supervised Release (§ 5D1.1)

The Commission should amend § 5D1.1 to limit supervised release to cases where it is necessary and appropriate based on the person's individual circumstances. There is one critical caveat: while supervised release is not warranted in every case, individuals who are eligible for First Step Act ("FSA") credits may nonetheless wish to request the minimum term of supervised release required to trigger FSA credits, and thus to obtain the benefit of earlier release from prison under the FSA. Under such circumstances, courts should impose that minimum period of supervised release.

Supervised release can actually increase incarceration rates when applied in circumstances where treatment and services are more appropriate. Many judges impose supervised release in a well-meaning attempt to connect people with services and supports. But in reality, supervision largely fails to connect people with the resources they need, such as housing, employment, transportation, and health care.[1]

[1] U.S. Dep't of Justice, *Dep't of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release* 21-22 (2023), https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf ("Over the last few decades, the number of individuals on supervision have increased dramatically, while resources for probation offices have not. As a result, probation offices can experience high caseloads and may lack

Meanwhile, supervised release demands strict adherence to wide-ranging, onerous, and complex conditions under threat of incarceration for any misstep.[2] As a result, supervised release is often a tripwire back to incarceration—further destabilizing people's lives and making reentry even harder.[3] Approximately 30 percent of federal supervision cases end in revocation.[4]

People with disabilities, including SUD and mental health conditions, face even higher barriers to success on supervised release. This includes difficulties understanding supervision conditions, effectively communicating with supervision officers, keeping track of their myriad supervision obligations, guarding against relapse, meaningfully engaging in required treatment programs, and adhering to electronic monitoring requirements.[5] People with SUD and mental health disabilities are disproportionately likely to be incarcerated for supervision violations related to their health conditions.[6] Prison, in turn, exacerbates their underlying health issues.[7]

There is a better path forward. Jurisdictions, including New York City and Colorado, have successfully downsized supervision and increased access to voluntary services in the community.[8] Federal courts should follow suit and sentence fewer people to supervised release, and shift resources away from enforcing compliance with mandated conditions and instead facilitate access to jobs, housing, and voluntary, community-based health services. These types of supports facilitate an individual's reentry into their community.

B. Limiting the Length of Supervised Release Terms (§ 5D1.2)

The Commission should amend § 5D1.2 to remove minimum terms of supervised release. Instead, courts should impose the minimum length of supervised release warranted based on an individualized assessment of the person's needs and abilities. This includes supervision terms of less than one year.

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appropriate resources to assist individuals under supervision to address major causes of criminal system involvement, such as underemployment, inadequate and unstable housing, etc."); Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* 54-57(2020), https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states (similar).

[2] Human Rights Watch & ACLU, *Revoked* at 41-52; Jacob Schuman, *Drug Supervision*, 19 Ohio State J. Crim. Law 2, 4-5 (2022).

[3] Human Rights Watch & ACLU, *Revoked* at 132-38.

[4] U.S. Dep't of Justice, *Dep't of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release* at 15.

[5] ACLU, *Reducing Barriers: A Guide to Obtaining Reasonable Accommodations for People with Disabilities on Supervision* 10-19 (2024), https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states.

[6] *Id.* at 10.

[7] *Id.*; *see infra* Section III(C).

[8] Human Rights Watch & ACLU, *Revoked* at 204-209 (discussing alternatives to supervision); Vincent Schiraldi, *Mass Supervision: Probation, Parole, and the Illusion of Safety and Freedom* (The New Press: 2023) (same).

Indeed, experts agree that supervision is most effective in the initial period, and that supervision terms of more than a couple years have little safety or rehabilitative value.[9]

C. Narrowly Tailoring Supervised Release Conditions (§ 5D1.3)

i. Individualizing Conditions

The Commission should amend § 5D1.3 to direct courts to individually assess what, if any, discretionary conditions are warranted, and to redesignate "standard" conditions as "examples" of conditions. The Commission should further instruct courts to impose the fewest number of conditions, and the least intrusive conditions, based on the individual's needs and capabilities.

Reducing the number and nature of conditions is a crucial step toward making supervised release manageable. Supervised release conditions are meant to help people re-enter their communities. But—even when imposed with the best intentions—the sheer number of conditions can be nearly impossible to follow.[10] People must remain employed while also attending frequent supervision appointments and mandated programs, which are typically held during standard work hours. These appointments also regularly interfere with caregiving responsibilities. Meanwhile, geographic restrictions and curfews limit job prospects and opportunities to earn higher wages. People living in homelessness and poverty struggle to report every address change and to pay required fines and fees. Conditions that restrict a person from associating with people convicted of felonies may appear neutral but disproportionately limit housing options and make community engagement nearly impossible for people who live in neighborhoods that are overpoliced and subject to the effects of systemic racism.[11] Unsurprisingly, studies show that imposing more conditions often creates more tripwires into incarceration for minor technical violations.[12]

ii. Treating Drug Use and Mental Health Disabilities as Public Health Matters

The Commission should advise courts to treat substance use and mental health disabilities as public health matters outside of the criminal-legal system. Courts should thus limit drug-testing conditions and, at the very least, should not test for marijuana where it is decriminalized in the state in which the

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[9] PEW Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision: A Framework to Improve Probation and Parole* 29 (2020), https://www.pewtrusts.org/-/media/assets/2020/04/policyreform_communitysupervision_report_final.pdf; Executives Transforming Probation and Parole, *Statement on the Future of Probation & Parole in the United States* (2019), https://www.exitprobationparole.org/statement; Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. Crim. L. & Criminology 1015, 1062-63 (2013).

[10] Human Rights Watch & ACLU, *Revoked* at 41-57; Emily Widra, Prison Policy Initiative, *One Size Fits None: How 'Standard Conditions' of Probation Set People Up to Fail* (2024), https://www.prisonpolicy.org/reports/probation_conditions.html; Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Geo. L J. 291 (2016).

[11] Human Rights Watch & ACLU, *Revoked* at 41-57.

[12] Klingele, *Rethinking the Use of Community Supervision* at 1038 ("more conditions tend to mean more opportunities for violation and detection"); Jennifer Doleac, The Brookings Institute, *Study after study shows ex-prisoners would be better off without intense supervision* (2018), https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision/.

individual is supervised.[13] Further, wherever possible, courts should facilitate access to voluntary, community-based treatment and services, rather than mandating such care. Where courts require treatment, programs should be evidence-based; permit medication for addiction treatment, including all three FDA-approved forms of medications for opioid use disorder ("MOUD");[14] and be appropriate to people's disability-related needs.

Courts regularly subject people with SUD and mental health conditions to stringent drug-testing regimes and mandated treatment, with the aim of helping them recover.[15] But these interventions are not demonstrably effective and often cause serious harm.

Relapse is a common and expected part of recovery.[16] It is thus unrealistic to expect or require consistent negative drug tests while a person is in recovery. However, federal law counterintuitively mandates revocation for drug possession and certain drug-test violations, which creates the conditions for failure for people with SUD.[17] Further, despite the ubiquity of drug-testing conditions, no evidence shows that routine drug testing reduces drug misuse.[18] Instead, more drug testing is associated with more technical violations and incarceration—making recovery and reentry even harder.[19]

Mandated treatment, likewise, does not demonstrably improve outcomes and often causes serious harm, including higher levels of mental duress, relapse, and risk of overdose and death upon discharge.[20] Myriad factors render forced treatment less effective than voluntary programming. Mandated treatment providers report minor technical violations—such as being late, missing sessions,

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[13] *See* Arnold Ventures, *Drug Testing on Supervision* 4 (2022), https://assets.arnoldventures.org/uploads/AV-Drug-Testing-Fact-Sheet_v2.pdf?_gl=1*1cxibzp*_ga*MTQ3ODc5NzE3My4xNzM5NDYzNzM2*_ga_J00GFVDRJS*MTc0MDYwMDcwNy43LjAuMTc0MDYwMDcwNy42MC4wLjA; U.S. Dep't of Justice, *Dep't of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release* at 20-21. As discussed in Section III(B), courts further should not revoke supervision or impose incarceration for drug-use violations.

[14] People on federal supervision should continue to have access to MOUD, which is the standard of care for people with Opioid Use Disorder. *See* Administrative Office of the U.S. Courts, *Substance Use Testing & Substance Use Disorder Treatment Reference Guide* 8 (2020), https://www.uscourts.gov/sites/default/files/substance_use_reference_guide_0.pdf (describing policy of permitting access to MOUD for people on federal supervision); ACLU, *Over-Jailed and Un-Treated: How the Failure to Provide Treatment for Substance Use in Prisons and Jails Fuels the Overdose Epidemic* 7-8 (2021), https://www.aclu.org/publications/report-over-jailed-and-un-treated (explaining importance of MOUD).

[15] Schuman, *Drug Supervision* at 13-22; ACLU, *Reducing Barriers* at 18.

[16] Human Rights Watch & ACLU, *Revoked* at 177.

[17] *See* 18 U.S.C. § 3583(g)(1), (3), (4). Notably, the U.S. Department of Justice has recommended that courts consider ending incarceration for drug-use violations. U.S. Dep't of Justice, *Dep't of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release* at 20-21.

[18] PEW Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision* at 33; Arnold Ventures, *Drug Testing on Supervision* at 1.

[19] PEW Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision* at 33; Arnold Ventures, *Drug Testing on Supervision* at 1. *See also infra* Section III(C) (discussing harms of incarceration for people who use drugs).

[20] Susan Sered, et al., *Ineffectiveness of Prison-Based Therapy: The Case for Community-Based Alternatives* 11 (2021), https://correctionalfunding.com/wp-content/uploads/2021/04/Ineffectiveness-of-Prison-Based-Therapy-Policy-Brief.pdf; Alexander Bazazi, *Unpacking involuntary interventions for people who use drugs*, 113(6) Addictions 1064-65 (2018), https://pmc.ncbi.nlm.nih.gov/articles/PMC7006027/.

or testing positive for drugs—to the court, which erects barriers to forming a trusting, therapeutic relationship.[21] Such program violations can also trigger revocation and incarceration, which is detrimental to successful treatment and increases the risk of overdose for people with SUD—underscoring the importance of avoiding unwarranted incarceration for these individuals.[22] Moreover, required programs are often not responsive to the individual's needs, including their trauma history and cognitive abilities, which hinders their ability to meaningfully engage in treatment.[23] Finally, many mandated treatment programs for SUD impose requirements, such as abstinence, that are not evidence-based.[24]

It would be far more effective, and less harmful, to facilitate access to voluntary treatment in the community for those who want and need it.

D. Encouraging Early Termination (§ 5D1.4)

The Commission should amend § 5D1.4 to specify that courts *should* (rather than "may") terminate supervised release early where warranted. Further, the Commission should specify that the mere fact of supervision violations does not render a person ineligible for early termination. Rather, courts must individually assess the person and their circumstances.

Studies show that most violations occur within the initial weeks and months of supervision, and that recidivism rates drop precipitously after the first year.[25] If someone is succeeding on supervision after a year, there is little safety or rehabilitative value in continuing to supervise them. Instead, prolonged supervision delays people's full reintegration into their community and puts them at risk of incarceration for minor technical violations.[26]

Moreover, the fact of a supervision violation alone does not indicate that continued supervision is necessary or appropriate. Technical violations do not inherently raise public-safety concerns and, studies show, "are not proxies of new crime."[27] Further, violations related to a person's disability, including SUD and mental health conditions, should be addressed through voluntary, community-based services and supports rather than the supervised release system.

[21] ACLU, *Reducing Barriers* at 17.
[22] *Id.* at 18; *see infra* Section III(C).
[23] ACLU, *Reducing Barriers* at 18.
[24] *Id.* at 17.
[25] PEW Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision* at 24.
[26] *Id.*; Klingele, *Rethinking the Use of Community Supervision* at 1062-63.
[27] Christopher Campbell, *It's Not Technically a Crime: Investigating the Relationship Between Technical Violations and New Crime*, Crim. Justice Pol'y Rev. (2014), https://journals.sagepub.com/doi/10.1177/0887403414553098.

II. COURTS SHOULD LIMIT INCARCERATION FOR SUPERVISED RELEASE VIOLATIONS.

A. New Classification for Technical Violations (§ 7C1.1)

The Commission should amend the Guidelines to create a "Grade D" violation category for technical violations, where the presumption is no incarceration. As discussed above, technical violations do not inherently raise public safety concerns and are not indicative of new criminal conduct.[28]

B. Alternative Responses to Supervised Release Violations (§ 7C1.3)

The Commission should enact "Option 1" and mandate revocation *only* where statutorily required. In all other cases, courts should individually assess whether revocation is necessary and appropriate. Further, unless mandated by statute, courts should not revoke supervision for drug use—and should instead treat substance use as a public health issue.[29] At the very least, courts should not revoke supervision for (a) positive drug tests that result from MOUD or (b) marijuana use where the substance is decriminalized in the state in which the individual is supervised.[30] Additionally, courts should treat positive drug tests as drug *use*, rather than drug *possession*, for purposes of mandatory revocation and penalties.[31]

Limiting revocation is critical because revocation proceedings destabilize people's lives—regardless of whether the court ultimately revokes supervision. Simply being accused of a violation can trigger lengthy periods of incarceration pending a revocation hearing.[32] Even a few days in jail is enough to lose employment, housing, health care, access to public benefits, and child custody.[33] Those consequences compound with each additional day in custody.[34] As discussed below, incarceration is especially damaging for people with SUD and mental health disabilities. If the aim of supervised release is rehabilitation, then incarceration must be a last resort.

C. Reducing Incarceration (§§ 7C1.4-7C1.5)

The Commission should enact "Option 1" in § 7C1.4 and instruct courts to individually assess the appropriate length of imprisonment (if any), with a presumption for concurrent prison terms. Further, the Commission should amend § 7C1.5 to instruct courts to impose the lowest term of incarceration (if any) warranted. The Commission should also amend the Revocation Table to (a) include Grade D

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[28] *See id.*
[29] *See* U.S. Dep't of Justice, *Dep't of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release* at 20 (recommending that courts consider establishing "a policy to no longer seek revocation for individuals based on drug use").
[30] *See id.* (at the very least, courts could "no longer seek revocation based on marijuana use and/or possession").
[31] *See* Schuman, *Drug Supervision* at 23-24 (discussing authorities' practice of treating a single positive drug test as drug *possession* and thus triggering mandatory revocation under 18 U.S.C. § 3583(g)(1)).
[32] Fed. R. Crim. Proc. 32.1(a)(6); *see* Human Rights Watch & ACLU, *Revoked* at 90-102. While potentially beyond the scope of this proposed Amendment, the Commission should consider recommending that courts individually assess whether detention pending revocation is necessary, with a presumption of release pending revocation proceedings.
[33] *See* Human Rights Watch & ACLU, *Revoked* at 103 (collecting sources).
[34] *Id.* at 103, 203.

violations with lower recommended sentences, (b) recommend lower minimum sentences for all Grade violations, and (c) eliminate the heightened sentencing ranges for people on supervised release for Class A felonies who commit Grade A violations.

There is little or no evidence that incarcerating people for technical violations and low-level offenses advances public safety.[35] Conversely, incarcerating people, particularly for a long time, makes it harder for them to re-enter their communities.[36] In other words, long incarceration periods for revocations have the opposite effect to the stated goal of supervised release.

Incarceration is especially detrimental for people with disabilities, including SUD and mental health disabilities. Common conditions of confinement—such as inadequate access to essential medications, over-stimulating bright lights and loud noise, invasive pat-downs and strip searches, and insufficient fresh air—exacerbate mental health conditions.[37] The trauma of incarceration also makes people with SUD more likely to use drugs.[38] Further, people with mental health disabilities are disproportionately placed in extended solitary confinement while in custody, which inflicts devastating mental and physical harm and can even lead to suicide.[39]

Meanwhile, people generally do not receive drug or mental health treatment behind bars.[40] Any treatment they do receive is not tailored to people's individual diagnoses or disability-related needs.[41] Further, studies show that any benefits of prison-based treatment are far outweighed by the harms of incarceration.[42] Finally, people with SUD are more likely to use drugs again upon release and, due to their reduced tolerance to drugs after imprisonment, they are much more likely to overdose.[43]

The class of people serving supervised release for Class A felonies who are revoked for Grade A violations includes individuals with SUD who are on supervised release for a drug crime and then use drugs during supervision. For such individuals, the current Guidelines recommend the harshest penalties. However, facilitating access to voluntary, community-based treatment—not lengthy incarceration—is the appropriate response to treat the root cause of their system involvement.

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[35] *Id.* at 203 (collecting studies).
[36] *Id.*
[37] Margo Schlanger et al., *Ending the Discriminatory Pre-Trial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act*, 17 Harvard L. & Pol'y Rev. 231, 243-44 (2022); Katie Rose Quandt & Alexi Jones, Prison Policy Initiative, *Research Roundup: Incarceration can cause lasting damage to mental health* (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/; Prison Policy Initiative, *Decarceration—and support on the outside—is the answer, not therapy behind bars* (Feb. 3, 2021), https://www.prisonpolicy.org/blog/2021/02/03/therapy.
[38] Human Rights Watch & ACLU, *Revoked* at 175.
[39] Schlanger, *Ending the Discriminatory Pre-Trial Incarceration of People with Disabilities* at 245.
[40] Emily Widra, Prison Policy Initiative, *Addicted to Punishment: Jails and Prisons Punish Drug Use Far More Than They Treat It* (Jan. 30, 2024), https://www.prisonpolicy.org/blog/2024/01/30/punishing-drug-use/.
[41] *Id.*; Human Rights Watch & ACLU, *Revoked* at 175.
[42] Prison Policy Initiative, *Decarceration—and support on the outside—is the answer, not therapy behind bars*; Sered, *Ineffectiveness of Prison-Based Therapy*.
[43] Human Rights Watch & ACLU, *Revoked* at 175-76.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

III. CONCLUSION

The ACLU and undersigned organizations support the proposed Amendment as a positive step toward making supervision less harmful and more manageable, and recommends the Commission adopt the Amendment. We thank the Commission for this opportunity to comment and welcome the opportunity to provide further input or assistance as the Commission moves forward to advance justice and protect civil liberties.

Sincerely,

Allison Frankel
Staff Attorney
American Civil Liberties Union Criminal Law Reform Project
[redacted]

Nina Patel
Senior Policy Counsel
American Civil Liberties Union Justice Division
[redacted]

The Sentencing Project
More Than Our Crimes

The United States Sentencing Commission
Attention: Public Affairs – Proposed Amendments

*Part D (Supervised Release) of Chapter Five (Determining the Sentence) and
*Part B (Probation and Supervised Release Violations) of Chapter Seven (Probation and Supervised Release Violations) of the *Guidelines Manual*.

February 28th, 2025

JustLeadershipUSA (JLUSA) and our national policy coalition, the JustUS Coordinating Council (JCC), support the Proposed Amendments to the U.S. Sentencing Commission's Guidelines for post-release supervision, early termination, and revocation. We broadly agree with these efforts and wish to offer the additional expertise of our 500-member coalition—each with a vested interest in reducing the economic impact of post-release supervision and balancing accountability with reduction of barriers to reintegration.

Supervised Release Guidance

Individualized assessments are always preferable to overly prescriptive attempts at determining the need for community-based supervision. This assessment must be accompanied, however, by much firmer and narrower guidance to reduce the overuse of supervised release when it is not warranted. As quoted in *U.S. v Johnson,* supervised release "fulfills rehabilitative ends, distinct from those served by incarceration," while easing transition back into society. The reality, however, is that supervised release offers very little to the person being supervised. We applaud the notions included in the introductory commentary, but if these are to be the primary aims of supervised release, the factors considered at sentencing should be more reflective of the **primary** aim of easing into a transition home. This posture, in and of itself, would result in a reduction in use of supervised release. In the words of one of our coalition members:

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"Supervised release, as it stands, hinders reintegration and is used far too broadly. Every effort should be made to terminate it as early as possible, with decisions based on an individual's strengths and needs rather than an overreliance on flawed 'risk' assessments. When someone has proven their commitment to change, continued supervision only serves to hold them back."
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Factors for Early Termination

The amended guidance is indeed appropriate to list and **we encourage strengthening the guidance wherever possible by including "should" versus "may" related to terminating supervision early.** In addition, we encourage caution around utilizing risk assessment tools, including the Post-Conviction Risk Assessment (PCRA) tool, as a primary factor for determining early termination. Because initial length of supervision determinations are made before administration of the PCRA, and the PCRA is not a perfect instrument, as noted in a 2016 U.C. Berkley study, the idea of "decreased risk" must be carefully implemented and **guidance should more firmly provide that this particular factor must not be viewed**

as the "super-factor" when making early termination decisions.[1] Far too often, supervision officers only have to say the words "too risky" to substantiate nullifying long periods of demonstrated rehabilitation. In the words of one of our coalition members:

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"I was considered to be low-risk for recidivism, yet the U.S. Probation Office insisted that keeping me on supervised release was essential to my success. In reality, my success was not due to supervision but to my own determination to rebuild my life and make things right. The system did not support my reintegration—it restricted it. I was even told I was a 'threat' to any employer, despite the fact that my actual employers submitted letters in support of my early release from probation. This is the reality of a system that claims to promote rehabilitation but instead imposes unnecessary barriers."
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Regarding how to list reentry programming in the guidelines, we encourage the Commission to broaden inclusion of program completion to include all forms of skill building, group interventions, and peer-led modalities. If the Commission feels it must include certified and/or evidenced-based programs for consideration, **it is imperative to provide guidance that the programs listed are merely examples versus an exhaustive list.**

Courts should, wherever possible, aim to release individuals from supervised release as soon as possible and, while access to counsel and victim notification are essential, it is encouraged that final guidelines strike a balanced approach so as to not impede the ability for Courts to operationalize improved case processing for early termination requests. While large jurisdictions already standardize many of these processes, the resources needed to do so in smaller districts may prevent the overarching aims of these amended guidelines. That said, **ensuring visibility and access for the public to these proceedings is important to both procedural justice and in the interest of authentic engagement from all parties.**

Revocation of Supervised Release

It is critically important, in addition to creating a separate Grade for technical violation-based revocations, that the Commission asserts that revocation is NOT appropriate unless required. According to recent data, well over 4,000 individuals in recent years were sentenced to incarceration following a technical violation revocation hearing with no accompanying arrest.[2] **The Commission's current guidance and proposed amendments must work to bring this number down.** Any attempt to assert when revocation is appropriate for a technical violation must be done in a manner that emphasizes revocation only after an intentional and substantial period of alternative accountability measures. While some state jurisdictions have implemented a progressive punishment grid, others have made distinctions between minor and major violations. Regardless of the structure, revocations for a technical violation must be approached carefully.

In addition to caution around revocation guidance as it relates to Grade D violations, **it is recommended that any guidance outside of statute that ties revocation for incarceration to the grade of the violation be done so without a recommended mandatory minimum.** While this does not guarantee broader

[1]https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339 excerpt… "Black offenders obtain higher average PCRA scores than White offenders (d= 0.34; 13.5% non-overlap in groups' scores), so some applications could create disparate impact."
[2]https://www.uscourts.gov/data-news/judiciary-news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes

discretion and an intentional, accompanying individualized assessment, it provides the necessary framework in which it can be modeled and implemented over time.

Conclusion

We appreciate your consideration of these comments. The Commission has a substantial opportunity to aid in balancing accountability with least-restrictive principles of restorative supervision both with how guidance is provided for the onset of supervision as well as guidance for ending it. In addition to the voices elevated in this comment from our coalition, we encourage the Commission to seek ongoing engagement from those impacted by these policies to determine if ongoing implementation matches the intentionality outlined in this comment period. If JustLeadershipUSA or the membership of the JustUS Coordinating Council can provide further assistance as these guidelines are finalized, we look forward to the opportunity to continue sharing experience and expertise.

Access to Doorways
298 Grand Ave #100, Oakland, CA 94610

February 24, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Courtney Watson, and I am submitting this comment letter on behalf of the Access to Doorways. We are a nonprofit organization raising money for QTBIPOC clients to receive legal psychedelic therapy, tuition support for QTBIPOC psychedelic therapists & research. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. Access to Doorways applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works
[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer

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[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of

[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/
[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf

whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

* * *

<u>Call for Retroactive Application</u>

[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Courtney Watson
Founder, Access to Doorways

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp
[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))
[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

Amy Jinx Coaching
5350 Centennial Trl
Boulder, CO 80303
February 27, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment
Dear United States Sentencing Commissioners,

My name is Amy Jenkins and I am submitting this comment letter on behalf of Amy Jinx Coaching. I provide holistic health support to individuals, including integration sessions pre- and post-psychedelic therapeutic sessions. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. Amy Jinx Coaching applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

> **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical

victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

> **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects,

there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics. Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap?

If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

> **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

> **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

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> **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

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> **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

> **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

* * *

Call for Retroactive Application

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drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Amy Jenkins
Owner
Amy Jinx Coaching

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[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10]Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.

[21] NIDA. (2020). Criminal Justice Drug Facts.

[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.

[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/

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[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

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Yale Law School

February 27, 2025

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 2002-8002

RE: Public Comment on Proposed Amendments to Supervised Release

Dear Judge Reeves:

We write in support of proposed amendments to Chapter 5 of the Sentencing Guidelines regarding supervised release. As we detail below, we hope that the Commission will adopt the proposed amendments. We do suggest one modification, as discussed below.

A word of introduction is in order about the bases for this comment. As part of our work in the Arthur Liman Center for Public Interest Law at Yale Law School, we researched the conditions that have been imposed when an individual's sentence includes supervised release. The enclosed report, *Collecting Conditions: A Snapshot of Supervised Release in 2023 in the U.S. District Court for the District of Connecticut*, details what we learned. Using the district in which we are located, we analyzed conditions imposed in 74 criminal judgments in 2023.[1] That set came from the Federal Public Defender's Office here, which enabled us to have information on the judgments for defendants whom that office represented during that year.

After reviewing the judgment for each defendant, we identified sixty-six whose sentences included supervised release. For each defendant, we recorded the number, type, and text of conditions imposed, including special conditions. In general, judges imposed all the mandatory and standard conditions and then some additional ones. After preparing a draft report, we circulated it to people knowledgeable about and involved in sentencing practices in this District. We then convened a seminar to discuss the draft with a few district court judges, federal public defenders, U.S. attorneys, probation officers, health care providers, and legal academics.

That session and other research enabled us to learn about problems, some of which stemmed from the fact that many conditions are imposed at the time of sentencing. As a result, for people serving time in prison, the interval between imposition and release may be months or years. By the time of release, a person may have different needs than had been anticipated at the time of sentencing. Furthermore, some of the regularly imposed conditions added challenges for

[1] Liz Beling, Katherine Braner, Elizabeth Clarke, Ibrahim Diallo, Avital Fried, Matthew Jennings, Zoë Mermelstein, Judith Resnik, Katherine Salinas, Julia Udell, & Paige Underwood, Collecting Conditions: A Snapshot of Supervised Release in 2023 in the U.S. District Court for the District of Connecticut 6-7 (Feb. 26, 2025) (enclosed).

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COURIER ADDRESS 127 WALL STREET · NEW HAVEN, CONNECTICUT 06511

individuals after they left prison. The travel condition[2] is one example. For people who are employed in transportation, the requirement of obtaining permission each time they go from Connecticut to Massachusetts or New York may impede their ability to comply with the needs of their employers. As we discuss below, our report thus illuminates the utility of recommendations before the Commission.

First, the proposed revisions to Chapter 5 are responsive to the concern that supervised release sentences are standardized and unvarying rather than tailored to an individual. Therefore, we support inclusion of a general proposition that courts should only impose supervised release if it is "warranted by an individualized assessment of the need for supervision."[3] And, as discussed, because many defendants are sentenced to years of imprisonment, a lag exists between imposition of supervised release and release from custody.[4] The proposed amendment helpfully encourages judges to revisit the issues so as "to conduct such an assessment as soon as practicable after the defendant's release from imprisonment."[5] This change would enable judges to have more information about which conditions would best contribute to an individual's rehabilitation after release from custody.

Second, we support the reclassification of standard conditions of supervised release as "examples of common conditions that may be warranted in appropriate cases."[6] As noted, in our study, the list of all the standard conditions was included in the sixty-six judgments we reviewed in which defendants were sentenced to supervised release. Thus, the proposed addition to § 5D1.3(b) (Discretionary Conditions) is wise to encourage judges to "conduct an individualized assessment to determine what, if any, other conditions of supervised release are warranted."[7] Doing so serves as a helpful reminder that each condition must be relevant and involve "no greater deprivation of liberty than is reasonably necessary" for the statutory purposes of deterrence, protection of the public, and rehabilitation.[8] Moreover, while some are concerned about the time that it takes to tailor conditions, doing so may save time later as individualization likely will improve compliance and may make the time of supervision as useful as possible.

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[2] "You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer." U.S. Probation and Pretrial Services, District of Connecticut, *Conditions of Supervision*, CTP.USCOURTS.GOV, https://www.ctp.uscourts.gov/conditions-supervision (last visited June 28, 2024).

[3] U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY) 3 (Jan. 24, 2025).

[4] The median sentence of imprisonment in Fiscal Year 2023 was twenty-four months, and supervised release was ordered in 82.5% of cases. *See* U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING tbl.15, 18 (2023). In our own set, the median length of imprisonment was forty months. Collecting Conditions, *supra* note 1, at 9.

[5] U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY) 16 (Jan. 24, 2025).

[6] *Id.* at 19.

[7] *Id.*

[8] 18 U.S.C. § 3583(d)(2).

Third, the proposed addition of § 5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)) provides judges with guidance for deciding whether to grant a motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1).[9] In January of 2025, the Administrative Office of the U.S. Courts published a study that found that arrest rates were lower for individuals whose terms of supervision were terminated early.[10] Thus, termination can support a person's reintegration in the community and conserve time of probation officers.[11] This guidance will also help judges, given that some district courts have required that a supervisee demonstrate "exceptional" behavior or "new or unforeseen" circumstances to support early termination of supervised release.[12] On occasion, even as courts of appeals have ruled that showings of "exceptional" behavior or "new or unforeseen" circumstances are not required, some district courts rely on those criteria. The factors enumerated in § 5D1.4(b) thus can also conserve judicial time by clarifying the criteria to apply.

We have a concern about one aspect of the proposed amendments. Provided as an example of a special condition is "requiring the defendant to participate in a program to obtain [a high school or equivalent] diploma."[13] For some individuals, this obligation may be helpful but for others, with learning disabilities or otherwise, this proposal may be difficult to fulfill. Moreover, health and cognitive challenges are not always clear at sentencing; further, they can develop during incarceration. More generally, we invite the Commission to study the challenges that individuals with disabilities face in complying with many of the conditions of supervised release. We hope the Commission will consider how to shape conditions in light of the principles underlying the Americans with Disabilities Act and Section 504 of the Rehabilitation Act to provide accommodations when appropriate. Supervised release and the ADA both aim to be rehabilitative and tailored to the needs of individuals. Thus, we urge the Commission not to adopt or propose as a routine condition a requirement of obtaining a High School or Equivalent Diploma.

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[9] *See* Stefan R. Underhill, *Everyday Sentencing Reform*, 87 UMKC L. REV. 159, 166-67 (2018).

[10] Thomas H. Cohen, *Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety*, ADMIN. OFFICE OF THE U.S. COURTS 21-22 (Jan. 22, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5098803. A 2013 study evaluating early termination found that individuals whose supervision ended early were less likely to commit crimes than individuals who served a full term of supervision. Laura M. Baber & James L. Johnson, *Early Termination of Supervision: No Compromise to Community Safety*, 77 FED. PROBATION 17, 21 (2013).

[11] See Jacob Schuman, *Terminating Supervision Early*, 62 AM. CRIM. L. REV. 5-6 (forthcoming 2025).

[12] *See, e.g.*, Whittingham v. United States, No. 12-CR-0971, 2017 WL 2257347, at *6 (S.D.N.Y. May 22, 2017) ("[T]he law is clear that only 'exceptional cases' involving 'special, extraordinary, or unforeseen circumstance[s]' warrant early termination."); United States v. Solano, No. 19-CR-17, 2023 WL 4599937, at *3 (E.D.N.Y. July 18, 2023) ("[T]he Court also finds that Defendant relies primarily on his compliance with the terms of his supervised release to support his request for early termination and that he has not presented any 'new or unforeseen circumstances' that warrant this relief." (quoting Lussier, 104 F.3d at 36)); United States v. Cohen, No. 18-CR-602, 2024 WL 1193604, at *3 (S.D.N.Y. Mar. 20, 2024) ("[E]arly termination of supervised release . . . is only 'occasionally' justified due to 'changed circumstances,' such as 'exceptionally good behavior by the defendant.'" (citing United States v. Lussier, 104 F.3d 32, 36 (2d Cir. 1997)).

[13] U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY) 16 (Jan. 24, 2025).

We have additional suggestions based on our research. One is to add language into the Guidelines encouraging judges to impose the minimum conditions needed to fulfill the statutory obligation of sentencing and to reserve additional conditions for post-incarceration modifications to supervised release conditions. Appendix B of our report illustrates how this recommendation can be applied. Further, and in line with the changes to § 5D1.3(b), we encourage the Commission to consider limiting the suggested list of standard conditions to those that are appropriate in a given case. Appendix D of our report provides an example of a limited list of conditions; we have drawn it from those used by a judge in the District of Connecticut.[14] Third, to provide a time frame for early termination, we recommend the Commission include policy guidance stating that when an individual has been successful on supervised release for a year, sentencing judges should exercise their authority under § 3583(e)(1) to terminate supervised release.

Thank you for your consideration of these comments.

Respectfully submitted,

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[14] *See* 18 U.S.C. § 3583; *see also* United States v. Jackson, No. 3:23-cr-00065, ECF No. 64 (D. Conn. Jan. 9, 2025) (imposing only conditions (1); (2); (4); (5); (6); (7); and (13) of the standard conditions contained in U.S.S.G. § 5D1.3(c)(1)-(13)).

The Arthur Liman Center for Public Interest Law

Collecting Conditions: A Snapshot of Supervised Release in 2023 in the U.S. District Court for the District of Connecticut

Yale Law School

January 28, 2025

Collecting Conditions: A Snapshot of Supervised Release in 2023 in the U.S. District Court for the District of Connecticut[1]

In 2023, more than 90 percent of federal defendants who were sentenced to prison were also sentenced to a term of supervised release.[2] At the end of 2023, an estimated 110,000 people were under federal supervised release.[3] Approximately 6,700 (or six percent) resided within the Second Circuit, with 966 individuals in the District of Connecticut.[4] When individuals are under supervision, they are subject to "conditions"—such as submitting to periodic drug testing, completing drug and mental health treatment, a prohibition against committing a state or federal crime, reporting any law enforcement contact to a probation officer, obtaining permission to travel, and refraining from being in contact with people who have felony convictions.[5] These conditions—operational upon release from incarceration—are imposed at the time of sentencing. Violations can result in being returned to incarceration.

Many questions exist about the utility and wisdom of imposing certain of these conditions. This report provides a window into the practices in the U.S. District Court for the District of Connecticut and, more generally, into the governing structure of this aspect of federal sentencing. After detailing research into the use of supervised release in the District of Connecticut, the report provides suggestions for revisions. Proposals for changes also come from the U.S. Sentencing Commission which, in January of 2025, announced its views on the need to make alterations that would better serve the statutory purposes of supervised release.

The Legal Framework

Congress established federal supervised release as part of the Sentencing Reform Act of 1984 (SRA), which, over time, abolished federal parole.[6] As the Senate Judiciary Committee Report on the SRA explained, the "primary goal" of supervised release was "to ease the defendant's transition into the community after the service of a long prison term . . . or to provide rehabilitation to a defendant who has spent a fairly short period in prison."[7]

As is familiar, judges impose a term of supervised release and conditions of supervision at sentencing.[8] Congress has instructed judges, when imposing supervised release, to consider the goals of rehabilitation, deterrence, and public safety,[9] and not to consider "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."[10] While judges are required to impose a term of supervised release for specific offenses, they have the discretion to do so for most defendants. Subject to limits set by Congress, judges have broad authority to determine conditions, which include "mandatory" conditions (required by statute) and "discretionary" conditions (depending on judges' decisions).[11]

Understanding Supervised Release

The U.S. Sentencing Commission is an important source of information on supervised release. Its annual *Sourcebook of Federal Sentencing Statistics,* online Interactive Data Analyzer, and *Supervised Release Primer* provide insights into the average length of supervised release keyed to the type of crime and the federal district court in which a person was sentenced, as well as an overview of the statutes, guidelines, and case law related to supervised release.[12] The *Primer's* appendix provides a summary of mandatory, standard, and special conditions which are routinely imposed by district courts throughout the country.

In addition, the Commission has published three reports. Its 2010 *Federal Offenders Sentenced to Supervised Release* provided a review of the legal and data issues related to the imposition, modification, and revocation of supervised release. The report, based on data from January 12, 2005, through the end of the fiscal year 2009, identified the length of the term of supervision by type of offense and criminal history category.[13] The Commission found that judges followed the Federal Sentencing Guidelines, which recommended imposing supervised release whether or not a statute required it; as of that data, 99 percent of defendants had to serve terms of supervised release. By then, about one million individuals had been sentenced to supervised release. The 2010 report found that approximately one-third of individuals on supervised release had returned to prison because of revocation.[14] That report explained that its data lacked information about specific conditions imposed and the grounds for revocation and termination.[15]

The Commission's 2019 report, *Revocations Among Federal Offenders*, explored the role played by defendants' criminal history in federal sentencing. It focused on the impact of revocation on a person's criminal history score, "Criminal History Category,"[16] "eligibility for the statutory safety value," and "career offender enhancements."[17] As the Commission explained, the data was limited as to whether revocations were based on new crimes or "technical" violations. Lacking specific information for 38.7 percent of the defendants studied, the Commission reported that between 38.9 percent and 77.5 percent of the revocations studied were for new crimes, and that between 22.5 and 61.1 percent were for technical violations.[18] A "technical violation," according to the report, is a violation of the conditions "that typically do not involve the commission of new criminal offenses and which did not result in new criminal charges or convictions."[19]

In 2020, the Commission published *Federal Probation and Supervised Release Violations*, which provided nationwide data on violations, hearings, and revocations for defendants sentenced between 2013 and 2017.[20] Key findings included:

> "Nationally, the number of individuals under supervision was relatively stable during the study period, ranging from 130,224 to 136,156 during the five years. Half of the individuals under supervision, however, were concentrated in only 21 of the 94 federal judicial districts.
>
> Nationally, the rate of violation hearings for individuals on supervision also was relatively stable, ranging from 16.2 to 18.4 percent during the five years, with an overall rate of 16.9 percent. The prevalence of supervision violations, however, varied considerably among the federal judicial districts . . . .
>
> The majority of supervision violations were based on the commission of an offense punishable by a term of one year or less or a violation of another condition of supervision not constituting a federal, state or local offense (Grade C Violation)."[21]

The Commission has not published aggregate data on the conditions judges impose for individuals on supervised release.[22] In this report, we provide a window by gathering and analyzing conditions that judges in the District of Connecticut imposed on defendants whose cases closed in 2023 and who were represented by the Office of the Federal Public Defender (FDO). With the help of that office, Liman Center faculty and students compiled information on conditions imposed on the 74 defendants represented by FDO. Below, we detail what we learned.

Imposition and Duration of Supervised Release

Judges must impose a term of supervised release for first-time domestic violence offenses,[23] as well as for certain sex crimes,[24] terrorism,[25] drug trafficking,[26] and kidnapping a minor.[27] For other crimes, judges can decide whether supervised release is appropriate.[28] The federal supervised release statute, 18 U.S.C. § 3583, directs judges to consider the factors outlined in 18 U.S.C. § 3553, listed below, when deciding whether to impose supervised release and determining its duration.[29]

> "(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
>
> . . . .
>
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> . . . .
>
> (4) the kinds of sentence and the sentencing range established for—
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress . . . ; and
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced;
>
> . . . .
>
> (5) any pertinent policy statement—
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress; and
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense."[30]

The Sentencing Guidelines recommend imposing a term of supervised release for individuals sentenced to prison terms longer than one year[31] unless deportation is likely.[32] The Application Notes to Guideline § 5D1.1 state that supervised release is "highly recommended" in cases involving substance abuse or domestic violence.[33]

Congress established maximum and minimum durations of supervised release for certain categories of offenses. Under § 3583(b), the maximum terms of supervised release are five years for Class A/B felonies, three years for Class C/D felonies, and one year for Class E felonies/Class A misdemeanors. Longer terms apply to specific offense types.[34] Sex offenses carry a supervised

release term of five years to life.[35] Drug trafficking convictions under 21 U.S.C. § 841 are subject to mandatory minimum terms of supervised release ranging from one to five years, with a maximum of life.[36] A policy statement in Sentencing Guideline § 5D1.2 recommends imposing "the statutory maximum term of supervised release" (i.e., life) for sex offenses.[37]

Conditions of Supervised Release

Federal judges have described the imposition of supervision conditions as a "core judicial function."[38] Section 3583(d) outlines mandatory conditions that judges must impose on all defendants and others that apply only to those convicted of sex offenses or domestic violence.[39] Statutorily mandated conditions include requirements that the supervisee "not commit another Federal, State, or local crime"; "make restitution in accordance with sections 3663 and 3663A"; "not unlawfully possess a controlled substance"; "refrain from unlawful use of a controlled substance"; and "submit to a drug test within 15 days of release . . . and at least 2 periodic tests thereafter."[40] Although listed as mandatory, a judge can "ameliorate or suspend" the mandatory drug-testing condition if sentencing information "indicates a low risk of future substance abuse by the defendant."[41]

Under § 3583(d), a court may impose "any other condition it considers to be appropriate," as long as the condition meets statutory requirements.[42] A discretionary condition must (1) be "reasonably related" to the statutory sentencing factors outlined in 18 U.S.C. § 3553(a)(1) and (a)(2)(B)-(D); (2) involve "no greater deprivation of liberty than is reasonably necessary" to serve the purposes of deterrence, public safety, and rehabilitation; and (3) be consistent with the Sentencing Commission's policy statements.[43]

The Sentencing Commission's Guidelines recommend judges impose 13 "standard" discretionary conditions outlined in § 5D1.3.[44] Many districts, including the District of Connecticut, developed lists of standard conditions mirroring those in the Guidelines.[45] Although the Guidelines are advisory, and these conditions are discretionary, standard conditions are "almost uniformly imposed by the district courts."[46]

The District of Connecticut's standard conditions are:

"report to the probation office . . . within 72 hours of your release from imprisonment."

"report to the probation officer as instructed."

"not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer."

"answer truthfully the questions asked by your probation officer."

"live at a place approved by the probation officer" and "notify the probation officer at least 10 days before" a change in residence or living arrangements.

"allow the probation officer to visit you at any time at your home or elsewhere, and . . . permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view."

> "work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so" and "notify the probation officer at least 10 days before" a change in "work or anything about your work."
>
> "not communicate or interact with someone you know is engaged in criminal activity" and "not knowingly communicate or interact" with someone known to be convicted of a felony "without first getting the permission of the probation officer."
>
> "notify the probation officer within 72 hours" of arrest or questioning by law enforcement.
>
> "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)."
>
> "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."
>
> "follow the instructions of the probation officer related to the conditions of supervision."[47]

The standard conditions in Connecticut generally mirror those provided at the national level by the U.S. Probation Office.[48] However, the District of Connecticut's conditions do not include one found in the national compendium. Excluded is:

> "If a probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk."[49]

The Second Circuit held this "risk" condition was impermissibly vague and afforded too much discretion to the probation officer.[50]

Judges also have discretion to impose "special" conditions.[51] Guideline § 5D1.3 recommends imposing special conditions based on the type of offense and the personal characteristics of the defendant.[52] Examples of these conditions include requirements for a supervisee to support dependents, refrain from incurring new debt, disclose financial information to the probation officer, participate in substance use or mental health treatment, and more.[53] The Guidelines policy statement specifies that conditions such as community confinement, home detention, community service, occupational restrictions, curfew, and intermittent confinement may be appropriate on a case-by-case basis.[54] If a supervisee is ordered to participate in a treatment program, failure to follow the rules provided by the program may be a basis for revocation.[55]

Judges generally impose special conditions for defendants convicted of sex offenses. Guideline § 5D1.3 recommends three conditions for individuals convicted of sex offenses: sex offender treatment and monitoring programs, limits on computer use and internet access, and searches of one's person or property based on reasonable suspicion of a violation of supervised release or unlawful conduct.[56]

Further, the U.S. Attorney's Office and the Probation Office may request the judge order special conditions, and defendants may object to proposed conditions. In the District of Connecticut, the Probation Office generally sets forth a set of conditions in a defendant's presentence report. In some cases, the U.S. Attorney's Office may include special conditions as part of a plea offer and, in some districts, may seek to require as part of an agreement that a defendant not contest these conditions. The sentencing judge has the power to impose more and, given the discretion afforded by § 3583(d), "[t]he range of conditions that can be imposed . . . is almost unlimited."[57]

A Snapshot of the Governing Case Law on Conditions

Convicted individuals have challenged conditions on constitutional and statutory grounds. As courts have explained, the Due Process Clause requires notice and that a condition be "sufficiently clear" to provide a sentenced individual with specific information about prohibited conduct.[58] On occasion, courts have vacated special conditions as unconstitutionally vague in violation of due process.[59] In *United States v. Carlineo*, for example, the Second Circuit addressed a special condition that required the supervisee to participate in a restorative justice program involving a "sentencing circle" and "listen to stories about Muslim refugees or people who suffered from violence [for] being Muslim."[60] The court held the condition violated due process because it did not make clear what activities were required for compliance, nor what conduct could trigger a violation.[61] In other cases, defendants have objected to allegedly vague conditions, and appellate courts have upheld some challenged special conditions.[62]

In addition to constitutional claims, convicted individuals have argued that conditions violate the statutory mandates of § 3583(d) because they are not "reasonably related" to permissible sentencing goals[63] or pose a "greater deprivation of liberty than is reasonably necessary."[64] To impose a standard or special condition in line with statutory requirements, a sentencing judge must "make findings specific to the defendant, connecting those findings to the applicable § 3553(a) factors that would justify including the [discretionary] condition."[65]

The Second Circuit has considered challenges to conditions that implicate a fundamental liberty interest—such as the right to parent[66] or maintain intimate relationships[67]—and concluded that such conditions could be "reasonably necessary" if they are narrowly tailored.[68] In recent years, appellate courts have addressed whether special conditions banning internet use pose a greater deprivation of liberty than is reasonably necessary.[69] In 2019, the Second Circuit vacated an internet ban condition where the defendant's conviction for failure to register as a sex offender was unrelated to internet use and lesser internet restrictions would have adequately protected the public.[70] Given the First Amendment implications of an internet ban,"[i]n only highly unusual circumstances will a total Internet ban imposed as a condition of supervised release . . . not amount to a greater deprivation of liberty than is reasonably necessary."[71]

Supervisees have also challenged courts' delegation of authority to the Probation Office or other third parties.[72] A district court has exclusive authority to impose conditions,[73] and it can delegate certain implementation decisions to the Probation Office.[74] The Second Circuit held that a court cannot delegate to a probation officer "decision making authority which would make a defendant's liberty itself contingent on a probation officer's exercise of discretion."[75] For example, a district judge, not a probation officer, must decide whether to require inpatient treatment.[76]

Conditions in Practice: The District of Connecticut, 2023

The Set of Defendants

This analysis is based on examining conditions imposed in 74 criminal judgments in the District of Connecticut in 2023. According to the District of Connecticut Clerk's Office, it entered 349 criminal judgments in 2023,[77] and through the FDO, the Liman Center reviewed judgments in cases of defendants that office had represented. To understand the distribution of defendants among the FDO, appointed lawyers under the Criminal Justice Act (CJA), and privately retained counsel, we looked at the Federal Judicial Center's Integrated Database (IDB).[78] For fiscal year 2023, the IDB reported data for 218,853 defendants in all federal district courts, including 1,116 individuals in the District of Connecticut. The IDB collects data on counsel at filing and at termination. Given that termination data would be close in time to sentencing, we focused on that information about convicted defendants. According to the IDB, convictions were recorded for 65,727 defendants and for 368 individuals in Connecticut. Variation can come from different databases using the calendar, fiscal, or statistical year.

Table 1 provides details for the District of Connecticut; 24.2 percent of convicted criminal defendants in Connecticut in 2023 were represented by a public defender or community defender. Nationally, according to data about convicted defendants, 39.4 percent of convicted criminal defendants were represented by a public defender or community defender.

TABLE 1: TYPE OF COUNSEL AT TERMINATION FOR CONVICTED DEFENDANTS IN FEDERAL DISTRICT COURTS 2023[79]

	Connecticut District Court N=368		**All District Courts** N=65,727	
	Number of Convicted Defendants	Percent	Number of Convicted Defendants	Percent
Criminal Justice Act (CJA)	191	51.9	27,118	41.3
Private Counsel	88	23.9	12,281	18.7
Pro Se	0	0.0	388	0.0*
None/other	0	0.0	0	0.0
Public/community defender	89	24.2	25,929	39.4
Pro bono	0	0.0	11	0.0*

* The percentages of defendants in all district courts who were pro se or represented by pro bono counsel have been rounded to zero from 0.01 percent and 0.00017 percent, respectively.

As noted, with help from FDO, we were able to examine 74 instances in 2023 when FDO was the lawyer for the defendant.[80] As is evident, this set is not a random sample, and therefore we do not know whether the conditions imposed in this group are representative of all conditions imposed in the District of Connecticut.[81]

Data Collection and Analysis

Appendix A details the variables for which we collected data. For each defendant, we first recorded basic information—the defendant's name, file name and number, date of imposition of judgment or sentence, date judgment was signed, district judge, title and section of offense, nature of offense, category of offense, type of crime, sex offense (yes/no), length of incarceration, and length of supervised release. We created a category-of-offense variable to account for commonly charged crimes for FDO clients. If one prosecution spanned two different offense categories (for example, firearms and drugs), we recorded both. We also categorized each filing based on the type of crime; we determined the applicable sentencing guidelines and, from there, the type of crime.[82] Other variables address decision points that arise when a court imposes mandatory and discretionary (standard and special) conditions. We recorded whether the court suspended the mandatory drug testing condition under § 3583(d) or otherwise modified the standard conditions of supervision. In contrast, the Sentencing Commission uses a "type of crime" variable in its data reports that categorizes defendants with more specificity than our category-of-offense variable.[83] For example, our category-of-offense variable includes a single "drug" category; the Sentencing Commission's type of crime variable delineates between "drug possession" and "drug trafficking."

In consultation with FDO, we developed a list of the types of special conditions that judges commonly impose in this District: substance use treatment, drug testing, ban on using or possessing alcohol, mental health treatment, education/vocation, search, association, gang affiliation, financial monitoring, location (GPS) monitoring, location restriction, polygraph testing, electronic monitoring of devices, sex offender treatment, child pornography restriction, and sex offender registration. The data collection key in Appendix A describes each type of condition. We termed a condition "an association condition" when it imposed restrictions on the people or groups with whom the supervisee can associate. A "location restriction condition" refers to restrictions on where the supervisee can go. An "education/vocation" condition" includes both conditions that impose educational or vocational obligations and those that restrict educational or vocational options. We counted all "non-device" search conditions, including conditions allowing the search of a person's home, workplace, or automobile, as a search condition. We counted device search conditions (for example, the search of a cellphone) as an electronic monitoring condition.

For each entry, two Liman student team members independently reviewed the judgment and coded data related to the sentence and supervised release conditions. Reviewers also consulted the PACER "Docket Report" to cross-check the name and number. The second reviewer did not consult the first reviewer's findings before or during the coding process. Once both reviews were complete, a Liman team member audited the data. The auditing process involved addressing any differences between the two reviews, correcting small errors, and adding,[84] deleting,[85] or modifying[86] variables to ensure the dataset accounted for all necessary information in a consistent manner. For each defendant, we recorded the total number, type, and text of the special conditions imposed. We also recorded other special conditions that did not fall within the listed categories.

Findings

Of the 74 defendants in the set, six had probation-only sentences[87]; two had prison sentences without supervised release[88]; and 66 defendants (89.2 percent of the set) had prison sentences with supervised release. Thus, of the 68 judgments with prison sentences, 97 percent included a term of supervised release and three percent did not. We compared this finding with the

Sentencing Commission national data: 90.8 percent of people sentenced to prison were sentenced to a term of supervised release in fiscal year 2023.

TABLE 2: 2023 FDO DEFENDANTS BY SENTENCE TYPE

N=74

Sentence Type	Number of Defendants	Percent of Defendants
Probation	6	8.1
Prison without SR*	2	2.7
Prison with SR*	66	89.2

* SR = Supervised Release

The mean probation sentence was 31 months. Of the 68 defendants with prison sentences, 13 had a prison sentence of time served. The maximum prison sentence imposed was 480 months (40 years). The mean prison sentence was 74 months.[89]

TABLE 3: 2023 FDO JUDGMENTS: LENGTH OF SENTENCE

N=74

Sentence Type	Number of Defendants		Months
Probation	6	Mean	31
		Median	36
		Minimum	12
		Maximum	48
Prison	68	Mean	74
		Median	40
		Minimum	0
		Maximum	480

Of the 66 defendants sentenced to supervised release, three had life supervision terms. The Sentencing Commission uses 470 months as a proxy for life terms of supervised release.[90] We did not include the three defendants with life terms in Table 4. With a data set of 66 supervised release defendants, these three would have had a disproportionate impact on the mean. For the 63 defendants with non-life supervised release terms, the mean was 51 months. According to Sentencing Commission data, the mean supervised release term in fiscal year 2023 in the District of Connecticut was 47 months.[91]

Congress has mandated minimum and maximum terms of supervised release for some crimes that constrains judicial discretion. For example, Class C felonies, punishable by 10 to 25 years imprisonment, carry a maximum supervised release term of three years.[92] Some sex offenses have a mandatory minimum supervised release term of five years.[93]

TABLE 4: 2023 FDO DEFENDANTS: LENGTH OF SUPERVISED RELEASE (NON-LIFE TERMS)

N=63

	Months
Mean	51
Median	36
Minimum	24
Maximum	180

For each of the 66 defendants who were sentenced to supervised release, judges imposed the District of Connecticut's entire list of standard conditions. Judges suspended the mandatory drug testing condition on eight occasions. Of the 58 defendants for whom judges imposed the mandatory drug testing condition, judges also imposed a substance use treatment condition on 50 defendants. For eight defendants, judges imposed the mandatory drug testing condition without substance use treatment or drug testing special conditions. Seven out of these eight were convicted of drug offenses.

Judges imposed an average of 5.3 special conditions per defendant. As noted, the Sentencing Guidelines recommend three additional special conditions (sex offender treatment and monitoring, computer limitations, and search) for sex offense cases.[94] In our set, defendants convicted of sex offenses had the highest average number of special conditions—15.5 per defendant. Defendants convicted of immigration crimes had the lowest average at 1.8 special conditions. All four such defendants were convicted of illegal reentry under 8 U.S.C. § 1326, and judges may have imposed minimal conditions because the defendants were likely to be deported upon release. As noted, the Sentencing Guidelines recommend no supervised release if deportation is likely.[95]

TABLE 5: AVERAGE NUMBER OF SPECIAL CONDITIONS BY TYPE OF CONVICTION

N=66

Number of Defendants	Type of Crime	Average Number of Special Conditions
27	Drug Trafficking	3.3
26	Firearms	4.1
8	Fraud/Theft/Embezzlement	5.0
5	Child Pornography	17.4
4	Robbery	5.8
4	Immigration	1.8
4	Sex Abuse	14.8
3	Tax	5.6
1	Burglary/Trespass	3.0
1	Money Laundering	6.0
1	Obscenity/Other Sex Offense	17.0
1	National Defense	8.0
1	Prison Offense	2.0
1	Murder	2.0

Across all offense types, for 77 percent of the defendants, mental health treatment was required; for 76 percent of the defendants, substance use treatment was required; and for 70 percent of the defendants, search conditions were imposed. The least commonly imposed conditions were GPS monitoring, which was imposed on one defendant, restrictions on alcohol use, imposed on two defendants, and gang affiliation restrictions, imposed on three defendants.

TABLE 6: FREQUENCY OF SPECIFIC SPECIAL CONDITIONS

N=66

Special Condition	Number of Defendants	Percent of Defendants
Mental Health Treatment	51	77.3
Substance Use Treatment	50	75.8
Search (non-device)	46	69.7
Drug Testing	45	68.2
Education/Vocational	24	36.4
Financial Disclosure	12	18.2
Association Condition	12	18.2
Polygraph	8	12.1
Electronic Monitoring	8	12.1
Child Pornography	7	10.6
Sex Offender Treatment	6	9.1
Sex Offender Registration	5	7.6
Gang Affiliation	3	4.5
Alcohol	2	3.0
GPS Monitoring	1	1.5

For many of the most common types of conditions—including treatment and search conditions—we observed nearly identical condition language for most defendants. As we understand it, the Probation Office routinely recommends conditions to the judge; that practice may account for the uniformity of language. For example, a commonly imposed mental health condition was:

> "You must participate in a program recommended by the Probation Office and approved by the Court for mental health treatment. You must follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You must pay all or a portion of costs associated with treatment based on your ability to pay as recommended by the probation officer and approved by the Court."[96]

In 48 out of 51 impositions of a mental health treatment special condition, the condition did not specify whether the treatment was to be inpatient, outpatient, either, or both. Conditions specified outpatient mental health treatment for two defendants and either outpatient or inpatient treatment for one. In 19 out of 51 mental health treatment conditions imposed, conditions specified a particular type or modality of care, including seven requiring cognitive behavioral therapy; six sex offender treatment, three gambling addiction treatment, one anger management treatment, one trauma / PTSD treatment; and one with one-on-one therapy.

TABLE 7: MENTAL HEALTH TREATMENT CONDITION BY INPATIENT OR OUTPATIENT SPECIFIED

N=51

Type of Treatment Specified	Number of Defendants
Neither	48
Outpatient	2
Either	1
Inpatient	0

TABLE 8: MODALITY OF CARE WHEN MENTAL HEALTH TREATMENT SPECIAL CONDITION ORDERED

N=51

Modality of Care	Number of Defendants
None Specified	32
Cognitive Behavioral Therapy	7
Sex Offender Treatment	6
Gambling Addiction	3
Anger Management	1
One on One Therapy	1
Trauma/PTSD	1

One substance use treatment condition stated:

> "You must participate in a program recommended by the Probation Office and approved by the Court for inpatient or outpatient substance abuse treatment and testing. You must follow the rules and regulations of that program. The probation officer will supervise your participation in the program. You must pay all or a portion of costs associated with treatment based on your ability to pay as recommended by the probation officer and approved by the Court."

Conditions specified either inpatient or outpatient substance abuse treatment for 21 defendants; neither inpatient nor outpatient for 15; outpatient for 11 defendants; both inpatient and outpatient for two; and inpatient for one.[97]

TABLE 9: SUBSTANCE USE TREATMENT CONDITION BY INPATIENT OR OUTPATIENT SPECIFIED

N=50

Type of Treatment Specified	Number of Defendants
Either	21
Neither	15
Outpatient	11
Both	2
Inpatient	1

An example of a search condition, imposed with slight variations for 45 of 46 defendants subjected to a search condition, stated:

> "You must submit your person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; you must inform any other residents that the premises may be subject to searches pursuant to this condition."

One search condition differed by specifying a narrower scope.

> "The defendant shall permit the United States Probation Office, accompanied by either local, state, or Federal law enforcement authorities, upon reasonable suspicion, to conduct a search of the defendant's residence, automobile, and workplace for the presence of sexually explicit materials involving minors."

As Table 10 details, 45 defendants were subjected to other conditions that we grouped under the term "miscellaneous."[98] For 14, these conditions concerned restitution or special assessment payments; 13 had third-party disclosure or notification requirements; eight had halfway house or residency requirements and restrictions on possessing firearms or weapons. In addition to the standard prohibition on firearm or dangerous weapons, conditions imposed on eight defendants included special conditions prohibiting a firearm or dangerous weapon.

TABLE 10: MISCELLANEOUS CONDITION TYPE

N=45

Special Condition	Number of Defendants
Restitution/Special Economic Assessment	14
Mandatory Disclosure of Conviction or Conditions to Third Parties	13
No Firearms and Weapons	8
Halfway House or Residency Restrictions	8
Required Community Service	7
Limited Investing and Use of Credit	7
Deportation/Immigration	6
Other	6
Required Observation of Support/Reentry Court	4

Table 11 details the frequency of certain special conditions imposed by type of crime; we identified the eight most common types imposed in this set of defendants.

TABLE 11: FREQUENCY OF SPECIAL CONDITIONS BY TYPE OF CRIME

N=66

	Fraud, Theft, Embezzlement		Child Pornography		Drug Trafficking		Firearms		Robbery		Tax		Immigration		Sex Abuse	
Type of Condition	**n**	**%**	**n**	**%**	**n**	**%**	**n**	**%**	**n**	**%**	**n**	**%**	**n**	**%**	**N**	**%**
Education Vocation	2	25	4	80	4	14.8	10	38.5	3	75	0	0	1	25	3	75
Mental Health Treatment	5	62.5	5	100	23	85.2	22	84.6	3	75	2	66.7	0	0	3	75
Substance Use Treatment	4	50	2	40	25	92.6	24	92.3	3	75	2	66.7	1	25	1	25
Search	2	25	5	100	18	66.7	24	92.3	4	100	0	0	0	0	3	75
Drug Testing	4	50	2	40	23	85.2	22	84.6	3	75	2	66.7	1	25	0	0
Gang Affiliation	0	0	0	0	1	3.7	2	7.7	0	0	0	0	0	0	0	0
Electronic Monitoring	0	0	5	100	0	0	0	0	0	0	0	0	0	0	3	75
Financial Disclosure	4	50	4	80	1	3.7	1	3.8	2	50	2	66.7	0	0	3	75
Alcohol	1	12.5	0	0	0	0	0	0	0	0	1	33.3	1	25	0	0
Location Monitoring	0	0	0	0	0	0	0	0	1	25	0	0	0	0	0	0
Location Restriction	1	12.5	4	80	1	3.7	2	7.7	2	50		0	0	0	3	75
Polygraph	0	0	5	100	0	0	0	0	0	0	0	0	0	0	3	75
Association	2	25	5	100	1	3.7	2	7.7	1	25	0	0	0	0	3	75
Sex Offender Treatment	0	0	5	100	0	0	0	0	0	0	0	0	0	0	2	50
Child Pornography	0	0	5	100	0	0	0	0	0	0	0	0	0	0	3	75
Sex Offender Registration	0	0	3	60	0	0	0	0	0	0	0	0	0	0	3	75

Table 12 compares the percentage of certain special conditions imposed on defendants convicted of sex offenses as opposed to defendants convicted of non-sex offenses. As expected, certain were common when individuals were convicted of sex offenses. Special conditions such as electronic monitoring, polygraph requirements, child pornography restrictions, financial disclosure, and location restrictions were present for all but one of the defendants; in that case, deportation appeared likely.

TABLE 12: FREQUENCY OF SPECIAL CONDITIONS IN SEX OFFENSES VERSUS NON-SEX OFFENSE

N=66

Special Condition Category	Percent of Defendants Convicted of Sex Offenses	Percent of Defendants Convicted of Non-Sex Offenses
Mental Health Treatment	87.5	75.9
Search	87.5	67.2
Polygraph	87.5	1.7
Electronic Monitoring	87.5	1.7
Association Condition	87.5	8.6
Child Pornography	87.5	0.0
Education/Vocational	75.0	31.0
Financial Disclosure	75.0	10.3
Sex Offender Treatment	75.0	0.0
Sex Offender Registration	62.5	0.0
Substance Use Treatment	50.0	79.3
Drug Testing	25.0	67.2
Location Monitoring	0.0	1.7
Gang Affiliation	0.0	5.2
Alcohol	0.0	3.4

Compliance, Violations, and Revocation

As the above analysis demonstrates, individuals on supervised release must abide by conditions that structure daily life. Given that many of the individuals from this set are, as of this writing, in custody, this report does not provide information about what has happened upon release and whether any of these individuals were charged with violations. According to the Sentencing Commission's 2020 analysis of data from 2013-2017, "more than one-third of individuals on supervision within the Southern District of California committed a violation (42.1 percent). In contrast, less than five percent of individuals on supervision committed a violation in the District of Connecticut (4.5 percent) and Maryland (4.7 percent)."[99] (As noted, the Commission did not have full information on all defendants.)

Critics of supervised release argue that the system has become overly punitive and creates a "revolving door of incarceration and poverty."[100] Concerns about post-release life stem from a growing body of social science literature that documents difficulties in transitions after incarceration.[101] Problems of health care and safety have been documented by researchers who have looked at individuals on conditional releases after state convictions. For example, within two

weeks of release from incarceration, individuals were 12.7 times more likely to die than other state residents.[102] Another study tracked Medicare beneficiaries released from prison between 2002 and 2010 and found that recently released individuals experienced significantly higher rates of hospitalization than the general Medicare population.[103]

Other concerns focus on resources for individuals under supervision, their communities, probation offices, and defender offices.[104] A 2023 Department of Justice survey of federal public defenders reported that current services did not fulfill supervisees' needs.[105] Of the 247 survey respondents, approximately 210 (85 percent) stated that poverty is the most common obstacle to their clients' successful completion of supervision, followed by transportation issues and lack of clinical support.[106] Over the past year, the Liman Center interviewed and surveyed 19 mental health and substance use treatment centers in Connecticut that support individuals on supervision. Many respondents raised concerns that recent changes to Medicaid funding have increased wait times, shortened treatment duration, and prompted providers to turn away clients.[107]

Before concluding, a brief comment on revocation is in order. As is familiar, if an individual commits a criminal or non-criminal ("technical") supervised release violation, the judge can modify the conditions, extend or terminate the supervised release term, or revoke supervised release entirely and impose a prison sentence, including a new term of supervised release thereafter.[108] To revoke supervised release, a judge must find by a preponderance of evidence that the supervisee violated a condition.[109] Under federal law, revocation is mandatory when an individual possesses a controlled substance in violation of a supervised release condition, possesses a firearm in violation of federal law or a supervised release condition, refuses to comply with a drug testing condition, or tests positive for illegal controlled substances more than three times in one year.[110] A judge must consider whether the "availability of appropriate substance abuse treatment programs or an individual's current or past participation in such programs" warrants an exception to revocation based on positive drug test results.[111]

The form that supervised release revocation proceedings should take is the subject of debate in this District and elsewhere.[112] District Judge Stefan R. Underhill and others have argued that the current procedures for revocation proceedings violate the Constitution by depriving individuals of constitutional rights—the Fifth Amendment right to indictment and Sixth Amendment right to trial by jury—that accompany criminal prosecutions.[113]

Supervised release violations, criminal and technical, are a major driver of incarceration in the federal system.[114] According to the Administrative Office of the U.S. Courts (AO), of the 45,000 decisions on federal supervised release made in 2023, more than 35 percent (16,351 defendants) resulted in revocations.[115] Nationally, technical violations accounted for 67 percent of the revocations.[116] As noted, the 2020 Sentencing Commission Report, *Federal Probation and Supervised Release Violations*, had incomplete information; of the set of defendants between 2013-2017, 6,341 people were under supervision in the District of Connecticut, and 283 were determined to have violated supervised release; the kind of violation was not specified. And as noted, when a court revokes supervision (as opposed to extending or modifying a supervised release term), incarceration generally follows along with another term of supervised release.[117]

Moving Forward: Reconsidering the Timing, Kinds of Conditions, and Use of Supervised Release

We conclude with recommendations aimed at improving the utility of supervised release. These suggestions have been developed through exchanges with some of the many participants in the system, including prosecutors, probation officers, defense attorneys, judges, healthcare professionals, and researchers.

Under the current practice of many judges, conditions are imposed on individuals sentenced to incarceration and therefore only apply after release, which can be many years later. The statutory purposes for supervised release focus on supporting rehabilitation. Yet given the time lag between imposition and release from custody, some conditions may not be relevant to an individual's flourishing by the time that person is released. Thus, a first recommendation is that sentencing judges, assisted by the United States Probation Office, should limit the conditions initially imposed to the minimum that fulfills the statutory obligation of completing the sentencing. Appendix B provides an illustration. Because federal law provides that sentencing judges retain jurisdiction to modify conditions of supervised release after the entry of a criminal judgment, judges can revisit these conditions, hold hearings if appropriate, and determine whether to modify conditions after an individual begins serving their term of supervised release.[118] This approach would improve the information available to the judge so as to tailor the conditions imposed.

Second, this report has documented the frequency of the imposition of a standard, unvarying set of conditions, rather than a tailored, individualized set. Instead, sentencing judges should reflect on standard conditions set forth in U.S.S.G. § 5D1.3(c) and consider whether each one is both relevant and involves "no greater deprivation of liberty than is reasonably necessary" for the statutory purposes of deterrence, protection of the public, and rehabilitation.[119] As discussed, the Sentencing Commission provides a list of thirteen "standard" conditions that it "recommend[s] for supervised release."[120] That full list is in Appendix C. The Commission has commented that "[s]everal of the conditions are expansions of the conditions required by statute."[121] An example of the selection of conditions comes from the District of Connecticut. One jurist has determined that, in general, six of the thirteen standard conditions are not to be used, and seven are often appropriate in many cases.[122] We attach that list as Appendix D.

Third, sentencing judges have discretionary authority under 18 U.S.C. § 3583(e)(1) to terminate supervised release after one year. Pursuant to § 3583(e)(1), a district court may, after considering the applicable factors set forth in 18 U.S.C. § 3553, "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release." The Supreme Court has explained that supervised release is "for those, and only those, who need[] it."[123] Consistent with this pronouncement, where an individual has been successful on supervised release for a year, sentencing judges should exercise their authority under § 3583(e)(1) to terminate supervised release.[124] In addition to commending that practice, our goal is to learn about its use and the information that courts rely upon in making those determinations.

As noted at the outset, the Sentencing Commission has recently called for changes. In late January 2025, the Commission proposed amendments to the supervised release guidelines.[125] The recommendations related to issues discussed in this report include encouragement of "a court, as soon as practicable after a defendant's release from imprisonment, to conduct an individualized assessment to determine whether it is warranted to modify, reduce, or enlarge the conditions of supervised release"; "that courts should conduct an individualized assessment to determine what discretionary conditions are warranted" and consider "redesignating 'standard' conditions as 'examples of common conditions.'" The Commission also proposed a policy statement that, after considering certain factors, a court "[may][should]" terminate supervised release "any time after the expiration of one year of supervised release."[126]

APPENDIX A, Data Collection Key to the Variables Used

Variable	Description
Defendant Information	
Defendant Name	
File Name	
File Number	
Date Judgment Imposed	
Date Judgment Signed	
District Judge	
Offense Information	
Offense(s) Title & Section	Example: 21 U.S.C. §§ 846, 84l(a)(l) and 84l(b)(l)(B)(ii)
Nature of Offense	Example: Conspiracy to Distribute and to Possess with Intent to Distribute 500 Grams or More of Cocaine
Category of Offense (including all applicable categories)	Categories: Drug Firearms Immigration Fraud / Financial / Tax Robbery / Burglary Sex Offense Other
Type of Crime	Types: Administration of Justice Antitrust Arson Assault Bribery/Corruption Burglary/Trespass Child Pornography

	Commercialized Vice Drug Possession Drug Trafficking Environmental Extortion/Racketeering Firearms Food and Drug Forgery/Counter/Copyright Fraud/Theft/Embezzlement Immigration Individual Rights Kidnapping Manslaughter Money Laundering Murder National Defense Obscenity/Other Sex Offenses Prison Offenses Robbery Sexual Abuse Stalking/Harassing Tax Other
Sex Offense	Y/N
Sentence Information	
Length of Incarceration	Total number in months Time served calculated as actual time detained.
Length of Supervised Release	Total number in months or "Life" if lifetime supervision was imposed.
Mandatory and Standard Conditions	
Unchanged Mandatory/Standard	Y = Judge imposed mandatory and standard conditions without changes. N = Modification of mandatory or standard condition
#3 Mandatory Drug Testing Condition Suspended? (Y/N)	Y = Judge used discretion to suspend the mandatory drug testing condition N = Judge imposed the mandatory drug testing condition.
#4 Mandatory Restitution Checked? (Y/N)	Y = Box next to mandatory condition #4 is checked. N = Box next to mandatory condition #4 is not checked.
#5 Mandatory DNA Collection Checked? (Y/N)	Y = Box next to mandatory condition #5 is checked.

	N = Box next to mandatory condition #5 is not checked.
#6 Mandatory Sex Offense Registration Checked? (Y/N)	Y = Box next to mandatory condition #6 is checked. N = Box next to mandatory condition #6 is not checked.
#7 Mandatory DV Program Checked? (Y/N)	Y = Box next to mandatory condition #7 is checked. N = Box next to mandatory condition #7 is not checked.
Special Conditions	
Special Conditions Imposed	Y/N
Number of Special Conditions	
Education/Vocation Condition	Y/N Description: special condition requiring the defendant to participate in educational or vocational programs or prohibiting the defendant from participating in certain educational or vocational programs or educational or employment settings.
Text of Education/Vocation Condition	
Search Condition	Y/N Description: condition allowing a non-device search of a defendant's residence, automobile, place of employment, or other non-device location.
Text of Search Condition	
Search Condition Standard	Description: standard of suspicion required for a search to occur, if provided in the condition. If none, state "none."
Substance Use Treatment Condition	Y/N Description: special condition requiring the defendant to attend substance use treatment of any type.
Text of Substance Use Treatment Condition	
Substance Use Treatment Inpatient / Outpatient	Inpatient = only inpatient treatment specified. Outpatient = only outpatient treatment specified. Both = inpatient and outpatient treatment specified. Either = inpatient or outpatient treatment specified. Neither = no specification of inpatient or outpatient.
Drug Testing Condition	Y/N

	Description: special condition (different from the mandatory drug testing condition) requiring drug testing of any type. Substance use treatment and drug testing may be the same condition.
Text of Drug Testing Condition	
Mental Health Treatment Condition	Y/N Description: special condition requiring the defendant to attend mental health treatment of any type.
Text of Mental Health Treatment Condition	
Mental Health Treatment Condition – Specific Treatment Modality	Description: modality or type of mental health treatment required by the condition. If none, state "none."
Mental Health Treatment Inpatient / Outpatient	Inpatient = only inpatient treatment specified. Outpatient = only outpatient treatment specified. Both = inpatient and outpatient treatment specified. Either = inpatient or outpatient treatment specified. Neither = no specification of inpatient or outpatient.
Electronic Monitoring Condition	Y/N Description: special condition allowing monitoring of electronic devices. Includes conditions mandating a search or review of devices or requiring the defendant to allow Probation to download monitoring software.
Text of Electronic Monitoring Condition	
Gang Affiliation Condition	Y/N Description: condition prohibiting or restricting the defendant's association with specific gangs or other specific groups.
Text of Gang Affiliation Condition	
Financial Monitoring/Disclosure Condition	Y/N Description: condition requiring the monitoring or disclosure of the defendant's financial information.
Text of Financial Monitoring/Disclosure Condition	
Financial Monitoring/Disclosure Purpose	Restitution = the condition states that the purpose of the condition is to ensure the defendant complies with restitution obligations or that monitoring only occurs if the defendant must pay restitution.

	Sex Offense = the condition states that the purpose of the condition is to ensure the defendant does not purchase or obtain sexual material or engage in inappropriate sexual contact. Both = the defendant has two financial monitoring conditions, one for restitution and one for sex offense purposes. Other = the condition has another stated purpose. Neither = the condition does not have a stated purpose.
Alcohol Condition	Y/N Description: condition banning or restricting the defendant's use of alcohol.
Text of Alcohol Condition	
Location Monitoring (GPS Tracking) Condition	Y/N Description: condition requiring the defendant to submit to location monitoring (GPS tracking).
Text of Location Monitoring Condition	
Location Restriction Condition	Y/N Description: condition restricting where the defendant can go. Includes categorical restrictions, such as restrictions on visiting all places where minors are likely to congregate.
Text of Location Restriction Condition	
Polygraph Testing Condition	Y/N Description: condition requiring the defendant to submit to polygraph testing.
Text of Polygraph Testing Condition	
Association Condition	Y/N Description: condition restricting the people or types of people with whom the defendant can associate.
Association Condition Related to Sex Offense	Y/N Y = Condition restricts association with minors, individuals convicted of sex offenses, or others related to the commission of a sexual offense. N = Condition does not appear related to a sexual offense.
Sexual Offender Treatment Condition	Y/N Description: condition specifically requiring sexual offender treatment or specialized mental health treatment for sex offenders.

	This may be the same condition as the mental health condition above, or it may be a different condition.
Text of Sexual Offender Treatment Condition	
Pornography Condition	Y/N Description: condition banning access to child pornographic material.
Text of Pornography Condition	
Sex Offender Registration Condition	Y/N Description: condition requiring or otherwise related to sex offender registration.
Text of Sex Offender Registration Condition	
Other Special Conditions	Y/N
Number of Misc. Special Conditions	
Text of Misc. Condition 1	
Text of Misc. Condition 2	
Text of Misc. Condition 3	
Text of Misc. Condition 4	
Text of Misc. Condition 5	

APPENDIX B, Statutorily Mandated Conditions

- You shall not commit another federal, state or local offense.
- You shall not unlawfully possess a controlled substance.
- You 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 your legal residence. **(If appropriate)**
- You shall adhere to an installment schedule to pay any fine imposed.
- You shall register under the Sex Offender Registration and Notification Act and comply with the requirements of that Act. **(If appropriate)**
- You shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of your release on supervised release and at least two periodic drug tests thereafter, as determined by the court.
- You shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; 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, the defendant shall adhere to the schedule.
- You shall submit to the collection of a DNA sample 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 (34 U.S.C. § 40702).

APPENDIX C, Sample of the Only Conditions Needed at Sentencing

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

(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, 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.

(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.

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(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.

(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.

(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.

(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.

(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).

(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.

(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.

APPENDIX D, Sample of Selected Conditions

- 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, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 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.
- The defendant shall answer truthfully the questions asked by the probation officer.
- 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.
- 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.
- 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.

- The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

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[1] This report, produced under the auspices of the Liman Center, was written by Liz Beling, Katherine Braner, Elizabeth Clarke, Ibrahim Diallo, Avital Fried, Matthew Jennings, Zoë Mermelstein, Judith Resnik, Katherine Salinas, Julia Udell, and Paige Underwood. Our thanks to the Office of the Federal Public Defender for the District of Connecticut for providing access to its 2023 data, to Federal Judicial Center staff for providing advice on data access and analysis, and to those who reviewed drafts, including Fiona Doherty.

[2] In fiscal year 2023, 92.4 percent of all convicted defendants (58,268 people) were sentenced to a term of imprisonment. U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 13 (2024). Others were sentenced to probation or ordered to pay a fine. *Id.* Approximately 82.5 percent of all convicted defendants (52,907 people) were sentenced to a term of supervised release. *Id.* at tbl.18. Supervised release is imposed on defendants also sentenced to prison; hence 90.8 percent of all people sentenced to prison were also sentenced to a term of supervised release.

[3] Admin. Off. of the U.S. Cts., *Table E-2 - Federal Probation System Statistical Tables for the Federal Judiciary*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2023/12/31 (last visited June 28, 2024). Including state and federal systems, 3.7 million people in the United States (one in 71 adult residents) were under community supervision. DANIELLE KAEBLE, U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE U.S., 2022, at 1, 4 (2024). The majority were on state probation or parole. In 2022, nearly three million people were on state probation, and 640,000 people were on state parole. *Id.* at 21, 28.

[4]Admin. Off. of the U.S. Cts., *Table E-2 - Federal Probation System Statistical Tables for the Federal Judiciary*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2023/12/31 (last visited June 28, 2024).

[5] *See* 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(c)(1)–(13).

[6] Sentencing Reform Act of 1984, Pub. L. No. 98–473, § 3583, 98 Stat. 1837, 1999 (current version at 18 U.S.C. § 3583); *see* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 996-97 (2013).

[7] S. REP. NO. 98-225 at 124 (1983); *see* Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. ONLINE 297, 305 (2022) (outlining the rehabilitative purpose of supervised release).

[8] *See* U.S. SENT'G GUIDELINES MANUAL § 7A2(b) (U.S. SENT'G COMM'N 2023) [hereinafter USSG] (stating that unlike parole, supervised release "does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court").

[9] *See* 18 U.S.C. §§ 3583(c), 3553(a)(2)(B)-(D).

[10] 18 U.S.C. § 3553(a)(2)(A); *see* 18 U.S.C. § 3583(c) (listing § 3553 sentencing factors that a court shall consider when imposing a term of supervised release). Absent from this list is 18 U.S.C. § 3553(a)(2)(A): "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."

[11] *See* 18 U.S.C. § 3583(d); USSG § 5D1.3; U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER 5-12 (2024).

[12] U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2024); U.S. Sent'g Comm'n, *Interactive Data Analyzer*, https://ida.ussc.gov/analytics/saw.dll?Dashboard (last visited June 28, 2024). U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER (2024); *see also* U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER (2023); U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER (2022). A version of this volume has been issued at least since 2014. U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER (2014).

[13] U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 49-60 (2010).

[14] *Id*. at 4, 61-62.

[15] *Id*. at 49.

[16] As the Commission explained, "As the purpose of the study was to determine the impact of the Chapter Four rules regarding revocations, the Commission collected information only for convictions that ultimately received criminal history points. These convictions are referred to as 'scored convictions' in this publication. For each 'scored conviction,' the Commission collected the following information: 1. Whether the offender had a term of probation, parole, or supervised release for the conviction that was revoked; 2. The number of points the conviction received; 3. The number of points the conviction would have received without the revocation(s); and 4. Whether the conviction would have been stale without the revocation(s)." *Id.* at 8.

[17] Pursuant to a statutory directive at 28 U.S.C. § 994(h), the Commission promulgated the career offender sentencing enhancement (§ 4B1.1) to ensure that certain repeat drug traffickers and repeat violent offenders are sentenced "at or near the maximum [term of imprisonment] authorized." When applied, the sentencing enhancement at § 4B1.1 typically results in a guidelines range significantly greater than would otherwise apply.

[18] TRACEY KYCKELHAHN & S. ALEXANDER MAISEL, U.S. SENT'G COMM'N, REVOCATIONS AMONG FEDERAL OFFENDERS 8 (2019).

[19] *Id.* at 11.

[20] U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS (2020).

[21] *Id.* at 3-4.

[22] *See* U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE (2010) ("At this time, information about specific conditions of supervised release imposed by the courts and revocation and termination information are not available in the Commission's datasets."); Stefan R. Underhill, *Supervised*

Release Needs Rehabilitation, 10 VA. J. CRIM. L. 1, 12 n.60 (2024) (discussing gaps in Sentencing Commission data on revocation).

[23] 18 U.S.C. § 3583(a) (providing for mandatory supervised release if convicted of a first-time domestic-violence offense as defined in 18 U.S.C. § 3561(b)).

[24] 18 U.S.C. § 3583(k) (minimum supervised release term of five years if convicted of any offense under 18 U.S.C. §§ 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425).

[25] 18 U.S.C. § 3583(j).

[26] 21 U.S.C. §§ 841, 846, 960, 963 (mandating supervised release terms upon conviction).

[27] 18 U.S.C. § 3583(k); *see also* 18 U.S.C. § 3583(a) ("The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute.").

[28] *See* 18 U.S.C. § 3583(a); CONG. RSCH. SERV., RL31653, SUPERVISED RELEASE (PAROLE): AN OVERVIEW OF FEDERAL LAW 1 (2015) ("Except in specified drug and domestic violence cases, courts may technically exercise discretion to decline to impose supervised release altogether for a particular defendant.").

[29] 18 U.S.C. § 3583(c). The Sentencing Guidelines also address supervised release in Chapter Five, Part D. *See* USSG §§ 5D1.2, 5D1.3.

[30] 18 U.S.C. § 3553(a).

[31] USSG § 5D1.1. The Sentencing Guidelines provide that a court "shall impose" a term of supervised release in most felony cases, *id.*, but Application Note 1 to § 5D1.1 provides that a court "may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary." USSG § 5D1.1 cmt. app. n.1. Furthermore, the Guidelines are advisory after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *See United States v. Parker*, 508 F.3d 434, 442 (7th Cir. 2007) ("*Booker* is applicable in this context; supervised release is discretionary absent a separate statutory provision making it mandatory.").

[32] USSG § 5D1.1(c). While the Sentencing Guidelines recommend against imposing a term of supervised release when deportation is likely, supervised release is imposed in 68% of immigration cases. U.S. SENT'G COMM'N, 2023 ANNUAL REPORT 18. The commentary to the Sentencing Guidelines states that judges should "consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case." USSG § 5D1.1, cmt. app. n.5. According to the Sentencing Commission, the majority of cases in which supervised release was not imposed involve non-citizens subject to deportation; in most immigration cases, supervised release was used. U.S. SENT'G COMM'N, FEDERAL OFFENDERS SUBJECT TO SUPERVISED RELEASE 4 (2024).

[33] USSG § 5D1.1, cmt. app. n.3.

[34] *See, e.g.*, 18 U.S.C. § 3583(j)-(k); 21 U.S.C. § 841(b)(1)(A).

[35] *See* 18 U.S.C. § 3583(k).

[36] *See* 21 U.S.C. § 841(b)(1).

[37] USSG § 5D1.2(a)-(b).

[38] *See, e.g.*, United States v. Kent, 209 F.3d 1073, 1078 (8th Cir. 2000) (quoting United States v. Johnson, 48 F.3d 806, 808 (4th Cir. 1995)) ("[T]he imposition of a sentence, including any terms for probation or supervised release, is a core judicial function."); *see* U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER 6 (2024).

[39] 18 U.S.C. § 3583(d).

[40] 18 U.S.C. § 3583(d); *see* USSG § 5D1.3(a); Stefan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 VA. J. CRIM. L. 1, 9-10 (2024) (describing mandatory conditions).

[41] 18 U.S.C. §§ 3563(a)(5), 3583(d).

[42] 18 U.S.C. § 3583(d)(3).

[43] 18 U.S.C. § 3583(d)(3).

[44] USSG § 5D1.3(c), p.s.; *see* Stefan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 VA. J. CRIM. L. 1, 10 (2024) (describing standard conditions). The Administrative Office of the United States Courts also includes 13 standard conditions of supervised release in Form AO-245B (Judgment in a Criminal Case). Form AO-245B (Judgment in a Criminal Case), https://www.uscourts.gov/sites/default/files/ao245b.pdf.

[45] *See* U.S. Probation and Pretrial Services, District of Connecticut, *Conditions of Supervision*, CTP.USCOURTS.GOV, https://www.ctp.uscourts.gov/conditions-supervision (last visited June 28, 2024).

[46] United States v. Truscello, 168 F.3d 61, 63 (2d Cir. 1999). *See also* United States v. Trotter, 321 F. Supp. 3d 337, 351 (E.D.N.Y. 2018).

[47] U.S. Probation and Pretrial Services, District of Connecticut, *Conditions of Supervision*, CTP.USCOURTS.GOV, https://www.ctp.uscourts.gov/conditions-supervision (last visited June 28, 2024).

[48] The most recent version is Admin. Off. of the U.S. Cts., *Overview of Probation and Supervised Release Conditions*, U.S. CTS. (2024), https://www.uscourts.gov/file/20262/download (last visited Oct. 30, 2024).

[49] *Id.*

[50] United States v. Boles, 914 F.3d 95 (2d Cir. 2019). *But see* United States v. Cambell, 77 F.4th 424, 431 (6th Cir. 2023) (risk notification as revised in 2016 is not impermissibly vague.)

[51] *See* USSG § 5D1.3(d), p.s.; U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER 11-12 (2024).

[52] USSG § 5D1.3(d), p.s.

[53] USSG § 5D1.3(d), p.s.

[54] USSG § 5D1.3(e), p.s.

[55] Whether providers' conditions vary from those imposed by judges is not clear from materials available to us. We know of no compendium of conditions or modes of accessing providers' specific contracts that would enable understanding them.

[56] USSG § 5D1.3(d), p.s.

[57] Stefan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 VA. J. CRIM. L. 1, 10 (2024).

[58] United States v. Simmons, 343 F.3d 72, 81 (2d Cir. 2001).

[59] *See, e.g.*, United States v. Carlineo, 998 F.3d 533, 537 (2d Cir. 2021) (vacating condition requiring participation in a restorative justice program as unconstitutionally vague); United States v. Loy, 237 F.3d 251, 265 (3d Cir. 2001) (vacating condition prohibiting all forms of pornography as unconstitutionally vague); United States v. Reeves, 591 F.3d 77, 81-82 (2d Cir. 2010) (vacating condition requiring reporting of any significant romantic relationship to probation as unconstitutionally vague); United States v. Hall, 912 F.3d 1224, 1227 (9th Cir. 2019) (vacating condition limiting contact with son to "normal familial relations" as unconstitutionally vague); United States v. Adkins, 743 F.3d 176, 194 (7th Cir. 2014) (vacating condition prohibiting supervisee from visiting a place where sexually stimulating material is available as unconstitutionally vague); *cf.* United States v. Evans, 883 F.3d 1154, 1162-64 (9th Cir. 2018) (holding that three standard conditions were unconstitutionally vague).

[60] United States v. Carlineo, 988 F.3d 533, 536 (2d Cir. 2021).

[61] *Id.*

[62] *See, e.g.*, United States v. Macmillen, 544 F.3d 71, 76 (2d Cir. 2008) (holding that a condition prohibiting the supervisee visiting locations where "children are likely to congregate" was not unconstitutionally vague); United States v. Abbate, 970 F.3d 601, 605 (5th Cir. 2020) (holding that a condition prohibiting "pornography" was not unconstitutionally vague); United States v. Simmons, 343 F.3d 72, 82 (2d Cir. 2003) (holding that a condition prohibiting "pornographic material" not was unconstitutionally vague).

[63] *See, e.g.*, United States v. Canfield, 893 F.3d 491, 495-98 (7th Cir. 2018) (reversing numerous conditions because the district court failed to provide an adequate rationale); United States v. Burroughs, 613 F.3d 233, 244 (D.C. Cir. 2010) (vacating internet-monitoring and log-keeping conditions as not reasonably related to statutory factors); *cf.* United States v. Johnson, 446 F.3d 272, 278 (2d Cir. 2006) (finding that conditions requiring sex offender polygraph testing and internet ban were reasonably related to statutory sentencing factors).

[64] *See, e.g.*, United States v. Ramos, 763 F.3d 45, 62-63 (1st Cir. 2014) (vacating computer and internet restrictions in light of other computer conditions already in place); United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005) (holding that a condition barring access to computer and internet posed a greater

deprivation of First Amendment rights than was reasonably necessary); United States v. Sofsky, 287 F.3d 22, 126 (2d Cir. 2002) (holding that an internet ban condition inflicts a greater deprivation of liberty than is reasonably necessary).

[65] United States v. Sims, 92 F.4th 115, 123 (2d Cir. 2024) (quoting United States v. Eaglin, 913 F.3d 88, 99-100 (2d Cir. 2019). Examples include bans on adult pornography if not reasonably related to permissible sentencing factors. *Compare Eaglin*, 913 F.3d at 99-100 *and* United States v. Williams, 836 Fed. App'x 51, 53-54 (2d Cir. 2020) (summary order) (vacating a lifetime adult pornography ban) *with* United States v. Simmons, 343 F.3d 72, 82 (2d Cir. 2003) (upholding a pornography restriction as reasonably related to relevant sentencing factors) *and* United States v. Springer, 684 Fed. App'x 37, 40 (2d Cir. 2017) (summary order) (same). See also United States v. Betts, 886 F.3d 198, 202 (2d Cir. 2018). The Second Circuit has vacated and remanded special conditions to obtain further explanations about the reasons for imposition. *See e.g.*, United States v. McQueen, No. 22-837, 2023 WL 4009742, at *3 (2d Cir. June 15, 2023); United States v. Hardnett, 802 F. App'x 4, 7 (2d Cir. 2020).

[66] *See* United States v. Myers, 426 F.3d 117, 126 (2d Cir. 2005).

[67] *See* United States v. Reeves, 591 F.3d 77, 82-83 (2d Cir. 2010) (holding that a special condition was not narrowly tailored because it required reporting of *any* significant romantic relationship, even if that relationship would not bring the defendant, who was convicted of possession of child pornography, into contact with children).

[68] *Myers*, 426 F.3d at 126.

[69] *See, e.g.*, *Eaglin*, 913 F.3d at 99 (vacating internet ban condition); United States v. Hamilton, 986 F.3d. 413, 422-23 (4th Cir. 2021) (rejecting claim that lifetime internet ban was a greater deprivation of liberty than reasonably necessary); United States v. Newell, 915 F.3d 587, 591 (8th Cir. 2019) (upholding internet ban condition).

[70] *Eaglin*, 913 F.3d at 97-98; *see also* United States v. Gonyea, No. 22-1722-CR, 2023 WL 7478489, at *2 (2d Cir. Nov. 13, 2023) (relying on *Eaglin* to vacate a total internet ban condition); United States v. Gladle, No. 23-6097, 2024 WL 1478719, at *2 (2d Cir. Apr. 5, 2024) (same).

[71] *Eaglin*, 913 F.3d at 97. In 2016, in response to appellate court decisions, the Sentencing Commission revised certain conditions in §5D1.3 that had been challenged as vague or constitutionally suspect. The purpose of the amendment was "to make [the conditions] easier for defendants to understand and probation officers to enforce." USSG App. C, amend. 803 (effective Nov. 1, 2016).

[72] *See, e.g.*, United States v. Loy, 237 F.3d 251, 265 (3d Cir. 2001); United States v. Matta, 777 F.3d 116, 122-23 (2d Cir. 2015); United States v. Hart, 852 F. App'x 596, 604 (2d Cir. 2021); United States v. Fefee, No. 22-3070, 2024 WL 763413, at *1 (2d Cir. Feb. 26, 2024); United States v. Dority, No. 23-7696-CR, 2024 WL 4634938, at *3 (2d Cir. Oct. 31, 2024); United States v. Nash, No. 23-6346, 2024 WL 3320861, at *2 (2d Cir. July 8, 2024).

[73] *Matta*, 777 F.3d at 122 ("The power to impose special conditions of supervised release . . . is vested exclusively in the district court."); United States v. Kent, 209 F.3d 1073, 1078 (8th Cir. 2000) (quoting United States v. Johnson, 48 F.3d 806, 808 (4th Cir. 1995)) ("[T]he imposition of a sentence, including any terms for probation or supervised release, is a core judicial function.").

[74] *See Matta*, 777 F.3d at 122 ("a district court may delegate to the probation officer decision-making authority over certain minor details of supervised release—for example, the selection of a therapy provider or treatment schedule.").

[75] *Id.*

[76] *Id.*

[77] The District Court Clerk's Office provided this number via email correspondence. The Sentencing Commission reports that 355 individuals were sentenced in the District of Connecticut in 2023. U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2023, DISTRICT OF CONNECTICUT 3 tbl.1 (2024).

[78] *Integrated Database: IDB Criminal 1996-Present*, FED. JUD. CTR. (2024), https://www.fjc.gov/research/idb/interactive/24/IDB-criminal-since-1996.

[79] *Id.*

[80] A word on methodology is in order. FDO provided the Liman team with a list of FDO defendants whose files had "closed" after sentencing on a trial guilty verdict or guilty plea disposition from January 1, 2023 through March 5, 2024 (the date of our request for data from FDO). FDO accessed the initial list from its case management system, Defender Data. The initial defendant list included client name, case type code, closure date, disposition code, and case notes. Prior to sharing the materials with students working under her supervision, an FDO legal fellow removed all closing notes from the list. The closure date on the list indicated the date that the attorney working on the case marked it as "closed" in the Defender Data system. Attorneys will typically "close" a case soon after sentencing, but this process is subject to delay. Therefore, closure dates are not perfect proxies for sentencing or judgment date. Thus, when we first reviewed a list of defendants with 2023 closure dates, some had judgments issued in late 2022. Similarly, some defendants had judgments issued in 2023 but were not "closed" in Defender Data until early 2024. FDO was not able to compile a list based on sentencing or judgment date, only closure date. We narrowed down the initial list of 107 defendants—two entries resulting from a guilty trial verdict and 105 entries resulting from a guilty plea conviction—to the final set of 74 defendants. To examine one full year of FDO data, we excluded from the initial list all defendants whose cases closed on or after January 1, 2024 (14 entries). We then used the PACER online system to access the final judgment for each on our list. Using the information available on PACER dockets and in the judgments, we excluded (1) defendants from jurisdictions outside of the District of Connecticut (four entries); (2) files in which a judgment was issued before January 1, 2023 but the file did not terminate until 2023 (17 entries); and (3) "duplicate" defendants in which the defendant was charged in more than one indictment and received one judgment (two entries). We excluded duplicates in which the defendant was sentenced in separate filings but with one judgment (i.e., there are no duplicate judgments in the final set of 74). The final set does include one set of two cases involving the same defendant—there, the defendant was sentenced in 2023 in two separate filings with different judgments. We then used PACER to determine whether any of the filings closed between January 1, 2024 and March 5, 2024 (which had previously been excluded) included judgments issued in 2023. We identified four such instances and added those entries back into the list. The final set included 74 entries with one criminal judgment. For reasons related to the Defender Database, our set of 74 likely does not include all FDO defendants with judgments issued in 2023. The final set does not account for defendants inadvertently left out of the Defender Data system or defendants against whom a judgment was issued in 2023, but the filing was not "closed" in Defender Data until after March 5, 2024. The set of 74 does not match the IDB data, which identified 89

criminal defendants represented by a public defender for FY 2023. This difference is likely due in part to the different range—the FDO data is from calendar year 2023, while the IDB data is from fiscal year 2023.

[81] The USAO for the District of Connecticut issued 304 press releases about sentenced defendants in 2023. *See News and Press Releases*, U.S. ATTY'S OFF., DISTRICT OF CONN., https://www.justice.gov/usao-ct/pr (filtering for keyword search = "sentenced") (last visited Oct. 30, 2024). Those releases may permit identifying judgments for defendants were not represented by the FDO.

[82] To determine "type of crime," we first used the statute(s) of conviction to determine the appropriate sentencing guideline. We then cross-checked the relevant sentencing guideline with the Sentencing Commission's description of each type of crime category to determine the appropriate type of crime. *See* U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A (2024). This process mirrors in part the Sentencing Commission's process for obtaining type of crime information. *See id.* The difference is that for defendants with more than one count with different statutes of conviction (for example, a gun offense and a drug offense), we determined the type of crime for each statute of conviction and included all types of crime in the final dataset. The Sentencing Commission determines one type of crime per case using the primary guideline detailed in the presentence report, or the count of conviction with the highest statutory maximum. *See id.* We decided to diverge from the Sentencing Commission's process because (1) without accessing the presentence report for each defendant in our final defendant list, it was not possible to determine the primary guideline; and (2) supervised release conditions are often based on the totality of a defendant's criminal behavior, not just behavior leading to the most severe count.

[83] *See, e.g.*, U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 18 (2024). The type of crime variable accounts for 30 different "types" of crime. *See id.*

[84] During the auditing stage, we added the following variables to the dataset: date judgment signed, type of crime, probation length, mental health treatment modality, search condition standard, and financial monitoring purpose.

[85] During the auditing stage, we deleted the following variables from the dataset: magistrate judge, other sex offense conditions, and sex offense association conditions.

[86] During the auditing stage, we adjusted the category of offense variable to create broader categories than those used during the initial reviews. The final categories are Drug, Firearms, Immigration, Fraud/Financial/Tax, Robbery/Burglary, Sex Offense, and Other. We also adjusted the search condition variable to clarify that it only applies to non-device search conditions. The electronic monitoring condition variable accounts for device search conditions. Finally, we removed the sex offense association conditions variable and accounted for all association conditions (sex offense-related and not) under the general association condition variable. We then added a variable to note whether the association condition is related to a sex offense or not.

[87] For a probation-only sentence, we are told that judges in the District of Connecticut generally add conditions that are similar to those of supervised release. *See* USSG § 5B1.3.

[88] One of the defendants was convicted of an escape from custody. According to the judgment, the court did not impose a term of supervised release because the individual was subject to a lengthy period of supervised release. The second was a conviction for re-entry of a removed alien who was likely subject to deportation.

[89] For all individuals sentenced to time served, we used the actual time served in jail (for example, nine months) prior to sentencing for the average prison sentence calculation and other calculations that rely on length of prison sentence. For individuals detained before trial, we calculated time served as the time between arrest date and sentencing date. For individuals released on bond before trial, we calculated time served as the time between arrest and order of release. This process is consistent with that used by the Sentencing Commission. *See* U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A (2024) ("When sentences are expressed as 'time served' on the J&C, Commission staff uses the dates in federal custody to determine the length of time served provided the individual has been in custody the entire time. If the person has been in and out of custody, or the start date is unclear or missing, then the Commission assigns a value of one day as a minimal time served amount for these cases.").

[90] *See* 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A (2024).

[91] U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 18 (2024); *see Interactive Data Analyzer*, U.S. SENT'G COMM'N, https://ida.ussc.gov/analytics/saw.dll?Dashboard (last visited June 28, 2024) (filtering for District = Connecticut). The nationwide average was also 47 months. *Id.* Importantly, the Data Analyzer tool calculates average for the fiscal year, whereas our dataset includes defendants from calendar year 2023.

[92] U.S. SENT'G COMM'N, SUPERVISED RELEASE PRIMER 4 (2024); 18 U.S.C. § 3583(b).

[93] *See* 18 U.S.C. § 3583(k).

[94] USSG § 5D1.3(d), p.s.

[95] USSG § 5D1.1(c).

[96] The model conditions language from the national probation office and the District of Connecticut's probation office includes the phrase "[y]ou must pay all or a portion of costs . . . based on your ability to pay as recommended by the probation officer and approved by the Court." One source of funding for the Probation Office to provide some support comes from the Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

[97] The Second Circuit has held that there are limits on the authority that can be delegated probation office to require inpatient treatment without the permission of the court. *See supra* note 73.

[98] The inclusion of a condition in the "miscellaneous" category may also have been included in the count for other specified types of conditions. We double counted some special conditions as both miscellaneous and a specified type of condition when the condition language included multiple mandates that spanned more than one category. For example, one special condition stated: "You must serve the first two months of supervised release in a halfway house. Thereafter, you must serve the following two months of supervised release on home detention with GPS monitoring. The only exceptions to the home detention condition are for employment, visits to the Probation Office or your attorney, court-ordered treatment and educational or vocational training, and medical appointments." We included this condition in the count of miscellaneous (for the home detention mandate), location monitoring, and location restriction conditions.

[99] U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 18 tbl.3 (2020).

[100] VINCENT SCHIRALDI, MASS SUPERVISION: PROBATION PAROLE, AND THE ILLUSION OF SAFETY AND FREEDOM 17 (2023). Due to the concerns with supervised release, judges, correctional officials, scholars, and activists have advocated the increased use of early termination to reduce the costs associated with supervised release and to encourage rehabilitation more effectively. Jacob Schuman, *Terminating Supervision Early*, 62 AM. CRIM. L. REV (forthcoming 2025) (manuscript at 5-7).

[101] *See* U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT ON RESOURCES AND DEMOGRAPHIC DATA FOR INDIVIDUALS ON FEDERAL PROBATION OR SUPERVISED RELEASE 12-13 (2023) (discussing the "significant barriers" faced by individuals reentering society after incarceration); AM. C.L. UNION & HUM. RTS. WATCH, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 153-61 (2020) (describing financial and housing challenges faced by people returning from incarceration).

[102] Ingrid A. Binswanger, Marc F. Stern, Richard A. Deyo, Patrick J. Heagerty, Allen Cheadle, Joanne G. Elmore, Thomas D. Koepsell, *Release from Prison - A Higher Risk of Death for Former Inmates*, 356 N. Eng. J. Med. 157 (2007). *See also* Jenerius A. Aminawung, Lisa B. Puglisi, Brita Roy, Nadine Horton, Johanna E. Elumn, Hsiu-Ju Lin, Kirsten Bibbins-Domingo, Harlan Krumholz, and Emily Wang, *Cardiovascular Disease Risk Factor Control Following Release from Carceral Facilities: A Cross-Sectional Study*, 12 JAHA 124 (2024); Brian McKenna, Jeremy Skipworth, Rees Tapsell, Dominic Madell, Krishna Pillai, Alexander Simpson, James Cavney & Paul Rouse, *A Prison Mental Health In-Reach Model Informed by Assertive Community Treatment Principles*, 25 CRIM. BEHAV. & MENTAL HEALTH 429 (2015). Other forms of conditional release have likewise raised concerns. A study of data from focus groups of adults on probation and of probation officers concluded that probation added fiscal, time, and emotional burdens to individuals "who were in precarious situations." Michelle S. Phelps & Ebony L. Ruhland, *Governing Marginality: Coercion and Care in Probation*, 62 SOC. PROBS. 799, 800 (2022); *see also* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 342 (2016).

[103] Emily A. Wang, Yongfei Wang & Harlan M. Krumholz, *A High Risk of Hospitalization Following Release from Correctional Facilities in Medicare Beneficiaries: A Retrospective Matched Cohort Study, 2002 to 2010*, 173 JAMA INT. MED. 1621 (2013).

[104] *See* U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT ON RESOURCES AND DEMOGRAPHIC DATA FOR INDIVIDUALS ON FEDERAL PROBATION OR SUPERVISED RELEASE 4-8 (2023) (describing U.S. Probation and Pretrial Services resources available to individuals on supervised release).

[105] *See id.* at 14. In the survey of Federal Public and Community Defenders, 44 percent of respondents reported that clients were "mostly left on their own" during reentry. *Id.*

[106] *Id.* at app. A, https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20Appendix%20A%20as%20pdf.pdf.

[107] In 2022, Connecticut was approved for a Section 1115 waiver to provide expanded Medicaid-funded inpatient and residential services to individuals with substance use disorders. Though the waiver increases treatment options for a population in dire need of services, our survey results show that it has also caused some short-term negative effects.

[108] *See* 18 U.S.C. § 3583(e).

[109] *Id*.

[110] 18 U.S.C. § 3583(g).

[111] 18 U.S.C § 3583(d).

[112] *See* Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. ONLINE 297, 306 (2022).

[113] *See* United States v. Peguero, 34 F.4th 143, 179 (2d Cir. 2022) (Underhill, J., dissenting); Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. ONLINE 297, 322-25 (2022); Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1890 (2022) ("By allowing the government to increase and ease punishment for crimes committed under supervised release, the law of revocation results in unfair double punishment and erodes constitutional rights."). The Supreme Court has not addressed this argument directly. In 2019, the Court held unconstitutional a provision of § 3583 that mandated a prison sentence of at least five years upon revocation of supervised release if the court found that the defendant had previously committed one of several enumerated offenses. United States v. Haymond, 588 U.S. 634 (2019). Justice Gorsuch's plurality opinion relied on United States v. Alleyne to conclude that the statute violated the Fifth and Sixth Amendments by altering "the legally prescribed range of allowable sentences" based on judicial factfinding alone. *Id.* at 646. In a concurring opinion, Justice Breyer concluded the statute was unconstitutional not because of *Alleyne*, but because the statute looked "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach." *Id.* at 659 (Breyer, J., concurring*). See also*, Kate Stith, *Apprendi's Two Constitutional Rights*, 99 N.C. L. REV. 1299, 1304 (2021).

[114] Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1819 (2022).

[115] Admin. Off. of the U.S. Cts.*, Table E-7A- Federal Probation System Statistical Tables for the Federal Judiciary (December 31, 2023)*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2023/12/31 (last visited June 28, 2024).

[116] Admin. Off. of the U.S. Cts.*, Table E-7A - Federal Probation System Statistical Tables for the Federal Judiciary (December 31, 2023)*, U.S. CTS., https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2023/12/31 (last visited June 28, 2024); *see also* U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT ON RESOURCES AND DEMOGRAPHIC DATA FOR INDIVIDUALS ON FEDERAL PROBATION OR SUPERVISED RELEASE 14-17 (discussing revocation data for fiscal years 2021 and 2022).

[117] See U.S. DEP'T OF JUST.*, supra* note 113, at 17 ("After their sentences of incarceration, approximately 67% of all revoked probationers and supervised releasees were sentenced to a new supervision term."); U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 34 (2020) (finding that from 2013-2017, courts primarily imposed prison terms at violation hearings, with an average term of imprisonment of 11 months); *see also* Phelps & Ruhland, *supra* note 100, at 801 ("The United States is . . . unique in its high revocation rates."); Fiona Doherty, *"Breach of Trust" and U.S. v. Haymond*, 34 FED. SENT'G REP. 274, 274-75 (2022) (arguing that the rise of "breach of trust" analysis in the 1990s contributed to rising revocation punishments, including increased reimprisonment). An analysis of data from state post-release supervision in Kansas found "post-release supervision caused large increases in imprisonment with no detectable impact on reoffending." Ryan Sakoda, *Abolish or Reform? An Analysis of Post-Release Supervision* (June 14, 2024), https://ssrn.com/abstract=4670939.

[118] *See* 18 U.S.C. § 3583(e)(2); Fed. R. Crim. P. 32.1(c). Rule 32.1(c)(1) typically requires a hearing before a condition is modified, a defendant can waiver a hearing, or " if the relief sought is favorable to the person and does not extend the term of . . . supervised release" and the attorney for the government is given notice and a reasonable opportunity to object but does not do so. Fed. R. Crim. P. 32.1(c)(1)–(2).

[119] *See* 18 U.S.C. § 3583(d).

[120] *See* U.S.S.G. § 5D1.3(c)(1)–(13).

[121] *Id.*

[122] *See United States v. Jackson*, No. 3:23-cr-00065(SRU), ECF No. 64 (D. Conn. Jan. 9, 2025) (imposing only conditions (1); (2); (4); (5); (6); (7); and (13) of the standard conditions contained in U.S.S.G. § 5D1.3(c)(1)–(13)).

[123] *United States v. Johnson*, 529 U.S. 694, 709 (2000).

[124] A petition to terminate supervised release maybe brought by the supervised individual or the United States Probation Office. A sentencing judge may, sua sponte, direct the Probation Office to bring such a petition.

[125] U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY) (Jan. 24, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250124_prelim_rf.pdf.

[126] *Id.* at 4.

BRENNAN CENTER FOR JUSTICE

March 3, 2025

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

RE: Proposed Amendments to the Sentencing Guidelines, January 24, 2025

Dear Judge Reeves and Members of the Commission:

The Brennan Center for Justice at New York University School of Law welcomes the opportunity to comment on amendments to the Sentencing Guidelines proposed on January 24, 2025.

We have previously reached out to you about our views on sentencing matters, including proposing several priorities for the 2024-2025 amendment cycle on July 15, 2024, and participating in the Commission's meeting on proposed priorities on December 4, 2024. In this outreach, we urged the commission to amend the supervised release guidelines to focus on rehabilitation, reduce the revocation of supervision due to technical violations, require judges to explain their decision to impose supervision, and generally encourage shorter supervised release terms. The Commission's proposed amendments include many of these ideas, which are backed by a large body of research demonstrating supervision and intervention resources are used to best effect when tailored to both an individual's risk factors of reoffending, and their protective factors that help alleviate that risk.

Additionally, we requested the Commission continue to revise the drug sentencing guidelines, placing greater emphasis on a defendant's role in the commission of an offense and less on drug quantity. Weight-driven sentences often lead to extraordinarily harsh sentences, even if a defendant does not have a leadership role in a drug trafficking organization. We are pleased to see that many of our suggestions have been included in the Commission's proposed amendments.

Our comments today are in response to the Commission's proposal to amend the *Guidelines Manual* on January 24, 2025, to improve supervised release and sentencing for drug offenses.

Limit Supervised Release Revocations for Technical Violations

When supervised release is revoked, a revocation table is used to determine the length of re-imprisonment. This table contains three grades: A, B, and C, with Grade A covering the most serious offenses (and longest terms of re-incarceration) and Grade C being minor offenses (with shorter terms of re-incarceration). The Commission proposes creating a new Grade D for technical violations of supervision. The consequences for a Grade D violation in the Commission's proposal would be similar to Grade C, generally less than a year of incarceration.

While we appreciate the Commission's recognition that technical violations are minor and merit their own distinct grade, this change will not prove impactful if re-incarceration is presumed for violations. As the Commission knows, revocation to prison is a severe, expensive, and mostly ineffective sanction for many types of supervision violations, especially for technical violations of supervision. Such violations consist of a broad array of conduct including failing a drug test, or missing an appointment with a supervision officer, but do not include the commission of a new crime. In 2021, of the 10,000 people who were sent back to prison from post-release supervision, 60 percent were reimprisoned due to technical violations. We therefore urge the Commission to clarify that that revocation is only appropriate for Grade D violations when required by statute, and judges should otherwise focus on community-based responses. This will provide clarity to judges and the U.S. Probation and Pretrial Services Office that revocation isn't presumptively appropriate.

Sentence Drug Offenses Based on Role, Not Weight

When a defendant is sentenced for a federal drug offense, several factors are considered: any serious bodily injury or death that results from the offense, the defendant's prior criminal history, and the quantity of drugs. The quantity of drugs is measured using a Drug Quantity Table that considers the type of drug and weight. The Commission proposes reducing the overreliance on drug weight in two ways. First, the Commission is considering changing the base offense level in the Drug Quantity Table, ensuring the table is used for more significant offenses. Second, the Commission would create a new Trafficking Functions Adjustment that would reduce drug sentences in certain circumstances. This new function would avoid unfair outcomes and ensure that despite the quantity of drugs involved, a low-level participant (such as street-level dealer, for example) is not held as culpable, and punished similarly, as a manager or leader of a drug trafficking enterprise.

We appreciate the Commission's recognition that quantity is a poor proxy for culpability. The application of lengthy mandatory minimum sentences for low-level, high-drug quantity offenses can lead to an enormous cost for incarcerated people, their families, and taxpayers, but it does not significantly disrupt a drug trafficking organization, as these roles are easily replaced by leaders and organizers. We therefore urge the Commission to reduce the impact of drug quantity on sentence length to the greatest extent possible. We also

urge the Commission to structure the Trafficking Functions Adjustment in an open-ended manner that allows judges to consider real world fact patterns in cases.
Additionally, the Commission raises several issues for comment about relevant or mitigating factors that should be considered. We would suggest that the Commission narrow the weapon function from "possess a firearm or other dangerous weapon" to "brandish or discharge a firearm or other dangerous weapon." Possessing but not brandishing or discharging a weapon can lead to a significant sentence enhancement. However, if a weapon is not drawn or used during an offense, it is not being used to threaten or cause violence, making this enhancement inappropriate. This change would better ensure that these enhancements are only applied when there is intent to cause harm.

In closing, we thank the Commission for the opportunity to comment on the proposed amendments to the sentencing guidelines. We appreciate the Commission's willingness to meet with stakeholders and incorporate suggestions into the amendment process, and we would be happy to discuss these matters further.

Sincerely,

JC Hendrickson
Senior Policy Strategist
Brennan Center for Justice
at NYU School of Law[1]

[1] The Brennan Center expresses enormous thanks to the following staff who provided assistance and counsel drafting this letter: Ram Subramanian, Hernandez Stroud, and Rosemary Nidiry.

Lyn Hunstad
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February 27, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Lyn Hunstad, and I am submitting this comment letter on behalf of Circle Consulting. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. I applaud your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime and recidivism rates in certain circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions. This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings. Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized. According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children, and community. For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year. Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has

found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD. Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder. Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019, and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024. There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime. Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges while

75% of incarcerated women have been victims of domestic violence at some point in their life. Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.

4. Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.

The Commission should provide guidance that allows for the lowest base offense level.

7. Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.

The Commission should provide guidance that allows for the lowest base offense level.

* * *

Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life. These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the

Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment. We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Lyn Hunstad

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510.663.6500
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December 19, 2024

U.S. Sentencing Commission
[redacted]
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Washington, D.C. 20002-8002

Subject: Recommendations for Reforms, Aligning Federal Drug Sentencing Guidelines and Supervised Release with the Commission's Mission

Dear Members of the U.S. Sentencing Commission,

Thank you for inviting us and our colleagues from other organizations to speak with your staff on December 4, 2024. Bringing criminal justice advocates together to discuss ideas for more fair and just drug sentencing guidelines and successful reentry is an important step in the commission's efforts to serve the public interest. At Dream.Org, we believe in closing prison doors and opening doors of opportunity, and that some of our nation's most pressing challenges - like mass incarceration - can also become opportunities for common ground. Guided by a commitment to bipartisan collaboration and innovative solutions, we have brought together our Federal Advisory Council of directly impacted leaders, policymakers, and allies across political divides to advance reforms that create a fairer, safer, and smaller criminal justice system.

As part of our ongoing efforts to transform the criminal justice system, we urge the U.S. Sentencing Commission to adopt reforms to ***federal drug sentencing guidelines*** and ***supervised release policies.*** These reforms align with the Commission's mission to promote fairness, consistency, and proportionality in sentencing, while advancing evidence-based practices that prioritize justice, equity, and public safety.

By addressing these critical issues, we can foster justice, reduce recidivism, and ensure that sentencing guidelines reflect the dignity and humanity of every individual. We have listed our recommendations below, beginning with our suggested reforms to federal drug sentencing guidelines.

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1. **Move Away From Weight-based Sentencing Frameworks**

   The Commission should move beyond weight-based sentencing frameworks, which currently overemphasize drug weight as a proxy for culpability. This approach often results in disproportionately harsh sentences for low-level offenders, such as couriers or individuals with limited roles in drug operations. Drug weight is influenced by market dynamics and does not always reflect a defendant's intent or actual harm caused. Reforming this approach to consider individual involvement, intent, and harm would align with the Commission's commitment to proportionality and fairness.

2. **Prioritize Alternatives to Incarceration**

   There is a critical need to prioritize treatment and rehabilitation over punitive incarceration, particularly for individuals with substance use disorders. Recognizing addiction as a public health challenge rather than solely a criminal issue, sentencing guidelines should expand access to treatment-based alternatives, such as drug courts and diversion programs. Offering sentencing reductions for individuals actively participating in recovery programs, as well as increasing in-custody resources like medication-assisted treatment, aligns with the Commission's mission to reduce recidivism and promote public safety. We should also follow the science of addiction recovery, and recognize that a person's failure to complete a drug treatment on their first attempt does not mean we should give up on them.

3. **Eliminate Crack Cocaine and Powder Cocaine Sentencing Disparity**

   The Commission should address long-standing disparities in drug sentencing. The crack versus powder cocaine disparity is one of the most egregious examples of inequity in federal sentencing guidelines. While past legislative efforts and a 2022 DOJ charging memo have narrowed this gap, achieving full parity is essential. Additionally, similar principles should be applied to sentencing for other substances, including methamphetamine and heroin, to ensure fairness across all drug types. Such efforts directly support the Commission's goal of eliminating disparities and fostering public confidence in the justice system.

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4. **Reform Methamphetamine Sentencing**

   Specific reforms to methamphetamine sentencing are also needed. Current guidelines disproportionately rely on purity levels, which are more reflective of market factors than of a defendant's intent or role. Weight thresholds for methamphetamine are also notably lower than those for other substances like heroin, leading to harsher penalties. Eliminating purity as a sentencing factor and adjusting weight thresholds for methamphetamine to align with other substances would enhance fairness and consistency in sentencing practices.

5. **The Fentanyl Crisis is a Matter of Public Health**

   Dream.org believes that when addressing fentanyl, the opioid crisis demands a public health-centered approach rather than punitive policies that replicate the failures of the past. The overdose epidemic - which is emblematic of the crisis - has caused harm to communities throughout the country and our recently launched nationwide campaign, Public Health Is Public Safety seeks to address this crisis. Thus it is our contention that sentencing guidelines should emphasize prevention, treatment, and harm reduction strategies, such as community education programs, and access to naloxone. Efforts should focus on dismantling large-scale trafficking operations while avoiding mandatory minimums that disproportionately impact low-level offenders - who are often people in need of treatment. These steps align with the Commission's role in promoting fair and effective sentencing.

   While our recommendations are responsive to the current fentanyl crisis it is important to note that when it comes to substance use of any kind, including but not limited to methamphetamine and cocaine, Dream.Org believes *all* substance use requires a comparable, public-health centered response.

6. **Mens Rea Reform**

   Reforms to mens rea standards are also essential to ensuring justice and proportionality in sentencing. Current practices often fail to differentiate between intentional and unintentional involvement in drug offenses. Clear guidelines requiring proof of intent would better align sentencing with the principle of holding individuals accountable for their actual culpability.

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Distinguishing between knowing and unknowing participation, particularly in cases of coercion or limited awareness, would reflect the Commission's commitment to fairness.

People should not be sentenced to the same amount of time when they have different levels of culpability. The Government should have to have a heightened burden of proof and prove that defendants had awareness of the facts.

7. **Reform Drug Conspiracy Sentencing**

   Similarly, reforms to drug conspiracy laws are necessary to ensure proportional accountability. These laws frequently hold defendants liable for the total drug quantities associated with a broader conspiracy, regardless of their knowledge or direct involvement. Limiting liability to the quantities an individual directly handled or knowingly participated in would result in more just outcomes. Additionally, requiring proof of awareness of the conspiracy's scope before imposing enhanced penalties would align sentencing with the Commission's principles of proportionality and fairness.

8. **Pilot an Expansion of First Step Act Eligibility**

   The Commission should build on the success of the First Step Act by expanding its principles and scope to those individuals who are currently ineligible as a result of the crimes they committed. The Act's emphasis on rehabilitation and reentry has achieved significant reductions in recidivism, with a 9% rate among eligible individuals, according to the 2024 First Step Act Annual Report. Here we challenge the Commission to pilot a program to expand eligibility for First Step Act programs to include currently excluded individuals and extend these benefits more broadly as described.

   In addition to increasing access to risk reduction and reentry programs it is critically important to enhance the transparency of tools like PATTERN and SPARC-13 which would further the Commission's mission to ensure equitable and effective sentencing practices.

Our ardent support for reforms to the supervised release guidelines, align with the Commission's role and mission to ensure fair sentencing practices and promote public safety.

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Supervised release serves as a critical mechanism for oversight and a bridge to help individuals transition from incarceration to productive, law-abiding lives in their communities. These reforms emphasize evidence-based practices and aim to foster justice, reduce recidivism, and enhance community safety.

1. **Expand Access to Drug Treatment, Employment, and Support Services**

   An individual's access to drug treatment, employment, and support services is essential for successful reintegration, and we must expand all such programs to make them more widely available. Likewise, comprehensive mental health care, substance use treatment, stable housing, and meaningful employment opportunities are foundational to addressing underlying issues that may lead to recidivism. It is important to note that relapse(s) should be treated as a health issue rather than a violation requiring incarceration, emphasizing treatment over punishment and fostering long-term recovery.

   Restrictions that broadly prohibit work in certain industries or self-employment should be revised to open pathways to economic independence. Additionally, funding recovery and peer support programs can build networks of encouragement and accountability. It is also critical to align mandatory check-ins and program participation schedules with individuals' work hours to prevent job loss due to compliance conflicts.

   Finally, implementing consistent Medicaid or equivalent health coverage before release from federal prisons will ensure continuity of care, especially in states lacking waivers.

2. **Presumption of Early Release**

   The process for early termination of supervised release should be streamlined, with clear criteria and a transparent process for individuals who demonstrate sustained compliance, allowing them to earn early termination as a reward for positive behavior. Introducing a presumption of early release from supervision for individuals who remain in good standing and pose no danger to the community would significantly reduce caseloads. This approach not only rewards responsible behavior but also enables officers to dedicate more attention to individuals who require closer supervision.

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3. **Tailor Supervised Release Conditions to Individual Needs**

   Supervised release conditions must also be tailored to individual needs through personalized assessments that consider health, family responsibilities, and employment stability. Blanket restrictions, such as bans on technology or specific employment types, hinder reintegration and should be avoided. Furthermore, monitoring mechanisms must be incorporated to prevent racial disparities within the system.

4. **Shift Toward Evidence-Based Practices**

   Shifting toward evidence-based practices, including positive reinforcement strategies, will encourage compliance through incentives rather than punitive measures, fostering motivation and supporting long-term behavioral change.

5. **Address Barriers to Compliance**

   Barriers to compliance, such as excessive fees and fines, should be eliminated to reduce financial hardship and increase the likelihood of successful reintegration. This approach prioritizes rehabilitation over punitive financial measures and allows individuals to focus on rebuilding their lives.

6. **Address Long-standing Inequities**

   Promoting racial and class equity within supervised release policies requires reviewing and revising practices that disproportionately impact individuals based on race or socioeconomic status. Regular assessments should be conducted to ensure equity in the application of conditions. And to the extent studies reveal the existence of disparities, policy change should be recommended. Moreover, officers should undergo implicit bias training and culturally competent supervision practices to foster fair treatment and equitable outcomes.

Public Outreach: As an organization that centers directly impacted people in all of our campaigns, we propose that the U.S. Sentencing Commission take proactive steps to enhance public awareness about its existence, purpose, and role. Specifically, the Commission should engage directly with communities across the country to provide education on its mission and goals.

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This initiative would inform the public, foster greater transparency, and create opportunities for community input. By doing so, the Commission can build trust, strengthen public understanding, and ensure its policies and practices align with the needs and concerns of the communities it serves. Dream.Org stands ready to assist the Sentencing Commission should it pursue such a project.

We appreciate the Commission including Dream.Org in the discussion and please know that it is our desire to continue conversations with the Commission in the coming session and beyond. We believe in the aims and purposes of the Commission and are committed to being a resource for the furtherance of your mission. Also know that as the Commission seeks to pull together an advisory board of formerly incarcerated individuals our Federal Advisory Council stands ready to participate.

Conclusion: At Dream.Org, we have witnessed the transformative power of second chances and the importance of creating pathways for individuals to rebuild their lives. Through bipartisan initiatives like the First Step Act and Dignity for Incarcerated Women campaigns, we have seen how bold and innovative solutions can lead to meaningful change.

Our recommendations to reform the federal drug sentencing guidelines and supervised release are aligned with the Commission's commitment to fairness and public safety while enabling individuals to contribute positively to their communities. By adopting these reforms, the Commission can advance its purpose while ensuring the supervised release system becomes a model for rehabilitation, accountability, and reduced recidivism. Thank you for considering these recommendations. We welcome the opportunity to provide further input or assistance as you move forward with these critical efforts.

Sincerely,
Janos Marton,
Chief Advocacy Officer,
Dream.Org

DRUG POLICY ALLIANCE.

U.S. Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Honorable Chairman Reeves and the United States Sentencing Commission,

We appreciate the opportunity to voice our strong support for reducing sentences for drug offenses. The Drug Policy Alliance (DPA) addresses the harms of drug use and drug criminalization through policy solutions, organizing, and public education. We advocate for a holistic approach to drugs that prioritizes health, social supports, and community wellbeing. DPA opposes punitive approaches that destabilize people, block access to care, and drain communities of resources. We believe that the regulation of drugs should be grounded in evidence, health, equity, and human rights. Criminalizing people for drug-related activity has proven ineffective and counterproductive, destabilizing individuals and communities, diverting resources from treatment, and perpetuating racial and economic inequities.

Criminalization undermines recovery and public health.

Addiction is a complex health condition, not a moral failing requiring criminalization. Research shows that 40-60% of people receiving treatment for substance use require multiple recovery attempts to achieve long-term stability.[1] A 2019 Harvard study found that individuals often needed an average of five recovery efforts, with even higher attempts among those with co-occurring mental health challenges.[2] Recovery is a non-linear process that requires access to supportive resources and healthcare.

Incarceration and criminalization actively disrupt the very factors that contribute to successful recovery. Support systems, stable housing, financial support and access to healthcare–what experts call recovery capital–are essential for long-term stability.[3] Criminalization severs people from these lifelines, exacerbating the very conditions that drive drug-related activity. Rather than fostering recovery, incarceration isolates individuals, weakens family relationships, and increases the stigma that makes seeking help more difficult.

[1] McLellan AT, Lewis DC, O'Brien CP, Kleber HD. Drug Dependence, a Chronic Medical Illness: Implications for Treatment, Insurance, and Outcomes Evaluation. JAMA. 2000;284(13):1689–1695. doi:10.1001/jama.284.13.1689
[2] Kelly, J. F., Greene, M. C., Bergman, B. G., Hoeppner, B. B., & White, W. (2019). How many recovery attempts does it take to successfully resolve an alcohol or drug problem? Estimates and correlates from a national study of recovering U.S. adults. Alcoholism: Clinical and Experimental Research , 43 (7), 1533-1544.
[3] Cloud W and Granfield R (2009) Conceptualizing recovery capital: expansion of a theoretical construct. Substance Use and Misuse, 43: 1971–1986.

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Criminalization diverts resources away from care while fueling economic and racial inequities.

Every 31 seconds, someone is arrested for a drug offense, yet many individuals who seek treatment face weeks- or months-long waitlists. Instead of meaningfully funding and investing in evidence-based interventions, our legal system continues to cycle people in and out of jail, leaving them without care or support. A criminal record of any kind follows people long after release, creating barriers to employment, housing, and financial stability.[4] For example, formerly incarcerated people are 10 times more likely than the general public to experience houselessness.[5] Misdemeanor convictions can lead to a 16% loss of income every year, while serving time reduces earnings by 52% annually.[6] These economic and social hardships exacerbate the risk of further drug-related activity, perpetuating a cycle of incarceration, problematic drug use, and instability.

Current drug enforcement also perpetuates stark racial disparities. Each stage of the criminal legal process disproportionately targets Black people for drug-related offenses. Although Black and white Americans use illicit drugs at similar rates, Black people account for roughly 25% of drug-related arrests despite comprising only 14% of the U.S. population.[7] The collateral consequences of criminal legal system involvement ripple across generations of families, contributing to entrenched economic and racial inequities.

Criminalization has failed to reduce drug use or prevent overdose deaths.

Decades of punitive drug policies have not stopped drug use or improved public health. Instead, drugs became more potent, overdose deaths rose dramatically, and illicit markets adapted in ways that increase harm. Even within jails and prisons, drugs remain available, effective treatment is rare, and overdose deaths continue to occur.

The criminalization of fentanyl-related substances in 2018 is a stark example of these failures. Despite efforts to crack down, overdose deaths rose 60% in just four years, from 67,367 in 2018 to 107,941 in 2022.[8] The recent decreases in overdose deaths have not been the result of tougher sentencing, but rather the expansion of harm reduction and health-based interventions such as naloxone distribution, syringe programs, and connections to community health and peer recovery specialists.

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[4] Vera Institute (2023). “How Collateral Consequences Keep People Trapped in the Legal System.” https://www.vera.org/news/how-collateral-consequences-keep-people-trapped-in-the-legal-system
[5] Prison Policy Initiative (2018). “Nowhere to Go: Homelessness Among Formerly Incarcerated People.” https://www.prisonpolicy.org/reports/housing.html
[6] Brennan Center for Justice (2020). “Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality.” https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf
[7] The Sentencing Project (2023). “One in Five: Disparities in Crime and Policing.” https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/
[8] Drug Policy Alliance. “Reduce Harms of Fentanyl.” https://drugpolicy.org/issue/reduce-harms-of-fentanyl

DRUG POLICY ALLIANCE.

Reducing sentences for drug offenses is a necessary step toward a more effective and humane approach.

Decades of punitive sentencing have failed to reduce drug use or prevent overdose deaths, while health-based initiatives have been proven to save lives. Reducing drug-related sentences aligns with an evidence-based approach to drug activity, allowing resources to be directed toward treatment, harm reduction, and community support. By moving away from ineffective punitive policies, we can build a more just system that prioritizes public health, stability, and real pathways to recovery.

For these reasons, we strongly support the proposed amendment to reduce sentences for drug offenses. Thank you for your time and consideration. If you have questions or need additional information about this letter, please contact Maritza Perez Medina of the Drug Policy Alliance at [redacted]

Sincerely,

Maritza Perez Medina
Director of Federal Affairs
Drug Policy Alliance

DUE PROCESS
INSTITUTE

March 3, 2025

The Honorable Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle NE
Washington, DC 20002

RE: *Comment to the Commission's January 2025 proposed amendments relating to Supervised Release and Drug Offenses*

Chairman Reeves and Members of the Commission,

Due Process Institute is a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system. Procedural due process concerns transcend "liberal" and "conservative" political labels and therefore we focus our work on core principles and values that are shared by all Americans. Guided by a bipartisan Board of Directors, and supported by bipartisan staff, we create and support achievable solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

PROPOSED AMENDMENTS RELATING TO THE IMPOSITION, LENGTH, AND CONDITIONS OF SUPERVISED RELEASE

We unequivocally support your recent proposals directing courts to base supervised release decisions on individualized assessments and removing recommended minimum terms of supervised release. Originally designed to be limited in use and only when necessary to preserve public safety, supervised release is unfortunately imposed in almost every single federal case. This has led to a bloated and burdened system, putting strain on actors in the criminal legal system as well as on citizens returning to their communities after completing their terms of sentence. The overuse of long periods of supervised release has created a number of undesirable consequences—probation officers are too overwhelmed to effectively supervise high-risk cases, low-risk defendants are unnecessarily recidivating under unnecessarily onerous burdens, and this broken system is costing American taxpayers $500 million annually.

In response to the Commission's request for fine attunement of its proposals, Due Process Institute first suggests the Commission consider strengthening its guidance towards courts by characterizing the early termination of supervised release as a rebuttable presumption, rather than merely a modification that "may" occur. This revision would ensure a much-needed course correction for our overburdened system, would more directly provide incentives for people reentering society on supervised release, and would free up resources for probation officers so that they could better focus on cases with serious public safety implications. We recommend that the Commission take the fullest opportunity it can to redirect our nation's supervised release

apparatus. We further recommend that the Commission adopt an approach to revocation of supervised release that maximizes a court's ability to consider the fullest set of considerations (rather than be tied to the grade of violation).

Second, as for the enumerated factors that a court should consider, Due Process Institute recommends that any amendment and/or any relevant commentary relating to the initial setting of a term of supervised release include specific factors that relate to a defendant's post-arrest yet pre-sentence conduct, and, similarly that any amendment and/or any relevant commentary relating to the modification or early termination of a term of supervised release include specific factors that relate to a defendant's conduct during pre-trial release (if applicable) as well as during any period of incarceration. Specifically, a defendant's efforts during these critical times relating to attempted restitution, rehabilitation, education, mental health services, drug/alcohol use or abuse treatment, family reunification, vocational training, programmatic involvement (including but not limited to specific reentry training), and participation in restorative justice measures, among other factors, are all useful indicators in assessing whether and for how long a term of supervised release should be imposed and Due Process Institute recommends that such factors be more explicitly included in the Commission's amendments.

Due Process Institute also recommends the Commission provide clarification that courts should not deny early termination solely on the grounds of unpaid fines or restitution and that willful nonpayment of financial obligations when defendant had the means to pay should be treated differently from situations in which a defendant has not practicably been able to fulfil his or her financial obligations to others.

Finally, Due Process Institute encourages the Commission—to the fullest extent it has authority to do so—to ensure that all defendants are given notice of their rights pursuant to any adopted proposed amendments, that any relevant proceedings ensure adequate due process rights to the defendant, and that defendants are afforded adequate appointed counsel to pursue their rights.

RECONSIDERING THE DISPARITY BETWEEN COCAINE AND COCAINE BASE

We wish to commend you for also seeking public comment on whether the Commission should reconsider the disparity between cocaine ("powder cocaine") and cocaine base ("crack cocaine") in the Drug Quantity Table at §2D1.1(c). Currently, the Drug Quantity Table reflects an 18-to-1 ratio between crack cocaine and powder cocaine. Due Process Institute strongly encourages the Commission to reconsider this disparity in a future amendment cycle.

The current disparity exists because of a well-intentioned but un-scientific overreaction to crack cocaine abuse in the 1980s. This initially led to crack cocaine being arbitrarily treated 100 times worse than powder cocaine in our federal sentencing laws, despite the fact that crack cocaine and powdered cocaine are pharmacologically the same. The primary differences between the drugs are that crack cocaine is cheaper and easier to access, particularly in poor communities that are already marginalized, and in the way the substances are typically ingested. The manner in which crack cocaine is ingested is, as the Commission has noted, "not a reliable basis for establishing longer penalties."

In the 2000s, policymakers began to rethink the disparate treatment between crack cocaine and powdered cocaine and have partially revisited their misguided approach. In 2010, the sentencing disparity was reduced to the current 18-to-1 ratio for current and future offenses. The Commission amended the *Sentencing Guidelines* to reflect the policy change and made the amendment retroactive, but those changes provided only limited relief. Since then, the First Step Act made the 18-to-1 ratio retroactive to all individuals incarcerated for crack cocaine offenses, which brought some additional relief to those punished by the original 100-to-1 sentencing disparity.

It is undeniable that the disparate treatment of crack cocaine and powder cocaine has hit communities of color the hardest. The percentage of Black crack cocaine trafficking defendants has consistently ranged between 77 percent and 86 percent. In FY 2023, 79 percent of crack cocaine trafficking defendants were Black while another 14.2 percent were Hispanic.[1] Further evidence of the racial impact of the disparate treatment of crack and powder cocaine is the fact that nearly 90 percent of individuals who received sentencing reductions through the Commission's retroactive application of the 2010 crack cocaine amendment were Black[2] and 92 percent of the individuals who benefited from Sec. 404 of the First Step Act were Black.[3]

However, the 18-to-1 ratio currently reflected in the Drug Quantity Table still does not reflect sound policy. There is no scientific basis for treating crack cocaine offenses more harshly than powder cocaine offenses. And there is no cultural or social impetus for the overly harsh treatment. In fact, the number of defendants whose primary drug type is crack cocaine has steadily declined from 6,168 in FY 2008 to only 855 in FY 2023.[4] And crack cocaine defendants as a percentage of all drug trafficking defendants have declined from 26.8 percent in FY 1996 to 4.6 percent in FY 2023.[5] The time has come for the Commission to correct the existing unnecessary and unfair disparity between cocaine offenses in the Drug Quantity Table.

We appreciate the Commission's continued thoughtful approach to these two areas of concern and look forward to continuing to work with you on ensuring that federal sentencing laws promote public safety and reintegration. We greatly appreciate the Commission's leadership in setting forth its supervised release proposals and seeking comment on the crack cocaine sentencing disparity. We encourage the Commission to finalize these amendments without delay.

Sincerely,

Shana-Tara O'Toole, President
Jason Pye, Vice President

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[1] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/TableD2.pdf
[2] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf
[3] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20220818-First-Step-Act-Retro.pdf
[4] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2008/Table33_0.pdf and https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/TableD1.pdf
[5] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1996/TAB-29_0.pdf

March 3, 2025

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Amendments for the 2025 Amendment Cycle

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate before the U. S. Sentencing Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines touch countless individuals and families, including many of our members – over 75,000 people nationwide. We welcome the opportunity to comment on the proposed amendments announced by the Commission in January 2025.

Since FAMM's inception, over 30 years ago, we have been dedicated to reducing overly punitive drug sentences. Our organization was founded by a sister grappling with the harsh mandatory minimum sentence that her brother would have to serve for a marijuana conviction – a sentence that the judge recognized as too harsh but was unable to alter. For most of our history, our leadership has had firsthand experience in the perniciousness of sentencings and the impact of these sentences on families. Our new President is no exception.

Dr. Shaneva D. McReynolds carries the torch to fight for more fair sentences because of a fire lit in her when she fell in love with her husband Jeffery. At the time, Jeffery was housed at FMC Rochester, serving a 235-month sentence for crack cocaine. Shaneva and Jeffery were married in 2014 at the FMC. When they got married, Jeffery was still facing nearly a decade left on his sentence. In 2009, Jeffery's sentence was reduced because of retroactive application of the crack minus two amendment. Five years later, in 2014, his sentence was reduced again following the retroactivity of drugs minus two. He finally got to come home to his family. Jeffery came to the Commission in 2023 to testify about the impact of retroactivity and how it gave him back his life. His 235-month sentence was a vestige of outdated misconceptions about crack and powder cocaine, and the unusually harsh punishment that ensued. The Commission's actions brought him home.

For decades the Commission has grappled with the reality that drug sentences – whether subject to a mandatory minimum or an inflated guideline range – are simply too long to meet the purposes of punishment. FAMM applauds the Commission for proposing changes to the drug guidelines. We urge the Commission, as we did in our previous comments this cycle,[1] to adopt only those changes to the guidelines that would reduce the number of people in prison for drug sentences.

I. §2D1.1 is ripe for reform

From an early age, Celeste Blair had a life filled with trauma. When Celeste was five years old, her mother told her she was going out shopping but never came home. She found comfort in her grandparents who provided a safe home, but events stole her sense of security. When she was 15 years old, she was raped by an acquaintance and became pregnant. She gave the baby up for adoption, but the experience left a searing hole in her heart that she could not fill. Drugs helped keep the pain at bay. And from then on, drug addiction governed most of her life decisions.

Celeste had periods of sobriety followed by periods of relapse. She sustained several convictions due to her substance use disorder. She came from a family plagued by substance abuse, and so this demon was familiar to her and her loved ones. When she was sober, she filled her life with creativity – making art to help process all that she had been through.

In 2015, she was federally indicted for a drug conspiracy and pled guilty to one count of possession with intent to distribute a controlled substance, methamphetamine.[2] In the factual resume to which she pled guilty, it is clear that she was not the "kingpin" but rather someone who received drugs from other sources to sell.[3] But, the drug weight for which she was held accountable triggered a base offense level (BOL) of 36.[4] With adjustments, her guideline range was 360 months to life.[5] This was well above the statutory mandatory minimum of five years because of her high criminal history level and other enhancements.

Prior to her relapse in 2014, Celeste volunteered in her community, worked with a nonprofit, and taught women at the Hilltop Women's State Prison to use art and painting to heal their past wounds through creativity. Her 30-year sentence was devastating, and far too long to fit the purposes of punishment; Celeste needed rehabilitation and treatment, not to grow old in federal prison.

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[1] *See* FAMM's comment to on Proposed Amendments 2024-2025 (Feb. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf.
[2] *United States v. Blair*, 4:15-cr-00152 (ND Tx. 2015), *Factual Resume.*
[3] *Id.*
[4] *Id.* at Sentencing Transcript.
[5] *Id.*

President Biden recognized that Celeste's sentence was far too long. On January 17, 2025, President Biden commuted her sentence.[6] Celeste was one of 2,500 sentences commuted for "non-violent drug offenses" that were "disproportionately long . . . ."[7] Her release date went from 2041 to 2027, two years away. Thanks to executive clemency, she has a second chance at life, a second chance to make art and bring creativity to her community.[8] But her sentence should not have been that long to begin with. President Biden's statement opened the door for other bodies of government to make adjustments that reflect the spirit of his action.

The problems with drug sentences called for in §2D1.1 are not news to the Commission. In 2004, the agency wrote that "no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."[9]

Unsurprisingly, communities of color suffer from these harms disproportionately to other communities. In Fiscal Year 2023, of the people who received drug trafficking offenses, 27.7 percent were Black and 43.5 precent were Hispanic –just over 70 percent.[10] As we have written before, and as the Commission well knows, this disparity reflects targeted policing of communities of color which has had a detrimental impact on those communities and families for far too long.[11]

The guidelines continue to influence the sentence imposed in federal cases. Nearly 50 percent of all cases in the fourth quarter of FY 2024 were within the calculated guideline range.[12] But a majority of judges do not follow the guidelines for drug trafficking offenses. In fact, only 28.5 percent of all sentences for drug trafficking offenses were within the guidelines.[13]

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[6] Joseph R. Biden, *Executive Grant of Clemency*, (Jan. 17, 2025), Warrant 2, https://www.justice.gov/pardon/media/1385591/dl?inline.
[7] Press Statement, *Executive Grant of* Clemency (Jan. 17, 2025), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2025/01/17/statement-from-president-joe-biden-on-additional-clemency-actions/.
[8] To read a poem that Celeste wrote during her time in prison visit this link.
[9] USSC, *Fifteen Years of Guideline Sentencing: An assessment of how well the federal criminal justice system is achieving the goals of sentencing reform* at 49 (Nov. 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.
[10] *See* USSC, *Sourcebooks of Federal Sentencing Statistics,* Fig. 2 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf.
[11] *See supra* n. 1.
[12] USSC, *Quarter Report, 4th Quarter FY 2024*, (September 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY24.pdf.
[13] *Id.*

Judges varied in a staggering 41.5 percent of drug trafficking offenses.[14] This trend has grown deeper over time.[15] Why? Because judges recognize that the guideline ranges for drug offenses are too long. As Former Commissioner Judge Gleeson wrote while on the bench, "the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability."[16] The drug-weight-driven sentencing scheme of §2D1.1 is contrary to evidence and ripe for reform.[17]

The Commission's historical changes to drug guidelines proves the impact of sentencing reform. In 2007, prior to the adoption of the "crack minus two" adjustment, the average sentence for the 5,477 defendants sentenced for crack cocaine was 129 months. In 2008, the average sentence dropped to 114.5 months. Similarly, in 2014, the Commission acted to lower guideline sentences for drug trafficking crimes across the board. The average sentence reduction by drug type between 2014 and 2016 was meaningful.[18] And what is more, the prison population declined between 2014-2016 from 214,149 to 192,170.[19]

Even though the Commission has helped to lower drug sentences, the guideline sentences for drug offenses remain high – particularly because they are anchored to mandatory minimums – and have fueled the crisis that the federal prison system faces. More work is needed to address this crisis. According to a recent BJS report, "6 in 10 people in BOP custody in 2018 were serving long drug sentences of 10 years or more."[20] In fiscal year 2023, drug offenses accounted for 30 percent of all individuals sentenced in federal court.[21] Drug sentences imposed in FY 2023 averaged 82 months.[22]

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[14] *Id.* at Tbl. 10.
[15] In contrast to 2024, in 2012 judges imposed sentences within the guideline range for drug trafficking offenses in 43% of cases. *See* USSC, *Federal Sentencing Sourcebook 2012*, (2012) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table27_0.pdf.
[16] *United States v. Diaz*, No. 11-cr-821-2, 2013 WL 322243, at *10 (E.D.N.Y. Jan. 28, 2013).
[17] *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").
[18] *Compare* USSC, *Annual Reports and Sourcebooks* 2014, Fig. J (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureJ.pdf, *with* USSC, *Annual Reports and Sourcebooks* 2016, Fig. J (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureJ.pdf.
[19] Bureau of Prisons, *Federal Prison Population Actuals*, https://www.bop.gov/about/statistics/raw_stats/BOP_pastPopulationTotals.pdf?v=1.3.
[20] Bureau of Justice Statistics, *Sentencing Decisions for Persons in Federal Prison for Drug Offenses, 2013-2018,* (July 13, 2023), https://bjs.ojp.gov/press-release/sentencing-decisions-persons-federal-prison-drug-offenses-2013-2018.
[21] *See supra* n. 10; *see also supra* n. 12.
[22] *Supra* n.12 at Tbl. 15.

The BOP cannot handle the population it currently has. The Bureau of Prisons is, according to the Inspector General of the Department of Justice, an agency in crisis.[23] For nearly 20 years, the Inspector General has issued reports detailing systemic issues facing the BOP. The BOP has, most recently, been added to the GAO's "high-risk" list because of "long-standing challenges with managing staff and resources and planning and evaluating programs that help incarcerated people successfully return to the community."[24]

In 2023, the Commission wanted to consider how it could address "the issue of reducing costs of incarceration and overcapacity of prisons" in light of 28 U.S.C. § 994(g).[25] Unquestionably, reducing drug sentences even more than what the Commission has already done will help reduce the pressure on BOP and honor the directive in 28 U.S.C. § 994(g).[26] We are thrilled that the Commission is revisiting the lengthy BOLs that flow from the drug table at §2D1.1.

A. The Commission should set the new base offense level cap in §2D1.1 at 30

By establishing the Commission, Congress sought "honesty in sentencing."[27] It wanted to "avoid the confusion and implicit deception that arose out of the pre-guideline sentencing system."[28] It also sought, "reasonable uniformity" in sentencing such that people with similar culpability should receive similar sentences. Finally, Congress sought "proportionality in sentencing."[29] But the sentences called for by §2D1.1 can undermine all three of Congress' goals. Sentences imposed under §2D1.1 sow confusion, fail to address culpability by using drug quantity as a flawed measure, and are thus, neither honest nor fair sentences.[30]

In proposing these amendments, the Commission noted that "the difference between the average guideline minimum and average sentence imposed varies depending on the base offense level, with the greatest difference occurring at the highest offense levels on the Drug Quantity Table."[31] A significant number of people are impacted by these differences – 64.5% of people

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[23] U.S. Dep't of Justice, Office of the Inspector General, *Challenge 1: The Ongoing Crisis Facing the Federal Corrections System* (2024), https://oig.justice.gov/tmpc/challenge-1.
[24] *Id.*; GAO, *High-Risk Series: Heightened Attention Could Save Billions More and Improve Government Efficiency and Effectiveness* (Feb.25 2025), https://www.gao.gov/products/gao-25-107743.
[25] USSC, *Proposed Priorities 2023-2024,* https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2023-2024-priorities.
[26] *See* 28 U.S.C. § 994(g) (Instructing the Commission to "minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.").
[27] USSG, CH. 1 Pt. A.
[28] *Id.*
[29] *Id.*
[30] *Diaz*, 2013 WL 322243.
[31] USSC, Proposed Amendments 2025, (Jan. 24, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf.

sentenced using the drug table received a base offense level between 30-38.[32] Sentences are within guideline range at 28.8% for BOL 30 and the percentage goes down from there as the BOL goes up.[33]

There is no data to support the need for base offense levels higher than 30, given the significant rate at which judges vary for sentences with BOLs 30 and above. As such, we believe that the Commission should drop the highest base offense level to 30. Anything above 30 would maintain the variances in sentences and, thus, undermine confidence in the guidelines.

Reducing the base offense level to 30 will also help address the overcrowding problems that plague the BOP – shorter prison sentences mean less people contributing to the overcrowding problem. It will also address some of the racial disparities in sentencing. FAMM urges the Commission to adopt this proposal and set the maximum base offense level under §2D1.1 to 30. Doing so will help countless people; people like Celeste Blair whose base offense level was 36, resulting in a significant term of imprisonment.

B. FAMM supports a flexible definition of "low-level trafficking" with a six-level reduction for qualifying individuals

Distinguishing role is critical to achieve the Sentencing Commission's goals. And yet, all too often the guidelines blur the lines between individuals who are profiting from drug trafficking – the "kingpins" – and those who are less culpable. Although the guidelines purport to create uniformity by providing the same range for all defendants found with the same quantity of drugs, this is one area where uniformity and proportionality clash. One way to address this is by adopting the proposed specific offense characteristic (SOC) that will aid judges in distinguishing culpability.

Individuals who play a low-level role in a conspiracy need their unique circumstances considered, if they are to be sentenced fairly. Take Debi Campbell, for example. Debi Campbell is a staff member at FAMM, bringing her lived experience to our storytelling team. But prior to joining our staff, she was serving an excessive sentence in federal prison for a methamphetamine offense. Debi had zero criminal history. Her lengthy sentence was based, in large part, on a drug quantity amount that she contested. But Debi was not someone who should have received a nearly two-decade sentence – she was no kingpin; she was a mother with substance abuse disorder. Debi needed treatment not decades in prison. Unlike Celeste, Debi did not receive executive clemency – she served her entire sentence. But Debi would likely have benefitted from a SOC that distinguished culpability based on her true level of involvement in the scheme.

The Commission has proposed a specific offense characteristic that would provide relief for individuals, who like Debi Campbell, played a low-level role in the trafficking scheme. This

[32] USSC, *Proposed Amendments on Drug Offenses, Data Briefing*, (2025) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf.
[33] *Id.*

proposal includes examples of conduct demonstrative of low-level involvement. And the list is proposed either as exhaustive or non-exhaustive.

FAMM opposes treating the list as exhaustive. Individualization and flexibility are necessary when assessing role. It is conceivable that the Commission and stakeholders will agree on circumstances that would suggest a low-level role in the crime. However, as we have all learned – most recently in the §1B1.13 context – circumstances do crop up that the Commission will not have anticipated.[34] We can imagine that unforeseen factors can be evidence of a low-level role. Federal judges should be equipped with the authority to go outside the boundaries of a list of examples, should that rare scenario present itself.

This is not to say that examples are useless. In fact, having a set of examples of scenarios/behaviors that would qualify for the SOC will help inform judges of what to look for when considering an adjustment. To this end, we firmly support the Commission's inclusion of substance abuse disorder, manipulation by loved ones, and the lack of significant compensation as among the conditions and features that would, correctly in our view, indicate a low-level role.

We do not think, however, that simple possession of a weapon should exclude someone from the SOC. Weapons are synonymous with drug dealing and their presence does not meaningfully negate the other indicia of reduced culpability from the list of examples.[35] Judges can consider the weapon when weighing the 18 U.S.C. § 3553(a) factors. Moreover, sentencing enhancements already account for the presence of a firearm in furtherance of a drug trafficking offense.[36] And so excluding people who would otherwise qualify for the reduction because of the possession of a weapon, penalizes those individuals two-fold – once in the gun bump and twice in exclusion from this SOC.

For those who do qualify, we support a six-level reduction. Given the historically inflated drug sentences for everyone, a six-level role reduction would go a long way toward bringing down sentences for those who were least culpable; people like Debi.

As an organization dedicated to advancing individualized sentences that account for each human being's circumstances, FAMM appreciates the Commission's efforts to reduce BOLs for drug offenses and open the door for additional reductions based on an individual's circumstances.

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[34] *See* FAMM comment on Proposed Amendment USSG §1B1.13(b)(5) (explaining the need for judicial discretion to respond to unforeseen circumstances).
[35] *See, e.g.*, *Drug Dealing and Gun Carrying go Hand in Hand: Examining How Juvenile Offenders' Gun Carrying Changes Before and After Drug Dealing Spells across 84 Months*, NIH, (describing as "tool of the trade" for drug trafficking among youths), https://pmc.ncbi.nlm.nih.gov/articles/PMC8011595/; *see also* Benjamin Levin, *Guns and Drugs*, Fordham L. R. (2016) ("We cannot (or should not) look at guns in a vacuum as divorced from other areas of a criminal justice system plagued by inequality."), https://fordhamlawreview.org/wp-content/uploads/2016/03/Levin_April.pdf.
[36] USSG §§2D1.1(b)(1), (b)(2).

II. FAMM Applauds the Commission's efforts to make sentences for methamphetamine fairer and more evidence based.

A. Reducing methamphetamine sentences

We would venture to guess that if random people on the street with no exposure to the criminal justice system were asked which drug type made up the highest percentage of cases in federal court, people would overwhelmingly respond heroin or fentanyl. But the reality is that methamphetamine offenses dominate the federal caseload.[37] Methamphetamine sentences are also some of the harshest drug sentences in federal court.[38] In 2022 alone, people sentenced for methamphetamine offenses "received longer sentences than individuals sentenced for trafficking fentanyl, heroin, or cocaine."[39] People sentenced for trafficking methamphetamine received an average sentence of 91 months. Thus, addressing the issues underlying methamphetamine sentences will also help address the swelling prison population discussed above.

The lengthy sentence for methamphetamine is attributable to outdated purity distinctions. Methamphetamine production and sourcing has changed over time, and so too has its purity. Today, methamphetamine is highly pure, unlike in the past.[40] But the guideline ranges have not been updated to reflect this reality. Many courts have recognized the injustices that flow from the outdated methamphetamine punishment scheme and vary greatly to account for the guidelines' failure to differentiate based on purity.[41]

In the current guidelines, the sentencing disparity for meth (actual) and meth (mixture) reflect the statutory disparity – it takes 10 times more methamphetamine mixture than methamphetamine actual to trigger higher guideline levels (and higher mandatory minimum levels). But as observed above, the distinction is meaningless. Moreover, since nearly all meth is now pure, purity is not a reliable measure of culpability for meth offenses. For so many reasons, it is high time to eliminate the disparities in meth sentencing.

FAMM supports the Commission's proposal to rid the guidelines of the meth disparities by deleting reference to "Ice," and leveling the sentencing for meth (actual) and meth (mixture). For the reasons discussed above regarding the lengthy sentences for methamphetamine offenses and the fact that purity is not an appropriate proxy for culpability, the punishment levels for meth mixture rather than actual should drive meth sentences. Using meth actual to tether punishment would only exacerbate the current problem of lengthy meth sentences and undermine the judicial practice to mitigate the influence of the meth actual BOLs. If those adjustments and specific

[37] USSC, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice* System (June 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *See supra n.* 10 at Tbl. D-14.

offense characteristics fail to reach the mandatory minimum, §5G1.1(b) ensures that the guidelines maintain consistency by inserting the statutory mandatory minimum.[42]

B. Crack cocaine and powder cocaine disparities should be addressed as soon as possible

The Commission has proposed an issue for comment regarding whether it should equalize the crack/powder weights for sentencing guideline purposes. For our entire history, FAMM has fought to equalize the pernicious impact of disparate crack and powder cocaine sentencing.[43] Not only is there no pharmacological reason for distinguishing the two, there is no empirical reason for doing so – quite the opposite. It is a stain on our system that this disparity persists. It is widely recognized that the different treatment is rooted in racism and perpetuates racially disparate outcomes. "Since 1995" the Commission has consistently taken the position that disparate drug quantity ratio of crack to powder cocaine "significantly undermined the congressional objectives set forth in the Sentencing Reform Act."[44] As such, allowing the disparity to continue undermines confidence in the legitimacy and fairness of our criminal justice system.

We applaud the Commission, which has led the way over the years in elevating the harms of the disparity and taking measures to mitigate those harms by lessening the delta between crack and powder cocaine sentencing. FAMM would celebrate the efforts to eradicate this disparity from the guidelines as soon as possible.

III. The Commission should not strike or dilute the mens rea in §2D1.1(b)(13).

We are sensitive to the realities of the opioid epidemic. However, we cannot let fear overwhelm sound judgement and evidence in selecting appropriate sentences. The crack/powder disparity is an example of the injustice that follows from creating fear-driven sentences. Moreover, longer sentences do not curb public health problems. In fact, the opioid epidemic has already started to ease up because of public health measures, not increasing sentences.[45]

In 2018, The Commission adopted a four-level enhancement for knowingly misrepresenting or marketing as another substance, a substance containing fentanyl or fentanyl

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[42] *See* USSG §5G1.1(b) (stating that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence").

[43] *See, e.g.*, FAMM Comments on Proposed Priorities (Aug. 16, 2010) (calling on the Commission to make changes in the Fair Sentencing Act retroactive because of the fundamental "unfairness of the existing penalty."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20100825/FAMM%20comment%20on%20proposed%20priorities.pdf.

[44] USSC, *Report to Congress: Fair Sentencing Act of 2010*, Executive Summary (August 2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf.

[45] *See, e.g.*, Jan Hoffman & Noah Weiland, *What's Behind the Remarkable Drop in U.S. Overdose Deaths*, NY TIMES, (Nov. 21, 2024), https://www.nytimes.com/2024/11/21/health/overdose-deaths-decline-drug-supply.html.

analogue. And in 2023, the Commission amended the mens rea to include "willful blindness" pertaining to pills marketed as authentic that included fentanyl. Some commentators have complained to the Commission that courts are rarely applying this enhancement at §2D1.1(b)(13).[46] The infrequency of the application, they argue, demonstrates that the enhancement is not working. In response to these comments, the Commission has proposed three options to amend the current mens rea requirement at §2D1.1(b)(13). All options would either strike or further dilute the mens rea requirement.

That the enhancement is infrequently applied should be seen as a feature, not a bug. The Commission itself intended that "only the most culpable offenders are subjected to these increased penalties."[47] And striking, or further diluting, the mens rea requirement will not achieve the Commission's goal of addressing the increase in fentanyl and fentanyl analogues in the drug market. Study after study has shown that people who are involved in the drug market do not order their behavior around punishment structures/lengths.[48]

We believe that diluting the mens rea requirement in the fentanyl enhancement flies in the face of other thoughtful proposals this amendment cycle that aim to reduce the impact of drug offenses.

IV. Supervised Release

FAMM focuses our efforts on the span of events in a defendant's journey from sentencing to the day someone is released from prison. As such, supervised release is not an issue that we work on. That said, as an organization directly in communication with impacted individuals, we understand how onerous supervised release can be. We have reviewed comments by the Federal Defenders as well as comments by Senator Coons and Rep. Wesley Hunt. We support the position taken in both of these comments.

[46] USSC, Proposed Amendment (Jan. 2018), https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2018-amendments.
[47] USSG App. C, Amend. 807, Reason for Amendment (2018).
[48] *See* Marta Nelson, et al., *A New Paradigm for Sentencing in the United States* (Feb. 2023), https://vera-institute.files.svdcdn.com/production/downloads/publications/Vera-Sentencing-Report-2023.pdf *(*collecting studies).

V. Conclusion

FAMM thanks the Commission for considering our input on issues critical to federal sentencing. We look forward to the public hearings on these issues.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

fwd.us

March 3, 2025

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008

Re: Proposed 2025 Amendments Regarding Supervised Release and Drug Offenses Amendments

Dear Judge Reeves:

FWD.us is a bipartisan advocacy organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, FWD.us is committed to ending mass incarceration, eliminating racial disparities, expanding opportunities for people and families impacted by the criminal justice system, and evidence-based approaches to advancing public safety.

We write today to urge the Sentencing Commission to adopt the Supervised Release Amendment, because it will reduce unnecessary imposition of supervised release and the number of revocations that lead to unnecessary re-incarceration. These changes will help align federal community supervision with evidence-based best practices and continue to prioritize public safety. Specifically, we urge the Commission to:

- Adopt Part A of the Supervised Release Amendment, which would remove the requirement for courts to impose supervised release for all sentences exceeding one year, except when mandated by statute and/or warranted by an individualized needs assessment. Additionally, the amendment includes a new policy statement advising judges to terminate supervision after one year when warranted by the individual's conduct and when it serves the interest of justice.
- Adopt Option 1 of Part B of the Supervised Release Amendment regarding how courts should respond to a violation of supervised release. Option 1 would advise revocation only when required by statute.

We also write in support of Part A (Setting New Highest Base Offense Level in Drug Quantity Table and New Trafficking Functions Adjustment Amendments), Part B (Methamphetamine Amendment), and Part E (Safety Valve Amendment) of the Drug Offenses Amendment. These proposed changes will begin to address disproportionately long drug sentences that do not improve public safety. Specifically, we urge the Commission to:

- Adopt Option 3 of Subpart 1 of Part A of the Drug Offenses Amendment, which would set the highest base offense level in the Drug Quantity Table at level 30. Furthermore, we support the adoption of Subpart 2 of Part A of the Drug Offenses Amendment, which introduces new specific offense characteristics that reduce the base offense level for individuals playing limited roles in drug trafficking.
- Adopt Subpart 1 of Part B of the Drug Offenses Amendment, eliminating references to "meth ice" in the Guidelines. We also support Option 1 of Subpart 2 of Part B of the Drug Offenses Amendment, which would set the quantity thresholds for methamphetamine at the current level for methamphetamine mixture. Both changes make important updates to the Guidelines to reflect current knowledge that methamphetamine purity does not correspond to culpability.
- Adopt Part E of the Drug Offenses Amendment because it provides much-needed clarity to ensure that people who provide truthful information to the government receive the appropriate departures from statutory minimums, regardless if the information is provided in-person or in writing.

Lastly, we urge the Commission to reject Part C (Fentanyl Misrepresentation Amendment) and Part D (Machine Guns Amendment) of the Drug Offenses Amendment, as both amendments would result in increased prison terms without improvements to public safety. Instead, before any changes are made, we encourage the Commission to conduct further study on these issues to determine whether the proposed enhancements are necessary.[1]

I. The Supervised Release Amendment Aligns Federal Community Supervision with Evidence-Based Best Practices

A. Support for the Adoption of Part A of the Supervised Release Amendment

[1] The parsimony principle posits that the criminal justice system must impose only "the least restrictive intervention to achieve societal goals." *See* Jeremy Travis and Bruce Western, ed., Parsimony and Other Radical Ideas About Justice, p. 3-4 (2023). This principle offers a framework for assessing the Commission's policy decisions to ensure courts impose the least restrictive punishment required to satisfy the purposes of sentencing. Increasing penalties, as proposed in Parts C and D of the Drug Offenses Amendment can only be justified under the parsimony principle if they effectively advance the underlying purposes of punishment.

We urge the Commission to adopt Part A of the Supervised Release Amendment because it reduces unnecessary imposition of supervised release and aligns federal community supervision with evidence-based best practices. Part A would remove the requirement that courts impose supervised release for all sentences exceeding one year, except when required by statute and/or warranted by an individualized needs assessment. This amendment would fulfill the rehabilitative goal of supervision without a blanket imposition of supervised release that does not advance public safety.

Best practices and research regarding the most effective supervision policies emphasize a "focused" approach, prioritizing resources for individuals who need supervision, rather than a broad use that does not advance public safety.[2] Research also shows that maintaining supervision for a large number of people undermines probation officers' ability to prioritize those who present the most risk to public safety or require the most intensive support to be successful.[3] Part A of the proposed amendment would narrow the scope of supervised release in line with research and best practice, which will help ensure that people are not unnecessarily subjected to supervision when it does not support public safety or individual rehabilitative goals.

The Commission's data shows that from 2005 to 2009, courts imposed supervised release in 99.1% of cases where supervised release was not required by statute and the average term was 35 months.[4] Consequently, the federal supervised release population nearly tripled between 1995 and 2015.[5] This significant increase in the use of supervised release does not make our communities safer. The overly broad use of supervised release burdens federal probation officers, and costs taxpayers an estimated $500 million annually,[6] without prioritizing individuals who may need more support to ensure their successful reentry.

Removing the blanket recommendation of imposing supervised release as proposed by Part A of the Supervised Release Amendment is in line with data that suggests narrowing supervision to those individuals where there may be a public safety concern. For example, a study that

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[2] The Pew Charitable Trusts, "Probation and Parole Systems Marked by High Stakes, Missed Opportunities," p.15, September 2018, https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf

[3] The Pew Charitable Trusts, "Policy Reforms Can Strengthen Community Supervision: A Framework to Improve Probation and Parole," p. 24, April 2020. https://www.pewtrusts.org/-/media/assets/2020/04/policyreform_communitysupervision_report_final.pdf

[4] United States Sentencing Commission [hereinafter "U.S.S.C.], "Federal Offenders Sentenced to Supervised Release," p. 4, July 2010, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf

[5] The Pew Charitable Trusts, "Number of Offenders on Federal Supervised Release Hits All-Time High," p.1, January 2017, https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf

[6] *See* Safer Supervision Coalition, https://safersupervision.com/. Although this budget is not published separately from other judiciary spending, a per year cost of $4,392 per person on supervision in FY2017 supports the high-level estimate produced by the coalition.

examined probation agencies found that reduced caseloads delivered better outcomes in Oklahoma City and Polk County, Iowa, when evidence-based community supervision strategies were also implemented.[7] There was a statistically significant reduction in recidivism for people supervised by officers with reduced caseloads in Oklahoma City and Polk County.[8] Another study similarly found that reducing case loads coupled with evidence-based supervision strategies reduced recidivism by 30%.[9] These findings underscore that supervision outcomes are better when supervision is not automatic for everyone to ensure that available resources can be used more judicially, and probation officers can deploy evidence-based strategies for individuals who need additional support.

Importantly, Part A of the Supervised Release Amendment would also add a new policy statement advising judges to terminate supervision after one year when warranted by the conduct of the individual and when it is in the interest of justice. Research shows that people entering parole are the most likely to reoffend in the first weeks and months after release from prison and the risk of recidivating decreases significantly after one year.[10] Similarly, lengthy probation terms, compared to shorter ones, are more likely to result in incarceration for a violation of a condition that is often not a new crime.[11] Long supervision terms also delays an individual's ability to fully integrate into their communities, which undermines the central goal of supervised release, which is to "facilitate reentry into society."[12]

Implementing early discharge of community supervision, as proposed, is a well-established and widely adopted policy that promotes rehabilitation and eases the strain on correctional systems and probation officer caseloads while still prioritizing public safety. Currently, at least 20 states across the political spectrum allow people to reduce their probation term by complying with the terms of their supervision.[13] For example, Missouri's Earned Compliance Credits program, which

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[7] Sarah Kuck Jalbert, et al., "A Multi-Site Evaluation of Reduced Probation Caseload Size in an Evidence-Based Practice Setting," p.1-2, March 2011, https://www.ojp.gov/library/publications/multi-site-evaluation-reduced-probation-caseload-size-evidence-based-practice

[8] Id.

[9] Sarah Kuck Jalbert and William Rhodes, " Reduced caseloads improve probation outcomes," Journal of Crime and Justice, April 2012, https://www.tandfonline.com/doi/abs/10.1080/0735648X.2012.679875

[10] The Pew Charitable Trusts, "Policy Reforms Can Strengthen Community Supervision: A Framework to Improve Probation and Parole," p. 24, April 2020, https://www.pewtrusts.org/-/media/assets/2020/04/policyreform_communitysupervision_report_final.pdf

[11] The Pew Charitable Trusts, "States Can Shorten Probation and Protect Public Safety," p.9, December 2020, https://www.pewtrusts.org/-/media/assets/2020/12/shorten_probation_and_public_safety_report.pdf

[12] The Pew Charitable Trusts, "Policy Reforms Can Strengthen Community Supervision: A Framework to Improve Probation and Parole," p. 24, April 2020, https://www.pewtrusts.org/-/media/assets/2020/04/policyreform_communitysupervision_report_final.pdf; U.S.S.C., "Federal Probation and Supervised Release Violations," p. 7, July 2020, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf

[13] Pew Charitable Trusts, "Incentives Can Improve Probation Success," p.4, December 2023, https://www.pewtrusts.org/-/media/assets/2023/12/3968_pspp_incentives_can_improve_probation_success_brief_v3.pdf

was enacted in 2012, reduces probation and parole supervision by 30 days for each month of compliance.[14] This allowed the state to reduce its supervised population by 23% and save approximately 1.3 million months of supervision time by 2018.[15] Notably, early discharge did not lead to an increase in recidivism rates. A study of the Missouri program found that people who were discharged early from parole had similar very low one, two, and three-year rates of new felony sentences and new prison admissions as those who completed parole through ordinary discharge.[16] Another example, utilizing a different approach, is Iowa, where judges have discretion to reduce the length of probation if they determine that the "purposes of probation have been fulfilled."[17] Most recently, Illinois advanced bipartisan legislation in 2023 mandating parole boards to evaluate a person's suitability for early release from supervision at least every six months.[18]

Furthermore, a new study from the Administrative Office of the U.S. Courts Probation and Pretrial Services Office found that people whose federal supervision was terminated early were two percentage points less likely to recidivate compared to those who completed their full supervision term.[19] People whose supervision was terminated early had a similar arrest rate for a violent offense (2.9%) as people who did not (3.2%).[20] Supervised release can also create an individual burden because people may have to miss work to meet with their probation officer or be more limited in their employment opportunities based on supervision requirements. Allowing for early termination removes these burdens that could impact their long-term success where there is no public safety benefit to continued supervision. These findings at the state and federal levels highlight that early termination of supervision can safely reduce the number of people on supervised release, help ensure a more effective use of federal resources, and lessen the individual burden of supervised release.

B. Support Adoption of Part B, Option 1 of the Supervised Release Amendment

Part B of the Supervised Release Amendment provides two policy options for how courts should respond to a violation of supervised release. We urge the Commission to adopt Option 1, which would allow for revocation only when required by statute. In certain circumstances, the existing

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[14] Robin Olsen, et al., "An Assessment of Earned Discharge Community Supervision Policies in Oregon and Missouri," Urban Institute, p. 19, January 2022, https://www.urban.org/sites/default/files/publication/105347/an-assessment-of-earned-discharge-community-supervision-policies-in-oregon-and-missouri.pdf
[15] Id., p.22-30
[16] Id., p. 32
[17] Iowa Code § 907.7-.9.
[18] Illinois General Assembly, SB 0423, 103rd General Assembly, https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=112&GA=103&DocTypeId=SB&DocNum=0423&GAID=17&LegID=144171&SpecSess=&Session=
[19] Administrative Office of the United States Courts Probation and Pretrial Services Office, " Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety," p. 19-20, January 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5098803
[20] Id.

statute requires judges to revoke a person's post-release supervision and incarcerate them in response to a violation of the conditions of their supervision. The mandatory grounds for revocation of supervision are found in 18 U.S.C. § 3583(g). In other cases, however, there is no directly applicable statute. In such cases, where the statute is silent, Option 1 authorizes judges to conduct an individualized case-by-case analysis to determine the appropriate response to a violation.

Since Congress has specified circumstances where revocation and imprisonment are required, the Commission should not extend this mandate to Grade A and B violations which are otherwise not covered by the statute. Instead, the Commission should align its recommendations with the statutory framework for supervised release revocations, which mandates revocation only under the specific circumstances enumerated in the law and otherwise allows judges to use their discretion and implement an alternative to incarceration that can address the violation through other requirements. To reduce supervised release revocations in instances that are not mandated by statute, we urge the Commission to adopt Option 1 of the court's response to a violation of supervised release.

II. Parts A, B, and E of the Drug Offenses Amendment Promote Necessary Changes to Reduce Disproportionately Long Sentences and Ensure an Evidence-Based Approach to Drug Sentencing

Over forty years ago, the federal government launched the War on Drugs, implementing harsh penalties – lengthy prison sentences and mandatory minimums – in an attempt to stem drug use and sales. A 2012 study by the Urban Institute found that the increase in expected time served for drug offenses "was the single greatest contributor to growth in the federal prison population between 1998 and 2010."[21] However, since then, research has found that increased penalties and longer sentences are ineffective in deterring drug use or trade and do not advance public safety.[22] Based on this data, there has been a growing movement at the state and federal levels to shorten drug penalties to align with this growing body of research. In the last 15 years, red, blue and purple states have advanced a range of evidence-based changes to drug laws, including reclassifying simple drug possession to a misdemeanor that is ineligible for state prison terms,[23] limiting or eliminating sentence enhancements that significantly increase prison stays,[24] and

[21] Kamala Mallik-Kane, Barbara Parthasarathy, and William Adams, "Examining Growth in the Federal Prison Population, 1998 to 2010," p.3, https://www.ojp.gov/pdffiles1/bjs/grants/239785.pdf

[22] The Pew Charitable Trusts, "More Imprisonment Does Not Reduce State Drug Problems," March 2018, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems

[23] Brian Elderbroom and Julia Durnan, "Reclassified State Drug Law Reforms to Reduce Felony Convictions and Increase Second Chances," Urban Institute, October 2018, https://www.urban.org/sites/default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convictions_and_increase_second_chances.pdf

[24] Vera Institute of Justice, "Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013," https://vera-institute.files.svdcdn.com/production/downloads/publications/state-drug-law-reform-review-2009-2013-v5.pdf

eliminating the unwarranted sentencing disparity between crack cocaine and powder cocaine.[25] Congress has also taken steps to reexamine federal drug sentencing. In 2010, the Fair Sentencing Act reduced the crack-powder cocaine sentencing disparity from 100:1 to 18:1,[26] and later in 2018, the First Step Act made additional and important changes to drug sentencing, including narrowing sentence enhancements for people convicted of multiple drug offenses.[27]

Some of the proposed amendments are critically needed policy changes to continue to address the lasting and disparate harm caused by failed mass incarceration policies and align federal drug sentencing with current research and data. Today, 44% of people in federal prison are there primarily for a drug offense.[28] More than 26,000 people in federal custody are serving sentences over 20 years.[29] A growing body of research over the last twenty years has made clear that the marginal benefit of lengthier sentences is minimal at best—and counterproductive at worst.[30] There is a growing consensus among researchers that incarceration cannot be justified on the grounds that it increases public safety by decreasing reoffending and in fact, it can actually increase the likelihood of returning to jail or prison.[31]

Imposing lengthy sentences does not effectively deter drug trafficking, instead, it leads to family separation, destabilizes communities, and drains public funds. It is for these reasons that we urge the Commission to adopt Parts A, B, and E of the Drug Offenses Amendments, which will safely reduce disproportionately long drug sentences and continue the work of moving the Guidelines toward a more evidence-based approach to drug sentencing. The proposed amendments FWD supports will ensure evidence-based sentencing decisions that will reduce the federal prison population without compromising public safety.

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[25] FAMM, "Crack-Cocaine Disparity Reform In The States," https://famm.org/wp-content/uploads/2024/11/Crack-Disparity-in-the-States-2025.pdf

[26] Congressional Research Service, "Cocaine: Crack and Powder Sentencing Disparities," November 2021, https://sgp.fas.org/crs/misc/IF11965.pdf

[27] Congressional Research Service, "The First Step Act of 2018: An Overview," March 2019 https://crsreports.congress.gov/product/pdf/R/R45558

[28] Federal Bureau of Prisons, Population Statistics, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[29] FWD.us, "With the Stroke of a Pen: A Primer on Presidential Clemency," October 2024, p.1, https://www.fwd.us/wp-content/uploads/2024/10/Presidential-Clemency-Primer.pdf

[30] *See* Laura Bennett and Felicity Rose, Center for Just Journalism and FWD.us, "Deterrence and Incapacitation: A Quick Review of the Research," https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research; Roger Pryzybylski, et al., "The Impact of Long Sentences on Public Safety: A Complex Relationship," November 2022, https://councilonj.org/wp-content/uploads/2024/05/Impact-of-Long-Sentences-on-Public-Safety.pdf

[31] Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson, and Francis T. Cullen,"Custodial Sanctions and Reoffending: A Meta-Analytic Review," Crime and Justice, 2021, https://www.journals.uchicago.edu/doi/abs/10.1086/715100?journalCode=cj;Charles E. Loeffler and Daniel S. Nagin, "The Impact of Incarceration on Recidivism," Annual Review of Criminology, 2022, https://www.annualreviews.org/doi/abs/10.1146/annurev-criminol-030920-112506

A. Support Adoption of Option 3 of Subpart 1 and Subpart 2 of Part A of the Drug Offenses Amendment

We encourage the Commission to adopt Option 3 of Subpart 1 of Part A of the Drug Offenses Amendment, which would set the highest base offense level in the Drug Quantity Table at level 30. Additionally, we support the adoption of Subpart 2 of Part A of the Drug Offenses Amendment, which would add new specific offense characteristics that reduce the base offense level for individuals who play limited roles in drug trafficking.

The use of drug quantity as a primary factor in federal sentencing has proven to be a flawed approach. The assumption that greater drug quantity indicates greater culpability and therefore warrants harsher sentences has resulted in disproportionately long sentences that do not make communities any safer. Congress established the framework of linking drug quantity with perceived culpability during the War on Drugs era with the Anti-Drug Abuse Act of 1986[32] and the Commission adopted this framework by using drug weight to determine the base offense level in the Guidelines.[33] The Commission's own prior study has since shown drug quantity to be a poor indicator of culpability. In 2010, using a sample of drug cases from FY 2009, the Commission conducted a special coding analysis to assess the role performed by people convicted of drug offenses. This study determined that the weight of drugs was not closely connected to a person's role in the drug offense.[34] When the Commission analyzed the median base offense level by role for the five major drug types, it concluded that, "there was not a strong correlation between base offense level and level of the [person's] function in the offense."[35] Despite Congress's intention to identify and harshly punish people higher in the drug trafficking chain by using drug quantity to determine sentences, this approach has instead resulted in people at all levels of the drug chain facing disproportionately long sentences that are often unrelated to their role in the offense. Further, the current approach ignores the overwhelming research demonstrating that long sentences do not advance public safety.

While the proposed Amendments do not delink drug type and quantity from the calculation of sentences, Option 3 of Subpart 1 of Part A of the Drug Offenses Amendment, would help reduce some of the longest sentences in the Guidelines, while Subpart 2 will help ensure that individuals with limited involvement in drug trafficking are not subjected to excessively long sentences. The

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[32] U.S.S.C., "2011 Report To The Congress: Mandatory Minimum Penalties In The Federal Criminal Justice System," Chapter Two, p. 24, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf

[33] *See* U.S.S.C., Amendment 782, Reason for Amendment (eff. Nov. 1, 2014), https://www.ussc.gov/guidelines/amendment/782#:~:text=Reason%20for%20Amendment%3A%20This%20amendment,Quantity%20Table%20in%20%C2%A72D1.

[34] U.S.S.C., "2011 Report To The Congress: Mandatory Minimum Penalties In The Federal Criminal Justice System," Chapter Eight, p. 168, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf

[35] Id.

Commission's data shows that judges are already imposing sentencing below the guidelines in most drug trafficking cases, especially in the highest base offense levels.[36] This is further evidence that all drug sentences in the guidelines are too excessive. The current guidelines fail to produce sentences that accurately reflect a person's role, making them an ineffective tool for judges. Moreover, the fact that judges frequently deviate from the guideline recommendations indicates that drug quantity does not reflect the true nature of a person's culpability in a drug offense and judges find it essential to look at the individual circumstances of each case. This can perpetuate disproportionate sentencing and does not prioritize public safety. Option 3 of Subpart 1 of Part A of the Drug Offenses Amendment would address this in part by codifying current guideline departures to ensure consistency in application and lowering some of the longest sentences in the guidelines.

Additionally, many of the Commission's prior amendments demonstrate that base offense levels can be reduced safely. For instance, in 2014, the Commission voted unanimously to reduce the applicable sentencing guideline range for most federal drug trafficking offenses by two base levels across all drug types. The Drugs Minus Two Amendment was subsequently applied retroactively. The Commission found no statistically significant difference in the recidivism rates of people who were released an estimated average of 37 months early through the retroactive application of the Amendment (27.9%) and people who served their full sentences and were released before the amendment (30.5%).[37] Similarly, when the Commission lowered base levels for crack offenses prospectively and retroactively, the Commission found that the recidivism rate for people who received an average retroactive sentence reduction of approximately 20% was similar to the rate for people who had been released prior to the adoption of the Crack Minus Two Amendment.[38] Adopting Option 3 of Subpart 1 and Subpart 2 of Part A of the Drug Offenses Amendment builds on the Commission's successful precedent in advancing safe and effective data-driven changes to drug sentencing.

B. Support Adoption of Subpart 1 and Option 1 of Subpart 2 of Part B of the Drug Offenses Amendment

We urge the Commission to adopt Part B of the Drug Offenses Amendment to update the Guidelines to be in line with current data that methamphetamine purity has drastically increased and is now similar across all three forms of the substance and therefore, the sentencing disparity

[36] U.S.S.C., " Proposed Amendments on Drug Offenses Public Data Briefing," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf
[37] U.S.S.C., "Retroactivity & Recidivism: The Drugs Minus Two Amendment," p.6, July 2020, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf. It is also worth noting that the study found that one-third of the recidivism, for both the study group and the control group, was attributable to court or supervision violations.
[38] U.S.S.C., "Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment," p. 3, May 2014, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf

is no longer warranted. In particular, we urge the Commission to adopt Subpart 1 of Part B of the Drug Offenses Amendment, eliminating references to "meth ice" in the Guidelines. We also support Option 1 of Subpart 2 of Part B of the Drug Offenses Amendment, which would set the quantity thresholds for methamphetamine at the current level for methamphetamine mixture.

Currently, the Guidelines differentiate methamphetamine offenses based on the purity of the drug, assigning higher base offense levels for pure methamphetamine ("meth actual") and meth ice (a form of methamphetamine that is at least 80% pure) than methamphetamine mixture. The weight of methamphetamine mixture that determines the base offense level under the guidelines is ten times the quantity of meth actual or meth ice because the latter forms of the substance are considered to be more pure. When the penalty disparity for methamphetamine offenses was first established in 1988,[39] trafficking a highly pure form of the drug was presumed to be an indicator of having higher involvement in the drug distribution chain. However, in the last two decades, purity has proven to be a weak marker of culpability. From 2011 to 2019, the average purity of methamphetamine seized and tested by the Drug Enforcement Agency has consistently been over 90%.[40] The Commission's study of people sentenced for trafficking methamphetamine in FY 2022 has also found no statistically significant difference in the purity of the drug and the person's role in the offense – the purity level was similar among people who were at the top of the drug distribution chain and people who had a very limited and low-level function in the chain.[41] As the data shows, purity is no longer an indication of increased involvement or culpability and therefore should not be used to significantly increase a person's offense level and corresponding sentence.

Assigning higher base offense levels in the Guidelines for meth actual and meth ice results in disproportionately harsh sentences that do not advance public safety. For example, people who are sentenced for trafficking meth ice receive sentences that are on average 20 months longer than people sentenced for trafficking methamphetamine mixture.[42] These lengthy sentences also stand out from the general trend in federal drug sentencing. In FY 2022, the average imposed sentence for methamphetamine offenses was 30 months longer than the average for all other drug trafficking offenses.[43]

Longer sentences for methamphetamine offenses do not deter drug use or sale, but instead add years to people's sentences and contribute to the growing federal prison population that has been

[39] U.S.S.C., "Methamphetamine Final Report," p.8, November 1999, https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf
[40] U.S.S.C., "Methamphetamine Trafficking Offenses In The Federal Criminal Justice System," p. 7, June 2024, https://www.ussc.gov/research/research-reports/methamphetamine-trafficking-offenses-federal-criminal-justice-system
[41] Id., p. 39
[42] Id., p. 50
[43] Id. p. 45

on an upward trend since 2020.[44] This increasing prison population comes at a significant cost to taxpayers and does not improve public safety. As we know, incarceration is one of the most expensive and least effective public safety strategies. The purity distinction is likely driving the sentencing disparity between methamphetamine offenses and other drug offenses since people receive much longer sentences for trafficking meth ice than for methamphetamine mixture.

For the reasons highlighted above, we urge the Commission to eliminate the unnecessary methamphetamine purity distinction and adopt Subpart 1 and Option 1 of Subpart 2 of Part B of the Drug Offenses Amendment.

C. Support for Adoption of Part E of the Drug Offenses Amendment

Lastly, we urge the Commission to adopt Part E of the Drug Offenses Amendment, which would provide much-needed clarity that the manner in which a person provides information to the government under §5C1.2(a)(5) of the guidelines— whether in person or writing – shouldn't impact the applicability of a departure from statutory minimums. Currently, the guidelines are being interpreted as necessitating an in-person meeting with the government, causing some individuals who would otherwise qualify for the safety valve to forgo it because they may not feel safe or comfortable with an in-person meeting. This technical amendment would ensure everyone who provides information to the government under this provision can receive the applicable departure. Importantly, it promotes consistency across judicial districts by resolving discrepancies in how §5C1.2(a)(5) should be interpreted and applied.

III. The Commission Should Reject Part C and Part D of the Drug Offenses Amendment

We urge the Commission to reject Part C (Fentanyl Misrepresentation Amendment) and Part D (Machine Guns Amendment) of the Drug Offenses Amendment.

The increased prevalence of fentanyl is deeply concerning and demands an evidence-based response. However, the proposal in Part C of the Drug Offenses Amendment to lower the mens rea requirement for the fentanyl misrepresentation enhancement under §2D1.1(b)(13) is not the correct approach. Rather than advancing policies that will increase incarceration without improving public safety, the Commission should prioritize measures that address the root causes of drug trafficking offenses. Watering down or otherwise amending the mens rea requirement in an effort to increase the application of the fentanyl misrepresentation enhancement risks repeating the failures of mass incarceration policies, which relied on punitive measures rather than addressing the underlying issues contributing to drug use and sales. The amendment also

[44] Federal Bureau of Prisons, Population Statistics and Past Inmate Population Totals, https://www.bop.gov/about/statistics/population_statistics.jsp

risks increasing penalties without providing justification that such an increase will make communities safer or further the underlying purpose of punishment, as advised by the parsimony principle.

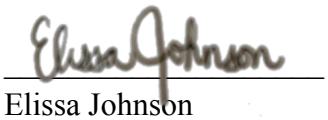
Similarly, we oppose the adoption of Part D of the Drug Offenses Amendment which would create a tiered enhancement based on whether the weapon possessed was a machine gun (4-level enhancement) or another dangerous weapon (2-level enhancement). This proposal, much like the Part C Amendment, is a reactive measure that will likely increase incarceration without improving public safety. Before making any changes, we encourage the Commission to do a more thorough analysis of this issue to determine whether the proposed enhancements would be effective in advancing the goals of the Guidelines.

IV. Conclusion

FWD.us urges the Commission to adopt the proposed amendments that align federal community supervision and drug sentencing with evidence-based practices. Specifically, we support the adoption of the Supervised Release Amendment, and Parts A, B, and E of the Drug Offenses Amendment. We also call on the Commission to conduct further study on the proposed Part C and Part D of the Drug Offenses Amendment, as they could lead to harsher sentences without improving public safety.

We thank the Commission for the opportunity to submit written comments and for your consideration of our recommendations to the proposed amendments.

Sincerely,



Elissa Johnson
Vice President, Criminal Justice Campaigns
FWD.us

PERA
Federal Prison Education and Reform Alliance

Education and Support for the Justice Community and Advocacy for People in Federal Prison

Jack T. Donson
Executive Director
Phone: 212 461-2252

Date: February 17, 2025

SUMMARY: **Not imposing a term of supervised release will preclude people from earing First Step Act recredits and cost the government more money for incarcerating people for longer periods.**

COMMENT: The preliminary proposal on Supervised Release (SR) changes where the Commission is proposing to discourage imposing SR on anyone who: (1) does not need SR due to their specific circumstances; and (2) who is or will be deported at the end of their carceral sentence. Specifically, the Commission asked for fee back on the "**unintended consequences**" that would impact a defendant's eligibility from the Commission's proposed changes in Chapter 5 of the Guidelines. See USSG Sec. 5D1.1(c) proposed changes.

By strongly discouraging SR for probable deportee's and those whose personal circumstances do not warrant a term of SR, those individuals who would **be otherwise eligible to earn FSA Time Credits under 18 U.S.C. Sec. 3632(d)(4)** would not be able to, specifically because:

18 U.S.C. Sec. 3624(g)(3) states the prisoners are to have the last year of their BOP custodial sentence converted to SR via the application of 365 credits (under Sec. 3632) If they have a term of SR included as part of their original sentence. Courts have interpreted this Section to prevent a prisoner from receiving any FSA credits if they were not sentenced to some amount of SR. **The preliminary proposal would prevent otherwise eligible prisoners from receiving FSA time credits no matter how much programming they do.**

For immigration cases, many individuals are extradited back to the US to face charges, others are seized on the high seas and paroled into the US to be charged, still others are here perfectly legal on visa's or as legal residents most of which are in the country legally and should not be subject to a final order of deportation until they have been seen by an immigration judge or proper process has been followed on issuing a "final order of removal." **See 18 U.S.C. Sec. 3632(d)(4)(E)(i) which makes them FSA time credit ineligible only when they are subject to a final order of removal. It should be noted that people under direct appeal are currently being afforded the 365 days FSA credit and released early pending the final decision by the EOIR. The average cost of incarceration is nearly $40,000.**

If one of the purposes of the changes to the SR regulations is cost reduction, then as applied to certain sentences, not giving them some form of SR **would extend their carceral sentences and significantly cost more money to house and supervise them.**

Jack T. Donson, Executive Director
[redacted]

The Federal Prison Education and Reform Alliance
WWW.BOPERA.ORG

Katja Cahoon, MBA, LCSW
Higher Path, Inc.

2/27/2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Katja Cahoon, I am a psychotherapist in private practice and provide psychotherapy for PTSD, Depression, and Anxiety, including ketamine assisted psychotherapy. I also work on FDA approved Phase I and III psychedelic trials for several sponsors.

I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. Higher Path, Inc. applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

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[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

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The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

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No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

<u>Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment</u>

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain,

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The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while

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[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
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75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

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If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

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Chapter Three, Part B. The Commission seeks comment on how it should address this issue.

The Commission should provide guidance that allows for the lowest base offense level.

* * *

Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Katja Cahoon, MBA, LCSW
President, Higher Path, Inc.

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

Illuminating Mindsight
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2/27/2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Maureen Milazzo and I am submitting this comment letter on behalf of Illuminating Mindsight LLC, a social justice oriented counseling practice. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. Illuminating Mindsight LLC applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

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[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier

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* * *

Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Maureen Milazzo
Founder-Illuminating Mindsight

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

Last Prisoner Project
1312 17th St Suite 640
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2/24/2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Sarah Gersten, and I am submitting this comment letter on behalf of the Last Prisoner Project, a national nonpartisan organization focused on drug policy and criminal legal reform. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for soliciting stakeholder feedback and considering making long overdue amendments to both drug sentencing practices as well as policies regarding supervised release. Our comment urges the Commission to both adopt an amendment providing courts with greater discretion when imposing terms of supervised release, as well as to reform sentencing practices based on the Drug Quantity Table that better align sentencing practices with the interests of safety and justice.

1. Proposed Amendments to Supervised Release

A. LPP Supports the Proposed Amendments Providing Courts Greater Discretion in Imposing Terms of Supervised Release and in Responding to Supervised Release violations

Supervised release can be a productive way to help individuals transition back to society post-incarceration. When periods of supervision are not individualized, however, they risk having the opposite outcome, and creating overly burdensome restrictions that undermine returning citizens' ability to successfully reintegrate. Allowing more discretion in imposing terms of supervised release that are grounded in data and evidence will work to increase public safety and ultimately reduce recidivism.

The notice of proposed amendments provides a two-part proposal relating to the imposition of supervised release to provide courts greater discretion to impose a term of supervision in the manner it determines is most appropriate based on an individualized assessment of the defendant. The Commission is also considering amendments to Chapter Seven (Violations of Probation and Supervised Release) to provide courts greater discretion to respond to a violation of a condition of supervision and to ensure the provisions in this Chapter reflect the differences between probation and supervised release.[1]

LPP supports implementing Part (A) of the proposed amendment to add language throughout Chapter Five, Part D (Supervised Release) directing courts that supervised release decisions should be based on an "individualized assessment" of the statutory factors listed in 18 U.S.C. § 3583(c)–(e) and to remove recommended minimum terms of supervised release.[2] The inclusion of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.

Adopting the proposed framework would "prevent probation system resources from being wasted on supervisory services for releasees who do not need them."[3] This reflects the desire of the Commission to distinguish supervised release from the parole system it replaced by giving district courts the freedom to provide post release supervision for "those, and only those, who needed it."[4] Part A of the proposed amendment would accomplish both of the commission's goals in that it would give courts greater discretion to impose a term of supervised release in the manner it determines is most appropriate based on an individualized assessment of the defendant and would ensure the provisions in Chapter Five "fulfil rehabilitative ends, distinct from those of incarceration."[5]

LPP also supports or suggests the following amendments:

- The addition of the introductory comment by the Commission that when making determinations regarding supervised release, courts should assess a wide range of factors to ensure its decisions fulfill the rehabilitative needs of the defendant.[6] However, the amendment should not include the language "~~protect the public from further crimes of the defendant~~" as this places an additional burden on court's discretion to consider this factor that is already inherently intertwined with the analysis enumerated in statutory factors

[1]U.S.S.C. Amendment Notice
[2]U.S.S.C. Proposed Amendments to the Sentencing Guidelines, published Jan. 24, 2025, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf [hereinafter "U.S.S.C. Proposed Amendment"].
[3] U.S.S.C. Proposed Amendment citing S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983), page 1.
[4] U.S.S.C. Proposed Amendment citing *Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it."), page 1.
[5] U.S.S.C. Proposed Amendment citing United States v. Johnson, 529 U.S. 53, 59 (2000), page 4.
[6] U.S.S.C. Proposed Amendment, Part D - SUPERVISED RELEASE, "Introductory Commentary," page 5.

and has the result of potentially swaying the court to favor granting supervised release even when it is not necessary. Relatedly, the introductory comment should not include the language that "~~a court should consider whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety.~~"[7]

- Amending the provisions of section §5D1.1 to remove the requirement that a court imposes a term of supervised release when a sentence of imprisonment of more than one year is imposed and to only require a court to impose supervised release when required by statute.[8]
- Amending the provisions of section §5D1.1 to allow the Court to order a term of supervised release only when warranted by an individualized assessment of the need for supervised release with the reason stated on the record.
- Amending Section §5D1.2 to require the court to conduct an individualized assessment to determine the length of the term of supervised release, which must not exceed the maximum term allowed by statute and to state on the record its reasons for selecting the length of the term of supervised release. However, the Commission should remove the statutory factors of ~~2. Criminal History; and 3. Substance Abuse~~. Similar to the argument made in "Application of Subsection (c)" regarding deportable aliens,[9] if such a defendant commits an additional criminal act, involving substances or otherwise, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. Additionally, under §5D1.2 (a), the Commission should amend the language to state "if a term of supervised release is **deemed necessary**, the court shall conduct an individualized assessment to determine the length of the term, not to exceed the relevant statutory maximum term **or a term greater than necessary**"
- Under Section §5D1.2 Commentary "3. Individualized Assessment", the Commission should change the language to "The court should ensure that the term imposed on the defendant is ~~sufficient~~ **no greater than necessary** to address the purposes of imposing supervised release on the defendant."
- Under Section §5D1.2 Commentary "4. Early Termination and Extension", the Commission should **add language** as to when a Court has authority to extend a term of supervised release (only when necessary).
- Amending Section §5D1.3 to add provision stating that courts must conduct an individualized assessment to determine what discretionary conditions are warranted. However, the Court should remove the language adding ~~an example of a "special" condition that would require a defendant who has not obtained a high school or GED to participate in a program to obtain such a diploma.~~ While this example is clearly meant to

[7] U.S.S.C. Proposed Amendment, Part D - SUPERVISED RELEASE, "Introductory Commentary," page 6.
[8] U.S.S.C. Proposed Amendment, §5D1.1 "Imposition of a Term of Supervised Release," page 6.
[9] "See U.S.S.C. Proposed Amendment "Application of Subsection (c)"— "...If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution."

promote rehabilitation, it provides too much discretion to courts in that if imposed, a defendant would receive more supervision than necessary. Additionally, such a requirement infringes on a defendant's right to choose when, where, and how to receive an education. An education is something to be proud of; not something someone was forced to do by threat of violating the conditions of their supervised release. Additionally, it may lead to a waste of public resources; a defendant who is obligated to participate in a GED program will likely not be motivated to do beyond the bare minimum and assessing whether the defendant has made a "good faith effort" in the program is a difficult judgment call for even the most seasoned educator. Finally, such a requirement may be a hurdle beyond the individual defendant's capabilities resulting in a futile effort at rehabilitation and worse, a potential supervised release violation for not fulfilling the special condition, landing them back in prison.

- Amending Section §5D1.4 to encourage a court, as soon as practicable, after a defendant's release from imprisonment, to conduct an individualized assessment to determine whether it is warranted to modify, reduce, or enlarge the conditions of supervised release.
- Amending Section §5D1.4 to encourage a court to terminate the remaining term of supervised release and discharge the defendant after the expiration of one year of supervised release that the termination is warranted by the conduct of the defendant and the interest of justice. However, the Commission should remove the requirement that the court ~~consult with the government and probation officer~~. Assessing the defendant's individual circumstances and whether termination of supervised release is appropriate and in the interests of justice can be accomplished without consultation of the government and BOP. This is an additional and unnecessary burden to place on courts and could result in a denial of early termination of supervised release where supervised release is not necessary and would be a waste of scarce public safety resources.
- Amending Part A of the proposed amendment to provide a list of factors for a court to consider when determining whether to terminate supervised release. However, the amendment should not provide that a court, any time before the expiration of a term of supervised release, ~~may extend the term in a case in which the maximum term was not imposed~~. Alternatively, if it provides that a court, any time before the expiration of a term of supervised release, may extend the term in a case in which the maximum term was not imposed, it should also **provide that the reason must be stated on the record.**
- LPP suggests adding a **policy statement that the court should assess whether "probation system resources are being wasted on supervisory services for releasees who do not need them."** Alternatively, perhaps this should be one of the factors that a judge considers in whether to terminate a term of supervised release.

Proposed Amendments to Drug Offenses

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[10] and recidivism rates[11] in certain circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[12]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[13] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[14] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[15]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[16] According to a meta-analysis, traumatic events during incarceration, including

[10] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[11] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

[12] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[13] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[14] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[15] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[16] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[17]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[18], and community.[19] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[20]

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[21] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[22]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this**

[17] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.
[18] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.
[19]Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.
[20] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5
[21] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[22]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, multiple studies have reported impressive safety and efficacy data for the treatment of PTSD with medical cannabis and MDMA.[23] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[24] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[25], and the same status to an LSD formula for the treatment of

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[23] *See* e.g. Mirkin, M. (2019, February 5). *San Diego VA study testing cannabidiol--a compound derived from cannabis*--for PTSD. VA Research Currents. https://www.research.va.gov/currents/0219-San-Diego-VA-study-testing-cannabidiol.cfm, Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[24] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[25] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

generalized anxiety disorder in 2024.[26] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[27] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[28]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

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[26] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[27] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[28] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: **"the defendant's primary function in the offense was performing any of the following low-level trafficking functions**." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: **"one or more of the following factors is present . . ."**

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[29]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for

[29] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.

SUDs but were under the influence at the time of their crime.[30] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[31]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[32] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[33] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[34]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

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[30] NIDA. (2020). Criminal Justice Drug Facts.
[31] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[32] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/
[33] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf
[34] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life imprisonment.[35] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[36]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments **should be applied retroactively**. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[37] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

[35] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[36] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

[37] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

We appreciate the opportunity to comment on this proposal and thank the Commission for its time and consideration.

Respectfully,

Sarah Gersten
Executive Director and General Counsel
Last Prisoner Project
1312 17th St
Suite #640
Denver, CO 80202

LAW ENFORCEMENT
ACTION PARTNERSHIP
ADVANCING JUSTICE AND PUBLIC SAFETY SOLUTIONS

Date: February 25, 2025

Re: Public Affairs - Priorities Comment

To: United States Sentencing Commission

Dear United States Sentencing Commissioners,

My name is Lieutenant Diane Goldstein (Ret.) and I am submitting this comment letter on behalf of the Law Enforcement Action Partnership (LEAP). We strongly support the proposed 2025 amendments to federal drug sentencing guidelines, which seek to lower the highest recommended base offense levels, reduce excessive sentencing for low-level drug trafficking, and eliminate life sentence recommendations for federal drug offenses.

The Law Enforcement Action Partnership (LEAP) is a nonprofit group of police, prosecutors, judges, and other criminal justice professionals who speak from firsthand experience. Our mission is to make communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations.

For over 50 years, punitive drug sentencing policies have failed in their stated objective. The federal government's reliance on harsh prison sentences has done little to improve public safety or reduce drive availability or trafficking, but it has fueled excessive government funding through unnecessary incarceration, destroying lives, fragmenting families, and corroding entire communities.

Research has consistently demonstrated that long prison terms do not deter drug offenses and often exacerbate recidivism. Despite this wealth of evidence, the current Drug Quality Table (DQT) continues to impose severe sentences on low-level drug offenders, failing to distinguish them from major traffickers. Many convicted individuals, such as couriers, lookouts, or those with little decision-making power, receive excessive sentences.

Sentencing data from drug cases reveals that federal courts frequently find current guidelines overly punitive, often issuing sentences below the recommended range. This pattern underscores the inadequacy of rigid, weight-based thresholds in determining culpability, highlighting the need for structural reforms to ensure consistency and fairness in sentencing.

By recalibrating the Drug Quantity Table and adjusting the highest base offense level, the Commission acknowledges the need for a more nuanced sentencing structure. That structure should ensure penalties are proportionate to an individual's actual role in an alleged drug distribution operation, and not just rely on the quantity of drugs involved. These reforms would align sentencing with modern criminological research, ensuring that those with minimal involvement are not subjected to excessive penalties designed for high-level traffickers.

One of the most critical aspects of this reform is the removal of life sentence recommendations for federal drug offenses. The United States remains one of the few developed nations that still imposes life sentences for nonviolent drug offenses, despite decades of evidence showing that extreme sentencing fails to deter crime, promote rehabilitation, or enhance public safety.

A life sentence for a drug offense ignores the possibility of rehabilitation and change. The human cost of these sentences is staggering. People sentenced for drug-related crimes often serve sentences in the same range as violent offenses, including homicide. This imbalance undermines public trust in the justice system.

Additionally, life sentences are applied disproportionately, particularly against Black, Latino, and Indigenous individuals, compounding racial disparities already present in drug law enforcement. According to federal data, nearly half of all people serving life without parole for drug offenses are Black, even though Black people make up only around 14 percent of the U.S. population and data shows similar rates of drug use across racial groups.

By eliminating life sentence recommendations, the Commission acknowledges the punishment must be proportionate to the crime, allow for proof of rehabilitation, and ensure that sentencing decisions are rooted in justice rather than outdated punitive ideologies.

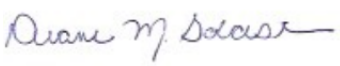
There are currently around 63,000 individuals serving federal sentences for drug-related offenses, many of whom were sentenced under outdated guidelines that failed to distinguish between different levels of involvement. Past reforms, such as the 2014 Drugs Minus Two Amendment, successfully provided retroactive relief, correcting excessive sentences for thousands of individuals.

We strongly urge the Commission to continue this progress by applying these new sentencing reductions retroactively, ensuring that individuals currently serving disproportionate sentences have the opportunity for just relief. Doing so would further advance fairness and consistency in federal sentencing.

By adopting these proposed amendments, the United States Sentencing Commission can take a historic step toward a more just and effective federal sentencing system. Lowering the highest base offense levels, reducing penalties for low-level trafficking roles, and applying these changes retroactively will ensure that federal sentencing laws reflect actual culpability, promote public safety, and uphold principles of fairness.

We urge the Commission to move forward with these amendments, ensuring that drug sentencing is proportionate, equitable, and grounded in evidence-based practices.

Respectfully,



Lt. Diane Goldstein (Ret.)
Redondo Beach Police Department
Executive Director, The Law Enforcement Action Partnership

LAW ENFORCEMENT
ACTION PARTNERSHIP
ADVANCING JUSTICE AND PUBLIC SAFETY SOLUTIONS

Date: February 25, 2025

Re: Public Affairs – Priorities Comment

To: United States Sentencing Commission

Dear United States Sentencing Commissioners,

My name is Lieutenant Diane Goldstein (Ret.), and I am submitting this comment letter on behalf of the Law Enforcement Action Partnership (LEAP). LEAP is a nonprofit group of police, prosecutors, judges, and other criminal justice professionals who speak from firsthand experience. Our mission is to make communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations. I am writing today in support of the Proposed 2025 Amendments on Supervised Release.

As law enforcement professionals, we are encouraged to see the introduction of a proposal that would better align the federal supervised release system towards promoting public safety and reducing recidivism.

The U.S. Congress designed the supervision system to be used "for those, and only those, who need it." In practice, supervised release is being drastically overused, withover 110,000 individuals currently serving on federal supervised release. This overburdened system is overwhelming probation officers with large caseloads, diverting their time and resources away from those most in need of supervision.

The proposed amendments would allow the supervised release system to operate as Congress intended, with probation officers overseeing a manageable caseload of people who truly need supervision. Specifically, they would restore discretion to courts to determine when – and to what extent – supervision would be imposed by using an individualized assessment of each particular case, rather than imposing supervision as a matter of course.

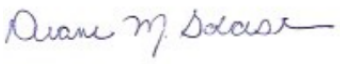
This change would also encourage courts to consider ending a person's supervision early when it is in the interest of public safety, thereby freeing up probation officers to focus on those who could benefit most from supervision. In addition, it would provide further incentive for those under supervision to remain compliant with the conditions of their release.

The proposal would also mark a positive step forward by providing courts with greater discretion to determine the appropriate penalty for people who violate their supervision. The amendment effectively distinguishes between probation and supervised release for purposes of revocations, and creates a new category of Grade D supervised release violations for minor noncriminal conduct. As law enforcement, we know that putting someone back in prison for a minor violation only reduces their ability to rehabilitate and reintegrate into society. These changes would give courts leeway to consider whether revocation of supervised release for minor violations is truly in the interest of public safety. This would lead to fewer people being unnecessarily reincarcerated, and give those on supervised a fair chance to focus on personal-transformation and reintegration into their communities, all of which lessens the likelihood of recidivism.

We appreciate your efforts to make necessary changes to the federal supervised release system that advance our shared goals of promoting public safety. We strongly urge the United States Sentencing Commission to move forward with these amendments.

Thank you for the opportunity to submit these comments in support of the Safer Supervision Act.

Sincerely,



Lieutenant Diane Goldstein (Ret.)
Executive Director, The Law Enforcement Action Partnership

Mindful Restoration PLLC
7400 Metro Blvd
Edina, MN, 55439

02/27/2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Cortney Amundson, and I am submitting this comment letter on behalf of Mindful Restoration.We provide individual therapy services for survivors of trauma and individuals experiencing other mental health disorders. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. Mindful Restoration applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works
[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80
(finding suspended sentences created a lower risk of reconviction than custodial sentences)

circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer

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[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of

[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/
[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf

whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

* * *

<u>Call for Retroactive Application</u>

[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Cortney Amundson
Mindful Restoration PLLC

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp
[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))
[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

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Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Mickensy Ellis-White, and I am submitting this comment letter on behalf of Mpower Counseling, PLLC. I am a Licensed Clinical Professional Counselor specializing in trauma and addiction. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. Mpower Counseling, PLLC applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

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[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

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[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

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Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain,

having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while

[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/

75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under**

[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf

[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

Chapter Three, Part B. The Commission seeks comment on how it should address this issue.

The Commission should provide guidance that allows for the lowest base offense level.

* * *

Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,

Mickensy Ellis-White
Mpower Counseling, PLLC

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

Multidisciplinary Association for Psychedelic Studies
3141 Stevens Creek Blvd, #40563
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February 25, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

I'm Rick Doblin, PhD (Public Policy, Kennedy School of Government, Harvard University, 2001), submitting this comment letter on behalf of the Multidisciplinary Association for Psychedelic Studies (MAPS), a 501(c)3 non-profit organization I founded in 1986 with a mission to develop medical, legal, and cultural contexts for people to benefit from the careful use of psychedelics and cannabis. For decades, MAPS has focused on researching 3,4-Methylenedioxymethamphetamine (MDMA), primarily to develop MDMA-assisted therapy into an FDA-approved treatment available by prescription.

I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025. I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. In 2001, I testified before the USSC regarding the drug sentencing guidelines for MDMA at a time of unscientific hysteria over supposed MDMA neurotoxicity.[1] Given the long fight for drug sentencing reform MAPS and countless other organizations have engaged in over the years, we have come a long way. I am overjoyed by this Commission's willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

[1] *See*, USSC Public Hearing March 19 - 20, 2001 (March 2001), https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-march-19-20-2001

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

This Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[2]

In certain circumstances, incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[3] and recidivism rates[4]. Prisons have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[5] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[6] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[7]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[8] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[9]

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[13] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
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which the base offense levels should not be reduced or for which there should be a different base offense level reduction?

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The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). This is the case especially for MDMA since the evidence presented to the USSC in 2001 regarding MDMA neurotoxicity has been disproven by subsequent research, similar to how exaggerated risk estimates presented to the USSC about the dangers of crack cocaine were disproven in subsequent years, leading to reductions in the sentencing guidelines. Cannabis and psychedelics[15] have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD[16], though the Food and Drug Administration (FDA) requested additional data before potential approval. Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[17] As of February 2025, there were over 70 registered studies investigating psychedelics for psychiatric disorders. The FDA granted

[15] MAPS Public Benefit Corporation. Investigator's Brochure (2023). https://maps.org/wp-content/uploads/2023/04/MDMA-IB-15th-Edition_FINAL_13MAR2023_MRC.pdf

[16] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[17] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[18], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[19] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[20] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[21] Even the Department of Defense has recently funded research into MDMA-assisted therapy in active duty soldiers suffering from PTSD.

Implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

2. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

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[18] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[19] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[20] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[21] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

3. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

4. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2]|[4]|[6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for

§2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[22]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[23] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[24]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[25] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[26] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[27]

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[22] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[23] NIDA. (2020). Criminal Justice Drug Facts.
[24] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[25] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/
[26] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf
[27] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

* * *

<u>Call for Retroactive Application</u>

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[28] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[29]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[30] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Rick Doblin, Ph.D.
Founder & President, MAPS

[28] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp
[29] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))
[30] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

LDF Legal Defense Fund

Advancing racial justice since 1940

March 3, 2025

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Proposed 2025 Amendments to the Federal Sentencing Guidelines and Issues for Comment on Drug Offenses

Dear Judge Reeves:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), we submit this comment in response to Part B of the U.S. Sentencing Commission's ("Commission") Proposed Amendment on Drug Offenses to the *Federal Sentencing Guidelines Manual* ("*Guidelines*").[1] The *Guidelines* have long been steeped in a history of racism and anti-Black bias, with policies like the crack-powder cocaine disparity disproportionately harming Black communities and exacerbating racial inequities in the criminal legal system. Although the *Guidelines* have played a role in perpetuating these injustices, it is encouraging that the Commission continues to amend them to better reflect principles of fairness, justice, and its core mission of ensuring uniformity in sentencing. To that end, it is essential that the Commission act now to eliminate the remaining disparity between crack and powder cocaine sentencing. Doing so is a necessary and long-overdue step toward rectifying the racial injustices embedded in federal sentencing policies and restoring public confidence in our criminal legal system.

We commend the Commission for inviting comment on the sentencing disparity between crack and powder cocaine offenses in the Drug Quantity Table of the *Guidelines*. While the *Guidelines*' current treatment of drug-related offenses overall reflects an outdated framework of using drug purity as a proxy for offender culpability,[2] the disparate sentencing treatment of crack and powder cocaine offenses has long served as a proxy for race, disproportionately subjecting Black individuals to harsher penalties under federal law. For nearly 40 years, this disparity has fueled systemic racial injustice, devastated Black communities, and undermined public confidence in the fairness of our legal system. We strongly recommend that the Commission eliminate the sentencing disparity between crack and powder cocaine.

Founded in 1940 by Thurgood Marshall, LDF is the nation's first and foremost civil rights legal organization.[3] LDF has a long history of challenging the arbitrary and pernicious influence of racial discrimination in the criminal legal system—as both counsel of record and amicus curiae—urging courts to acknowledge and combat convictions and sentences plagued by

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[1] 90 Fed. Reg. 8968 (proposed Feb. 4, 2025).
[2] U.S. v. Robinson, No. 3:21-CR-14-CWR-FKB-2, 2022 WL 17904534, at *1 (S.D. Miss. Dec. 23, 2022).
[3] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.

such discrimination.[4] Within this history, LDF has addressed specific concerns on the impacts of the federal criminalization of marijuana-related and cocaine-related activities.[5] LDF's mission has always been to be transformative: to achieve racial justice, equality, and an inclusive society.

I. The *Guidelines*' History and Impact Disproportionately Affect Black Communities.

The Commission promulgated its current *Guidelines* on the treatment of drug offenses in the mid-1980s in response to the "War on Drugs" initiated under President Nixon. John Ehrlichman, a top Nixon aide, revealed that this war was designed to target Black people and "hippies."[6] Bipartisan support for sentencing guidelines was rooted in decades of congressional attacks on judicial discretion following the U.S. Supreme Court's decision in *Brown v. Board of Education*,[7] and the period of massive resistance that followed. As judges dismantled the legal order of Jim Crow, legislators chastised what they saw as judicial abuse of power and criticized reliance on sociological evidence at the expense of narrow legal reasoning.[8] Thirty years after the *Brown* decision and against this backdrop, Congress passed the Sentencing Reform Act, which established both the Commission and the *Guidelines*. The *Guidelines* were thus drafted and promulgated amidst a "sentencing revolution,"[9] driven by the belief that unconstrained judicial discretion led to extreme disparities in sentencing. Indeed, one of the primary goals of the Sentencing Reform Act of 1984 was to avoid "unwarranted sentencing disparities."[10] In practice,

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[4] *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Coker v. Georgia, 433 U.S. 584 (1977); McCleskey v. Kemp, 481 U.S. 279 (1987); Banks v. Dretke, 540 U.S. 668 (2004); Buck v. Davis, 580 U.S. 100 (2017); Reed v. Goertz, 598 U.S. 230 (2023) (as amicus); United States v. Flores-González, 86 F. 4th 399 (1st Cir. 2023) (same); Commonwealth v. Dew, 492 Mass. 254 (2023) (same); Commonwealth v. Gelin, No. SJC-13433 (Mass., argued Dec. 4, 2023) (same); People v. Paredes, No. SC-166129 (Mich., filed Dec. 12, 2023) (same).

[5] *See, e.g.*, Public Comment from LDF Re: 89 FR 44597, Docket No. DEA—1362, Proposed Rule on Marijuana Rescheduling Under the Controlled Substances Act to U.S. Drug Enforcement Admin. (July 22, 2024) (on file with LDF); Nigel Roberts, *Justice Department Adjusts Longstanding Drug Policy On Crack, Powder Cocaine To End Racial Disparities*, BET NEWS (Dec. 19, 2022), https://www.bet.com/article/n77qwu/justice-department-adjusts-drug-policy-crack-powder-cocaine-sentencing-disparity (quoting LDF President and Director-Counsel Janai Nelson on the harmful effects of disparate sentencing for cocaine offenses).

[6] Dan Baum, *Legalize It All*, HARPER'S MAG. (2016), https://harpers.org/archive/2016/04/legalize-it-all/ (quoting a 1994 interview with Ehrlichman who confessed that "the Nixon White House . . . had two enemies: the antiwar left and black people . . . We knew . . . by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.").

[7] Brown v. Bd. of Educ. of Topeka., 348 U.S. 886 (1954).

[8] *See, e.g.*, Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 Roger Williams U.L. Rev. 473, 480-93 (2006) (tracing criticisms of racially lenient judges in the 1950s to later critiques that judges were allegedly pro-Communist and then pro-criminal, all with racial undertones).

[9] James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 127-28 (2009).

[10] 28 U.S.C. § 991(b)(1)(B) (2023); *see also* 28 U.S.C. § 994(f) (2023) ("The Commission … shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.").

however, the *Guidelines*' approach to criminal conduct creates considerable disparities by race that do not relate to culpability nor other goals of federal sentencing.

As a result of disparate treatment in policing, charging, and sentencing, a disproportionate number of all persons arrested, convicted, and incarcerated in this country are Black.[11] In 2014, at least 70 police departments arrested Black people at ten times the rate of non-Black people.[12] Specifically, Black people were more than twice as likely to be arrested for "drug abuse violations" than white people.[13] In 2019, Black people made up 12 percent of the U.S. adult population but more than twice that share of adult drug arrests.[14] In the same year, Black people comprised 28 percent of admissions and 36 percent of the population in prison for drug convictions, which are two and three times, respectively, their share of the general population.[15] While Black and Latinx people use drugs at similar rates as other people,[16] nearly 80 percent of people in federal prison and almost 60 percent of people in state prison for drug offenses are Black or Latinx,[17] while together making up only 31 percent of the population.[18] This overrepresentation of Black people in the criminal legal system is not explained by racial

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[11] Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System March 2018; Univ. of Maryland College of Behavioral & Social Sciences, Study: Nearly Half of Black Males, 40 Percent of White Males Arrested by 23 (last visited Dec. 21, 2022), https://bsos.umd.edu/featured-content/study-nearly-half-black-males (finding that nearly half of Black men will be arrested by age 23); Sarah K.S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5996985/#:~:text=We%20estimate%20that%203%20%25%20of,African%20American%20adult%20male%20population (finding that 33 percent of Black men have a felony conviction, compared to 8 percent of all adults); Prison Pol'y Initiative, Race and ethnicity, https://www.prisonpolicy.org/research/race_and_ethnicity/ (last visited Feb. 27, 2025) (finding that Black people make up 13 percent of the U.S. population, but 30 percent of the people on probation or parole and 38 percent of the incarcerated population).

[12] Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA TODAY (Nov. 19, 2014), http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/.

[13] VERA INST., EVERY THREE SECONDS: UNLOCKING POLICE DATA ON ARRESTS (Jan. 2019), https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings (calculating disparities using 2014 UCR estimated arrest volumes and United States Census Bureau population data).

[14] Drug Arrests Stayed High Even as Imprisonment Fell From 2009 to 2019, PEW RSCH. CTR. (Feb. 15, 2022), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019.

[15] *Id.*

[16] DIANE WHITMORE SCHANZENBACH ET AL., THE HAMILTON PROJECT, INCARCERATION AND PRISONER REENTRY (2016), https://www.hamiltonproject.org/assets/files/12_facts_about_incarceration_prisoner_reentry.pdf.

[17] DRUG POL'Y ALLIANCE, THE DRUG WAR, MASS INCARCERATION & RACE (2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf.

[18] U.S. Census Bureau, *2020 Census Illuminates Racial and Ethnic Composition of the Country* (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html.

differences in participation in criminalized behavior, but rather by structural discrimination at the system's very root.[19]

II. The Commission should eliminate the different treatment between cocaine and cocaine base in the Drug Quantity Table.

We appreciate the opportunity to comment on the sentencing disparity between cocaine (i.e., "powder cocaine") and cocaine base (i.e., "crack cocaine")[20] as outlined in the Drug Quantity Table at § 2D1.1(c). While the quantity ratio reflected in the base offense levels for offenses involving powder and crack cocaine tracks the 18:1 statutory penalty structure for those substances,[21] we urge the Commission to eliminate the distinction in the *Guidelines* between the two different forms of the same substance by penalizing all cocaine offenses at the lower base offense levels. Eliminating this disparity would be a crucial step toward a more equitable and just sentencing system that aligns with principles of equal treatment and proportionality.

The original justification for the crack-powder sentencing disparity has been thoroughly debunked by decades of social and scientific research.[22] Crack cocaine was never more inherently dangerous or addictive than its powder counterpart, nor did it uniquely contribute to violence in ways that justified vastly harsher penalties.[23] Despite this, Congress passed the Anti-Drug Abuse Acts of 1986 and 1988 that established the 100:1 weight ratio of powder to crack cocaine for sentencing purposes and the first mandatory minimum sentencing scheme for simple possession of crack cocaine, respectively. These policies led to the mass incarceration of Black

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[19] *See, e.g.,* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAVIOUR 736 (July 2020), https://www.nature.com/articles/s41562-020-0858-1 (analyzing data showing that police search Black and Latinx drivers more often than White drivers, but are less likely to turn up contraband during searches of Black and Latinx drivers compared to searches of White drivers, who are more likely to possess contraband); SUSAN NEMBHARD & LILY ROBIN, URBAN INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM: A RESULT OF RACIST POLICIES AND DISCRETIONARY PRACTICES (2021) (citing multiple studies showing that racial disparities in the criminal legal system cannot be explained by differences in criminality between racial groups, but instead by racial bias); A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM, AM. C.L. UNION (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf (citing data showing that Black people are 3.6 times as likely to get arrested for marijuana possession than White people, despite similar usage rates).

[20] U.S.S.G. § 2D1.1(c) (Note D) (defining "cocaine base" as crack cocaine).

[21] 21 U.S.C. §§ 841(b)(1)(A) & (B); 960(b)(1) & (2).

[22] Memorandum from the U.S. Att'y Gen. on Additional Dep't Pol'y Regarding Charging, Pleas, & Sentencing in Drug Cases to All Fed. Prosecutors (Dec. 16, 2022), https://www.justice.gov/archives/ag/file/1265321/dl?inline (citing testimony from the Justice Dep't that "the crack/powder disparity is simply not supported by science, as there are no significant pharmacological differences between the drugs") [hereinafter AG Garland Memo].

[23] *See, e.g* U.S. SENTENCING COMM'N REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY, 184-187 (Feb. 1995) (concluding that the violence associated with crack is primarily related to the drug trade and not to the effects of the drug itself); CARL HART, HIGH PRICE: A NEUROSCIENTIST'S JOURNEY OF SELF-DISCOVERY THAT CHALLENGES EVERYTHING YOU KNOW ABOUT DRUGS AND SOCIETY (2013) (finding the effects of crack and powder cocaine are nearly identical, with no significant difference in addiction potential).

Americans,[24] given the socioeconomic and racial dynamics surrounding crack use, even though data has consistently shown that the majority of crack users have been white.[25]

The consequences of these draconian federal drug policies were devastating for Black defendants. Before Congress enacted the notorious 100:1 sentencing disparity in 1986, the average federal drug sentence for Black defendants was 11 percentage points higher than for white defendants. By 1990, however, that number grew to 49 percentage points.[26] A 2006 report found that two-thirds of crack cocaine users were white or Hispanic, yet 81.8 percent of crack cocaine defendants were Black.[27] Even as recently as 2024, the Bureau of Justice Statistics reported that 78 percent of persons convicted for a crack cocaine offense in FY 2022 were Black, compared to just 7.6 percent of those who were white.[28]

In 1995, the Commission issued the first of several reports[29] to Congress acknowledging the ratio's racially disparate targeting of Black individuals, who were more likely to be sentenced for crack cocaine offenses.[30] In each report, from 1995 to 2007, the Commission unanimously urged Congress to act promptly to reduce the crack-to-powder cocaine quantity disparity. Congress rejected these recommendations until 2010, when it passed the Fair Sentencing Act that reduced the ratio to 18:1. Reforms stemming from the Fair Sentencing Act significantly lessened excessive sentences for Black defendants, cutting nearly 24,000 years from the total amount of time Black defendants sentenced for crack cocaine offenses would have otherwise served.[31] But even this reduced disparity remains an arbitrary and indefensible relic of a failed drug war that continues to disproportionately harm Black communities.

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[24] *Cracks in the System: 20 Years of the Unjust Federal Crack Cocaine Law*, AM. C.L. UNION (Oct. 26, 2006), https://www.aclu.org/documents/cracks-system-20-years-unjust-federal-crack-cocaine-law; U.S. SENTENCING COMM'N REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY (May 2007), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (showing that 82 percent of people convicted of crack-related offenses were Black compared to only 9 percent white). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010) ("Nothing has contributed more to the systematic mass incarceration of people of color in the United States than the War on Drugs").

[25] Joseph J. Palamar et al., *Powder Cocaine and Crack Use in the United States: An Examination of Risk for Arrest and Socioeconomic Disparities in Use*, DRUG ALCOHOL DEPEND 149:108–116 (Feb. 2, 2015), https://pmc.ncbi.nlm.nih.gov/articles/PMC4533860/ ("Whites are more likely to report lifetime cocaine use (i.e., powder and/or crack cocaine) compared to Blacks and Hispanics").

[26] *How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It*, SENT'G PROJECT (Feb. 14, 2024), https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/.

[27] THE SENT'G PROJECT, FEDERAL CRACK COCAINE SENTENCING 5 (2010), http://www.jstor.org/stable/resrep27326.

[28] Mark Motivans, *Methamphetamine, Cocaine, and Other Psychostimulant Offenses in Federal Courts, 2022*, U.S. Dep't Just. 10 (Nov. 2024), https://bjs.ojp.gov/document/mcpofc22.pdf.

[29] United States Sentencing Commission [hereinafter USSC], 2007 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007); USSC, 2002 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002); USSC, 1997 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 2 of Pub. L. No. 104–38) (April 1997); USSC, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 280006 of Pub. L. No. 103–322) (February 1995) [hereinafter 1995 Commission Report].

[30] *See* 1995 Commission Report, *supra* note 29, at 163 ("The 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants.").

[31] *See* USSC, 2015 REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010 (August 2015).

There is no justification—scientific, legal, or moral—for continuing to treat crack and powder cocaine offenses differently, nor does treating the two forms of cocaine differently have an impact on the safety of our communities. Most states do not distinguish between the two in sentencing, recognizing the inherent unfairness of the federal system's approach.[32] Former Attorney General Merrick Garland directed federal prosecutors to end disparities in charging, pleas, and sentencing in cases involving crack cocaine, explicitly acknowledging that the policy has driven unwarranted racial disparities.[33] Additionally, the National District Attorneys Association and bipartisan justice reform advocates have supported eliminating the disparity, demonstrated by their endorsement of the EQUAL Act, introduced in the 117th Congress by Senators Cory Booker (D-NJ) and Richard Durbin (D-IL).[34] It is past time for the Commission to align with this growing consensus and eliminate this unjust distinction in our federal drug policies.

Maintaining this disparity erodes trust in the rule of law, particularly in Black communities where faith in the criminal legal system is already at historic lows. After the murder of George Floyd in 2020, 69 percent of Americans recognized that racial discrimination remains embedded in the United States' criminal legal system.[35] The persistence of the crack-to-powder sentencing disparity reinforces the perception that race disproportionately and unfairly influences who is charged, arrested and incarcerated for crack-related drug offenses in the United States. Indeed, former DEA Administrator Asa Hutchinson warned that maintaining such unjust policies weakens the credibility of law enforcement and the justice system as a whole.[36] To fulfill its purpose of introducing consistency, fairness, and transparency into the sentencing process, the *Sentencing Guidelines* must reflect reasonable and justifiable differences in sentencing disparities.

III. Conclusion

The U.S. Sentencing Commission has an opportunity to take a historic step toward racial justice and a fairer criminal legal system. By eliminating the crack-to-powder disparity in the *Sentencing Guidelines*, the Commission would affirm its commitment to equal justice under the law and signal that outdated, racially discriminatory policies have no place in our federal

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[32] Emilie Chau et al., *Policy Brief on EQUAL Act*, Princeton Sch. Pub. & Int'l Aff. 10 (Dec. 2024), https://spia.princeton.edu/sites/default/files/2024-12/Princeton%20PAC%20EQUAL%20Act%20Policy%20Brief.December%202024.pdf (finding that 41 states have no crack-powder cocaine sentencing disparities, and of the remaining nine states, seven have lower disparities than that at the federal level).

[33] *See* AG Garland Memo, *supra* note 22.

[34] H.R. 1693 / S. 524; Press Release, Nat'l Dist. Att'y Ass'n, Nation's Largest Prosecutor Organization Endorses Ending the Disparity in Sentencing Between Crack and Powder Cocaine (Feb. 24, 2021), https://ndaa.org/wp-content/uploads/NDAA-Press-Release-on-EQUAL-Act.pdf.

[35] Gary Langer, *63% support Black Lives Matter as recognition of discrimination jumps: POLL*, ABC (July 21, 2020), https://abcnews.go.com/Politics/63-support-black-lives-matter-recognition-discrimination-jumps/story?id=71779435.

[36] *Examining Federal Sentencing for Crack and Powder Cocaine: Hearing Before the S. Comm. on Judiciary*, 117th Cong. (June 22, 2021) (statement of Asa Hutchinson, Governor of Ark.); Governor Asa Hutchinson, *Gov. Asa Hutchinson: It's time to fix an old wrong and end the disparity between crack and cocaine offenses*, FOX NEWS (June 8, 2021), https://www.foxnews.com/opinion/endcrack-cocaine-offenses-gov-asa-hutchinson.

sentencing framework. We urge the Commission to act now and eliminate this unjust disparity once and for all.

Thank you for the opportunity to comment. If you have any questions, please contact Sarah Seo, Policy Fellow, [redacted] or Kristina Roth, Senior Policy Associate, at [redacted]

Sincerely,

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March 3, 2025

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Amendments on Supervised Release and Drug Guidelines

Dear Judge Reeves:

This submission addresses the proposed amendments to (1) the Sentencing Commission's policies regarding supervised release and (2) §2D1.1 On all other issues in the proposed amendments not addressed in this letter, NACDL joins in the comments filed by the Federal Defenders.

I. Proposed Amendments: Supervised Release

NACDL applauds the Sentencing Commission for revisiting the Guidelines pertaining to supervised release in both Chapters 5 and 7. While we appreciate the concern of judges and U.S. Probation officers that the proposed amendments could necessitate more time spent on supervised release—deciding whether to impose supervised release, terminate a term early, or sanction a violation of supervised release—NACDL believes the proposed amendments will work in concert to focus the courts' and U.S. Probation Office's attention where it is needed rather than increase the overall amount of time devoted to supervised release.

Part A: Proposed Amendments to Chapter 5

A. NACDL supports the Commission's proposal to amend §5D1.1 to state a term of supervised release should only be imposed if warranted by an individualized assessment of the need for supervision.

NACDL concurs with the bipartisan Safer Supervision Act of 2023 and the Commission's Proposal to "ensure the provisions in Chapter Five 'fulfill[] rehabilitative ends, distinct from those of incarceration. *United States v. Johnson*, 529 U.S. 53, 59 (2000)."[1] For too

[1] USSC, Proposed Amendments to the Sentencing Guidelines dated January 24, 2025, at 6.

long, a multi-year term of supervised release has been imposed reflexively in most felony cases, without regard to whether the defendant has rehabilitative needs that can be addressed through supervision by the U.S. Probation Office. As a result, in 2021, more than 110,000 people were on supervised release.[2] The nearly automatic imposition of a multi-year term of supervised release without an individualized assessment of whether supervision fulfills the defendant's rehabilitative needs has the long-term impact of wasting the scarce resources of the U.S. Probation Office. An individualized assessment to determine whether a supervised release term is necessary and, if so, what conditions of supervised release are appropriate would help conserve scarce resources and provide individuals with the support that they actually need to be successful upon their return to the community.

In addition to conserving resources, an individualized assessment to determine whether, and how long, a term of supervised release is appropriate acknowledges that supervision can place an unnecessary restriction on the freedom of defendants who have already completed the term of incarceration imposed by the court. Standard conditions can be quite burdensome and rather than "ease the defendant's transition into the community" after service of a sentence[3], they can inhibit success upon release.[4] For example, being on supervised release often limits a formerly incarcerated person's geographic mobility, keeping them in the community where they initially offended and limiting their ability to pursue out-of-state work. Some employers will not hire people who are under court-ordered supervision. If an individualized assessment does not identify a clear need for the resources and supports that come through supervised release, its inherent restrictions cannot be justified and are counterproductive to the goal of having formerly incarcerated people quickly become productive members of their communities.

NACDL agrees with the Federal Defenders' recommended language to application note 5D1.1(a) for a nominal term of supervised release so that a defendant can benefit from the Earned Time Credits created by the First Step Act. NACDL also joins the Federal Defenders in asking the Commission to more strongly discourage imposition of a term of supervised release on those who will be removed from the United States at the end of their periods of incarceration.

B. NACDL supports the addition of §5D1.4 to Chapter 5 to encourage modification of conditions and early termination of supervised release.

Just as important as encouraging judges to consider whether a term of supervised release is warranted when not statutorily required is empowering judges to consider modifying or

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[2] *See* United States Courts, Table E-2—Federal Probation System Statistical Tables For The Federal Judiciary (June 30, 2021), available at https://www.uscourts.gov/data-news/data-tables/2021/06/30/statistical-tables-federal-judiciary/e-2.

[3] *See Johnson*, 529 U.S. at 59 (quoting Senate Report No. 98-225, at 124 (1983)).

[4] For this reason, NACDL joins the Federal Defenders in recommending the removal of the term "standard" to describe conditions as it connotes a presumption of applicability rather than the individualized assessment the case law and the Guidelines favor.

reducing conditions or terminating supervision early once it becomes clear that it is an unnecessary restriction on the defendant's freedom and an inefficient use of U.S. Probation resources. Currently, U.S. Probation petitions the court when it wants to add supervised release conditions. U.S. Probation seldom petitions the court to reduce conditions to make them less onerous. Parity is important, and the wording of §5D1.4(a) reflects this. NACDL recommends that the Commission use "should" rather than "may," with the understanding that conditions should only be modified if warranted by an individualized assessment.

NACDL similarly recommends that §5D1.4(b) adopt the "should" rather than "may" language to encourage early termination when it is warranted by the conduct of the defendant and the interests of justice. Each jurisdiction should be allowed to determine the common procedure for pursuing early termination, including ruling on the papers. But to provide courts with ample flexibility, such as considering early termination on the papers without need for a formal hearing, NACDL believes the Commission should recommend appointment of counsel to pursue motions filed pursuant to 18 U.S.C. § 3583(e)(1).

Relatedly, so as not to overburden the court, the parties or U.S. Probation with lengthy filings engaging in a multi-factor analysis, NACDL suggests that the Commission not include the bracketed factors in §5D1.4(b). However, should the Commission decide to keep an enumerated list of factors, NACDL discourages Factor 5 (a reduction in risk level). NACDL has previously raised concerns with the proper implementation of risk assessment tools.[5] Because the defense seldom has access to the tools, the lack of transparency renders them an unfair basis on which to evaluate whether early termination is appropriate. Factor 2 and Factor 4 (prosocial activities and support systems) could merge, since the elements in Factor 4 are often the best predictor of future success that Factor 2 attempts to predict.

Finally, on the issue of enumerating factors for consideration, while it is laudable that existing re-entry programs include early termination as an incentive for completion of the program, too few jurisdictions have problem-solving courts to include language in §5D1.4 that could be interpreted as making early termination contingent on completing such a program.

Part B: Proposed Amendments to Chapter 7

NACDL welcomes the Commission's proposed changes to Chapter Seven's policy statements and sentencing tables. These amendments will afford courts and probation officers more discretion in their ability to address individuals' non-compliant behavior while on supervision; and, with regard to supervised release specifically, will encourage the use of a broader array of options to help achieve the stated purpose of supervised release:

[5] *See, e.g.*, Melissa Hamilton, *Risk Assessment Tools in the Criminal Legal System – Theory and Practice: A Resource Guide* (Nov. 2020), at https://www.nacdl.org/Document/RiskAssessmentReport.

[T]o ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training purposes after release.[6]

C. NACDL supports the Commission's proposal to issue separate policy statements in Chapter Seven to address probation revocations (Chapter Seven, Part B) and supervised release revocations (Chapter Seven, Part C) so as to reflect the different purposes served by probation and supervised release.

Probation and supervised release serve two very different purposes: a sentence to a probationary term is imposed as an alternative to incarceration whereas supervised release is to "fulfill[ ] rehabilitative ends, distinct from those served by incarceration" after a term of incarceration has been served. *United States v. Johnson*, 529 U.S. 53, 59 (2000). For this reason, there should be separate frameworks – one for supervised release violations, and one for probation violations. As such, NACDL supports the Commission's proposal to separate the Chapter Seven policy statements on probation and supervised release revocations into two separate Parts (Part B – Probation, Part C – Supervised Release) – the purposes served by the two forms of supervision are quite distinct, and, thus, how violations of the two forms are addressed should be distinct as well.

D. NACDL supports the Commission's decision to add a separate grade (Grade D) to § 7C1.1 for technical violations of supervised release.

There is a difference between a violation of supervised release based on conduct that constitutes a new law violation and conduct that constitutes a technical violation of supervised release. NACDL commends the Commission's proposal to create a new Grade D that would recognize this distinction. The new Grade D violations would capture low-level, non-violent, non-criminal conduct often related to substance use disorders, poverty, or being unhoused. For this reason, NACDL strongly urges the Commission to include a stated presumption that reincarceration should **not** be imposed for revocations based on Grade D violations. Indeed, NACDL strongly urges the Commission to include a stated presumption that supervised release should **not** be revoked based on Grade D violations alone.

E. NACDL supports Option 1 for the proposed new §7C1.3, which allows for courts to exercise greater discretion and individually assess how to address non-compliant behavior.

Although the current policy statement sets forth several options upon a finding of a Grade C violation, including extending the term of supervised release and/or modifying the conditions

[6] *Johnson*, 529 U.S. at 709 (*citing* S. Rep. No. 98-225, p. 124 (1983)).

of supervision, *see* U.S.S.G. § 7B1.3(a)(2), statistics demonstrate that courts are not utilizing this discretion but, rather, are reverting to reincarceration in the vast majority of cases regardless of the violation grade. Indeed, courts imposed reincarceration in 83.2% of revocations that involved only Grade C violations. *See* United States Sentencing Commission, *Federal Probation and Supervised Release Violations,* July 2020, at p. 35. In revocations involving Grade B violations, that percentage increased to 93.7%. *Id.* Revocation and reincarceration is not the answer to low-level violations; it disrupts prosocial activities, re-exposes individuals to anti-social features of incarceration, and interferes significantly with an individual's re-entry into society, causing them to lose housing, benefits, and employment. If the purpose of supervised release is, as legislatively stated, to fulfill rehabilitative ends and to ease the transition back into society after a period of incarceration, revocation and reincarceration should be *the last resort* – not the default option suggested for all violations as set forth in § 7C1.5's Sentencing Table.

Option 1 for the proposed new § 7C1.3 appropriately sets forth that, should revocation not be statutorily required, an individualized assessment should be conducted to determine what response – *if any* – is appropriate. Option 1 serves to refocus courts on the stated purpose of supervised release and provide suggested, clear alternatives to revocation. Directing an individualized assessment upon finding a violation would serve to recognize that many Grade D violations are related to substance abuse disorders or poverty and, thus, a more appropriate response would be to address the underlying issues in the community. Revocation is not the appropriate response for all violations, and certainly not for the lower grade violations. Option 1 appropriately recognizes that there are several other alternatives to revocation.

NACDL joins the Defenders in urging the Commission to add language to § 7C1.3 encouraging the use of summonses to bring people to court on violation petitions when those individuals have met regularly with their probation officer and there is no serious risk of immediate danger to others.

F. NACDL supports Option 1 for the proposed new § 7C1.4 as it properly encourages courts to exercise discretion, assess each case individually, and recognize the non-punitive purpose of supervised release.

As noted *supra,* supervised release does not serve a punitive purpose; rather, its stated legislative purpose is to ease one's transition back into the community after a long period of incarceration. In the case of a revocation of supervised release – which, as set forth in the preferred Option 1 to § 7C1.3, should **not** be the response to the majority of supervised release violations, the court should have the discretion to determine how a term of reincarceration will be served in relation to any other sentence of imprisonment the defendant is serving. Of import, as stated by the Commission in its Introductory Commentary to the new Part C, "imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence."

NACDL supports Option 1 for the proposed new § 7C1.4, providing courts the appropriate discretion to determine, following an individualized assessment, how best to account for any other sentence of imprisonment. Eliminating the recommendation that sentences be imposed consecutively is encouraged. U.S.S.G. § 4A.1.1(e) already accounts for the commission of the new offense while on supervision when calculating the advisory sentence for the new offense (when the specified factors are met). Thus, to run the term of reincarceration for the supervised release revocation consecutively would only serve to further punish the defendant in direct contradiction to the stated purpose of supervised release.

G. NADCL supports amending the Supervised Release Revocation Table found in § 7C1.5 but believes the Commission should go further and eliminate minimum terms of reincarceration.

Reincarceration should not be recommended for the majority of supervised release violations – especially those premised upon Grade C and Grade D violations. Accordingly, the Supervised Release Revocation Table should not include a minimum term of reincarceration for Grade B, C, or D violations. Rather, the Table should include only the high end of what the Commission has recommended. Recognizing the option of a "minimum" sentence other than a minimum term of reincarceration would encourage courts to examine alternatives when conducting the required individualized assessment.

As such, NACDL joins the Defenders in their proposal of a revised Supervised Release Revocation Table that specifically denotes "0" as the bottom end of each proposed range. NACDL further joins the Defenders in their requests that the upper end for Grade C and D violations should be lowered and that the higher range for Class A/Grade A Violations be stricken entirely from the Supervised Release Revocation Table.

H. Criminal History Category Computation Considerations

NACDL believes that a defendant's criminal history should be recalculated to reflect changes made by amendments listed in U.S.S.G. § 1B1.10(d) if said changes have an ameliorative effect on the defendant's Criminal History Category. It is appropriate for the defendant to get the benefit of retroactive changes in the law reflecting or addressing prior practices or laws that have since been corrected (e.g. status points that had been shown to have a racially-biased application).

Further, NACDL urges the Commission to balance the considerations of post-sentencing conduct in the Application Notes: if courts can consider intervening criminal conduct for an "upward departure" under App. Note 3 of §7 C1.4, courts must also be able to consider mitigating conduct (e.g. a clean record during incarceration in the Bureau of Prisons, post-conviction rehabilitation, etc.) for a "downward departure." The Application Note should reflect this balance of considerations.

II. Proposed Amendments: Drug Guidelines

NACDL applauds the Sentencing Commission for revisiting the drug guidelines, which have driven the exponential growth in the federal prison population since the late 1980s, fueled racial, economic, and gender disparities, and yielded unnecessarily lengthy prison sentences that have devastated individuals, families and communities. Indeed, it is no exaggeration to say that these guidelines have played a key role in quintupling the federal prison population from the mid-1980s to the 2010s,[7] and generating a dramatic expansion in racial disparities.[8] While state prison systems have radically reduced their numbers of imprisoned drug offenders,[9] those convicted of drug offenses continue to form the backbone of the Bureau of Prisons population. Current BOP statistics reveal that 43.8% of its population is serving time for a drug offense.[10] That only tells part of the story. Over 50% of the current population is serving sentences of over 10 years – a function primarily of lengthy drug sentences, given the number of imprisoned drug offenders.[11]

A key reason for excessive sentences in drug cases is the Commission's fateful decision to abandon its empirical role in setting sentencing ranges based on past practices, and instead linking its drug guideline ranges to drug weights.[12] By structuring the guidelines around the quantity of drugs involved, rather than assessing individual culpability, the system frequently imposes severe sentences on low-level offenders who have little to no leadership or proprietary role in trafficking operations.[13] This approach is further exacerbated by the Commission's

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[7] National Research Council, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES at 33 (2014) (The US incarceration rate--measured as the proportion of the population held in state and federal prisons plus local jails--nearly quintupled from 1972 (161 per 100,000) to its peak in 2007 (760 per 100,000.)).

[8] *See* USSC, *Demographic Differences* at 4 (Nov. 2023), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf (noting that Black and Hispanic males receive longer sentences than white counterparts, and more likely to be sent to prison in the first place).

[9] Only one in five incarcerated individuals at the state level is locked up for a drug offense. *See* Prison Policy Initiative, Mass Incarceration, the While Pie, 2024, available at https://www.prisonpolicy.org/reports/pie2024.html#myths.

[10] Bureau of Prisons, Sentences Imposed, available at https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited March 2, 2025).

[11] 54.6 of the BOP inmate population is serving sentences of 10 years or more. Bureau of Prisons, Sentences Imposed, available at https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last visited March 2, 2025).

[12] *See United States v. Diaz*, 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013) ("The flaw is simply stated: the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.").

[13] In a series of articles, the Dallas Morning News has profiled typical low-level, non-violent individuals subject to harsh sentences under the drug guidelines, and the patterns of childhood deprivation and abuse, undiagnosed mental illness, and drug addiction are painfully familiar to federal defense lawyers in NACDL's membership. *See* Kevin Krause, *Clemency gave these North Texas Moms a Second chance at Life after Meth Imprisonment*, Dallas Morning

decision to tie these weight-based guidelines to the excessive mandatory minimum sentences set by Congress for major traffickers and kingpins.[14] As a result, minor participants – such as couriers or street-level dealers – often receive sentences originally intended for high-level drug bosses, distorting proportionality in sentencing and contributing to mass incarceration without meaningfully deterring drug crime. These overstatements reflect that §2D1.1 never actually reflected empirical observations and conclusions, but rather followed political decisions to set mandatory minimum sentences no matter individual circumstances, in an effort to seem "tough on crime."[15]

The current proposals to reduce the sentences produced by U.S.S.G. § 2D1.1 will go a long way towards redressing these injustices.

A. Lowering Top Base Offense Level and Adding Culpability Reduction

NACDL strongly supports the proposal to lower the highest base offense level (BOL) in the drug guidelines from 38 to 30, and the addition of a specific offense characteristic (SOC) that would grant a six-level reduction for those involved at the lower-level levels in drug trafficking.

First, NACDL favors setting the BOC at the lowest level that captures the seriousness of the offense, and submits that current drug offense levels regularly and grossly overstate the nature of offender culpability. Resetting the highest base offense level to 30, and reducing other base offense levels correspondingly, brings the quantity of drugs into a driving yet coordinate role in empirically assessing overall culpability. Reducing the highest base offense level, and adjusting all other base offense levels downward, will also reduce the political pull of mandatory minimum sentences over individualized assessments of individual responsibility.

This broad reduction in drug quantity base offense levels should apply across the board, to all drug types and at all offense levels, excepting no substances or offense types. All current levels are ultimately products of the "drug war" mania that consumed the country throughout the 1980s. This across-the-board reduction would fully reflect the Commission's transition from politically driven to empirically based drugs guidelines. By coordinating the reductions with additional culpability adjustments, the Commission can capture the kingpins actually meant to

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News, December 5, 2024, available at https://www.dallasnews.com/news/investigations/2024/12/05/clemency-gave-these-north-texas-moms-a-second-chance-at-life-after-meth-imprisonment/; Kevin Krause, *Biden Clemencies Free more North Texans Serving Long Meth Sentences*, Dallas Morning News, February 14, 2025, available at https://www.dallasnews.com/news/courts/2025/02/14/biden-clemencies-free-more-north-texans-serving-long-meth-sentences/.

[14] *See Diaz*, 2013 WL 322243, at *1 ("The genesis of the structural flaw is easily traced. It is rooted directly in the fateful choice by the original Commission to link the Guidelines ranges for all drug trafficking defendants to the onerous mandatory minimum penalties in the Anti–Drug Abuse Act of 1986 ("ADAA") that were expressly intended for only a few.").

[15] *See, e.g., Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").

see long prison terms, and so further Congress' goals of sentencing – particularly the primary mandate, that sentence lengths be no greater than necessary to achieve those goals.

Similar offense level reductions should follow at the chemical quantity tables at §2D1.11. The purpose for reducing the drug quantity offense levels is to bring the Guidelines into better balance with offense culpability over adherence to mandatory minimum sentencing schemes. The same political factors that drove drug base offense levels upward over decades, since their very inception, have similarly tainted the chemical quantities assessments. Across the board reductions will allow the entire drugs guideline to reflect sound criminological research regarding punishment's certainty rather than sentence length as best addressing recidivistic risk,[16] and so the ultimate goal of criminal sentencing: crime reduction.[17]

NACDL appreciates the discussion about reducing methamphetamine offense levels to bring them into line with other controlled substances. NACDL believes the reductions to methamphetamine base offense levels should resemble those of other drugs covered by §2D1.1, but only after independently reducing meth base offense levels to reflect the common chemical compositions involved in meth offenses. NACDL discusses its positions and recommendations for methamphetamine adjustments in the Guidelines structure.

Second, with respect to the proposed six-level role-based reduction, which would supplant the reductions set forth in §3B1.1, NACDL supports the formulation proposed by the Defenders. By amalgamating Options 1 and 2, the Defenders' proposed revisions create a broad and inclusive set of scenarios covering low-level individuals in drug trafficking schemes who should qualify for this sentence reduction. While comprehensive, this list remains non-exhaustive, allowing room for defense advocacy and judicial discretion to address unforeseen cases. This flexibility ensures continuous refinement and expansive application of the proposed reduction to further mitigate the impact of the harsh drug guidelines.

B. Eliminating Purity Distinctions in the Methamphetamine Guidelines.

NACDL supports the Commission's proposal to eliminate purity distinctions in the methamphetamine guidelines, specifically eliminating references to "Ice" (Subpart 1) and "Methamphetamine (Actual)" (Subpart 2), thus erasing the empirically unjustifiable 10:1 ratio between methamphetamine-ice/actual and methamphetamine-mixture. NACDL supports Option 1 in Subpart 2, which keeps the current meth-mixture quantity levels, and opposes Option 2, which would apply meth-actual levels, as meth-mixture levels are closer to sentencing practices across the country and avoid the unnecessarily and arbitrarily harsh sentences produced by the ice/actual guidelines.

[16] Daniel S. Nagin, Crime and Justice Vol. 42, No. 1, Crime and Justice in America 1975–2025 (August 2013), at 199-263 (Univ. Chicago Press).
[17] *See* U.S. Sentencing Guidelines, Part A, Sec. 1(1) (Authority).

The Commission's proposal reflects the growing awareness among sentencing judges across the country that the methamphetamine guidelines, like the crack guidelines to which they were linked, lack any empirical basis. The U.S. Supreme Court statements in *United States v. Kimbrough,* 552 U.S. 85 (2007), about the crack cocaine guidelines – that the Commission abandoned its usual empirical approach based on past sentencing practices for a weight-driven approach, *id.*, at 96 – applies with equal force to the methamphetamine guidelines, which were based in part on the crack guidelines.[18] In fact, it applies to all drug guidelines that are based on mandatory minimums, rather than empirical data.[19] Like the former crack cocaine guidelines, the Sentencing Commission has consistently linked the meth guideline ranges to statutory penalties, even though not required to do so.[20] None of these sentencing increases had anything to do with an examination of sentencing practices or any of the sentencing objectives set out in 18 U.S.C. § 3553. In fact, the severe penalties for methamphetamine are not justified by any purpose of sentencing. As to the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), methamphetamine and all stimulants combined are less physically dangerous or addictive than heroin or cocaine, yet methamphetamine is now punished more severely than any other drug.

Not only do the current meth guidelines lack a legislative basis, they also lack any practical empirical basis. In 1989, when the 10:1 ratio was developed, untested methamphetamine mixture typically received a presumed purity of 10%.[21] Today's typical methamphetamine mixture hovers close to 95%.[22] Thus, sentences have received arbitrary enhancement based on whether the methamphetamine was tested.[23] All else being equal, a 90% pure methamphetamine sample, untested, would lead to a Guidelines range of 51–63 months; tested, it would lead to a Guidelines range of 97–121 months.[24] The chances that a sample will receive testing is subject to factors unrelated to culpability, like whether the lab had a chance to complete testing, or when in the case the defendant pled guilty.[25]

The Sentencing Guidelines justify enhancements based on purity "[s]ince controlled substances are often diluted and combined with other substances as they pass down the chain of

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[18] *See*, *e.g.*, *United States v. Valdez*, 268 Fed. App'x 293, 297 (5th Cir. 2008); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1010-11, 1016 (D. Neb. 2008).

[19] *See Gall v. United States*, 552 U.S. 38, 46 n.2 (2007) (noting "Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses").

[20] *See, e.g.,* USSC, Methamphetamine: Final Report of the Working Group 7 (1999), https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf.

[21] *United States v. Weimer*, 2024 WL 2959187, at *2 (D. Idaho June 11, 2024).

[22] *Id.* ("Today, methamphetamine is almost always imported from foreign drug labs and the purity levels are much higher. A recent 2015–16 survey of drug purity levels in the District of Idaho revealed an average purity level of 92.6% with a low of 88% and a high of 100%.").

[23] *Id.* at *3 (Simply put, the presumed purity of 10% for untested methamphetamine is no longer valid. This, in turn, has led to substantial and unwarranted disparities in sentencing based solely on whether methamphetamine is lab tested.").

[24] *Id.*

[25] *Id.* at *3 ("Today, most methamphetamine seized at all distribution levels is remarkably pure, which means that higher purity is not a good indicator of a defendant's place in the chain of distribution. The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level.").

distribution," postulating that "unusually high purity . . . is probative of the defendant's role or position in chain of distribution." USSG § 2D1.1, note 27(C). But many low-level offenders do not know the quantity or quality of the product they are involved in distributing. A qualitative research study of federal prisoners charged with drug crimes shows that the organizational structure of drug trafficking includes smaller, decentralized units operating independently of others.[26] Individuals had limited knowledge of others' roles in the enterprise and the structure of the larger operation.[27] It was common that members of the drug smuggling trade were involved in other enterprises, including legitimate means of employment, but found themselves in a tight spot that led to the drug world.[28]

Noting the arbitrariness and disparities outlined above, numerous courts have determined that the treatment of methamphetamine (actual) versus methamphetamine (mixture) produces inequitable and unusually long sentences and have elected to deviate from the guidelines.[29] Indeed, the Commission's own data reveals substantial and extensive below-guidelines sentences in methamphetamine cases.[30]

In sum, NACDL supports the elimination of the 10:1 actual/ice to mixture ratio, and favors adopting Option 1 of Subpart 2, which would set all methamphetamine guidelines at the mixture level. As the Federal Defenders lay out in detail in their submission, this proposal is better aligned with sentencing practices, where courts already treat meth-mixture cases as the baseline, and apply larger variances in cases involving meth-ice/actual.

Respectfully submitted,

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[26] Jana S. Benson & Scott H. Decker, *The Organizational Structure of International Drug Smuggling*, 38 J. CRIM. JUSTICE 130, 135 (2010).

[27] *Id.*

[28] *Id.* at 136.

[29] *See e.g. United States v. Celestin,* 2023 WL 2018004, at *3 (E.D. La. Feb. 15, 2023) (citations omitted); *United States v. Robinson,* 2022 WL 17904534, *3 (S.D. Miss. Dec. 23, 2022) (noting that in a recent case, "the United States conceded that there is no empirical basis for the Sentencing Commission's 10-to-1 weight disparity between actual methamphetamine and methamphetamine mixture," and that other district courts had concluded there was no empirical basis for the disparity); *United States v. Ferguson*, 2018 WL 3682509, at *8 (D. Minn. Aug. 2, 2018) ("[M]ethamphetamine purity is no longer a proxy for, and thus not probative of, the defendant's role or position in the chain of distribution."); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1026 (N.D. Iowa 2013) ("This issue [of punishing a pure substance more than a mixed substance] is heightened when the offender was merely a courier or mule who has no knowledge of the purity of the methamphetamine he or she is transporting."); *United States v. Ortega*, No. 8:09CR400, 2010 U.S. Dist. LEXIS, at *21 (D. Neb. May 17, 2010) ("To punish [a street-level distributor] as harshly as an upper-level distributor because of a presumptive ten-to-one ratio does not reflect his position in the hierarchy nor will it promote respect for the law."); *Castro*, 2018 U.S. Dist. LEXIS 39367, at *7 ("The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level.").

[30] *See* USSC, Methamphetamine Trafficking Offenses Quick Facts (FY 2023) (in fiscal year 2023, 41% of all individuals convicted of methamphetamine trafficking received a non-guideline sentence; out of those, 99% were downward variances averaging a 35% reduction), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Methamphetamine_FY23.pdf.

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U.S. Sentencing Commission
1 Columbus Circle, N.E.
Washington, D.C. 20002

Dear U.S. Sentencing Commission,

The National District Attorneys Association (NDAA) is the oldest and largest national organization representing state and local prosecutors in the nation. The NDAA is a non-partisan, non-profit membership association that provides training, technical assistance, and resources to prosecutors to aid in their pursuit of justice. With over six-thousand members, NDAA's mission is to be the voice of America's prosecutors and to support their efforts to protect the rights of individuals and the safety of communities. This year marks NDAA's 75th anniversary of being the prominent organization on prosecutor topics and criminal justice policy.

As advocates of sound criminal justice reform and supporters of the Safer Supervision Act, the NDAA applauds the U.S. Sentencing Commission's leadership in announcing its supervised release proposal amendment. We recommend that the Commission follows through with the supervised release amendment language and adopt it into the sentencing guidelines.

The proposed supervised release language strikes a meaningful balance in our justice system by emphasizing individualized assessments at the sentencing stage, leading to a more tailored and just application of supervised release. The Commission mentions that it has received feedback from commenters that the guidelines should provide courts with greater discretion when making decisions of including supervised release based on an individualized assessment of the defendant. The NDAA agrees with this sentiment and is voicing its support once more. Additionally, the increased support for federal probation officers enables them to manage their caseloads more effectively and focus on the high-risk individuals who need close supervision. Allowing courts greater discretion in regard to implementing supervision ensures the justice system is best serving all parties involved. The Commission's supervised release language represents a thoughtful update of our criminal justice system, balancing fairness, rehabilitation, and our unwavering commitment to public safety.

Prosecutors are in the accountability profession, and the NDAA strives to strike the right balance among enforcement and accountability whenever it comes to policy that affects the criminal justice system. Thank you for your support in this vision through the hard work of your staff and the proposal to update the Commission's guidelines pertaining to supervised release protocol. We appreciate the U.S. Sentencing Commission's initiative on this issue and look forward to its implementation as we continue to work with Congressional Members to make these supervised release updates in U.S. Code.

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February 26, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

I am submitting this comment letter as Director of Drug Policy Reform at Open Society Foundations. For the past 30 years, Open Society Foundations has advocated for evidence-based drug policy reform in the United States and around the world. I am writing in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

We applaud your willingness to revisit the Drug Quantity Table (DQT). These revisions are long overdue, especially given that the United States is a global outlier when it comes to incarceration per capita. These sentencing revisions allow us an opportunity to begin to shift our response to certain drug crimes.

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain circumstances. In fact, this

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works
[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6

Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have found to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression,

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(2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

Other countries that are economically similar to the United States incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types.

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[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

[13] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment

[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

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[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

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Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions."

In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the

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[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/
[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf

majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

The Commission should provide guidance that allows for the lowest base offense level.

* * *

Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Kasia Malinowska-Sempruch
Director of Drug Policy Reform
Open Society Foundations

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[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Paralegal Project

Topics:

Drug Offenses

Comments:

19 February 2025

Honorable Judges and Committee Members

you - the committee members - don't get it - you have sentenced addicts to such long terms of imprisonment - the reasons can be found by the offenses listed in their PSR/PSI - these addicts who have never been forced into rehab but instead have been arrested and charged with conspiracy, intent and Lord knows what else because the only way they can feed their habit is to work for their dealer often times getting sentences double what their dealer got. The government offer deals to the dealer to squeal on their supplier and higher ups so they get a lesser sentence but the addict has no one to squeal on (usually) so they get double punishment.

I once again am advocating for 24 month lockdown rehab with the same criteria as RDAP (which the court "recommends" so the BOP can deny them RDAP). So if you insist on making an addict serve this kind of time then the court should ORDER the BOP to put the addict in RDAP immediately and make consequences available against the BOP to the addict if not immediately placed in RDAP AND make the courts enforce the order. If you want to serve the public then you need to do a little more on the sentencing of addicts as addicts than as drug kingpins. Fair is fair but not under the current guidelines. An addict should never spend more time in prison than their dealer. Also there would be far less drug deaths if sentencing structure would change. If addicts got the RDAP program (or 24 month mandatory lockdown) – and as a reminder an inmate can sign out of RDAP which is why a 24 month lockdown rehab would be better - and include education and job training (and I am sure there are organizations that would provide this free of charge) then you get a productive citizen that cost the taxpayer $53.5K per year for 2 years instead of 20 not counting yearly increases in BOP budget. This last year it is $8.3 BILLION taxpayer dollars – your tax dollars, my tax dollars – EVERYONE'S tax dollars.

As a reminder the BOP wastes a lot of their budget – they are broke. Several of the prisons I

know about do not have food to feed the inmates properly, their buildings are in such disrepair they are closing them down and the overcrowding is worse now because the BOP won't release those eligible to go to home confinement but instead are moving the inmates to other over-crowded prisons. When Duluth closed the BOP moved the majority of the inmates were moved to Florence – no hot water, no heat, (I heard no a/c), limited food, no commissary, no sanitation supplies, the building is falling apart and the list goes on. The federal budget is already too big and your committee does more to increase it rather than looking for ways to economize but instead a lot to expand.

There needs to be an equitable way to sentence addicts (which come from an over-zealous medical community prescribing opioids without a remedy for the addiction they cause) and friends who get them hooked because being young and dumb is their only excuse. 60% of prison population is drug convictions. Society makes allowances for drug addicts (oh isn't that a shame attitude) rather than being proactive in solving the problem. Oh society has created a 'fix', plush rehab centers that cost thousands of dollars that addicts can't afford because they don't have college degrees and some not even a high school diploma therefore they're flipping burgers and spend a great deal on feeding their habit. Judges are partly responsible for this condition as they have addicts who have been in their court multiple times with no consequences (maybe a few days in county) and locking them up in county accomplishes nothing because there is no rehab in county. If there was a 24 month mandatory lockdown rehab after 2nd (or 3rd) visit to local court or anytime the Feds arrest an addict then our Federal Budget would be less – the BOP neglect and abuse would be much less and their control over how their sentence is served because the BOP would be made to observe the law and the needs of the BOP would be less because the there would be fewer population and hopefully a change is the way the BOP is operating. Addicts exacerbate the problems of the BOP - so why not do something about it instead of feeding the problem.

Be a problem solver – you can do it – if you want

Sincerely,

Paralegal Project

Submitted on: February 19, 2025

Peaceful Growth Therapy
1717 Swede Rd, Suite 104
Blue Bell, PA 19422

February 27, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Courtney Gable, and I am submitting this comment letter on behalf of Peaceful Growth Therapy, a private outpatient mental health clinic, where I am Director of the Ketamine-Assisted Psychotherapy (KAP) Program. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. Peaceful Growth Therapy applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

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[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

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<u>Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment</u>

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

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[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

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[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/

[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf

[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

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Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

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Sincerely,
Courtney Gable, LPC
KAP Director,
Peaceful Growth Therapy

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[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

PRISON FELLOWSHIP

Seek justice. Love mercy. Restore hope.

Honorable Carlton W. Reeves
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C 20002-8002

February 27, 2025

Chair Reeves and Members of the Sentencing Commission,

Prison Fellowship® is the nation's largest Christian nonprofit serving prisoners, former prisoners, and their families, and a leading advocate for criminal justice reform. For nearly 50 years, Prison Fellowship has shared hope and purpose with men and women in prison. We appreciate the opportunity to offer recommendations on the proposed amendments regarding supervised release and for the ongoing commitment of the U.S. Sentencing Commission (hereafter "Commission") in reviewing and improving sentencing polices to promote rehabilitation and public safety.

Proportional Punishment and Promoting Public Safety

As of June 2022, over 110,000 individuals were serving a term of federal supervised release.[1] Supervised release plays a crucial role in helping former federal prisoners successfully transition to a law-abiding and flourishing life that reflects their God-given potential. Many individuals benefit from the support and accountability it provides, particularly in the critical months following incarceration. However, when supervised release is imposed unnecessarily or for an excessive period, an already overburdened federal community corrections system hinders successful reintegration.[2]

As the Commission notes, Congress aimed to address this issue through the Safer Supervision Act of 2023, which would have required courts to assess the necessity of supervision at sentencing and consider whether prison or community-based rehabilitation was the most appropriate response for certain offenses.[3] Community supervision is most effective when it incorporates key best practices, such as flexibility and judicial discretion in determining supervision terms. We appreciate that the proposed amendment aligns with this approach by allowing courts to conduct individualized assessments when setting terms of supervised release. Additionally, we commend the amendment for encouraging courts to consider using early termination when it serves the interest of justice. Early termination can benefit public safety by reducing unnecessary supervision and enabling resources to be redirected towards people who require more support.

Consistent guidelines are essential to ensure fairness and efficiency in the supervision system. We urge the Commission to offer clearer guidance on when early termination serves the interest of justice, specifically by clarifying that it applies whenever supervision is unnecessary for public

[1] DOJ, *Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release*, U.S. Department of Justice (May 2023), https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf.
[2] Pew, *Max Out: The Rise in Prison Inmates Released Without Supervision*, The Pew Charitable Trusts (June 2014), https://www.pewtrusts.org/en/research-and-analysis/reports/2014/06/04/max-out.(Research indicates that individuals released to community supervision have better public safety outcomes, such as lower recidivism rates, compared to those who serve their entire sentence in prison and therefore are released without supervision.)
[3] Safer Supervision Act of 2023, S. 2681, 118th Cong. (2023).

safety. Also, to further encourage positive outcomes, the Commission could consider adopting a rebuttable presumption, similar to the Safer Supervision Act, placing a presumption in favor of early termination. This would allow individuals the opportunity to demonstrate their rehabilitation and reintegration into their communities.

The Role of In-Prison Programming

At Prison Fellowship, we believe that access and participation in effective programming while incarcerated is critical for progress toward rehabilitative goals. The Prison Fellowship Academy program is an intensive model where participants develop a renewed mindset and transformed behavior that leads to personal responsibility and hope. It builds communities and creates opportunities for men and women to practice and develop values that transform them and others into good citizens.

Studies from The Texas Department of Criminal Justice, Baylor University, and the Minnesota Department of Corrections document that the more intensive versions of Prison Fellowship's Academy curriculum led to substantial improvements in post-release outcomes.[4] In fact, those completing our more intensive in-prison programs show a more than 60% reduction in reincarceration. While these results are specific to our program, other research shows that overall prison programs positively impact in-prison conduct, recidivism, and post-release employment.[5] Given these encouraging results, we do believe that completing reentry programs should be a factor for courts to consider when determining whether to terminate supervision.

Furthermore, the First Step Act of 2018 allows incarcerated individuals to earn time credits for successfully completing evidence-based recidivism reduction programs. The proposed changes to supervised release could support these goals by incentivizing rehabilitation and reducing unnecessary supervision. However, it is important to ensure that these changes do not unintentionally restrict eligibility for earning time credits. If the new criteria for early termination limit access to these credits, it could undermine the Act's purpose of encouraging participation in programs. Clear guidance on early termination is crucial to avoid such consequences.

Conclusion

Every human being is created in God's image, with inherent dignity and value. Our justice system must reflect this truth by treating all individuals with respect and providing opportunities for redemption. We applaud the Commission's efforts to promote fairness in sentencing. By further refining sentencing policies, the Commission can help build a system that balances public safety with rehabilitation, fostering a more just society. We look forward to continued progress in this direction.

Sincerely,

Scott Peyton
Director, Government Affairs
Prison Fellowship

[4] Executive Administrative Services, *Evaluation of Offenders Released in Fiscal Year 2013 That Completed Rehabilitation Tier Programs*, Texas Department of Criminal Justice (Oct. 2017); Bryon Johnson & David Larson, *The InnerChange Freedom Initiative: A Preliminary Evaluation of a Faith-Based Prison Program*, Baylor University (2008), https://www.baylor.edu/content/services/document.php/25903.pdf; Grant Duwe, *Can Faith-Based Correctional Programs Work?: An Outcome Evaluation of the InnerChange Freedom Initiative in Minnesota*, National Institute of Health (2013), https://www.ncbi.nlm.nih.gov/pubmed/22436731.

[5] Lois M. Daivs, *Higher Education Programs in Prison: What We know Now and What We Should Focus on Going Forward*, RAND (Aug. 2019), https://www.rand.org/pubs/perspectives/PE342.html; Robert Bozick, et. al., *Does Providing Inmates with Education Improve Post-release Outcomes?*, RAND (July 2018), https://www.rand.org/pubs/external_publications/EP67650.html.

REFORM

March 3, 2025

Honorable Judge Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500
Washington D.C. 20002-8002

RE: Public Comment on USSC Proposed Amendments to Sentencing Guidelines Concerning Supervised Release

Dear Judge Reeves and fellow Commissioners:

On behalf of REFORM Alliance, a national organization that focuses exclusively on community supervision policies and practices around the country, we are pleased to submit the following comments regarding effective and essential amendments to the sentencing guidelines concerning supervised release.

Introduction

As Chief Policy Officer at REFORM Alliance, I work with our Chief Executive Officer Jessica Jackson and our Executive Leadership Team, under the direction of our Board, to advance public safety solutions through evidence-based policies and best practices in community supervision. At REFORM, we aim to transform community supervision by changing laws, systems, and culture to create real pathways to meaningful second chances. We believe that a justice system that holds people accountable and redirects them back to work and wellbeing leads to safer communities.

We work at all levels of the system, from local county departments up to state and federal government, even passing a resolution on social reintegration in the United Nations. We partner with local coalitions and public safety stakeholders, prioritizing unlikely allies, including law enforcement, employers, crime survivors, directly impacted advocates, experts, practitioners, and thought leaders to champion evidence-based policy solutions that make communities stronger and safer. REFORM's policies consistently prioritize common-sense supervision solutions that hold people accountable, incentivize good behavior, and encourage success and rehabilitation, all while strengthening families and making communities safer. A core function of REFORM's mission is our commitment to bipartisanship: every policy that we advance is supported by a bipartisan coalition. Even at the height of political polarization, we have found bipartisan consensus on supervision reforms by centering our solutions on public safety and community stability.

Since our founding in 2019, REFORM has built and led community coalitions to pass 18 bills in 11 states, including: California, Michigan, Louisiana, Virginia, Florida, Georgia, Mississippi, New York, New Jersey, Illinois, and Pennsylvania. These 18 bipartisan bills in 11 states create pathways for more than 800,000 people to exit the system over five years, marking a measurable step forward to safely transition people out of the criminal legal system and set them up for lasting success in the community.

REFORM has been an active leader in efforts to develop and advance the Federal Safer Supervision Act, bipartisan legislation championed by dozens of organizations, including Conservative Political Action Conference (CPAC) and Drug Policy Alliance, practitioners and stakeholders including the National Association of District Attorneys and the National Association of Public Defense, law enforcement leaders like Federal Law Enforcement Officers Association and the Major Cities Chiefs Association, and

sponsored in the Senate by Senator Coons and Senator Cornyn and in the House by Representative Hunt and Representative Ivey.[1] We are proud to be a part of the Safer Supervision Coalition, which has banded together, across political divides, to advance this legislation that prioritizes our public safety and shrinks government overreach and waste by right-sizing our supervised release system and refocusing our system on evidence-based practices that lead to long-term community success. The polices in SAFER Supervision were developed through extensive consultation with leading experts, practitioners, and stakeholders, drawing on the direct experiences of our partners with supervised release (with some partners serving supervised release and others serving as probation officers overseeing those on supervised release) to find consensus in evidence-based solutions that work for all of us. The proposed amendments to the guidelines regarding supervised release are wholly consistent with the aims and language in SAFER Supervision. For the reasons stated below, we strongly support both the SAFER Supervision Act and the proposed amendments to the guidelines regarding supervised release.

Individualized Assessments

The Commission's recognition of the urgent need to tailor and right-size the supervised release system reflects the consensus that our current policies fail to achieve their intended purpose of targeted support and monitoring while simultaneously falling far short of reaching the ultimate aims of deterring recidivism and safeguarding our communities.

At its core, the purpose of federal supervised release is to support rehabilitation and reentry upon release from prison. This makes supervised release distinct from other forms of supervision: Supervised release does not serve as a tool for early release (like parole) but applies only to people *already* released from prison. And, supervised release is ***explicitly prohibited from being ordered as a form of punishment*** but instead serves only to support successful reentry and advance community safety. Federal supervised release is therefore a unique and distinct form of supervision intended not to punish or to alter the term of incarceration, but instead ***to support reentry, encourage community stability and individual wellbeing, and deter recidivism.***

As of March 2023, there were more than 110,000 people on federal supervised release – costing taxpayers more than $500 million each year.[2] This number represents an exponential increase of 200% since 1995,[3] with current guidelines requiring supervised release in any case mandated by statute *or* when a defendant is sentenced to a period of incarceration that exceeds one year.[4] The result is a system that orders supervised release in almost all federal cases, leading to an overburdened system in which probation officers report that their caseloads are overwhelmed, reaching sometimes three to four times the recommended size. Probation officers report that their caseloads are packed with lower-risk individuals who may not need intensive supervision while simultaneously not having the time or resources to provide the close supervision and support that higher-risk individuals need to reintegrate into society safely. Not only is this overburdened system ineffective, it's also entirely inconsistent with the purpose it was created to serve:supervised release was intentionally designed as a precise tool to support successful reentry and advance community safety in *rare* cases where additional support was required after successfully serving a sentence of imprisonment. It was prohibited from use as a second punitive sentence, and instead must serve to deter recidivism or support reentry. The excessive overuse of

[1] Co-sponsors include: Senators Durbin, Lee, Booker, Tillis, Cramer, Wicker,and Lankford; Representatives Owens, Donalds, Armstrong, and Trone. More information on the SAFER Supervision Act and a full list of endorsing organizations and co-sponsors can be found here: https://safersupervision.com/safer-supervision-act/

[2] United States Courts. *Federal Probation System - Table E-2: Persons Under Post-Conviction Supervision*. March 31, 2023

[3] Pew Charitable Trusts (2017) *Number of Offenders on Federal Supervised Release Hits All-Time High*; United States Courts. *Federal Probation System - Table E-2: Persons Under Post-Conviction Supervision*. March 31, 2023

[4] USSG §5D1.1(a)(2)

supervised release has perverted its intended purpose and rendered it counterproductive to its ultimate goals. What was meant to be a purposeful, strategic intervention to ensure safety in communities while individuals work to successfully transition out of incarceration has become a default that ultimately fails to promote the goals of public safety, reduced recidivism, accountability, and successful reintegration.

Accordingly, we support the proposed amendment to §5D1.1, which would remove the requirement that courts impose supervised release when a sentence exceeds one year, and instead encourage courts to only impose supervised release "when and only when" an individualized assessment calls for such a decision. Such an individualized assessment would take into account the specific circumstances of an individual's original conviction; personal history; and an individual's medical, behavioral, educational, and/or psychological needs — all balanced against considerations for victim impact and public safety, providing a holistic perspective that is responsive to the individual and eschews the one-size-fits-*none* approach that impedes our current system.

A natural extension of this individualized approach (on whether to order supervised release) grounded in the court's discretion is a more tailored assessment of the appropriate ***length*** and ***conditions*** of supervised release– both factors that should be guided by the specific ***risks*** and ***needs*** underlying any given case in service of public safety and rehabilitative goals. In 2022, the average length of supervised release imposed was 48 months, even though research recommends that the most effective length of supervision is 18-24 months [5] The Commission's guidelines currently establish minimum terms not to exceed the statutory maximum for felonies falling under Classes A through E, and Class A misdemeanors. For felony convictions falling under Classes A and B, courts have the discretion to impose up to five years of supervised release; for Classes C and D, courts may impose up to three years of supervised release. In 2022, the average length of supervised release imposed was 48 months, even though research recommends that the most effective length of supervision is 18-24 months [6] By contrast, research shows that supervision can often have counterproductive effects for low-risk defendants, especially when terms exceed 1.5-2 years in length, making it harder for these individuals to avoid recidivism and reintegrate successfully into their families and communities.[7]

With respect to conditions, Section 5D1.3 of the Guidelines provide for mandatory and discretionary (including standard, special, additional) conditions. In addition to the eight mandatory conditions, the guidelines recommend thirteen additional standard conditions for supervised release terms, bringing the baseline to twenty-one total conditions. As the Prison Policy Institute notes, these conditions *by definition* are not tailored to individual needs or the underlying conviction.[8] Yet, individuals on supervised release – a system originally created to help people rehabilitate and reenter society successfully – are forced to remember and keep track of conditions that could have deleterious impacts on employment stability, financial stability, and caregiving responsibilities, while serving no rehabilitative purpose. Onerous supervision conditions undermine success and result in unnecessary, expensive incarceration for technical violations. When these conditions are broken, individuals on supervised release can face revocation and prison time for "technical" violations which can also include actions as innocuous as crossing jurisdictional lines without prior permission, switching jobs without prior approval, or missing a

[5] US Department of Justice. (2023) Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release.; United States Sentencing Commission, "Fiscal Year 2021: Overview of Federal Criminal Cases" April 2022, p. 10.; Pew Charitable Trusts. (updated 2021). States Can Shorten Probation and Protect Public Safety
[6] US Department of Justice. (2023) Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release.; United States Sentencing Commission, "Fiscal Year 2021: Overview of Federal Criminal Cases" April 2022, p. 10.; Pew Charitable Trusts. (updated 2021). States Can Shorten Probation and Protect Public Safety
[7] Pew Charitable Trusts (2020) *States Can Shorten Probation and Protect Public Safety | The Pew Charitable Trusts*
[8] https://www.prisonpolicy.org/reports/probation_conditions.html

meeting with a supervision officer. Research shows that supervision conditions bring little benefit when they are focused on rote compliance rather than promoting individual growth and development.[9] Indeed, a recent study on federal supervision conditions estimated that ***each additional condition decreased the chances of successful supervision compliance by 19%.***[10] Annually, around 10,000 people on supervised release are incarcerated for a supervision violation.[11] Thirteen percent of supervised release cases closed in 2021 were revoked solely for technical violations with no accompanying arrests for new crimes.[12] Technical violations that result in even short periods of reincarceration have far-reaching consequences that can threaten public safety, disrupt the workforce, harm employment,[13] fracture the family unit, and create housing instability. On top of this, a few recent studies have found that custodial sanctions for technical violations *do not outperform non-custodial, community-based sanctions* when trying to prevent future criminal activity.[14]

Recognizing these critical issues, REFORM is supportive of the Commission's proposed §§ 5D1.2, D1.3, and 5D1.4 amendments to (1) eliminate minimum terms and instead require courts to conduct individualized assessments when setting the term of supervised release, (2) to encourage courts to conduct individualized assessments when determining which conditions (other than those that are mandatory) are appropriate for supervised release; and (3) to encourage courts to revisit imposed conditions through an individualized assessment conducted soon after an individual's release from prison. Redesignating "standard conditions" as "examples of common conditions" would meaningfully dislodge any sort of notion that these conditions are a baseline that must be imposed alongside every order of supervised release, and encourage courts to more fully consider the necessity of each condition. Though statutorily discretionary, courts have noted that standard conditions are "essential to the functioning of the supervised release system[;] they are almost uniformly imposed by the district courts and have become boilerplate."[15] It appropriately and proactively encourages courts to take into account the perspectives of the individual on supervised release, the government, and the supervision officer as a means to best support the individual's rehabilitation and reintegration into their community.[16] Indeed, this level of judicial discretion would only reinforce what is clearly laid out in federal code: when imposing supervised release, courts may require additional, discretionary conditions *to the extent* those conditions are "reasonably related to" "the nature and circumstance of the offense and the history and characteristics

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[9] Arthur Rizer et al., "Realigning Probation with Our Values," *National Affairs,* 47 *(*Spring 2020). https://nationalaffairs.com/publications/detail/realigning-probation-with-our-values.

[10] DeLisi, M., Drury, A., & Elbert, M. (2021). Who are the compliant correctional clients? New evidence on protective factors among federal supervised releases. *International Journal of Offender Therapy and Comparative Criminology, 65,* 1536-1553. The total number of conditions in this study ranged from 0-18, with an average overall of 5.98. When split into groups, those who were compliant on supervised release had an average of 5.49 conditions and those who were non-compliant had 6.93.

[11] U.S. Courts. (2022). Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes; US Department of Justice. (2023) Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release

[12] U.S. Courts. (2022). Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes.

[13] Studies assessing the impact of detention in the pretrial setting has shown that even short periods of incarceration can decrease formal sector employment and the receipt of other benefits. William Dobbie et al., "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review 108:2 (2018),* 201-240. https://www.aeaweb.org/articles?id=10.1257/aer.20161503.

[14] E.K. Drake and S. Aos, "Confinement for Technical Violations of Community Supervision: Is There an Effect on Felony Recidivism?" *Olympia: Washington State Institute for Public Policy*. (2012), https://www.wsipp.wa.gov/ReportFile/1106; E.J. Wodahl, J.H. Boman, and B.E. Garland, "Responding to Probation and Parole Violations: Are Jail Sanctions More Effective Than Community-Based Graduated Sanctions?," *Journal of Criminal Justice* 43, no. 3 (2015): 242-50, https://doi.org/10.1016/j.jcrimjus.2015.04.010. P. Villettaz, G. Gillieron, and M. Killias, "The Effects on Re-Offending of Custodial Vs. Non-Custodial Sanctions: An Updated Systematic Review of the State of Knowledge," *Campbell Systematic Reviews* 1 (2015), http://dx.doi.org/10.4073/csr.2015.1.

[15] United States v. Truscello, 168 F.3d 61, 63 (2d Cir. 1999)

[16] *See* Berman, Richard M., *Court Involved Supervised Release*, Southern District of New York, 10 June 2024

of the defendant" and "the need for the sentence imposed," among other factors.[17] Timing also matters. If the federal system is to serve the actual rehabilitative needs of individuals on supervised release, then it is appropriate for courts to revisit imposed conditions following a period of incarceration. It is at that point in time that judges would have greater insight into an individual's rehabilitative needs and any risk to public safety that they may or may not still pose.[18]

First Step Act

In its enumeration of Issues for Comment, the Commission is seeking feedback on the impact of the proposed amendments on the ability of individuals to benefit from earned time credits under the First Step Act, calling specific attention to 18 § U.S.C. 3624(g)(3).[19] Through the First Step Act, Congress took significant action to ensure men and women in federal prison return home to their communities rehabilitated and ready to work by expanding opportunities to earn time toward early release to ***prerelease custody or supervised release*** by completing evidence-based programs or productive activities. Accordingly, the language quoted in the Commission's Issues for Comment only addresses supervised release and does not provide full context. If a court were to decide that the imposition of supervised release is not needed in a particular case, an individual could still have any earned time credits applied to prerelease custody (including home confinement, a residential reentry center, or alternative means of monitoring) under the First Step Act.[20] Federal courts have also acknowledged the First Step Act's eligibility framework in a number of decisions.[21]

Ultimately, having previously considered amendments to sentencing guidelines concerning supervised release, the Commission should be guided by its own recognition of the impact of the federal system's overuse of supervised release on the lives of individuals on supervision. With the number of individuals on federal supervision at an all-time high, it is critically important for courts to be intentional when ordering someone to serve a term of supervised release. The Commission's amendments to would preserve eligibility under the First Step Act, allowing earned time credits to be applied to prerelease custody if supervised release is not ordered, while also safely reducing (through the elimination of unnecessary orders) the number of people on supervised release and ensuring that the rehabilitative needs of individuals are met.

Early Termination

Under Commentary to §5D1.2 of the current Guidelines, courts are merely encouraged to exercise their authority to reduce a supervision term through early termination "in appropriate cases." Under 18 U.S.C. §3583(e), courts are permitted to grant early termination "if it is satisfied that such action is warranted by the conduct of the defendant released and *the interest of justice*" (emphasis added). However, without additional guidance, there has been scant direction to courts, offering individuals on supervised release with little hope and few incentives to achieve the goals of supervised release. Indeed, this is made

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[17] 18 U.S. Code § 3583(d); 18 U.S. Code § 3553. *See also Michael P. Kenstowicz, The Imposition of Discretionary Supervised Release Conditions: Nudging Judges to Follow the Law , 82 U. Chi. L. Rev. 1411, 1411-12 (2015)*, noting the tendency of sentencing judges to frequently impose the discretionary conditions recommended by the Guidelines without consideration for public safety or rehabilitation.

[18] *See* United States v. Trotter, 321 F. Supp. 3d 337 (E.D.N.Y. 2018)

[19] "SUPERVISED RELEASE.-If the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to section 3583, the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under section 3632."

[20] 18 U.S.C. § 3632(d)(4)(A), (C); 18 U.S.C. §3624(g)(1); *See also* First Step Act of 2018 (P.L. 115- 391), https://www.bop.gov/inmates/fsa/docs/bop_fsa_rule.pdf.

[21] *See Sila v. Warden*, 2023 U.S. Dist. Lexis 43734 (C.D. Cal. Feb. 13, 2023); *Komando v. Luna*, 2023 U.S. Dist. Lexis 11477 (D.N.H. 13 Jan. 2023); *Parsons v. FCI, Berlin*, 2024 U.S. Dist. Lexis 146422 (D.N.H. 22 July 2024); *Szafian v. Warden R.D. Keyes*, 2022 U.S. Dist. Lexis 99332 (W.D. Wisconsin 3 June 2022); *Girven v. Smith*, 2023 U.S. Dist. Lexis 220718 (N.D. Tex. 12 Dec 2023)

apparent in the practices of multiple district courts, which have adopted the position of the Department of Justice in requiring extraordinary circumstances to support early termination. In *United States v, Wesley* (31 F.Supp.3d 77 (D.D.C. 2018)), the DOJ argued that while the individual had made progress, including maintaining employment, engaging in educational/vocational training, and remaining drug free, the efforts he made did not rise to the level of extraordinary circumstances needed to justify early termination. Ultimately, the Court praised the progress of the individual on supervised release, but noted that "mere compliance" was not enough to merit supervised release – the individual needed to have demonstrated "extraordinary circumstances." Similarly, in *United States v. Bouchareb* (76 F. Supp.3d 478 (S.D.N.Y. 2014), the Court denied an early termination request due to the failure of the defendant to present an "exceptional case" that would distinguish him from other compliant individuals on supervised release. However, the plain language of 18 U.S.C. 3583(e), which provides for early termination when "in the interest of justice," does not require extraordinary circumstances. And, in fact, appellate courts have recently affirmed that extraordinary, new, or unforeseen circumstances are *not* required and are not supported by statute. (*See United States v. Melvin, 978 F.3d 49 (3d Cir. 2020); United States v. Ponce, 22 F.4th 1045 (9th Cir. 2022*).

If we accept that supervision was ***never intended to be imposed as punishment***, then it should follow that early termination of supervision is appropriate when supervision is no longer serving non-punitive purposes. The proposed amendment would create a new section – §5D1.4 – which would directly provide for early termination of supervised release after expiration of one year (in accordance with statute) and following an individualized assessment that takes into account several enumerated factors, including an individual's "substantial compliance" with their supervision conditions. As noted above, in the absence of more, courts have required a show of extraordinary circumstances before granting early termination. This has meant that deserving individuals who have made meaningful strides to rehabilitate, rebuild their lives, and reintegrate into their communities have been denied the opportunity to actually move on from the criminal legal system. People on supervised release have already paid their debt to society, but they still aren't truly free until they've completed their term of supervision, which can last for years. Research has found that people under supervision rate opportunities to earn time off their term of supervision as the most meaningful of incentives.[22] In addition, length of stay studies of probation systems commissioned by PEW Charitable Trusts prove that supervision terms can be reduced with no negative impact on safety.[23]

We support and applaud the Commission's inclusion of "substantial compliance with all conditions of supervision" among the non-exhaustive list of proposed factors to be considered when assessing the appropriateness of early termination. "Substantial compliance" would reflect a system that has learned in supporting second chances that perfect should not be allowed to be the enemy of the good *and just* when there is nothing in federal law that requires it. Courts would benefit from additional language in the Commentary to the Guidelines further explaining what is intended by "substantial compliance," recognizing that successful rehabilitation does not mean perfect (or nearly perfect) compliance and is often not a linear path.

State-level reforms seeking to limit the length of supervision terms have made the case for related policies serving as a common sense approach to supervision and have provided useful evidence for effective cost

[22] Eric J. Wodahl, Brett E. Garland & Thomas J. Mowen (2017) Understanding the Perceived Value of Incentives in Community Supervision, Corrections, 2:3, 165-188, DOI: 10.1080/23774657.2017.1291314

[23] "States Can Shorten Probation and Protect Public Safety." The Pew Charitable Trusts, https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety#:~:text=The%20national%20average%20probation%20term,to%20five%20years%2C%20in%20Hawaii

savings and increased benefit to the community without negatively impacting public safety. By 2017, **at least ten states** had laws requiring a periodic review of probation cases to assess whether or not the individual can be discharged early.[24] And some states, such as Florida, have criteria to qualify for a presumption of early termination in statute.[25] As of 2021, **19 states adopted statutory policies to explicitly limit incarceration periods** for at least the first technical probation violation revocation event to at or under 180 days, with states like Utah, Nevada, and Michigan limiting incarceration for a first technical violation revocation to 30 days or less. And many other states have graduated administrative or statutory sanctions to limit revocation and reincarceration.[26] Many states also already offer different opportunities for early discharge from supervision. In addition, as of 2021, **18 states awarded individuals "earned time" credits for good behavior or the completion of recidivism-reducing activities** while on probation, including South Dakota, Kentucky, Texas, Arkansas, Alaska, among others.[27]

In passing state legislation, REFORM Alliance has actively pursued policies that streamline early termination practices, making them accessible for individuals on supervision. To that end, we are also supportive of the proposed guidelines under § 5d1.4 that would encourage courts to conduct assessments for early termination specifically upon the expiration of one year of supervision and throughout the remainder of an individual's supervision term. We recommend strengthening this guidance by establishing a timetable for subsequent assessments and requiring courts to provide feedback on denials of early termination so that individuals on supervised release have clarity on what they need to do going forward to earn early termination in the future. Such a timetable could be operationalized through the establishment of a presumption of early termination once an individual has spent a designated amount of time on supervised release and has fulfilled specific criteria. In establishing a timetable for early termination assessments, the Commission would be in alignment with at least ten states with laws requiring periodic review of probation cases to assess an individual's readiness for discharge.[28] In establishing a presumption in favor of early termination, the Commission would follow states like Florida, Georgia, Pennsylvania, and Vermont, which all have some form of a presumption in their supervision systems.[29] This would not only benefit individuals on supervised release who would have clear guidance from courts, but also ensure that the federal system is not keeping people on supervision longer than necessary and allow for the prioritization of resources for those who need it most.

Violations of Supervision and Mandatory Revocations

As this comment recognizes throughout, supervised release is intended to be a rehabilitative tool for individuals who have paid their debt to society following a period of incarceration. Unlike probation, which is imposed as a sanction or punishment in the alternative to incarceration, supervised release is ***explicitly prohibited from being ordered as a form of punishment*** and instead serves only to

[24] Pew Charitable Trusts, "States Can Shorten Probation and Protect Public Safety," December 3, 2020. https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety#:~:text=The%20national%20average%20probation%20term,to%20five%20years%2C%20in%20Hawaii.

[25] Fla. Stat. § 948.04(4).

[26] Jake Horowitz, "Five Evidence-Based Policies Can Improve Community Supervision, Pew Charitable Trusts, January 27, 2022. https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/01/five-evidence-based-policies-can-improve-community-supervision.

[27] Ibid.

[28] Pew Charitable Trusts, "States Can Shorten Probation and Protect Public Safety," December 3, 2020. https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety#:~:text=The%20national%20average%20probation%20term,to%20five%20years%2C%20in%20Hawaii.

[29] *See* Fla. Stat. § 948.04(4) (2024); GA Code § 42-8-37 (2024); 42 Pa. C.S. § 9774.1 (2023); 28 VT Stats § 251(2024).

support successful reentry and advance community safety. We are supportive of the Commission's bifurcation of probation and supervised release under a new Part C to Chapter 7 of the Guidelines, further emphasizing federal supervised release as a unique and distinct form of supervision intended not to punish or to alter the term of incarceration, but instead to support reentry, encourage community stability and individual wellbeing, and deter recidivism.

Current guidelines mandate revocation for Grade A or B violations, and give courts the option to revoke, extend, or modify the conditions of supervised release for Grade C violations. While Grade A and Grade B violations solely constitute federal, state, and local offenses punishable by a term of imprisonment exceeding one year, Grade C violations include federal, state, and local offenses punishable by imprisonment of one year or less *and* violations of *any other* conditions of supervision, including low level violations that are only technical in nature.[30]

Annually, around 10,000 people on supervised release are incarcerated for a supervision violation.[31] For the 12-month period ending March 31, 2022, technical violations were **the most common caus**e for revocations.[32] During this period, more than one third of individuals on supervised release had their supervision terminated with a revocation — of this population, **a staggering two thirds were terminated due to a technical violation.** Non-criminal, or "technical" violations of supervised release, such as missing a meeting with one's supervision officer, are the leading cause of revocation in the federal supervision system.[33] Twenty percent of supervised release cases closed in 2021 were revoked due to technical violations, with 13% percent of that number revoked solely for technical violations with no accompanying arrests for new crimes.[34] Between 2013-2017, the majority (54.9%) of supervision violations analyzed in one study were for less serious, Grade C offenses.[35] Yet courts revoked and sentenced more than 94% of people to prison, with an average term of 8 months, following a supervision violation hearing for a Grade C offense.[36]

Technical violations that result in even short periods of reincarceration have far-reaching consequences that can threaten public safety, disrupt the workforce, harm employment,[37] fracture the family unit, and create housing instability. On top of this, a few recent studies have found that custodial sanctions for technical violations *do not outperform non-custodial, community-based sanctions* when trying to prevent future criminal activity.[38] This makes sense. Individuals on supervision are already on the brink of or are

[30] U.S. SENT'G COMM'N, GUIDELINES MANUAL §7B1.1 (Nov. 2024)
[31] U.S. Courts. (2022). Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes; US Department of Justice. (2023) Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release
[32] See "Table E-7A--Federal Probation System Statistical Tables for the Federal Judiciary (March 31, 2022), Administrative Office of the U.S. Courts.
[33] See "Table E-7A--Federal Probation System Statistical Tables for the Federal Judiciary (March 31, 2022), Administrative Office of the U.S. Courts.
[34] U.S. Courts. (2022). Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes.
[35] Grade C offenses are defined as conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision. United States Sentencing Commission, "Federal Probation and Supervised Release Violations," July 2020, p. 38. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf
[36] Ibid. p. 35
[37] Studies assessing the impact of detention in the pretrial setting has shown that even short periods of incarceration can decrease formal sector employment and the receipt of other benefits. William Dobbie et al., "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review 108:2 (2018)*, 201-240. https://www.aeaweb.org/articles?id=10.1257/aer.20161503.
[38] E.K. Drake and S. Aos, "Confinement for Technical Violations of Community Supervision: Is There an Effect on Felony Recidivism?" *Olympia: Washington State Institute for Public Policy*. (2012), https://www.wsipp.wa.gov/ReportFile/1106; E.J. Wodahl, J.H. Boman, and B.E. Garland, "Responding to Probation and Parole Violations: Are Jail Sanctions More Effective Than Community-Based Graduated Sanctions?," *Journal of Criminal Justice* 43, no. 3 (2015): 242-50, https://doi.org/10.1016/j.jcrimjus.2015.04.010. P. Villettaz, G. Gillieron,

currently experiencing poverty and financial stress, which can be exacerbated by incarceration for a technical violation. A study by the Brookings Institute, which analyzed the labor outcomes of U.S. prisoners found that **only *55 percent* of people released from prison had any earnings** after their release.[39]

Individuals can face *mandatory* revocation policies for drug use violations such as failing multiple tests in a year, even when commonsense dictates that incarcerating addicted individuals – rather than trying to find them better help in the community – is more likely to *hinder* their success than assist it. Indeed, federal and state prisons notoriously fail to provide needed addiction and mental health services even when they know someone has a diagnosed issue.[40] The federal system's response to drug abuse violations is disconnected from the realities of addiction and treatment. When analyzing closed cases last year, nearly one out of every three people on supervision were violated or had their supervision revoked primarily for drug offenses and other non-serious violations.[41] Addiction issues are complex and require both mental and physical treatment – treatment that federal and state prisons notoriously fail to provide.[42] Under current law, individuals on federal supervised release who possess a controlled substance, refuse to comply with ordered drug tests, or test positive for illegal drug use more than three times in a year have their supervision mandatorily revoked.[43] Thus, the legal system's response to addiction has been to punish rather than treat, perpetuating a cycle of "supervision, relapse, and incarceration."[44] Defaulting to incarceration for low level drug-related violations is a punitive approach that fails to take into account the treatment and rehabilitative needs of the individual and ultimately fails to advance our shared goals of community safety and security.

It is under this framework that we urge the Sentencing Commission to construct § 7C1.3 to mandate revocation ***only when statutorily required***, thus allowing courts the latitude to assess the appropriate response to a violation by an individual who is on a rehabilitative path. Anything short of this would continue the federal system's punitive approach to a system that was originally intended to support the reintegration of individuals into their communities. Supervised release's "promise of redemption" is undercut by the constant threat of incarceration for violations, creating an untenable paradox within the system.[45] Where someone has already paid their debt to society by serving time in prison for an offense, sanctions for violations of supervised release thus become about punishing the violation itself, with the threat of that punishment – loss of liberty – used as a cudgel by supervision officers and courts alike. It is under these dynamics that our supervised release system demands rehabilitation. Option 1 would allow

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and M. Killias, "The Effects on Re-Offending of Custodial Vs. Non-Custodial Sanctions: An Updated Systematic Review of the State of Knowledge," *Campbell Systematic Reviews* 1 (2015), http://dx.doi.org/10.4073/csr.2015.1.

[39] Adam Looney and Nicholas Turner, "Work and opportunity before and after incarceration" Brookings Institute, March 14, 2018. https://www.brookings.edu/research/work-and-opportunity-before-and-after-incarceration/.

[40] Bronson and Berzofsky, "Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-2012," Bureau of Justice Statistics, June 2017. https://bjs.ojp.gov/content/pub/pdf/imhprpji1112.pdf; Jack Tsai and Xian Gu, "Utilization of addiction treatment among U.S. adults with history of incarceration and substance use disorders," *Addiction Science and Clinic Practice* 14:9 (2019). https://link.springer.com/article/10.1186/s13722-019-0138-4

[41] Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes | United States Courts

[42] Bronson and Berzofsky, "Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-2012," Bureau of Justice Statistics, June 2017. https://bjs.ojp.gov/content/pub/pdf/imhprpji1112.pdf; Jack Tsai and Xian Gu, "Utilization of addiction treatment among U.S. adults with history of incarceration and substance use disorders," *Addiction Science and Clinic Practice* 14:9 (2019). https://link.springer.com/article/10.1186/s13722-019-0138-4

[43] 18 U.S. Code § 3583(g).

[44] Bloom, Aliza Hochman & Jacob Schuman, *It is Time to Reform Federal Supervised Release*, ACS Law (Nov. 30, 2022).

[45] Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission* , 28 Fed. Sent'g Rep. 231, 232 (2016)

judges to take stock of an individual's case ***within the context of that individual's rehabilitative path*** by allowing for consideration of appropriate responses to violations other than incarceration that would not derail progress or trap them in a dangerous carceral loop of supervision to prison. To that end, we also support the adoption of Option 1 under § 7C1.4, which would grant courts the discretion to individually assess whether a term of incarceration, following a revocation, should be served concurrently or consecutively to any term of incarceration an individual is serving regardless of whether incarceration resulted from the same conduct that is the basis for revocation. This would be a meaningful and needed expansion of current practice which requires a term of imprisonment upon revocation to be served consecutively to any other sentence, even if both result from the same conduct. This has, in effect, allowed individuals on supervised release to be doubly sanctioned.

We appreciate the distinction offered in the proposed amendment carving out under § 7C1.1 a new category of violations (previously captured in Grade C) – Grade D, representing "a violation of any other condition of supervised release" that is not a federal, state, or local offense punishable by a term of imprisonment. We strongly encourage the Commission to provide for a presumption against revocation for technical violations, stating explicitly that revocation is generally not an appropriate response for non-criminal violations, unless public safety is implicated and/or alternative interventions fail. Violations of supervision conditions do not necessarily indicate whether someone is a public safety risk or will engage in future criminal activity.[46] In the face of repeated violations, graduated sanctions are a proven tool for achieving accountability and compliance with supervision conditions.

Conclusion

REFORM Alliance is grateful to the U.S. Sentencing Commission for its thoughtful consideration of these issues and continued engagement of key stakeholders in the development of these proposals. The Commission's proposals would make meaningful strides in strengthening the federal supervised release system and helping realign it with its original goals of supportive reintegration and rehabilitation for affected individuals alongside increased public safety and prosperity for communities across America – outcomes beneficial to all stakeholders.

Sincerely,

Erin D. Haney
REFORM Alliance
Chief Policy Officer

[46] The Pew Charitable Trusts, To Safely Cut Incarceration States Rethink Responses to Supervision Violations (July 2019).

Right On Crime is pleased to submit a comment in support of the U.S. Sentencing Commission's proposed amendment on supervised release. Right On Crime is a national campaign of the Texas Public Policy Foundation that supports conservative criminal justice solutions resulting in less crime, fewer victims, and safer communities. The movement was born in Texas in 2007 and has led the way in implementing conservative criminal justice reforms across the nation.

The proposed amendment about supervised release seeks to "provide courts with greater discretion to make determinations regarding the imposition of supervised release that are based on an individualized assessment of the defendant."[1] In short, the proposed amendment would do the following:

(1) *Clarify intent:* Amend introductory commentary to clarify that "courts should assess a wide range of factors to ensure its decisions fulfill the rehabilitative needs of the defendant and protect the pubic from further crimes of the defendant."[2]
(2) *Refine imposition of supervised release:* Amend guidelines so a court is "required to impose supervised release only when required by statute." A court may still order a term of supervision "when warranted by an individualized assessment of the need for supervision."[3]
(3) *Address supervised release length:* "[R]equire the court to conduct an individualized assessment to determine the length of the term of supervised release[.]"[4]
(4) *Provide an option for supervised release modification:* "[E]ncourage a court . . . to conduct an individualized assessment to determine whether it is warranted to modify, reduce, or enlarge the conditions of supervised release."[5]

The above four proposals are a welcome change, as they will give courts the ability to assess a wide range of factors to ensure its decisions fulfill the rehabilitative needs of the defendant and protect the public from further crimes by the defendant.

The proposed amendment largely mimics the policies of the *Safer Supervision Act*.[6] This bipartisan, bicameral bill is similarly rooted in improving the federal supervision system by tailoring supervision to the individual. Specifically, the bill would require courts to conduct an individualized assessment of the appropriateness of supervision and to state its reasons on the record. This would help ensure that supervision is imposed when warranted by the facts rather than being imposed automatically in every case. It also creates positive incentives that will encourage rehabilitation and good conduct. And lastly, it would provide courts with discretion to determine whether reimprisonment or treatment is a more appropriate sanction for minor controlled substance possession violations.

The changes and policies advanced by both the USSC's proposed amendment and the *Safer Supervision Act* are not unwarranted. Rather, both are data-driven and based on sound research and policy.

For instance, lengthy supervision sentences have not been proven to improve public safety. The U.S. Department of Justice has reported that access to and maintenance of meaningful reintegration into

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[1] https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] H.R. 5005, *Safer Supervision Act of 2023*, 118th Cong.; S. 2681, *Safer Supervision Act of 2023*, 118th Cong.

society helps reduce recidivism, which in turn promotes public safety.[7] To that end, having shorter periods of time for supervision and allowing for early termination for a limited class of offenders will help "eliminat[e] barriers associated with justice system involvement" and "improve[] outcomes and reduce[] recidivism, thereby promoting public safety."[8] In fact, lengthy post-release supervision can lead to more reimprisonment and little – to no – benefit to public safety.[9]

Similarly, modifying the terms and length of supervised release is also a proven public safety tool. Under the current federal supervised release system, there are too few incentives to encourage growth. Rather, individuals remain under supervision for years without any understanding of how to improve and avoid a life of crime. While current law allows individuals to seek the earned and positive incentive of early termination, there is little to no guidance for courts on how to make that determination.[10] The positive incentive of early termination will encourage faithful compliance with the terms of supervision. The possibility of early termination provides a clear roadmap for success, promoting good conduct, compliance, and overall rehabilitation. In fact, a recent study by the U.S. Administrative Office of the Courts even concluded that "early terminations [of federal supervised release] did not threaten community safety."[11] And the proposed amendment does not restrict the modification of the supervised release term from enlargement. In fact, this aptly illustrates the intent of the amendment: to add discretion for individualized assessments, not to wholesale eliminate federal supervised release terms. The opportunity for a review with the discretion to modify, shorten, or enlarge the term is a smart on crime policy.

Right On Crime applauds the U.S. Sentencing Commission for proposing this amendment to improve the federal supervised release system.

Sincerely,

Brett Tolman
Executive Director
Right On Crime

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[7] https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf
[8] *Id*. at 8.
[9] Sakoda, Ryan, Abolish or Reform? An Analysis of Post-Release Supervision (June 14, 2024). Available at SSRN: https://ssrn.com/abstract=4670939 or http://dx.doi.org/10.2139/ssrn.4670939.
[10] 18 U.S.C. § 3583(e).
[11] Cohen, Thomas, Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety (Jan. 15, 2025). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5098803#:~:text=State%2DLevel%20Studies%20of%20Early,al.%2C%202017%3B%20Pew%20Charitable.

Sugar Buzzed
1540 S 2nd Street Ste 100
Wilmington, NC 28401

02/27/2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Mia, and I am submitting this comment letter on behalf of the Sugar Buzzed, a storefront in Wilmington, NC that sells hemp-derived and mushroom-derived Federally legal products. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. Sugar Buzzed applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

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[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain,

having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while

[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/

75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under**

[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf

[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

Chapter Three, Part B. The Commission seeks comment on how it should address this issue.

The Commission should provide guidance that allows for the lowest base offense level.

* * *

Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Mia Troy
Owner
Sugar Buzzed, LLC

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

TEAM FED CHICKS

Fighting Exclusions and Disqualifications for zero Criminal History Internet Convictions with Knowledge and Solutions

March 3, 2025

The Honorable Carlton F. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Dear Judge Reeves and Esteemed Commissioners:

Thank you for the opportunity for TEAM FED CHICKS to respond to the Commission's request for public comment on proposed changes to federal probation. We are a dedicated team of nonpartisan, nondenominational justice-impacted family members who love and support spouses, partners, children, parents, and siblings who have zero criminal history and are currently in federal custody for non-contact internet-based sex offense convictions. We do not excuse sexual abuse of any kind. However, we believe the population we advocate for, which has the lowest documented same-crime recidivism rates of any conviction, according to the Bureau of Justice Statistics and the Commission's own research, has been mischaracterized, over-sentenced, receives excessive supervision, and does not benefit from long sentences or extended periods of probation. Your own research shows that this population is consistently and successfully rehabilitated far more than the other conviction populations who benefit from changes to the guidelines. We believe that excluding this population from probation reforms is a mistake, is a substantial waste of federal tax dollars, and that extended terms of federal supervision for this population does nothing to keep the public safe. Therefore, it is essential that the population with convictions of 18 U.S.C. § 2422, 2251 (noncommercial production/sexting only), and 2252(a) be included in the Commission's proposed probation reforms, that federal probation/supervised release be limited to a *maximum* of five years, or sooner if the probationer meets the release criteria established by U.S. Probation, and that the mandatory minimum in 18 U.S.C. § 3583 (k) of 5 years to life time supervision be removed and new revisions be made retroactive for current probationers in good standing.

The current arrest, prosecution, and incarceration of people of all ages with no other criminal history for non-contact sex offenses has already resulted in a huge loss of productivity and talent from our national workforce, has impoverished families, and led to an increase in

the cost of social programs to support these families. The Commission's own report, "Educational Levels of Federally Sentenced Individuals" states "Sentenced individuals with an undergraduate or graduate degree were convicted more often for economic or sex offenses than sentenced persons with less education." (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231218_Education.pdf). Our nation's unemployment rate of 4% for the general population is substantially lower than the 27% unemployment rate for people with a felony conviction. (https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v37/no-1/jlel-37-1-6.pdf) It is probable that the unemployment rate for people with sex offense convictions is significantly higher than 27%, and it is not unusual for family members to lose *their* positions of employment when an employer discovers they have a family member with a sex offense conviction. These facts show that the disproportionate unemployment rate is not caused by job availability or ex-offenders being unwilling to work; they are just being systematically excluded from the employment market. Prolonging the excessive intrusions of federal probation for this group only worsens its chances for economic stability, which forces employers to seek resources outside the United States when there are highly educated, employable, talented prospects here at home who would welcome the chance to work for and contribute to a companies' success.

Congress has failed to keep the public and the children it claims to want to protect "safe" with the draconian laws it has passed which treat all sex offenses the same, and the Media has contributed willingly to this ruse on the American public. We have an unwieldy bureaucracy which spends billions of dollars to track the people who are least likely to reoffend, with same offense re-arrest and recidivism rates documented in the article (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220210_Recidivism-Violence.pdf P. 25 Figure 11 *Most Serious Offense at Re-arrest for Violent and Non-Violent Federal Offenders Released in 2010 as which as 0.5 violent and 0.7% non-violent, respectively).* Other Commission research documents the sexual recidivism as 3.6% to 4.3% for non-production child pornography convictions (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/rg_child-pornography-non-production.pdf).

In addition to unconstitutional 4th amendment violations, (Burkhardt, B. (2020). *Manufacturing Criminals: Fourth Amendment Decay in the Electronic Age*. Blue Ridge Software Consulting) excluding individuals convicted of these noncontact internet convictions from reforms like reduced sentencing and reduced federal supervision squanders law enforcement resources by placing undue burdens on both law enforcement and probation officers. Because of numerous federal ICAC, SMART, and SORNA grants, probation and other law enforcement officers must spend their limited time and resources monitoring people who are least likely to re-offend, instead of investigating, pursuing, arresting, and monitoring violent cartels, sex traffickers, and those engaged in the commercial production of child pornography (Sidhu, D. S., & Robinson, K. (2022). Child Pornography and Criminal Justice Reform. *Cardozo Law Review*, *43*(6.3), 2157–2202. https://research.ebsco.com/c/z63j24/search/results?q=CHILD+PORNOGRAPHY+AND+CRIMINAL+JUSTICE+REFORM+Dawinder+S.+Sidhu+&+Kelsey+Robinson%E2%80%A0=&recordId=ys7igfsuqz). How is excluding those with no criminal history and noncontact internet offenses from probation reform, most who are domiciled in low security facilities and have the lowest documented same conviction recidivism rates, keeping children and the public safe?

These noncontact internet convictions have been classified as violent and deserve reevaluation and reclassification as non-violent to allow participation in alternatives to incarceration, pre-trial diversion and, for those who are incarcerated, participation in rehabilitation programs. Programs such as First Step Act, with a purpose to end mass incarceration, offer early release time credits and have documented low recidivism rates. Participation in the reforms to federal probation will allow these individuals with documented low risk of recidivating, as well as their families who suffer collateral economic and social consequences, to lead productive lives, while freeing up federal and state law probation and enforcement resources to pursue sex trafficking and commercial production instead of pursuing individuals for possessing and emailing images. Limiting federal supervision to a maximum of 5 years for this specific population allows probation officers more resources to monitor high recidivism convictions of persons more likely to be rearrested, convicted, and re-incarcerated, many which are currently not excluded from proposed reforms.

TEAM FEDCHICKS supports the Commissions proposed federal probation reforms, ***with*** the inclusion of the population with zero criminal history who have convictions of 18 U.S.C. § 2422, 2251 (noncommercial production/sexting only), and 2252(a). To be truly effective and promote public safety, this population, with no criminal history and the lowest documented recidivism rates must be included in the Commission's proposed probation reforms, reduced federal supervised release must be limited to a *maximum* of five years, or less if the probationer meets the release criteria established by U.S. Probation, and the mandatory minimum in 18 U.S.C. § 3583 (k) of 5 years to life time supervision be removed for these noncontact internet convictions and made retroactive for current probationers in good standing.

Thank you, Judge Reeves and Commissioners, for providing the opportunity for our team to provide commentary, and to share our honest concerns with you. TEAM FED CHICKS values the Commissions' representation of truth and justice.

Respectfully submitted,

TEAM FED CHICKS

TEAM FED CHICKS
Fighting **E**xclusions and **D**isqualifications for zero
Criminal **H**istory **I**nternet **C**onvictions with **K**nowledge and **S**olutions
[redacted] -

The Hood Exchange
1074 Astor Ave SW
Atlanta, GA 30310

February 19, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Sia Henry, and I am submitting this comment letter on behalf of the Hood Exchange. The Hood Exchange is introducing formerly-incarcerated Black populations to international travel, creating opportunities for them to connect with the African diaspora, learn about their history, begin to heal from racism and trauma, and develop plans to grow personally and professionally. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making more rooted in data, science, and sociological evidence. Recognizing that far too many people, especially those from historically oppressed and exploited communities, have been deeply harmed by our country's War on Drugs, the Hood Exchange applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in

violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have found to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research

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[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

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[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

[13] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.
[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

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[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

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[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/

[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf

[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

* * *

Call for Retroactive Application

There are roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments.

* * *

Sincerely,
Sia Henry
Executive Director, The Hood Exchange

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp
[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))
[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

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March 3, 2025

The Honorable Carlton Reeves, Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Request for Public Comment on Proposed 2025 Amendments to Sentencing Guidelines (90 FR 8968)

Dear Judge Reeves,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, we are pleased to submit the following comments and suggestions regarding the proposed amendments to the federal sentencing guidelines on supervision and drug offenses. We applaud the Sentencing Commission for promulgating these amendments, and we urge you to finalize them in a manner that reverses ineffectiveinvestments in overcriminalization, overincarceration, and excessive sentencing practices.[1]

The criminal legal system is rife with racial disparities, and the commission should look to reducing these disparities in its work.

Currently, the United States leads the world in imprisoning or supervising nearly 5.5 million people, imprisoning people at a higher rate than any other nation. As of 2022, 700 of every 100,000 adults in the United States were behind bars. The racial inequities rooted in slavery and discrimination that permeate every aspect of our lives are likewise present in our criminal-legal system. People of color are disproportionately affected by policies in every aspect of the criminal-legal system. In state prisons, Black people are five times more likely to be incarcerated than White people.[2] Additionally, Black men receive sentences 13.4 percent longer, and Hispanic men receive sentences 11.2 percent longer, than White men. Similarly, Hispanic women receive sentences 27.8 percent longer than White women.

[1] For more information on our conceptualization of a more just and fair system, *see* "Vision for Justice." *The Leadership Conference on Civil and Human Rights*. https://www.visionforjustice.org/.
[2] Nellis, Ashley. "The Color of Justice: Racial and Ethnic Disparity in State Prisons *The Sentencing Project*, Oct. 13 2021. https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

Overall, people of color make up 39 percent of the U.S. population,[3] but are greatly overrepresented in prisons, making up nearly 70 percent of the prison population.[4] It is clear that current sentencing practices perpetuate racial and ethnic disparities that take place at the front end of the criminal legal system. We urge the commission to make reducing these injustices one of their main goals in promulgating these amendments.

The primary purpose of supervised release should be to ensure a successful reentry into the community, without acting as a restrictive, coercive tool. The proposed amendments would greatly improve the federal system.

As of June 30, 2024, there were nearly 110,000 individuals on federal supervised release.[5] Supervised release is served after the completion of a sentence of incarceration, in effect lengthening an individual's sentence. Per the Supreme Court, postrelease supervision is meant to be "for those, and only those, who [need] it."[6] Yet, in practice, courts impose supervision for nearly all cases, even when not required by statute, and without a consideration of actual need.[7] The conditions of supervised release can be severely restrictive due to their onerous requirements, including requirements for meeting with probation officers, detailing comings and goings and other life changes, paying steep fines and fees, and others.[8] These restrictions can lead to revocations that reincarcerate individuals who had already completed their sentences of incarceration. In 2021, for example, the government revoked supervision in nearly a third of cases.[9] These revocations can be due to new criminal conduct or to violations of terms of release. In effect, supervised release can be a funnel back into incarceration, preventing individuals from fully reintegrating into the community.

We appreciate the commission's proposed changes to the supervision guidelines, including the removal of the requirement to impose a term of supervised release when a sentence of imprisonment more than one year is imposed and the inclusion of individualized assessments for term and condition imposition. We urge the commission to go further in its proposed policy statement at §5D1.4 on "Modification, Early

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[3] Jones, Nicholas, et al.," 2020 Census Illuminates Racial and Ethnic Composition of the Country." *United States Census Bureau*. Aug. 12, 2021. https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html.
[4] Nellis, Ashley. "Mass Incarceration Trends." *The Sentencing Project*. May 21, 2024. https://www.sentencingproject.org/reports/mass-incarceration-trends/.
[5] Table E-2- Federal Probation System Statistical Tables for the Federal Judiciary. *Administrative Office of the United States Courts, Statistics and Reports*. https://www.uscourts.gov/data-news/data-tables/2024/06/30/statistical-tables-federal-judiciary/e-2.
[6] Johnson v U.S., 529 U.S. 694, 709 (2000).
[7] U.S. Sentencing Guidelines Manual § 5D1.1 (2024) currently requires the imposition of a term of supervised release when a sentence of imprisonment of more than one year is imposed.
[8] "Revoked: How Probation and Parole Feed Mass Incarceration in the United States." *American Civil Liberties Union & Human Rights Watch*. July 31, 2020. https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states.
[9] "Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes." *Administrative Office of the United States Courts*. June 14, 2022. https://www.uscourts.gov/data-news/judiciary-news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes.

Termination, and Extension of Supervised Release."[10] This statement should state explicitly that early termination is appropriate any time it is not serving the purposes for which it was imposed. As it quotes from *U.S. v. Johnson* within the proposed amendments, the commission, with its proposed changes, is clearly looking to ensure that its guidelines regarding supervised release "fulfill [] rehabilitative ends, distinct from those of incarceration."[11] Yet any time spent on supervised release, after completion of a prison sentence, risks reincarceration, with fewer rights than afforded to defendants in traditional criminal prosecutions.[12] Individualized assessments of if and how to impose a term of supervised release, together with such assessments on length *and* a preference for or presumption of early termination once those rehabilitative ends have been met, will aid in lessening the revolving door nature of supervised release.

The Commission should not repeat the mistakes of the past in implementing the proposed drug offense amendments

The drug overdose crisis is a serious issue, and it is unfortunately one to which policymakers have responded not with a serious investment in public health and in communities, but with overpolicing and draconian punishments. Harsh federal drug laws and mandatory minimums enacted under the banner of the 'war on drugs' have caused the federal prison population, and attendant racial disparities, to explode.[13] The Urban Institute has found that increases in expected time served for drug offenses was the largest contributor to growth in the federal prison population between 1998 and 2010.[14] Currently, people convicted of drug offenses make up 43.9 percent of the Bureau of Prisons (BOP) population.[15]

These failed "tough on crime" policies have had a markedly disproportionate impact on communities of color. Today, BOP reports 38.9 percent of its current prison population is Black and 29.2 percent is Hispanic, an enormous disparity given that both groups combined represent only about one third of the nation's population.[16] The commission's own research shows that Hispanic and Black people account for

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[10] "Proposed Amendments to the Sentencing Guidelines." *U.S. Sentencing Commission*. Jan. 24, 2025. Pgs. 18-19. https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf.

[11] *Ibid* at 4.

[12] Some have argued that the federal supervised release scheme is unconstitutional because those subject to revocation proceedings do not have access to the rights applicable in traditional criminal prosecutions. *See* Underhill, Stefan R., & Powell, Grace E. "Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution." 108 Va. L. Rev. Online 297. https://virginialawreview.org/articles/expedient-imprisonment-how-federal-supervised-release-sentences-violate-the-constitution/.

[13] *See, e.g.*, "Drivers of Growth in the Federal Prison Population." *Charles Colson Task Force on Federal Corrections*. March 2015. https://www.urban.org/sites/default/files/publication/43681/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf.

[14] Mallik-Kane, Kamala & Parthasarathy, Barbara & Adams, William. "Examining Growth in the Federal Prison Population, 1998 to 2010." *Urban Institute*. 2012. Pg. 3. https://www.urban.org/sites/default/files/publication/26311/412720-Examining-Growth-in-the-Federal-Prison-Population–to–.PDF.

[15] "Statistics: Inmate Offenses." *Federal Bureau of Prisons*. Updated Feb. 22, 2025. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

[16] "Inmate Statistics." *Federal Bureau of Prisons.* Updated Feb. 22, 2025. https://www.bop.gov/about/statistics/statistics_inmate_race.jsp. Hispanics make up 18.5% of the U.S. population,

a majority of those convicted with an offense carrying a drug mandatory minimum,[17] despite the fact that White and Black people use illicit substances at roughly the same rate, and Hispanic people use such substances at a lower rate.[18]

We are encouraged to see the commission acknowledging the realities of mass incarceration and harsh punishment for drug offenses in these amendments. We are, however, disappointed by how reactive the proposed amendments are when addressing fentanyl sentencing. By singling out fentanyl, the amendments risk making the same mistakes made during the height of the 'war on drugs,' as discussed *supra*. For example, Black people have been disproportionately incarcerated and sentenced to mandatory minimum sentences for small amounts of crack cocaine, despite the fact that White people are more likely than Black people to use crack cocaine in their lifetimes.[19] Unfortunately, similar trends for fentanyl and its analogues are emerging: Since 2015, "the number of fentanyl offenders reported to the commission has doubled each fiscal year," and between 2015 and 2019, prosecutions for fentanyl-analogue offenses increased by more than 5,000 percent, with no corresponding decrease in the use of fentanyl or in overdose deaths.[20] In 2019, 40.5 percent of those sentenced in fentanyl cases and 58.9 percent of those sentenced in fentanyl-analogue cases were Black, yet Black people continue to die of fentanyl overdoses at higher rates than White people.[21] Clearly, there is no indication that overly punitive sentences or mass incarceration deter crime, protect public safety, or decrease drug use or trafficking. Studies of federal drug laws show no significant relationship between drug imprisonment rates and drug use or recidivism.[22] In effect, we cannot punish or imprison our way out of this drug overdose crisis, and singling out fentanyl for harsher punishments will only repeat the missteps of the past.

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while Black people make up 13.4%. "United States QuickFacts." *U.S. Census Bureau*. Last updated July 1, 2019. https://www.census.gov/quickfacts/fact/table/US/PST045219.

[17] "Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System." *United States Sentencing Commission.* Oct. 2017. Pg. 57. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf. [hereinafter "Mandatory Minimum Penalties."]

[18] "Results from the 2018 Nat'l Survey on Drug Use and Health: Detailed Tables." *Substance Abuse and Mental Health Service Administration*. 2018. Table 1.23B. https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf.

[19] 6.3 percent of people sentenced under these laws are White, while 77.1 percent are Black. "Quick Facts: Crack Cocaine Trafficking Offenses, FY2020." *U.S. Sentencing Commission*. 2020. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY20.pdf.

[20] U.S. Sentencing Comm'n. "Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns." Jan. 2021. P. 4. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

[21] *Ibid* at 24; Spencer, Merianne Rose, et al. "Estimates of Drug Overdose Deaths Involving Fentanyl, Methamphetamine, Cocaine, Heroin, and Oxycodone: United States, 2021." *National Vital Statistics System, Centers for Disease Control and Prevention.* May 2023. https://www.cdc.gov/nchs/data/vsrr/vsrr027.pdf.

[22] *See, e.g.*, Luna, Erik. "Mandatory Minimums." *The Academy for Justice*. 2017. Pgs. 127-130. https://law.asu.edu/sites/default/files/pdf/academy_for_justice/7_Criminal_Justice_Reform_Vol_4_Mandatory-Minimums.pdf; Nat'l Inst. of Justice. "Five Things about Deterrence." May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf; "Federal Drug Sentencing Laws Bring High Cost, Low Return." *Pew Charitable Trusts*. Aug. 27, 2015. https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return.

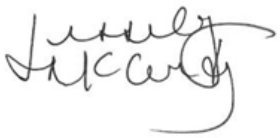
The amendment proposal asks for feedback on a number of different options, and we urge the commission, in all cases, to choose the options that would have the most consequential effects in reducting mass incarceration and addressing these stark racial disparities. We also want to briefly respond to a specific issue for comment three in Part A, Subpart 2, where the commission asks about mitigating circumstances regarding the distribution of retail or user-level quantities.[23] The commission should consider that many of those who sell drugs may themselves be users of those drugs and possibly have substance use disorder.[24] Fear of prosecution and of lengthy prison sentences may lead people who sell drugs and who suffer from substance use disorder to avoid accessing treatment and health care. Additionally, most of those who sell these lower quantities "do not make much money, have little knowledge of the distribution network as a whole, and are not involved in profit sharing," yet are often the easiest targets for law enforcement.[25] The commission should look to these facts when considering mitigation for measures for those who sell retail or user-level quantities of illegal substances. Once again, it will take real investments in public health, not severe punishments, in order to prevent and treat substance use disorder.

Conclusion

Many of the proposed amendments would help to address the inequities within our criminal legal system. We thank the commission for its attention to these issues and for its clear dedication to making the system fairer and more just. We look forward to continuing to work with the commission to achieve these aims. Please direct any questions about these comments to Chloé White, senior counsel, justice, at [redacted]

[23] "Proposed Amendments to the Sentencing Guidelines" *supra* note 10 at 77.
[24] According to an analysis of the 2012 National Survey on Drug Use and Health, 87.5 percent of people who reported selling drugs in the past year also reported using substances in that year, while around 43 percent of people who reported selling drugs also reported that they met the criteria for substance use disorder. Stanforth, Evan T., et al. "Correlates of engaging in drug distriction in a national sample." *Psychology of Addictive Behaviors* 30(1). Feb. 2016. *Cited in* Drug Policy Alliance. "Rethinking the 'Drug Dealer.'" Dec. 17, 2019. P. 36. https://drugpolicy.org/wp-content/uploads/2023/05/Rethinking_the_Drug_Dealer_Report.pdf.
[25] "Rethinking the 'Drug Dealer" at 40. Indeed, the commission's own 2016 data notes that those convicted of a drug offense and categorized as "Employee/Workers," a lower culpability function according to the commission, were convicted at a higher rate than those considered more culpable under the commission's rubric. "Mandatory Minimum Penalties," p. 46. The commission notes that this seems due to many of those in the category being those responsible for handling large quantities of prohibited substances but who had no actual control or authority over the drugs or their distribution. *Ibid* at 47.

Sincerely,



Jesselyn McCurdy
Executive Vice President of Government Affairs

TZEDEK
ASSOCIATION

March 2, 2025

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500 South Lobby
Washington, D.C. 20002-8002

RE: Tzedek Association Comments on the Commission's Proposed Amendments for the 2025 Amendment Cycle Posted January 24, 2025

Dear Judge Reeves and Members of the Commission,

Tzedek Association appreciates the opportunity to comment on aspects of the proposed amendments relating to Supervised Release and Drug Offenses promulgated on January 24, 2025, for the cycle ending May 1, 2025.

I would like to begin by expressing our deepest admiration and appreciation for the extraordinary work of the United States Sentencing Commission since it regained its quorum in August of 2022. Under your leadership, the Commission has achieved unprecedented progress, demonstrating an unparalleled commitment to justice, fairness and evidence-based sentencing policy. In recent years, the Commission has set a new standard for excellence in criminal justice reform. Your accomplishments have not only strengthened the integrity of our sentencing system but have also changed countless lives for the better. We look forward to witnessing, and participating in, your continued tremendous achievements in the months and years ahead.

Tzedek is a non-profit humanitarian organization that focuses on criminal justice reform, religious liberty and humanitarian causes around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system and empowering individuals to be productive members of society. Tzedek seeks a society that values and embraces compassion and fairness.

202.221.7513 I [redacted] I 571 Bedford Ave Brooklyn NY

Save A Life, Save A World

In recent years, Tzedek has championed ground-breaking reforms such as the monumental First Step Act, as well as the provision in the CARES Act that allowed for home-confinement for incarcerated individuals vulnerable to COVID-19 based on CDC criteria, among other criminal justice accomplishments. Tzedek always advocates for reform measures seeking to ensure that the criminal justice system embraces fundamental core values that reflect a belief in the unbounded human capacity for atonement, redemption and rehabilitation.

Tzedek is proud to work alongside numerous advocacy organizations and stakeholders to address the significant need for reform in the American sentencing system. We believe that every human being is placed in this world with a unique purpose and mission. When individuals are warehoused for extended periods, it not only strips them of their humanity but also undermines their very reason for being. We advocate for a sentencing system that is more humane, fair, compassionate and just.

Several weeks ago, Tzedek submitted comments on proposed amendments related to Firearms Offenses and Simplification of the Three Step Process in the Guideline Manual.[1] And, last July, in response to the Commission's call for comments on Proposed 2024-25 Policy Priorities, Tzedek submitted a comprehensive memorandum, urging the Commission to embrace bold reforms to combat excessive harshness and unwarranted disparity in federal sentencing.[2] As more fully delineated below, Tzedek believes that some of the current proposals incrementally address fundamental concerns that have previously been raised with the Commission, not only by Tzedek, but also by many other groups reflecting a broad ideological perspective.

While Tzedek applauds every step that advances the goal of achieving a fairer and more rational sentencing regime, the following suggestions are offered to make the proposed changes as effective as possible and to

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[1] See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (January 30, 2025) at www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf.

[2] See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (July 15, 2024), *at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=761.

encourage the Commission to build on these steps to undertake more encompassing reforms in upcoming cycles.

Introductory Context

Tzedek's observations with respect to the pending proposed amendments necessarily must be viewed within the context of Tzedek's perspective on larger reforms that are essential to address the unfortunate carceral legacy of the Sentencing Reform Act of 1984 (SRA) and other federal sentencing laws. This disconcerting legacy includes: (1) overreliance upon incarceration, when alternatives to incarceration are adequate to accomplish the statutory purposes of sentencing; (2) overly severe terms of incarceration; and (3) systemic disparities manifested in various phases of the criminal justice system that are exacerbated by flawed components of the current Sentencing Guidelines.

Without fully reiterating the comprehensive proposals Tzedek provided during the Commission's 2024 cycle when it invited comments coinciding with the 40th anniversary of the SRA,[3] a few overarching concerns that are to some extent addressed by the pending proposals, warrant mention. Two of Tzedek's overriding concerns with the current operation application of the Guidelines are the terms and conditions of sentences and core underlying methodologies that vastly overstate individual culpability and disregard the importance of criminal intent.

1) With respect to the first of these concerns, Tzedek believes the Guidelines continue to recommend prison sentences that are far too frequent and far too harsh, failing to maximize the use of alternatives to incarceration and failing to limit terms. By now the Commission is well familiar with the empirical evidence that overly harsh prison sentences produce diminishing returns in terms of public safety and the consequential harms they unintentionally inflict on individuals, families and communities.

[3] Id.

Similarly, there is ample evidence that alternatives to incarceration—including periods of probation, therapeutic approaches, and restorative justice programs—can often be more effective and more likely to decrease recidivism than sentences of imprisonment.[4] Additionally, the imposition of overly harsh conditions upon those who are released can often be counterproductive and, in some cases, lead to unnecessary and costly reincarceration.

2) With respect to what Tzedek characterizes as flawed methodologies, the heart of this concern is the diminishment of *mens rea* ("guilty mind" or criminal intent) as the critical moral anchor of the criminal code, in the charging process and especially sentencing phases. Fundamental to our justice system, individuals should not be subjected to criminal prosecution or conviction unless the underlying conduct evinces a guilty mental state. In the same vein, the severity of the punishment imposed should be tethered to the extent of the individual's criminal intent and all sentencing rules and decision-making should be attentive to this reality.

This problem of criminal intent's degradation in federal law is exacerbated by current federal conspiracy law, which correlates a conspiracy conviction with a violation of the substantive offense and generally subjects co-conspirators to punishment commensurate with the full scope of the criminal conspiracy. As a result, the culpability of an individual co-conspirator may be vastly overstated. While it may be beyond the ken of the Commission to comprehensively reform the problems with federal conspiracy law, it can and should take necessary steps that ameliorate the unduly harsh sentencing consequences that flow from it.

The current Guideline approach to sentencing hinges on a methodology that operates to eviscerate traditional notions of *mens rea* in the imposition of punishment. Most obviously and impacting a

[4] As a case in point, the CARES Act home confinement program proved to result in a significant reduction in recidivism among its participants. See https://www.bop.gov/resources/news/pdfs/20240329-press-release-cares-act.pdf.

> substantial percentage of all federal criminal prosecutions, of the Guidelines give no consideration of *mens rea* in the Drug Quantity Table under U.S.S.G. § 2D1.1, or in the loss table for economic offenses in U.S.S.G. § 2B1.1.
>
> Tzedek continues to hold the strong view that the exaltation of quantification as the key factor driving sentence severity, insofar as quantity without regard for *mens rea* is the essential determinator of the base offense level, constitutes an unreliable and unjust proxy for individual culpability and the factors set forth in 18 U.S.C. § 3553(a), which a court must consider in imposing sentence.[5]
>
> Simply put, sentences that are driven by drug quantity and loss amount completely disregard *mens rea*—which unfairly contributes to excessive sentences and mass incarceration in this country. It is high time that this fundamental injustice is put to an end.

With that background, Tzedek continues to believe far more significant reform is necessary to redress key flaws in the Guidelines. Nevertheless, most of the proposed amendments constitute significant steps to ameliorate some of these flaws and additional concerns.

[5] Tzedek has previously urged the Commission to jettison the quantitative approach that drives sentences in drug and economic loss cases. See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (July 15, 2024), *at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=761. For an excellent analysis of the flaws in the application of the loss table in §2B1.1 see Statement of Daniel Dena, Assistant Federal Defender on Behalf of the Federal Public and Community Defenders.

Proposed Amendment: Supervised Release

Tzedek Endorses the Proposed Amendments Related to the Imposition of Supervised Release 1 (A), While Urging the Commission to Add Additional Factors for Courts to Consider

Tzedek enthusiastically endorses the Commission proposal to empower courts to limit the imposition of supervised release where unconstrained by statutory requirements. Tzedek especially lauds the Commission for emphasizing the importance of individualized assessment of each defendant's needs and the transparency that will come with the provision that the court should state the reasons for its determination on the record. Similarly, Tzedek endorses the relaxation of the requirements for certain minimum terms of supervised release (where statutorily permissible) and the provision that courts should conduct an *individualized* assessment to determine what discretionary conditions may be warranted. Finally, Tzedek wholeheartedly supports the new proposed policy statement § 5D1.4, particularly the provision that would encourage a court, soon after a defendant's release from imprisonment, to conduct an individualized assessment to consider modification of the conditions of supervised release and to provide for early termination of supervision in appropriate cases.

Additionally, Tzedek offers the following observations and suggestions with respect to specific issues for comment:

Issue 1

(A) The Commission seeks comment on whether the inclusion of an individualized assessment based on statutory factors is sufficient to provide discretion and useful guidance.

The "individualized assessment" based on the statutory factors are a satisfactory base point, but Tzedek believes that additional factors should be included in the policy statement as well. When the assessment is conducted prior to the imposition of sentence, courts should be encouraged to consider evidence related to the defendant's behavior between the time of arrest and sentence. This period of conduct may be particularly informative when the individual has been at liberty during the pendency of the case. Factors should include evidence of rehabilitation and personal growth, efforts to

repair any harms from the offense (such as some payment of restitution), completion of programs designed to address underlying pathologies that contributed to the criminal conviction or to advance an individual's education or vocational skills and prospects to be a productive member of society, as well as any other evidence of exceptional post-arrest behavior and work performance.

To effectuate this objective when deciding whether and how long a term of supervised release to impose at the time of sentencing, Tzedek recommends adding an Application Note 7 to § 2D1.1 as follows:

> *7) **Post Arrest Behavior** – In considering the history and characteristics of the defendant as required by 18 U.S.C. § 3553(a)(1), the court should consider the defendant's post arrest behavior including but not limited to evidence of rehabilitation and personal growth, efforts to repair any harms from the offense (such as some payment of restitution), completion of programs designed to address underlying pathologies that contributed to the criminal conviction or to advance the defendant's education or vocational skills and prospects to be a productive member of society, as well as any other evidence of exceptional post-arrest behavior and work performance.*

(B) The Commission seeks comment on the bracketed non-exhaustive facts in proposed policy statement § 5D1.4 and whether similar guidance should be included elsewhere.

For the reasons stated above, Tzedek supports the inclusion of the bracketed language, however, suggests that the list of non-exclusive specific factors delineated in the draft of § 5D1.4 should be augmented by including a specific reference to an individual's behavior both during any period of pretrial release and while imprisoned. Indeed, Tzedek notes that factor 6, which addresses the question of whether early termination will jeopardize public safety, directs consideration of the defendant's record while incarcerated. This formulation properly implies that a defendant's record while incarcerated may support the conclusion that early release puts the public at risk. There is no reason why the converse should not be true.

Further, a defendant's exemplary behavior, and achievements while incarcerated may be the strongest indicators that early termination is warranted. One way the Commission might ensure that this factor is fully considered is to modify factor (4) as follows:

(4) the defendant's engagement in appropriate prosocial activities [*subsequent to arrest and during any period of imprisonment, including but not limited to evidence of rehabilitation and personal growth, the completion of programs designed to address underlying pathologies that contributed to the criminal conviction, or to advance the defendant's education or vocational skills and prospects to be a productive member of society, as well as any other evidence of exceptional behavior and work performance while in prison*,] and the existence or lack of a prosocial support to remain lawful beyond the period of supervision.

Issue 3

The Commission seeks comment on whether the non-exhaustive factors for courts to consider when determining whether early termination is warranted are appropriate and adequate.

Tzedek reiterates its comments above that full consideration should be given to an individual's behavior prior to sentence and while in prison in assessing whether early termination of supervised release is appropriate. See the above proposed language adding an Application Note 7 to the revised Commentary under § 5D1.1 and proposed language adding to Factor 4 in the proposed new Policy Statement § 5D1.4 referenced in response to Issues 1 (A) and (B) above.

Additionally, Tzedek urges the Commission to encourage courts to refrain from granting early termination solely because of an outstanding fine, assessment, or restitution. In the absence of a willful failure to make such payments, this is an unfair and irrelevant basis to deny early termination. There are other established means to convert these monetary obligations into a collectible judgment.

Issue 4

The Commission seeks comment on whether and how the proposed changes to supervised release may impact defendants' eligibility to benefit from the First Step Act (FSA) earned time credits, and whether additional changes are necessary to avoid any unintended consequences.

Presumably the Commission has posed this issue out of concern for the potential that if a court did not impose any term of supervised release, an individual might not qualify for early release arising from earned credits due to the provisions of 18 U.S.C. § 3624(g)(3) (Supervised Release), which appears to condition early release upon a term of supervised release after imprisonment. While there are likely to be few cases in which courts impose a significant term of imprisonment without imposing some minimal term of supervised release, one way to deal with this is to add a new subsection to § 5D1.1 as follows:

> (d*) In any case in which a court imposes a sentence including a term of imprisonment, but does not believe that an extended period of supervised release is necessary, the court should consider imposing a minimal period of supervised release to ensure that a defendant may qualify for early release based upon earned credits pursuant to 18 U.S.C. § 3632(d)(4)(A) and 18 U.S.C. § 3624(g)(3).*

Alternatively, or perhaps additionally, the Commission should consider exercising its statutory authority to recommend that Congress amend the appropriate statutes to ensure that the absence of a term of supervised release does not preclude an otherwise qualified individual from benefiting from the early release provisions arising from earned credits.

Issue 7

The Commission seeks comment on procedures to employ in the implementation of the proposed new policy statement § 5D1.4 concerning early termination of supervised release.

Even before considering the nature of the proceeding, whether to provide counsel, and how to ensure victim input in appropriate cases, Tzedek is

concerned with the issue of notice, i.e., ensuring that a defendant who has served a term of imprisonment knows of the right to seek modification or early termination of supervised release. There are others who are better positioned than Tzedek to address whether the Commission has the authority to address that question, as well as the other identified issues, without congressional action and/or modification of the Federal Rules of Criminal Procedure (See F.R.Cr.P. 32.1(c)(2)). Tzedek certainly supports a process, however truncated, that provides meaningful due process and access to counsel, as well as an opportunity for victims to have input.

To address the notice issue, the Commission could recommend that Congress adopt provisions that were previously set forth in legislation introduced in the Safer Supervision Act in the 118th Congress,[6] obligating the Administrative Office of the United States Courts to provide notice to the defendant, defendant's counsel, and any local and Federal Defender Organization or Community Defender when a releasee becomes eligible for early termination of supervision. In this situation, assuming the proposed amendment is adopted, such notice should be required immediately upon release from custody.

Proposed Amendment: Revocation of Supervised Release

Tzedek endorses the Commission's proposals to provide greater discretion to respond to a violation of a condition of supervised release, especially the emphasis on individualized assessment and increased flexibility. Individualized assessment is essential to a system of justice that recognizes the uniqueness of each and every human being, and the circumstances in which a potential violation may occur.

Tzedek also appreciates the Commission's determination to distinguish between the rehabilitative purposes of supervised released as opposed to the punitive aspects of probationary sentences. That said, the same flexibility should be available to courts whenever a statute does not mandate revocation

[6] See Safer Supervision Act of 2023, https://www.congress.gov/bill/118th-congress/house-bill/5005/text.

or incarceration for probation violations. While a probationary sentence is a punitive consequence of criminal conduct, it does not follow that revocation and incarceration should necessarily be imposed in circumstances where such would not be statutorily required and where the policy would not require that outcome in cases of a violation supervised release. Here again, because an individual assessment is the preferred approach to serve all statutory goals, a court should be able to consider the infinite permutations of individual circumstances in assessing whether full revocation is appropriate. Societal interests are not necessarily best served by incarceration when other modifications to the terms of probation may be more effective. For this reason, Tzedek recommends that the Commission consider, in this amendment cycle or future ones, implementing some or all the ameliorating provisions that are proposed under Option I for policy statement§ 7C1.3 (Responses to Violations of Supervised Release) also for § 7B1.3(a) (Revocation of Probation).

Additionally, Tzedek offers the following observations and suggestions with respect to specific issues for comment:

Issues for Comment

1.

(A) The Commission seeks comment on whether the recommendation of an individual assessment when considering a revocation of supervised release based solely on statutory factors is sufficient.

As was the case with the guidance in determining whether to provide early termination of supervised release, Tzedek urges the Commission to include additional non-exclusive factors that expressly urge courts to consider an individual's behavior and achievements while incarcerated. While a purported violation takes place after an individual's release from imprisonment, it does not follow that behavior while incarcerated, which may have encompassed many years of positive adjustment and evidence of rehabilitation, is irrelevant to a revocation determination. While such behavior might not be accorded the same weight in a revocation situation as it is in an early release determination, it still constitutes an important indicator of progress toward rehabilitation.

2. **Should the Commission continue to provide guidance tying whether revocation is required to the grade of the violation, or should the Commission remove this restriction and permit courts to make revocation determinations based on the individualized assessment in all cases?**

For all the reasons stated above concerning the unique characteristics of each individual and each set of circumstances, Tzedek urges the Commission to adopt Option 1 which will provide courts maximum flexibility in fashioning the most just and effective outcome. As suggested above, a range of facts and considerations that can be relevant to supervised release decision-making, and especially to any decision to reincarcerate someone after having completed a prison term, should be considered. Consequently, the Commission should seek to remove any provisions that restrict courts' ability to consider and give effect to all relevant matters.

Greater use of Supervised Release, as well as Terms of Probation, in Lieu of Incarceration

While discussing the importance of individual assessments in supervised release decision-making, albeit beyond the purview of the current proposed amendments, Tzedek takes this opportunity to emphasize the critical importance of the Commission's ability to dynamically and forcefully promote the use of alternatives to incarceration. Alternative approaches have been severely underutilized since the creation of the Guidelines. As noted above, Tzedek agrees that supervised release which is overseen by U.S. Probation should not be considered a punishment when it follows incarceration—but it *should* be considered as an alternative to extended and potentially excessive terms of incarceration when utilized *instead of* extended periods of incarceration, especially in cases in which a defendant lacks a serious *mens rea* and when public safety and community repair may be better served.

As the Commission is well aware, 18 U.S.C. § 3553(a) directs courts to impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing and § 3553(a)(3) expressly instructs judges to consider the "kinds of sentences available" so as to ensure judges

directly consider in every case whether alternatives to incarceration may be "sufficient." Yet despite these clear statutory directives, federal judges have relied excessively on prison sentences and often extremely severe terms of imprisonment since the enactment of the SRA. In 1986—the year before the U.S. Sentencing Guidelines took effect—*just over half of all federal sentences included a prison term* and the average time served by those going to prison in this period was less than 20 months.[7] By Fiscal Year 2023, according to Commission data, *the percentage of those sentenced to prison had soared to 92.4%,* and the expected median time served by those now going to prison (even assuming good time credits) is well over 45 months.[8]

Tzedek, along with many others, believes that the modern addiction to incarceration must end. Greater use of supervised release and probation are effective tools that can help achieve important public safety and justice goals without the long-term consequences and burdens associated with imprisonment. Accordingly, Tzedek continues to strongly urge the Commission to prioritize expanding the use of alternatives to incarceration—including the use of supervised release, probation, home detention and other alternatives—which will also likely encourage judges to impose shorter prison terms.

Proposed Amendment: Drug Offenses

As explained in the introductory section above, Tzedek believes that the continued reliance upon quantification without regard for relevant *mens rea* consideration and other more relevant circumstances as the driving force in U.S. sentencing structures is a fundamental flaw. Whether it is loss amount under § 2B1.1 or drug quantity under § 2D1.1 as well as in some mandatory minimum provisions, in many if not most circumstances, especially in multi-defendant conspiracy cases, these factors do not adequately account for

[7] Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90 (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf.
[8] U.S. Sentencing Comm'n, 2023 Annual Report and Sourcebook of Federal Sentencing Statistics, Figure 6 & Table 15, https://www.ussc.gov/research/sourcebook-2023.

individual *mens rea* and consequently overstate culpability, resulting in unnecessarily harsh sentences.

Tzedek fervently hopes that the Commission's current proposal to ameliorate the severity of drug sentencing does not portend that the Commission is foreclosing more fundamental reforms that are so necessary to restore justice to drug and financial crime sentencing.

With that proviso, Tzedek supports the Commission's proposal to reduce base offense levels and to provide a new mechanism for a reduction for low-level trafficking functions. The base offense level reform is, fundamentally, an important acknowledgement that quantification-driven sentencing results in overly harsh sentences. Similarly, the addition of a new means to provide reductions for the less culpable is a positive step toward addressing inadequate attention to *mens rea* in the structure and operation of the drug guideline.

In contrast, however, the proposal to amend the fentanyl/fentanyl analogue enhancement in § 2D1.1(b)(13) to either lessen or remove the *mens rea* requirement is a wholly regressive step. Tzedek recognizes the harms caused by fentanyl and fentanyl analogues, but that is insufficient justification to impose sanctions in the absence of clearly delineated criminal knowledge and intent. Tzedek urges the Commission to refrain from providing any enhancement without adequate fundamental *mens rea* requirements.

More generally, as with the overreaction to cocaine base decades ago, sentence enhancements engineered to placate intense concern of the moment without being fully attentive to the fundamentals of criminal culpability and other principles of justice inevitably lead to unjust outcomes in individual cases and unnecessary harshness throughout the entire sentencing system.

Additionally, Tzedek offers the following observations and suggestions with respect to specific issues for comment:

Part A – Subpart 1 Amendments to §2D1.1 re: highest base offense level

Issues for Comment

1.

Should the Commission consider setting the highest base offense level at another level [other than 34, 32 or 30]? If so, what is the appropriate highest base offense level for the Drug Quantity Table?

Short of abandoning the quantification approach, among the choices proposed, Tzedek strongly encourages the Commission to adopt the lowest level among the options. Level 30 will provide a base offense level requiring roughly 8 – 10 years imprisonment for the lowest criminal history offender. This is a more than adequate base level to meet the legitimate purposes of sentencing for a non-violent drug offender lacking in other aggravating factors, especially since the guidelines recommend in cases involving death or serious injury or other aggravating factors much greater sentences. Groups with greater expertise in drug sentencing than Tzedek are likely to suggest that a lower level than 30 would be more appropriate, and the Commission should seriously consider such recommendations.

2.

Whether the Commission should consider reducing all base offense levels in the Drug Quantity [rather than just the highest level] and if so to what extent? And should this reduction apply to all drug types and at all offense levels?

The basic rationale behind reducing the base offense level for the highest quantities—the concern that drug quantity assessments alone produce excessive sentencing range—surely justifies implementing a corresponding reduction at all levels. Thus, Tzedek encourages the Commission to select the lowest of the three options (level 30) as the highest base offense level and reduce each succeeding level accordingly. Whether each of the levels is reduced by the same amount as the highest offense level is reduced from 38 (either 8, 6 or 4 levels) or by some lesser amount, it is fair, just and appropriate, to provide some corresponding downward adjustment at the declining quantities. Tzedek does not support limiting any such ameliorative steps to certain categories of drugs.

3.

The Commission seeks comment on how it should address the interaction between the options set forth in Subpart 1 and the

mitigating role cap. Specifically, should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap?

This issue will be impacted by the proposed new § 2D1.1(b)(17) if it is adopted. Apart from that, assuming that § 3B1.2 remains the sole vehicle for a minor or minimal role adjustment, Tzedek proposes that the Commission eliminate any reference to a mitigating role cap.

Part A Subpart 2 – Amending § 2D1.1 to add a reduction for low-level trafficking

Issues for Comment

1.

The Commission has proposed that this specific offense characteristic decrease the offenses levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?

For the reasons previously discussed, Tzedek supports an individualized assessment of culpability and affording courts maximum discretion. Accordingly, Tzedek's inclination is to support the 6-level reduction. That said, with concern that some judges may be disinclined to grant a reduction of that magnitude if that is the only option, the Commission might authorize a reduction of between 2 and 6 levels based upon an individualized assessment of all surrounding facts and circumstances.

Additionally, as will be discussed in greater depth below, if the Commission opts to limit the reduction to anything less than 4 points, Tzedek urges that the Commission make clear that a court should apply either this provision or the Mitigating Role provisions provided in § 3B1.2, whichever results in the greatest reduction.

2.

Are there other factors beyond the specific offense characteristics in the new § 2D1.1b (17) that this provision should capture?

Consistent with the view that every case is unique, and every individual should be assessed with full regard for the attendant circumstances in each situation, under either Option 1 or 2, Tzedek urges the Commission to include an additional phrase to the effect of: "*or under all the attendant circumstances of the case demonstrated a limited role in the trafficking offense.*"

4. and 5. How should the Commission amend § 2D1.1(a)(5) to account for the new low-level trafficking functions?

Tzedek urges the Commission to ensure that eligibility for the role reduction should apply irrespective of how the base offenses levels in the Drug Quantify Table are modified. As far as the reference to § 3B1.1 (Mitigating Role) the Commission should amend the language in § 2D1.1(a)(5) to make clear that the court should apply *whichever analysis results in the greatest reduction*. Language to this effect will be especially crucial if the Commission opts to limit the new role reduction to 2 points.

6.

The Commission seeks comment whether to include a special instruction providing that § 3B1.2 (Mitigating Role) should not apply where the defendant's offense level is determined under § 2D1.1.

As noted above, this special instruction would be wholly inappropriate if the Commission limits the role reduction to anything less than the 4-point reduction for which an individual might qualify under § 3B1.2. Beyond that, should the Commission limit the low-level reduction to 2 points, Tzedek urges the Commission to add an Application Note to the Commentary to the new § 2D1.1(b)(17) making clear that *a court in its discretion may apply both the limited role reduction as well as the Mitigating Role in an appropriate case*.

Part C Misrepresentation of Fentanyl and Fentanyl Analogues

Issue for Comment

1.

The Commission seeks comment on whether any of the three options set forth [to amend § 2D1.1(b)(13)] is appropriate to address concerns. If not, is there an alternative and should the Commission provide a different *mens rea* requirement?

Tzedek opposes sentencing enhancements that hinge upon removing or diminishing *mens rea.* In that regard, as compared to the existing provision, all the options are flawed. Tzedek is unaware of any empirical evidence that casting a broader net to subject individuals who did not know the nature of the substance to greater punishment will in any manner redress the nation's fentanyl problem. The first option is completely unacceptable in that it essentially provides for a significant enhancement, which depending upon other factors could result in additional years of imprisonment, based wholly upon a theory of strict criminal liability. The second option, which has two bracketed alternatives, is similarly flawed. The first alternative alters "knowingly misrepresented or knowingly marketed" to "knowledge or *reason to believe*" [emphasis added]. A "reason to believe standard" is novel and extraordinarily vague and may be viewed as even less rigorous than a civil law negligence standard. The second alternative which speaks to "knowledge or *reckless disregard* as to actual content" [emphasis added] is similarly vague and would inevitably penalize individuals who simply did not know the substance was present, based on an amorphous standard. In the absence of actual knowledge by the defendant, there is no reasonable basis to conclude that either of these standards would deter the unlawful conduct. The third option, which presents a tiered approach, replicates the existing provisions of § 2D1.1(b)(13), but substitutes the dangerously vague dilution of the intent requirements to justify a four-point enhancement and eliminates the *mens rea* requirement for a two-point enhancement.

As Tzedek noted in its comments submitted on January 30, 2025, in response to the proposed amendments related to stolen firearms and firearms with modified serial numbers, if knowledge and intent cannot be proved, an enhancement should not be applied, even if it means that fewer individuals will receive the enhancement.[9] The whole point of the *mens rea* doctrine is

[9] See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (January 30, 2025), www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf pp. 1018-1019.

to ensure that only those who are truly culpable because they act with the requisite guilty state of mind should be subjected to prosecution, or in this case subjected to enhanced punishment.

In seeking to persuade the Commission not to go down this road, it cannot be overemphasized that the underlying crime, even without this enhancement, carries substantial penalties. It is neither good policy nor fundamentally just to eliminate or reduce the requisite level of culpability at sentencing, especially in a context in which the burden of proof is less than beyond a reasonable doubt. And to do so, as explained in the Commission's Synopsis of the Proposed Amendment "because courts rarely apply this enhancement" and because "[s]ome commentators suggested that the Commission lower the *mens rea* requirement" appears to be an outcome driven goal of seeking harsher penalties without any rationale or appropriate concern for just punishment.

Finally, in its comments last year, Tzedek urged the Commission to consider numerous steps to mitigate the trial penalty.[10] Eliminating or diluting the *mens rea* requirement for this enhancement will undoubtedly provide another tool in the trial penalty arsenal as role enhancements are routinely deployed to exacerbate the punishment imposed upon those who assert their right to a trial.

Part E Safety Valve

Issue for Comment

The Commission seeks comment on whether the changes set forth in Part E of the proposed amendment are appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider?

Tzedek fully supports the amendment to dispense with the requirement of an in-person meeting with the Government to qualify for the Safety Valve to ensure the safety of defendants who seek the benefit of this provision. Tzedek notes, however, that to accommodate situations or jurisdictions in

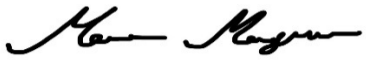
[10] See Supra, note 2, at pages 770 - 778.

which the Government feels that personal interaction is essential, the Commission might also consider providing for a *virtual* meeting as an alternative or an adjunct to a written submission. Such an option would provide for direct interaction between the Government and the defendant but would not implicate the safety concerns of an in-person meeting.

Conclusion

Tzedek greatly appreciates the opportunity to provide input on the proposed amendments in the current amendment cycle. Tzedek looks forward to continuing to work with the Commission in pursuit of a fairer and more humane approach to sentencing.

Sincerely,



Rabbi Moshe Margaretten[11]
President

[11] **Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this letter.**

Unify.Us

March 3, 2025

Via Electronic Delivery

The Honorable Carlton W. Reeves
Chairman
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

The Honorable Luis Felipe Restrepo
Vice Chairman
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Re: ***Proposed Revisions to the U.S. Sentencing Guidelines on Supervised Release***

Dear Judge Reeves and Judge Restrepo, and Members of the Commission:

We write in strong support of revisions to the Sentencing Guidelines that will make federal supervised release more effective and more efficient in protecting American communities, while aiding those who need structure during re-entry transition.

Our Background

Unify.US is a new addition to the public policy community and is engaged in work across the country to strengthen our economy, our families, and our communities. A merger of economic and faith driven conservatives, we were formed by former senior staff of the *American Conservative Union* (better known as "*CPAC*") and the *Faith & Freedom Coalition*.

The founders of *Unify.US* have more than 50 years of collective experience as grass roots activists. Our team also has a significant record on criminal justice policy. *Unify's* President, Timothy Head, was formerly the Executive Director of the *Faith & Freedom Coalition*. Prior to that, Tim was one of the key staffers in the Texas legislature that developed the Justice Reinvestment Initiative, a policy framework that changed the way conservatives have dealt with crime, punishment, and incarceration in 33 states across the country.

Our Executive Vice President and General Counsel, Patrick Purtill, spent the last decade as Director of Legislative Affairs for the *Faith & Freedom Coalition* where he worked with the first Trump Administration to craft and pass the First Step Act. As you know, this legislation was designed to reduce criminal recidivism and promote public safety. Prior to that, Patrick spent three years as Special Assistant to the U.S. Deputy Attorney General where he managed drafting and implementation of regulatory reforms and pilot grant programs. He also served on the Attorney General's Prisoner Reentry Working Group, the President's Prisoner Reentry Initiative Group, and the Strategic Management Council's Subcommittee on Violent Crime and Gangs.

My role at *Unify.US* is Chief Operating Officer. I am also senior advisor to *CPAC* for criminal justice policy. In addition to my work in the non-profit space, my career has spanned three decades and across all three branches of government. I was a Senate-confirmed appointee in the Bush White House and chief of staff to a member of the Judiciary Committee in the U.S. House of Representatives. I have also clerked for a United States magistrate judge and worked as a police officer. Most relevant to the issue of federal supervision policy, I have experienced supervised release first hand, following a criminal conviction in 2008. (I have since been pardoned by President Donald J. Trump and been re-admitted to the bar.) For the past decade, I have been a zealous advocate for improving America's criminal justice system at the federal and state levels.

Our View on the Sentencing Commission's Proposed Guidelines Revisions

Others who have analyzed the federal supervision system have submitted substantive comments for the record in support of the Sentencing Commission's proposed Guideline revisions. Suffice to say, we share their concerns about the current system. We believe changes proposed by the Commission are merited and applaud the proposed modifications to the Guidelines. In particular, we are strongly supportive of:

- Providing clarity and a consistent standard for ex-offenders to obtain early termination of supervision;

- Establish tailored terms of supervision, including length of time (if supervision is necessary at all) and conditions of release; and

- Establish guidelines for *proportionate* sanctions for technical violations.

Our commentary below, however, brings a somewhat different perspective – that of someone who has actually experienced the federal supervision system.

My Personal Experience

Having been convicted of violating 18 USC 1505 and 18 USC 1001 in 2008, I was sentenced to a year and a day of incarceration, as well as three years of supervised release. I began my period of supervision in 2012.

After completing my sentence, I returned to my family and was at little risk of recidivism. I had a job, a safe place to live, healthcare, and family and peer support. While under supervision, however, I was required to: schedule weekly check-ins; undergo weekly drug and alcohol testing (despite my conviction being wholly unrelated to illicit use of drugs or alcohol); and submit copies of all monthly bank and credit card statements (despite my conviction being unrelated to financial impropriety). To the extent any supervision was helpful at all, three years – triple my sentence of incarceration – was not just unnecessary, time consuming, and costly to the taxpayers. It was punitive.

Fortunately, my probation officer recognized that supervised release was not needed. After thirteen months, I was approved for early termination of my period of supervision.

Not every ex-offender has a probation officer who recognizes when supervision becomes superfluous. And even then, not every ex-offender resides in a jurisdiction where early terminations are regularly granted. By providing clarity and a consistent standard for early terminations, the Sentencing Commission can aid in reducing the unnecessary number of case files where supervision provides negligible benefit. Doing so would be a significant improvement to the federal supervision system.

Supervised Release: An Overbroad System That Gives False Comfort to the Public

Federal supervised release was intended to provide structure to ex-offenders as they transition from incarceration to freedom. It was not designed as an additional penalty or extended sentence.[1] Unfortunately, that is exactly what supervised release has become. Rather than function as a tailored framework to help people get back on their feet, supervision has morphed into a one-size-fits-all default application of continuing behavioral controls.

Ironically, the legislation creating the supervised release system anticipated meaningful, individualized assessments rather than the application of boilerplate terms of supervision. As the Senate Judiciary Committee explained:

> The factors that the judge is required to consider in determining whether to include a term of supervised release as part of the defendant's sentence, and if a term of supervised release is included, the length of the term [include:] the history and characteristics of the defendant, the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant and to provide the defendant with

[1] *See*, Report of the Senate Judiciary Committee Accompanying the Comprehensive Crime Control Act of 1984: S. Rep. No. 98-225 at *125: "The term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and *may not be imposed for the purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment*." S. Rep. No. 98-225, 1st Sess. 1983, 1983 WL 25404 (Leg.Hist.) 3182 P.L. 98-473, Continuing Appropriations, 1985 – Comprehensive Crime Control Act of 1984 (emphasis added).

> needed educational or vocational training, medical care or other correctional treatment in the most effective manner….[2]

Proponents of maintaining the status quo vaguely argue public safety; however, the actual benefits of the current system are illusory. With too many people being supervised by too few probation officers, those who need intense supervision don't get it. Yet, individuals who are clearly no longer threats to public safety consume a large amount of supervision resources. As a result, the current system actually undermines public safety by diluting the resources that should be dedicated to those who need intense supervision.

It would be inaccurate to say the current system has no value at all. With stiff sentences meted out by the federal system, people who have been incarcerated for long periods need help in finding a safe place to live, meaningful work, life's necessary documents, healthcare, etc. The list goes on and on. And yes, they need supervision to understand and comply with modern-day behavioral norms to stay on the straight and narrow. But cramming nearly every ex-offender into a one-size-fits-all system allows those who need intense supervision to blend in with those who need little of it. The impact of the current system is not merely inefficiency. Those who require intense monitoring get overlooked, thus undermining safety.

As of two years ago, there were more than 110,000 people on federal supervised release. The cost of this program exceeded half a billion taxpayer dollars in 2023. Indeed, the budget for the federal supervised release program has increased by 200% since 1995. Unfortunately, absent a change in policy, the program will continue to grow for the foreseeable future.

Growth of the federal supervision system is driven by a Sentencing Guidelines *requiring* supervision whenever a defendant is sentenced to more than one year of incarceration. Given that nearly every federal sentence is calculated in years rather than days, almost all federal offenders are placed on supervised release when they leave prison. This one-size-fits-all approach leads to overburdened probation officers facing overwhelming caseloads (often three or four times the recommended size).

Probation officers report that their caseloads are packed with lower-risk individuals who may not need intensive supervision while simultaneously not having the time or resources to provide the close supervision and support for higher-risk individuals to reintegrate into society safely. This scenario is not theoretical. Former Acting U.S. Attorney General Matt Whitaker and I wrote about it three-and-a-half years ago, citing the tragedy that befell Jaycee Dugard.[3]

The Dugard case highlights how an overburdened supervision system undermines community safety. Dugard had been kidnapped and repeated raped by a sex offender. She was held captive for 18 years in a locked shed, where she gave birth to two children fathered by her kidnapper. During this time, her captor had been visited numerous times by probation and parole officers, as

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[2] *Id.*

[3] David Safavian and Matthew Whitaker, *The Federal Probation System Needs Reform. Just Ask Jaycee Dugard,* THE HILL, October 25, 2021, found at: https://www.washingtonexaminer.com/opinion/2612505/the-federal-probation-system-needs-reform-just-ask-jaycee-dugard/.

he was on supervision. Despite obvious indicators that something was amiss, probation and parole officers never took the time to follow-up or inspect the locked shed where Dugard was held.

The federal supervision system today has many of the hallmarks of the system that let down Jaycee Dugard. With too many people on supervision, and a shortage of federal agents to supervise them, the current system is ripe for another horror story.[4]

Clarification of the Pathway to Early Termination is Necessary

The Sentencing Guidelines encourage courts to exercise their authority to reduce a supervision term through early termination "in appropriate cases." Under 18 U.S.C. §3583(e), courts are permitted to grant early termination "if it is satisfied that such action is warranted by the conduct of the defendant released and *the interest of justice*" (emphasis added). However, without additional guidance, there has been little direction in terms of what this actually means.

The Department of Justice takes a particularly rigid approach to early termination and its approach lacks common sense. In the Department's view, early termination of supervised release should only occur in "*extraordinary circumstances*." For example, in *United States v. Wesley*[5], the Department argued that while the individual had made progress, including maintaining employment, engaging in educational/vocational training, and remaining drug free, the efforts he made did not rise to the level of extraordinary circumstances needed to justify early termination. Ultimately, the court found that "mere compliance" was not enough to merit supervised release – the individual needed to have demonstrated "extraordinary circumstances." Similarly, in *United States v. Bouchareb*[6], the court denied an early termination request due to the failure of the defendant to present an "exceptional case" that would distinguish him from other compliant individuals on supervised release.

However, the plain language of 18 U.S.C. 3583(e), which provides for early termination when "in the interest of justice," does not require extraordinary circumstances. And, in fact, appellate courts have recently affirmed that extraordinary, new, or unforeseen circumstances are not required and are not supported by statute.[7]

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[4] While it is beyond the scope of the amendments to the Guidelines under consideration, we also support the use of incentives to permit those on supervision to "earn" their way off. The *Safer Supervision Act*, which is under consideration by Congress, would do just that. The use of such incentives in not unprecedented. Indeed, the *First Step Act* offers incentives to allow inmates to move to home confinement or community supervision earlier. Such incentives are earned through completion of anti-recidivism programming, as well as addiction treatment and job training. And it has proven successful. According to a recent study by the *Council on Criminal Justice* (of which I am a board member), recidivism rates were 55% lower for those who earned credits toward early release than those who failed to complete anti-recidivism programming. https://councilonj.foleon.com/first-step-act/fsa/. A similar approach for those under supervisory release would similarly incentivize ex-offenders to do the hard work of self-improvement, thus leading to lower recidivism.

[5] 31 F.Supp.3d 77 (D.D.C. 2018).

[6] 76 F. Supp.3d 478 (S.D.N.Y. 2014).

[7] See, *United States v. Melvin*, 978 F.3d 49 (3d Cir. 2020); *United States v. Ponce*, 22 F.4th 1045 (9th Cir. 2022).

But more to the point, if supervision is intended not as an additional punishment, but rather to help ex-offenders return to the straight and narrow, and the ex-offender has demonstrated in word and deed a successful transition from incarceration to freedom, what is the point of keeping an ex-offender on supervision? The only answer is that the Department views supervision as an additional penalty that should not be modified absent "extraordinary circumstances." Such a reading of the statute creating the supervised release system directly conflicts with Congressional intent.

Not only does the Department of Justice's approach make it unnecessarily difficult for individuals to obtain early termination of their supervision, but it also unnecessarily inflates probation officer caseloads. This translates into higher costs for the taxpayers and an increased risk that those who do require additional supervision 'fall through the cracks.'

We strongly support the Commission's inclusion of "substantial compliance with all conditions of supervision" among the non-exhaustive list of proposed factors to be considered when assessing the appropriateness of early termination.

Reduce Traps for the Unwary…and Even for the Diligent

Federal supervision often comes with a laundry list of requirements or prohibited activities for those being supervised. Sometimes, they are relevant to the underlying conduct for which the offender was originally charged (e.g., regular drug tests for drug offenders). But as often as not, restrictions are applied in broad boilerplate without any consideration for whether they are tailored to ex-offender's needs and/or criminal conduct (e.g., regular drug tests for someone convicted of a financial crime).

Unnecessary restrictions placed on those under supervision are a cost to the government. For probation officers, they take time and add paperwork to an already full workday. And such restrictions pose a trap for the unwary that can lead to a return to prison.

A violation of any supervision requirement is not a criminal act *per se*. But any violation of the terms of supervision (so called "technical violations") can result in a revocation of release. Examples of technical violations include: missing a check-in, failing a drug test, opening a credit or bank account without authorization, or crossing jurisdictional lines. The longer someone is on supervision, the more likely he/she is to make an error that constitutes a technical violation. In 2021, for example, 20% of all revocations of supervised release were for technical violations[8] -- that is, people sent back to prison for behavior that is not in and of itself, a violation of the criminal code.

The solution to this problem lies in:

[8] Report of the Administrative Offices of the U.S. Courts, Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes (2022) found at: https://www.uscourts.gov/data-news/judiciary-news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes#:~:text=In%20the%20federal%20system%2C%20people%20placed%20on%20supervision,conditions%20or%20an%20arrest%20for%20new%20criminal%20activity.

(1) Courts tailoring the terms of supervision to be relevant to the ex-offender's criminal conduct and risk profile, consistent with the legislative history[9] of system's enacting statute;

(2) Establishing a clear framework for technical violations that provides for reasonable and proportional sanctions, particularly for minor and inadvertent violations.

Conclusion

The current system of federal supervision has evolved – from a period of structure to assist the ex-offender in a successful re-entry to a one-size-fits-all additional sentence for most federal defendants. Because federal supervision caseloads are growing, probation officers find themselves overwhelmed. Ex-offenders in need of more intense supervision don't get it, while low risk ones find the path to redemption unnecessarily complicated and littered with potential trap doors leading back to prison.

The United States Sentencing Commission can address these issues by: (1) urging courts to make individualized assessments as to the need for supervision in general as well as specific terms of release; (2) clarifying the requirements for early termination that do not include the "extraordinary circumstances" approach adopted by the Department of Justice; and (3) establishing a framework for *proportional* sanctions for technical violations.

Accordingly, we support the Commission's efforts to improve the federal supervised release system and realign it with its original goals of supportive reintegration and rehabilitation for affected individuals. On behalf of *Unify.US*, thank you for your consideration of our views on this matter.

Respectfully submitted,

David H. Safavian, Esq.
Chief Operating Officer

Cc: Members of the United States Sentencing Commission

[9] S. Rep. No. 98-225, 1st Sess. 1983, 1983 WL 25404 (Leg.Hist.) 3182 P.L. 98-473, Continuing Appropriations, 1985 – Comprehensive Crime Control Act of 1984, at *124.

PROPOSED AMENDMENT: SUPERVISED RELEASE

Synopsis of the Proposed Amendment: The Sentencing Reform Act of 1984 establishes a framework for courts to order supervised release to be served after a term of imprisonment. For certain offenses, the court is statutorily required to impose a term of supervised release. This framework aims to "assure that [those] who will need post-release supervision will receive it" while "prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them."

The length of the term of supervised release a court may select depends on the class of the offense of conviction. The term may be not more than five years for a Class A or Class B felony, not more than three years for a Class C or Class D felony, and not more than one year for a Class E felony or a misdemeanor (other than a petty offense). There is an exception for certain sex offenses and terrorism offenses, for which the term of supervised release may be up to life.

If a court imposes a term of supervised release, the court must order certain conditions of supervised release, such as the defendant not commit another crime or unlawfully possess a controlled substance during the term, and that the defendant make restitution. The court may order other discretionary conditions it considers appropriate, if the condition meets certain criteria. In determining whether to impose a term of supervised release and the length of the term and conditions of supervised release, the court must consider certain 18 U.S.C. § 3553 factors.

Courts are authorized, under certain conditions, to extend or terminate a term of supervised release, or modify, enlarge or reduce the conditions thereof. Before doing so, the court must consider the 18 U.S.C. § 3553 factors listed above. For certain violations, courts are required to revoke supervised release.

The Sentencing Commission's policies regarding supervised release are included in Part D of Chapter Five and Part B of Chapter Seven of the *Guidelines Manual*. This proposed amendment contains two parts revising those policies:

Part A: amend Part D of Chapter Five, which addresses the imposition of a term of supervised release. Issues for comment are also provided.

Part B: amend Chapter Seven, which addresses the procedures for handling a violation of the terms of probation and supervised release.

The Commission is considering whether to implement one or both parts, as they are not mutually exclusive.

Part A: Imposition of a Term of Supervised Release

Synopsis: Chapter Five, Part D of the *Guidelines Manual* covers supervised release, including the imposition decision itself, the length of a term of supervised release, and the conditions of supervised release.

Section §5D1.1 governs the imposition of a term of supervised release. Under §5D1.1(a), a court shall order a term of supervised release (1) when it is required by statute or (2) when a sentence of more than one year is imposed. In any other case, §5D1.1(b) treats the decision to impose a term of supervised release as discretionary. The commentary to §5D1.1 describes the factors to consider in determining whether to impose a term of supervised release: (1) certain 18 U.S.C. § 3553 factors, which the court is statutorily required to consider; (2) an individual's criminal history; (3) whether an individual is an abuser of controlled substances or alcohol; and (4) whether an offense involved domestic violence or stalking.

Subsection §5D1.1(c) provides an exception to the rule in §5D1.1(a), directing that "[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." However, Application Note 5 directs that a court should consider imposing a term of supervised release if "it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case."

Section §5D1.2 governs the length of a term of supervised release. First, §5D1.2(a) sets forth the recommended terms of supervised release for each classification of offense. Second, for offenses involving terrorism or a sex offense, §5D1.2(b) provides for a term of supervised release up to life, and a policy statement further directs that for a sex offense, as defined in Application Note 1, the statutory maximum term of supervised release is recommended. Lastly, §5D1.2(c) instructs the term of supervised release shall not be less than any statutorily required term of supervised release.

The Commentary to §5D1.2 provides further guidance for setting a term of supervised release. Application Note 4 directs the factors to be considered in selecting the length of a term of supervised release are the same as those for determining whether to impose such a term. Application Note 5 states courts have "authority to terminate or extend a term of supervised release" and encourages courts to "exercise this authority in appropriate cases."

Section §5D1.3 sets forth the mandatory, "standard," "special," and additional conditions of supervised release. It provides a framework for courts to use when imposing the standard, special, and additional conditions—those considered "discretionary."

The Commission received feedback from commenters that the Guidelines should provide courts with greater discretion to make determinations regarding the imposition of supervised release based on an individualized assessment of the defendant. Additionally, a bipartisan coalition in Congress has sought to address similar concerns.

Part A of the proposed amendment seeks to revise Chapter Five, Part D to accomplish two goals. The first is to provide courts greater discretion to impose a term of supervised release in the manner it determines is most appropriate based on an individualized assessment of the defendant. The second is to ensure the provisions in Chapter Five "fulfill rehabilitative ends, distinct from those of incarceration." The proposed amendment would make changes to the supervised release provisions in Chapters Five to serve these goals.

The proposed amendment would add introductory commentary to Part D of Chapter Five expressing the Commission's view that, when making determinations regarding supervised release, courts should assess a wide range of factors to ensure its decisions fulfill the rehabilitative needs of the defendant and protect the public from further crimes of the defendant.

The proposed amendment would amend the provisions of §5D1.1 addressing the imposition of a term of supervised release. The proposed amendment would remove the requirement that a court impose a term of supervised release when a sentence of imprisonment of more than one year is imposed, so a court would be required to impose supervised release only when required by statute. For cases in which the decision whether to impose supervised release is discretionary, the court may order a term of supervised release when warranted by an individualized assessment of the need for supervision. Additionally, the court should state the reason for its decision on the record.

The proposed amendment would amend §5D1.2, which addresses the length of the term of supervised release. The proposed amendment would remove the provisions requiring a minimum term of supervised release of two years for a Class A or B felony and one year for a Class C, D, or E felony or Class A misdemeanor. Instead, the proposed amendment would require the court to conduct an individualized assessment to determine the length of the term of supervised release, which must not exceed the maximum term allowed by statute. It would remove the policy statement recommending a supervised release term of life for sex offense cases and add a policy statement that the court should state on the record its reasons for selecting the length of the term of supervised release.

The proposed amendment would amend §5D1.3, which addresses the conditions of supervised release. It would add a provision stating courts should conduct an individualized assessment to determine what discretionary conditions are warranted. It brackets the possibility of redesignating "standard" conditions as "examples of common conditions" and brackets either that such conditions may be warranted in some appropriate cases or may be modified, omitted, or expanded in appropriate cases. It would also add an example of a "special" condition.

Response by the United States Probation Department for the Eastern District of Michigan:
The Eastern District of Michigan supports the usage of "individual assessment" throughout Chapter Five as it coincides with our system philosophy and current practices to supervise each case on an individual basis. Supervision Procedural Manual, PR 3.20 (a) "good supervision individualized, proportional…every supervision activity should be related to the statutory purposes for which the term of supervision was imposed, and the related objectives established for the individual case." In addition, the department does not recommend any additional or alternative changes to §5D1.1 or its commentary beyond those proposed.

The Eastern District of Michigan supports removing minimum terms of supervised release for all felony conviction classes, including sex offenses. Hopefully, this will sway the court from imposing excessive terms of supervised release which can place a strain on departments. The department has no other recommendation, additions or alternative changes to §5D1.2 or its commentary beyond those proposed.

The Eastern District of Michigan is in favor of amendments and does not recommend any additional or alternative changes to §5D1.3 or its commentary beyond those proposed.

The Eastern District of Michigan supports using "should" instead of "may" in §5D1.4(a). The utilization of "should" embraces the philosophy that supervision, conditions, and strategies are sufficient, but not greater than necessary, to achieve desired outcomes and supervision goals. Our department does not have any other recommendations, addition or alternative changes to §5D1.4 or its commentary beyond those proposed.

Part B: Revocation of Supervised Release

Synopsis: The introduction to Chapter Seven, Part A explains the framework the *Guidelines Manual* uses to address violations of probation and supervised release. It describes the Commission's resolution of several issues. First, the Commission decided in 1990 to promulgate policy statements rather than guidelines because of the flexibility of this option. The Commission adopted a "breach of trust" framework for violations of supervised release; the alternative option would have sanctioned individuals who committed new criminal conduct by applying the offense guidelines in Chapters Two and Three to the criminal conduct that formed the basis of the new violation, along with a recalculated criminal history score. Under this approach, the "sentence imposed upon revocation [is] intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense." The Commission opted to "develop a single set of policy statements for revocation of both probation and supervised release." The Commission signaled that it intended ultimately to issue "revocation guidelines," but it has not done so.

Section §7B1.1 governs the classification of violations of supervised release. Grade A Violations consist of conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years. Grade B Violations involve conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding on year. Grade C Violations involve conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision. In cases with more than one violation of the conditions of supervision, or a single violation with conduct constituting more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Section §7B1.2 focuses on the reporting of violations of supervised release to the court. In cases of Grade A or B violations, §7B1.2(a) directs that the probation officer "shall" promptly report them to the court. For Grade C violations, the probation officer also "shall" promptly report them to the court unless the officer determines that (1) the violation is minor and not part of a continuing pattern, and (2) non-reporting will not present an undue risk to the individual or the public or be inconsistent with any directive of the court.

Section §7B1.3 governs a court's options when it finds that a violation of the terms of supervised release occurred. Upon the finding of a Grade A or B violation, the court shall revoke an individual's supervised release; upon the finding of a Grade C violation, the court may either revoke supervised release, or it may extend the term of supervision and/or modify the conditions of supervision. When a court does revoke supervised release, §7B1.3(b) directs that the applicable range of imprisonment is the one set forth in §7B1.4. Subsection §7B1.3(c) provides that in the case of a Grade B or C violation, certain community confinement or home detention sentences are available to satisfy at least a portion of the sentence. Subsection §7B1.3(f) directs that any term of imprisonment imposed upon revocation shall be ordered to be served consecutively to any sentence

of imprisonment the individual is serving, regardless of whether that other sentence resulted from the conduct that is the basis for the revocation. If supervised release is revoked, the court may also include an additional term of supervised release to be imposed upon release from imprisonment, but that term may not exceed statutory limits.

Section §7B1.4 contains the revocation table, which sets forth recommended ranges of imprisonment based on the grade of violation and an individual's criminal history category. Increased sentencing ranges apply where the individual has committed a Grade A violation while also on supervised release following imprisonment for a Class A felony. An asterisked note to the revocation table notes that the criminal history category to be applied is the one "applicable at the time the defendant originally was sentenced to a term of supervision." Trumping mechanisms apply if the terms of imprisonment required by statute exceed or fall below the suggested range.

Subsection (b) of §7B1.5 directs that upon revocation of supervised release, "no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision." An exception applies for individuals serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A.

Part B seeks to revise Chapter Seven to accomplish two goals. The first to provide courts greater discretion to respond to a violation of a condition of probation or supervised release. The second is to ensure the provisions in Chapter Seven reflect the differences between probation and supervised release.

The proposed amendment revises the introductory commentary in Part A of Chapter Seven. It would add commentary explaining the Commission has updated the policy statements addressing violations of supervised release in response to feedback from stakeholders identifying the need for more flexible, individualized responses to such violations. It would also add commentary highlighting the differences between probation and supervised release and how those differences have led the Commission to recommend different approaches to handling violations of probation, which serves a punitive function, and supervised release, a primary function of which is to "fulfill rehabilitative ends, distinct from those served by incarceration."

The proposed amendment separates the provisions addressing violations of probation from those addressing violations of supervised release by removing all references to supervised release from Part B of Chapter Seven. It then duplicates the provisions of Part B as they pertain to supervised release in a new Part C.

The proposed amendment would create Part C of Chapter Seven to address supervised release violations. Part C would begin with introductory commentary explaining that – in responding to an allegation that a supervisee has violated the terms of supervision, addressing a violation found during revocation proceedings, or imposing a sentence upon revocation – the court should conduct the same kind of individualized assessment used throughout the process of imposing a term of supervised release. It would also express the Commission's view that courts should consider a wide array of options to address violations of supervised release.

The specific policy statements of Part C would duplicate the provisions of Part B as they pertain to supervised release, with several changes. Under the new §7C1.1, which duplicates §7B1.1, there would be a fourth classification of violation: Grade D, which would include "a violation of any other condition of supervised release," which is currently classified as a Grade C violation. The proposed amendment would duplicate §7B1.2, which addresses a probation officer's duty to report violations, in the new §7C1.2.

The proposed amendment would create §7C1.3, establishing the actions a court may take in response to an allegation of non-compliance with supervised release. Under the policy statement, upon an allegation of non-compliance, the court would be instructed to conduct an individualized assessment to determine the appropriate response. The proposed amendment brackets the possibility of creating in the guideline a non-exhaustive list of possible responses and brackets the possibility of including a list of other possible responses in an Application Note. The proposed amendment provides two options for addressing a court's response to a finding of a violation.

- Under Option 1, upon a finding of a violation for which revocation is not required, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release. Upon a finding of a violation for which revocation is required by statute, the court would be required to revoke supervised release.
- Under Option 2, the court would be required to revoke supervised release upon a finding of a violation for which revocation is required by statute or for a Grade A or B violation. Upon a finding of any other violation, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release.

Section §7C1.4 would address instances of revocation. In such a case, the court would be required to conduct an individualized assessment to determine the appropriate length of the term of imprisonment. The amendment provides two options, Option 1 and Option 2, for addressing whether such a term should be served concurrently or consecutively to any sentence of imprisonment the defendant is serving.

- Option 1, the court would be instructed to conduct an individualized assessment to determine whether that term should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment the defendant is serving.
- Option 2 would maintain the current provision requiring the term to be served consecutively. The amendment would also continue to recognize the court's authority to include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment.

Section §7C1.5, which duplicates §7B1.4, would set forth the Supervised Release Revocation Table. The Supervised Release Revocation Table would include recommended ranges of imprisonment, which would be subject to an individualized assessment conducted by the court. The Table would also include recommended ranges for Grade D violations. It would also remove the guidance addressing statutory maximum and minimum terms of imprisonment.

Finally, §7C1.6 would duplicate §7B1.5, which provides that, upon revocation of supervised release, no credit shall be given for time previously served on post-release supervision.

Response by the United States Probation Department for the Eastern District of Michigan:
The Eastern District of Michigan is in favor of the amendment and does not recommend any additional or alternative changes to Part A Introduction to Chapter "Updating the Approach" or its commentary beyond those proposed. Probation cases are only 10% of individuals on federal supervision. It is still important to clearly reiterate that probation serves a different purpose than supervised release and should not be treated the same. We do not forecast this amendment having a negative impact on our department or court.

The Eastern District of Michigan does not recommend any additional or alternative changes to §7B1.4: Term of imprisonment – Probation (Policy Statement) and §7B1.5: No Credit for Time on Probation. Considering violators of a term of probation are subject to maximum statutory penalty for their original offense, it is logical to remove the increased penalties for Class A felony convictions.

The Eastern District of Michigan does not recommend any additional or alternative changes to the addition to Chapter 7, Part C – Supervised Release Violations. Providing the option for judges to terminate supervised release at a revocation hearing, if the defendant has completed at least a year of supervision, will have a positive impact on probation staff. The guidelines are advisory to the bench. Providing the option for officers to recommend termination of supervision in reports to the court, is welcomed by the Eastern District of Michigan. Afterall, the probation officer is in the best position to provide an accurate "individual assessment" to the court.

The Eastern District of Michigan does not recommend any additional or alternative changes to the amendments to §7C1.1: Classification of Violations and §7C1.2: Reporting of Violations Supervised Release (Policy Statements). Specifically, the addition of a Grade D violation. Over the past five years, 35% of all revocation were for technical violations. Conversely, only approximately 7% of those cases were closed because their supervision was revoked. The addition of a less punitive guideline range for technical violations that officers can recommend, with their individual assessment, should have a positive impact on our department.

The Eastern District of Michigan has no objections to the addition of §7C1.3: Responses to Violations of Supervised Release (Policy Statement) and does not recommend any additional or alternative changes.

The Eastern District of Michigan recommends proposed amendment to create §7C1.3 Option 2: requiring the court to revoke supervised release upon a finding of a violation for which revocation is required by statute or for a Grade A or B violation. Upon a finding of any other violation, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release. under the proposed amendment would create §7C1.3, establishing the actions a court may take in response to an allegation of non-compliance with supervised release. Grade A and B violations constitute the greatest danger to the community and typically do not involve technical violations and many time public safety issues.

The Eastern District of Michigan recommends §7C1.4 address instances of revocation with Option 1. The court would be instructed to conduct an individualized assessment to determine whether that term should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment the defendant is serving. There are many circumstances where clients have been given a lengthy state sentence and additional federal time ordered consecutive to that sentence would be greater than necessary. Conversely, in cases where the state sentence is light or a departure from guidelines, an individualized assessment will allow the Court to order consecutive if the Court believes just punishment is not achieved through a concurrent sentence.

The Eastern District of Michigan supports §7C1.5, which duplicates §7B1.4, that sets a fourth Supervised Release Revocation Table; including recommended ranges for Grade D violations and removing the guidance addressing statutory maximum and minimum terms of imprisonment.

The Eastern District of Michigan supports §7C1.6 which would duplicate §7B1.5, providing, upon revocation of supervised release, no credit shall be given for time previously served on post-release supervision.

Vilomah
FOUNDATION

February 27, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Susan Ousterman, and I am submitting this comment letter on behalf of the Vilomah Memorial Foundation. Our organization provides bereavement support services to families who've lost a loved one to a substance-related death. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. The Vilomah Memorial Foundation applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works

[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)

circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

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[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

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[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

[13] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

<u>Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment</u>

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of

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[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/
[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf

whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

* * *

<u>Call for Retroactive Application</u>

[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,
Susan Ousterman
Executive Director, Vilomah Foundation

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp
[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))
[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

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Mar 1, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Allison Rees, AMFT, and I am submitting this comment letter on behalf of the Zendo Project. Our organization offers professional harm reduction education to communities and organizations, and provides peer support services at events to help transform difficult psychedelic experiences – and other complex emotions – into opportunities for learning and growth. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by expressing gratitude to this Commission for being courageous, listening to stakeholders, and embracing an approach to policy making more rooted in data, science, and sociological evidence. Zendo Project applauds your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Thank you for the opportunity to provide feedback on the proposed amendments to the Federal Sentencing Guidelines, particularly regarding drug offense sentencing. Our organization would like to offer the following recommendations based on evidence-based research and practical considerations.

Base Offense Levels in the Drug Quantity Table

We strongly recommend adopting Option 3, which would set the highest base offense level at 30. Our recommendation is grounded in substantial research showing that extended incarceration often fails to improve public safety while causing significant harm to individuals, families, and communities.

Research consistently demonstrates that:

- Incarceration shows little to no association with reductions in violent crime and may actually increase recidivism rates

- Federal recidivism rates can reach up to 80%, according to the Commission's own findings
- Prison environments frequently cause or worsen mental health conditions due to trauma, violence, and isolation
- Children of incarcerated parents suffer long-term consequences, as parent incarceration is considered an Adverse Childhood Experience with documented links to mental health issues

Countries with considerably shorter sentences than the U.S., such as Norway and Finland (with average sentences under one year), maintain substantially lower recidivism rates of 20-30%. This suggests we can achieve better outcomes with shorter sentences while redirecting resources to more effective interventions like substance use treatment.

Recommendations for All Drug Types

We recommend reducing base offense levels across all drug types proportionally with the new highest base offense level. However, we believe additional reductions should be considered for cannabis and psychedelics (including psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine) given:

- Their established safety profiles and low addiction potential
- Growing research supporting their therapeutic applications
- Increasing legal recognition at state and local levels (39 states have legalized medicinal cannabis, 24 for recreational use)
- Recent FDA breakthrough therapy designations for MDMA and psilocybin for treating PTSD and depression
- The practical issue of sentencing disparities caused by including the weight of carrier mediums in drug calculations

Low-Level Trafficking Functions

Regarding the proposed specific offense characteristic for low-level trafficking functions, we recommend:

- Implementing the maximum six-level reduction, recognizing that individuals in these roles typically engage in less harmful activity and profit least from trafficking
- Using inclusive language that treats the listed functions as examples rather than an exhaustive list
- Adopting the less restrictive option for §2D1.1(b)(17)(C): "the defendant's primary function in the offense was performing any of the following low-level trafficking functions"
- Applying similar reductions for retail distribution involving mitigating circumstances, particularly to address cases involving substance use disorders, mental illness, and survivors of domestic violence

We appreciate your consideration of these recommendations and would welcome continued discussion into drug policy reformation that would benefit millions of people in the United States of America.

Sincerely,
Allison Rees, AMFT
Pulse Program Manager
Zendo Project Inc.

Yale Law School

FIONA M. DOHERTY
Nathan Baker Clinical Professor of Law

March 1, 2025

The Honorable Carlton W. Reeves
Chair of the United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Amendments on Supervised Release

Dear Chair Reeves, Vice Chairs, and Commissioners:

Thank you for inviting comment on the January 24, 2025, proposals to revise the U.S. Sentencing Guidelines. Our comments focus on the proposed changes to supervised release.

1) The Need for Individualized Assessment

We agree with the proposed amendments to § 5D1.1, which encourage district courts to exercise more discretion in deciding whether a term of supervised release is appropriate. Courts should weigh the unique circumstances of each defendant in deciding whether to impose supervised release.[1] A more individualized assessment would comport with research on prisoner recidivism and community safety.[2] Studies have shown that the automatic imposition of supervision can lead to counterproductive results.[3] Intensive supervision can increase recidivism among low-risk individuals, for example.[4] It can also increase the rate of technical violations for high-risk individuals in a way that is not connected to new criminal activity.[5] For some people

[1] *See* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 183 (2013) ("[T]he widespread imposition of supervised release occurs without any apparent consideration of either an individual's risk to public safety or his or her rehabilitation needs.").
[2] *See, e.g.*, Michael D. Trood, Benjamin L. Spivak, James R.P. Ogloff, *A Systematic Review and Meta-Analysis of the Effects of Judicial Supervision on Recidivism and Well-Being Factors of Criminal Offenders*, 74 JOURNAL OF CRIMINAL JUSTICE 15-19 (2021) (finding that problem-solving court interventions that incorporate individualized treatment approaches are more effective in reducing recidivism and improving offender outcomes compared to standard justice processes).
[3] Jennifer L. Doleac, *Study After Study Shows Ex-Prisoners Would Be Better Off Without Intense Supervision*, Brookings (July 2, 2018); Christy A. Visher and Jeremy Travis, *The Characteristics of Prisoners Returning Home and Effective Reentry Programs and Policies*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 684, 697 (Joan Petersilia & Kevin R. Reitz eds., 2012) ("The evidence has been very consistent in establishing that contact-driven supervision, surveillance, and enforcement of supervision conditions have a limited ability to change offender behavior or to reduce the likelihood of recidivism.").
[4] Doleac, *supra* note 3.
[5] *Id*.

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coming out of prison, being subject to supervision (with its inflexible requirements) makes successful reintegration more difficult.[6] If judges use their discretion to impose supervision only when it is constructive and evidence-based, probation officers will have more resources to devote to the individuals on supervision.

We support the proposed amendments to § 5D1.3 that would redesignate "standard" conditions as "examples of common conditions." We favor the bracketed addition that "such conditions may be warranted in some appropriate cases." These amendments signal a move away from a one-size-fits-all approach to conditions. If supervised release is to be part of the sentence, courts should impose only those conditions that respond to a defendant's actual needs and circumstances.

The current approach to "standard conditions" has contributed to the over-imposition of conditions more generally.[7] Presently, the sentencing guidelines recommends thirteen "standard" conditions of supervised release.[8] These thirteen conditions, although not required by statute, have become mandatory in practice because they are preprinted on Form AO-245B.[9] As Judge Underhill explained in a recent law review article, these pre-printed conditions impose "burdens on supervisees" and have contributed to a "distressingly high rate of reimprisonment" for technical violations of supervision.[10]

Judges should independently assess the need for discretionary conditions because of the consequences that flow from them.[11] Blanket conditions impinge on core liberty interests, including associational rights, employment decisions, and treatment confidentiality. Under the law, any violation of a condition can trigger reimprisonment.[12] In 2021, 43% of all revocations

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[6] *See, e.g.*, Pew, *For People Under Probation, Conditions Meant to Support Behavior Change Can Burden More Than Benefit* (March 2023) (noting how being under supervision in the related context of probation can "consume the life of the person under supervision").

[7] Michael P. Kenstowicz, *The Imposition of Discretionary Supervised Release Conditions: Nudging Judges to Follow the Law*, 82 U. CHI. L. REV. 1411, 1411-12 (2015) (noting the "troubling" practice of judges imposing the Commission's recommended thirteen "standard conditions" "without considering whether they enhance public safety or rehabilitation in each case").

[8] U.S. SENTENCING GUIDELINES MANUAL § 5D1.3 (2024).

[9] Kenstowicz, *supra* note 7 at 1425 (attributing judges' failure to provide reasons for imposing "standard" conditions to the "preprinted boilerplate text" on the judgment-and-commitment form issued by the Judicial Conference).

[10] Stefan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 VA. J. CRIM. L. 1, 10, 20 (2024) ("Almost all the standard conditions serve to make supervision by the probation officer easier and to permit a frustrated probation officer to bring technical violations as a way to demand compliance with the probation officer's instructions").

[11] United States v. Siegel, 753 F.3d 705, 717 (7th Cir. 2014) (advising judges on best practices on supervised release, including making an independent judgment on the appropriateness of recommended conditions for the specific defendant); Haci Duru, Lori Brusman Lovins, Brian Lovins, *Does Reducing Supervision for Low-risk Probationers Jeopardize Community Safety?* 84 FED. PROBATION 20, 26 (2020) (noting that imposing strict conditions of supervision can disrupt positive attributes like family support, employment, and healthy leisure activities that serve as "protective factors" against recidivism).

[12] U.S. COURTS, JUST THE FACTS: REVOCATIONS FOR FAILURE TO COMPLY WITH SUPERVISION CONDITIONS AND SENTENCING OUTCOMES (Jun. 14, 2022) ("When a person under supervision fails to comply with release conditions,

resulted solely from technical violations.[13] Even short periods of reincarceration from technical violations can substantially derail people's employment, child-care, housing, treatment, and schooling.[14]

2) Providing Guidance on Early Termination

We support adding a presumption of early termination after the expiration of a year of supervision under the criteria proposed for § 5D1.4(b). The language in the proposal modestly extends the existing presumption of early termination in the "Framework for Effective Supervision" within the Guide to Judiciary Policy § 360.20. The Guide to Judiciary Policy already recommends that supervision be terminated at 18 months under a similar set of criteria.[15] Adopting the early termination proposals into the guidelines would enhance transparency and reduce disparities among districts. In all cases, judges will retain the authority not to order early termination based on an individualized assessment.

3) Rehabilitation Remains a Central Function of Probation

The new language in Chapter 7 on the function of probation invites misapplication of the governing law. In distinguishing between probation and supervised release, the new language rightly emphasizes that supervised release "fulfills rehabilitative ends," but then asserts that probation by contrast "serves a punitive function."[16] The probation statute does allow judges to consider the need for punishment in imposing (or revoking) probation, but only as one of several factors. Indeed, the statute explicitly instructs judges to weigh a defendant's rehabilitative needs both in choosing to impose probation and in deciding whether revocation is an appropriate response to a violation of a condition of probation.[17]

Rehabilitation has been a central goal of federal probation for more than a century.[18] Congress passed the first federal probation statute in 1925. In 1937, the Department of Justice explained that probation developed into "a method of social treatment and rehabilitation" from

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which in the community corrections context is labelled a technical violation, that person can be sent back to federal prison.").

[13] *Id*.

[14] Underhill, *supra* note 10, at 1-2; Vincent Schiraldi, "*Explainer: How Technical Violations' Drive Incarceration*," The Appeal (2021).

[15] U.S. COURTS, GUIDE TO JUDICIARY POLICY, Vol. 8, Pt. E *Post-Conviction Supervision*, § 360.20 ("at 18 months, there is a presumption in favor of recommending early termination for persons who meet" the specified criteria).

[16] U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 33 (January 24, 2025).

[17] 18 U.S.C. § 3553(a); 18 U.S.C. § 3565 (instructing judges to consider all applicable factors set forth in § 3553(a) in deciding whether to continue a defendant on probation or to revoke the sentence of probation and resentence the defendant under Chapter A).

[18] Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 986 (2013) (describing the history of federal probation and federal supervised release); Burns v. United States, 287 U.S. 216, 220 (1932) (noting the Federal Probation Act of 1925 "was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable").

its early days "as a legal device for alleviating the harshness of punishment and preventing contamination of the criminal novice in the unsavory atmosphere of the prison."[19] The legislative history of the Sentencing Reform Act of 1984 similarly stressed the rehabilitative value of probation. The Senate Report noted: "When the purpose of sentencing is to provide the educational opportunity, vocational training, or other correctional treatment required for rehabilitation, given the current state of knowledge, probation is generally considered to be preferable to imprisonment."[20]

The Commission should modify the language in Chapter 7 to make clear that both probation and supervised release serve rehabilitative ends, requiring an individualized approach.[21] Because probation functions as the primary alternative to incarceration, the Commission should extend its Chapter 7 reforms to the revocation of probation. For example, the new Class "D" violation in § 7C1.5 should be incorporated into the probation revocation table in § 7B1.4. Judges should be encouraged to consider non-prison responses for both probation and supervised release violations. These changes would help ensure that courts give proper weight to probation's rehabilitative orientation.

Thank you for your important work.

Respectfully submitted,

Fiona Doherty
Nathan Baker Clinical Professor of Law
Yale Law School

Rachel Ijams
Mia Alvarez
Yale Law School, Classes of 2026 and 2027

[19] 2 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PROBATION, at vii (1939).
[20] S. REP. NO. 98-225, at 91 (1983).
[21] Burns, 287 U.S. at 220 (For federal probation, "[it] is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.").

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Alison Siegler
Clinical Professor of Law
Founding Director, Federal Criminal Justice Clinic

March 3, 2025

The Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
Via Public Submission Portal

Re: Proposed Amendments to the Drug Sentencing Guidelines

Dear Judge Reeves, Vice Chairs, and Commissioners,

I am a Clinical Professor of Law and the Founding Director of the Federal Criminal Justice Clinic (FCJC) at the University of Chicago Law School. In conjunction with the students and other faculty in the Clinic, we provide direct representation for indigent clients charged with federal felonies while also engaging in policy advocacy and systemic reform efforts. In this advocacy role, I recently participated in the Commission's Drug Sentencing Roundtable on November 20, 2024, and I have previously testified in person before the Commission.[1] Other members of the Clinic have also provided comments on proposed changes to the Sentencing Guidelines and testified before the Commission.[2]

We write in support of the Commission's proposed amendments to the Drug Offenses Guidelines.[3] In particular, we address Parts A, B, C, and E of the Proposed Drug Amendments.

[1] *See* Alison Siegler, Assistant Clinical Prof. & Dir., Fed. Crim. Just. Clinic, Statement Before the United States Sentencing Commission (Jan. 21, 2010) (available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100120-21/Siegler_Testimony.pdf). In addition to advocacy before the Commission, our Clinic has also provided written testimony in support of congressional legislation. *See, e.g., Controlled Substances: Federal Polices and Enforcement: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 84–169 (2021) (statement of Alison Siegler, Erica Zunkel & Judith P. Miller, Fed. Crim. Just. Clinic); *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 223–239 (2013) (statement of Alison Siegler & Erica Zunkel, Fed. Crim. Just. Clinic).

[2] *See* Letter from Judith P. Miller, Clinical Prof. of Law, Fed. Crim. Just. Clinic, to Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Feb. 3, 2025) (on file with author); Erica Zunkel, Clinical Prof. & Assoc. Dir., Fed. Crim. Just. Clinic, Statement Before the United States Sentencing Commission (Feb. 23, 2023) (available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Zunkel.pdf).

[3] *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 55–112 (2025) [hereinafter U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS].

I. Part A Rectifies a Long-Standing and Much-Criticized Problem with the Drug Sentencing Guidelines

A core, and much-criticized, problem with the drug sentencing Guidelines is their overemphasis on drug *type* and *quantity* and their underemphasis on a person's *function* in a drug organization. This overreliance is problematic because drug type and quantity are flawed proxies for culpability.

Empirical evidence demonstrates that quantity is often inversely proportional to function, with the least culpable people frequently holding all of the weight.[4] As far back as 1994, the Department of Justice (DOJ) found that "larger drug quantities" were not "associated with the higher level functional roles."[5] Rather, the DOJ found that "those with a peripheral role were involved with more drugs than couriers and street-level dealers and almost as much as high-level dealers."[6] Notably, in a recent Commission report, individuals who perform some of the lowest-level functions—*couriers and mules*—were found to possess the highest quantity of drugs.[7] In addition, street-level dealers are the most likely to receive mandatory minimum penalties.[8]

The proposed amendments recognize that offender function better captures culpability. The Commission itself has repeatedly used function to assess a defendant's culpability.[9]

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[4] *See* United States v. Diaz, No. 11-CR-00821-2, 2013 WL 322243, at *12 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) ("Drug quantity rarely has the dominant effect that Congress and the Commission have ascribed to it, especially when it comes to determining the culpability of couriers and other low-level offenders.").

[5] U.S. DEP'T OF JUST., AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES 45 (1994):

> One may have expected that larger drug quantities would be associated with the higher level functional roles. This was not the case. Instead, what table 30 and figure 3A show is that the distribution of the amount of drugs is the same across the different functional roles. If there is a difference, street-level dealers were involved with less drug quantities than high-level dealers, couriers, or those with a peripheral role. In fact, those with a peripheral role were involved with more drugs than couriers and street-level dealers and almost as much as high-level dealers.

[6] *Id.*

[7] U.S. SENT'G COMM'N, METHAMPHETAMINE TRAFFICKING OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 39 fig.23 (2024) [hereinafter 2024 METH REPORT] (finding that, in Fiscal Year 2022, defendants categorized as a "Courier/Mule" possessed the most drug weight); *id.* at 39 ("Couriers had double the quantity of methamphetamine, compared to high level suppliers . . . ."). We use the term "mule" throughout this Comment as a term of art that mirrors the Commission's terminology. However, we note that the term's dehumanization of people who are often roped into the drug trade out of economic destitution or addiction is problematic.

[8] Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 12–13 (2015).

[9] *See, e.g.*, 2024 METH REPORT, *supra* note 7, at 36–40; U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 43–44 (2017) [hereinafter 2017 MANDATORY MINIMUM REPORT]; U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 15 (2015); U.S. SENT'G COMM'N, *Mandatory Minimum Penalties for Drug Offenses*, *in* 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 149, 166–67 (2011) [hereinafter 2011 MANDATORY MINIMUM REPORT].

Similarly, a congressionally created task force of experts—the Colson Task Force—along with many commentators, have urged the Commission to prioritize function over weight.[10] In fact, legislative history makes clear that the mandatory minimum scheme that undergirds the current drug Guidelines was "specifically intended" to target "managers of drug enterprises" with five-year minimums and "organizers and leaders" with ten-year minimums.[11] Yet the system has drifted far from that goal, and the Guidelines' overemphasis on quantity is a major culprit. In sum, as Judge Reeves has opined, "Succinctly stated, '[a] more useful factor in determining culpability is not quantity, but role.'"[12]

As such, we believe that *function*, rather than drug type and weight, should drive the assignment of base offense levels (BOLs) and, by extension, the resulting Guideline ranges. The FCJC, therefore, has proposed a more extensive rewriting of § 2D1.1 that moves *function* from its current place as an afterthought to a frontline position where it drives the Guideline ranges (which is attached for reference).[13] This proposal will be further spelled out in our forthcoming article in the *Federal Sentencing Reporter*, and key recommendations from the FCJC proposal are also referenced throughout this Comment.[14]

While we would go further, we nevertheless support the Commission's proposed amendments in Part A as a positive step toward granting function a more prominent role in the Guidelines analysis.

Subparts 1 and 2 of Part A work in tandem to address the current flawed system from the top down and bottom up. First, Subpart 1 addresses the excesses at the top of the current sentencing regime. Most notably, Subpart 1 takes a Guideline range that includes life in prison off the table for someone convicted of drug crimes. Under the current regime, an offender with a Criminal History Category (CHC) of V or VI assigned a BOL of 38 faces a Guideline range of 360 to life. But if Subpart 1 is adopted—regardless of which of the proposed options is

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[10] CHARLES COLSON TASK FORCE ON FED. CORR., TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, at xiv (2016) [hereinafter COLSON REPORT], https://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf (recommending that the Commission "revise the Sentencing Guidelines to better account for factors that reflect role in and culpability for an offense, while considering alternatives to incarceration [and encouraging probation] for lower-level drug trafficking offenses").

[11] Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 216 (2019) (quoting United States v. Dossie, 851 F. Supp. 2d 478, 479 (E.D.N.Y. 2012)); *see also* 132 CONG. REC. 27,193–94 (1986) (statement of Sen. Robert Byrd):

> For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well.

[12] United States v. Robinson, No. 3:21-CR-14, 2022 WL 17904534, at *3 n.2 (S.D. Miss. Dec. 23, 2022) (Reeves, J.) (quoting *Diaz*, 2013 WL 322243, at *13 (Gleeson, J.)).

[13] *See generally* ALISON SIEGLER & GRANT DELAUNE, FEDERAL CRIMINAL JUSTICE CLINIC'S REVISED USSG § 2D1.1 (2024) [hereinafter FCJC REVISED GUIDELINE].

[14] *See infra* Parts I.A.2, I.B.2.

selected—that offender's Guideline range would no longer include a life sentence. For Subpart 1, Option 3 is the best way to incorporate "empirical data and national experience," in keeping with the Commission's "important institutional role."[15]

Second, Subpart 2's new low-level trafficking functions adjustment addresses the problem of excessive sentences for those who are the least culpable: couriers, mules, employees/workers, and street-level dealers. Subpart 2 elevates culpability over drug quantity by recognizing the importance of the function a person plays. While newly proposed, this is in no way a radical move. Rather, it is simply a belated recentering of function that has been called for since the 1990s,[16] drawing on the function categories the Commission has highlighted for decades.[17] For Subpart 2, the best way to elevate function over drug quantity and avoid creating unwarranted sentencing disparities would be to enact Option 1's minus-6-level reduction across the board.

The Part A amendments will also mitigate the back-end effect of high pretrial detention rates caused by the Bail Reform Act's[18] (BRA) pretrial "presumption of detention" in drug cases.[19]

The well-documented sentence-enhancing effects of the statutory "presumption of detention" mean that current sentences in drug cases—while well below Guideline ranges[20]—are nevertheless higher than they should be. Enacting the Part A options we endorse is the best way for the Commission to account for and remediate this problem, while also mitigating the racial disparities associated with pretrial detention under that presumption.

A recent data study by the Administrative Office of the U.S. Courts (AO) concluded that the statutory presumption of detention—which applies in 93% of drug cases—keeps far too many nonviolent, low-level individuals in jail for the duration of their case, without advancing public safety.[21] In addition, our Clinic's *Freedom Denied* report shows that the statutory

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[15] Kimbrough v. United States, 552 U.S. 85, 109 (2007).
[16] Jon O. Newman, *Five Guideline Improvements*, 5 FED. SENT'G REP. 190, 190 (1993) ("[C]onsider guidelines that will correlate drug sentences primarily with the defendant's role in the drug distribution system—greatest sentences for kingpins, substantial sentences for those in significant managerial positions, lesser sentences or ordinary street sellers and mules.").
[17] *See supra* note 9 and accompanying text.
[18] 18 U.S.C. §§ 3141–3150, 3156.
[19] *Id.* § 3142(e)(3) (stating that, in most federal drug cases, "it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community").
[20] *See infra* notes 29–32 and accompanying text.
[21] Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROB. 52, 55 (2017); *see also id.* at 61 (finding that the presumption of detention statute "has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration"). Evidence further proves that the drug presumption dramatically limits pretrial release for the lowest-risk offenders. *Id.* at 57 & fig.3 (showing that low-risk individuals who are not facing a presumption of detention are released 94 percent of the time, while "the release rate for [equally low-risk individuals in] presumption cases was only 68 percent"). In addition, the presumption does not advance public safety, as it does a bad job of predicting whether defendants on

presumption contributes to racial disparities in pretrial detention.[22] According to recent data, 84% of those charged with federal drug offenses are detained pending trial,[23] and drug defendants with zero prior convictions are detained in 60% of cases.[24] These high pretrial detention rates lead directly to higher sentences at the end of a case—and this is a matter of causation, not just correlation.[25] As the Federal Judicial Center has observed, "The decision to release or detain a defendant can also have significant effects on sentencing."[26] This should come as no surprise, since high pretrial detention rates prevent defendants from developing mitigation evidence that would weigh in favor of a lower sentence.[27] As one federal judge noted, "Mass [pretrial] detention creates mass incarceration."[28]

This evidence demonstrates that without the sentence-enhancing effects of pretrial detention, drug sentences nationwide would be even lower. The Commission has a responsibility to account for the fact that high pretrial detention rates unnecessarily drive-up sentences in drug cases and exacerbate racial disparities. Of the various options, the best way to mitigate this systemic problem is to enact Option 3 of Subpart 1 and the minus-6-level version of Option 1 of Subpart 2.

We address each Subpart of the Commission's proposal in greater detail below.

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pretrial release will recidivate or fail to appear. *Id*. at 58 ("[H]igh risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high-risk non-presumption cases of being rearrested for any offense, being rearrested for a violent offense, failing to appear, or being revoked for technical violations.").

[22] *See* ALISON SIEGLER ET AL., FREEDOM DENIED: HOW THE CULTURE OF DETENTION CREATED A FEDERAL JAILING CRISIS 165–67 (2022), https://freedomdenied.law.uchicago.edu/report (finding that 89% of people facing presumption charges were people of color, and yet prosecutors invoked the presumption at an even higher rate against people of color, and "judges detained people of color at higher rates than white individuals" in presumption cases).

[23] Austin, *supra* note 21, at 55.

[24] *See* George E. Browne & Suzanne M. Strong, *Pretrial Release and Misconduct in Federal District Courts, Fiscal Years 2011–2018*, BUREAU OF JUST. STAT. 2, 5 (Mar. 2022), https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf.

[25] *See* Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 26 (2020); *see also id*. (collecting sources similarly finding that pretrial detention is associated with longer sentences); James C. Oleson et al., *The Sentencing Consequences of Federal Pretrial Supervision*, 63 CRIME & DELINQUENCY 313, 325 (2017) (finding that "pretrial detention is itself associated with increased likelihood of a prison sentence and with increased sentence length," while pretrial release cuts the other way); CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 3 (2013) ("Compared to defendants released at some point pending trial, defendants detained for the entire pretrial period are more likely to be sentenced to jail or prison – and for longer periods of time.").

[26] FED. JUD. CTR., THE BAIL REFORM ACT OF 1984, at 37 & n.173 (4th ed. 2022) (citing studies).

[27] *See* Didwania, *supra* note 25, at 57.

[28] James G. Carr, *Why Pretrial Release Really Matters*, 29 FED. SENT'G REP. 217, 220 (2017); *see also id.* at 218 (explaining that a defendant released pretrial "can show a court, often for the first time in his or her life, that he or she can be law-abiding[, which] offers the court the best of all possible records and reasons to consider leniency").

A. Subpart 1: Adjustment to the Highest Base Offense Level

1. The Commission should adopt Option 3 and set the highest base offense level at 30.

The nationwide, on-the-ground sentencing experience illustrates the overwhelming consensus that the BOLs in the current drug Guidelines are "greater than necessary" to advance the § 3553(a) purposes of criminal punishment.[29] In 2023, judges issued below-Guideline sentences in 71% of drug cases.[30] And, as the Commission's Public Data Briefing on this topic usefully highlighted, the average sentence imposed in 2023 was less than the average Guideline *minimum* sentence for offenders with a BOL of 16 or higher.[31] In fact, the divergence between actual sentences and Guideline-minimum sentences grows wider as BOLs increase, with offenders assigned a BOL of 38 facing, on average, actual sentences nearly 40% below the Guideline minimum.[32]

Beyond highlighting the flaws of the current system, the Commission's Public Data Briefing also supports resetting the highest available BOL to 30. Even after excluding offenders who received a departure under § 5K1.1 (Substantial Assistance) or § 5K3.1 (Early Disposition Program), the average sentence imposed for offenders with a BOL of 32–38 ranged from 102 months (for those with a BOL of 32) to 135 months (for those with a BOL of 38).[33] The means that judges are issuing sentences that are starkly below the Guideline range, since the Guidelines call for a sentence of 121–262 months for those with an offense level of 32, and 235–life for those with an offense level of 38.[34]

To avoid unwarranted disparities and ensure consistent sentencing practices, the Commission's revised Guidelines should reflect this on-the-ground reality. Option 3's top BOL of 30 does just that. The ranges associated with a BOL of 30 capture the average *actual* sentences judges impose on offenders currently assigned a BOL between 32 and 38—ensuring sufficient, but not greater than necessary, punishment of these offenders. Specifically, for an offender with a CHC of I, a BOL of 30 results in a Guideline range of 97–121 months (capturing the actual average sentence for offenders with a BOL of 32 and 34) and, for an offender with a CHC of II, a BOL of 30 results in a Guideline range of 108–135 months (capturing the actual average sentence for offenders with a BOL of 36 and 38).

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[29] The Commission has a statutory duty to ensure penal practices "are effective in meeting the purpose of sentencing" set forth in § 3553(a)(2). 28 U.S.C. § 991(b)(2).

[30] This statistic was generated using the Commission's Fiscal Year 2023 Individual Datafile. *See Commission Datafiles*, U.S. SENT'G COMM'N, https://www.ussc.gov/research/datafiles/commission-datafiles#individual (last visited Mar. 1, 2025).

[31] *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS ON DRUG OFFENSES: PUBLIC DATA BRIEFING 7 (2025) [hereinafter U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING]. This is true for all offenders assigned a BOL of 18 or higher, even after excluding individuals who received a departure under § 5K1.1 (Substantial Assistance) or § 5K3.1 (Early Disposition Program) from the analysis. *See id.* at 8.

[32] *See id.* at 7 (detailing the average sentence imposed of 105 months and the average Guideline-minimum sentence of 172 months for drug offenders assigned a BOL of 38).

[33] *See id.* at 8.

[34] These ranges capture offenders across all 6 Criminal History Categories.

Additionally, by capping the top Drug Quantity Table bracket at a BOL of 30, Option 3 avoids any concerns the Commission might have about decoupling the drug Guidelines from the statutory mandatory minimums for drug offenses.[35]

2. Consistent with the Commission's initial empirical approach, base offense levels should be set even lower than Option 3.

While the changes proposed in Option 3 of Subpart 1 of Part A are important, they do not go far enough. Instead of basing revised BOLs on the current, inflated drug sentences, the Commission should revise BOLs to conform with the drug sentences handed down before the Guidelines were enacted. The FCJC's alternative proposal for amending the drug Guidelines bases BOLs on pre-Guidelines sentencing data (see attached). This results in our proposal's top function-based bracket topping out at a BOL of 25,[36] rather than the top BOL of 30 in the Commission's Option 3.

Conforming BOLs to pre-Guidelines sentences would be in line with the empirical approach the Commission took when promulgating the other Guidelines and would rectify the original sin of departing from that approach for the drug Guidelines. "In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports."[37] However, the Commission did not follow this empirical approach when first crafting the drug Guidelines, instead tying § 2D1.1's BOLs to the Anti-Drug Abuse Act's[38] (ADAA) mandatory minimums.[39] That decision, in turn, led to a steep increase in sentence length for drug cases. For example, a 1990 study found that, "[f]or all offenses *other than Federal drug crimes*, the guidelines brought shorter maximum imprisonment sentences, on average."[40]

However, if the Commission is uncomfortable with relying on pre-Guidelines sentencing data, present-day state sentencing data also weighs in favor of resetting BOLs at a much lower level. Like pre-Guideline sentences, state sentencing data avoids the anchoring effect of the

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[35] *See* U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 57 (discussing how the Commission's 2014 amendments produced Guideline ranges that straddle the mandatory minimum levels for offenders with a CHC of I, and specifically identifying a BOL of 30 as consistent with the ten-year mandatory minimum).

[36] FCJC REVISED GUIDELINE, *supra* note 13, at 1.

[37] *Kimbrough*, 552 U.S. at 96.

[38] Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended primarily in scattered sections of 18 and 21 U.S.C.).

[39] *See Kimbrough*, 552 U.S. at 96 ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme."); *see also, e.g.*, *Diaz*, 2013 WL 322243, at *1 ("The flaw is simply stated: the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants.").

[40] Douglas C. McDonald & Kenneth E. Carlson, *Federal Sentencing in Transition, 1986-90*, BUREAU OF JUST. STAT. 3 (1992) (emphasis added), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf; *see also id.* at 4 tbl.4.

federal Guidelines[41] and the BRA's presumption of detention.[42] And this untainted state data indicates that much lower federal Guideline ranges would be appropriate—with the average time served in state prison on drug trafficking charges being only 26 months, and median time served an even lower 17 months.[43]

3. Adopting Option 1 or Option 2 would insufficiently address the flaws of the current weight-based regime.

As discussed above, the current weight-based drug Guidelines are deeply flawed and excessively punitive. While incremental change is better than the status quo, Option 1 and Option 2 do not effectuate the Commission's statutory duties and stated priorities. Instead, Option 3 best furthers the Commission's statutory duty "to minimize the likelihood" that the prison population exceeds Bureau of Prisons (BOP) capacity[44] and the Commission's stated priority of "reducing the costs of unnecessary incarceration."[45] Moreover, Option 1 or 2 would fail to fully mitigate the overcrowding and dangerous conditions in the BOP that are directly related to overincarceration for nonviolent drug offenses: "Federal prison growth was driven largely by drug and weapon offenses," even though "[m]any people convicted of drug crimes have minimal or no criminal histories."[46]

Additionally, any concerns that Option 3 would put society at risk are unwarranted. Evidence shows that long prison sentences have a criminogenic effect, meaning shorter sentences keep us safer.[47] Further, data studies following other sentence reductions confirm that

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[41] *See* Peugh v. United States, 569 U.S. 530, 541, 543–44 (2013) (discussing how, even post-*Booker*, the Guidelines continue to influence the sentences imposed by district court judges).
[42] *See supra* notes 18–28 and accompanying text.
[43] Danielle Kaeble, *Time Served in State Prison, 2018*, BUREAU OF JUST. STAT. 2 tbl.1 (Mar. 2021), https://bjs.ojp.gov/document/tssp18.pdf.
[44] 28 U.S.C. § 994(g).
[45] Final Priorities for Amendment Cycle, 89 Fed. Reg. 66176, 66177 (Aug. 14, 2024).
[46] COLSON REPORT, *supra* note 10, at 9; *see also* OFF. OF THE INSPECTOR GEN., DEP'T OF JUST., AUDIT OF THE FEDERAL BUREAU OF PRISONS' EFFORTS TO MAINTAIN AND CONSTRUCT INSTITUTIONS 12 (2023), https://oig.justice.gov/sites/default/files/reports/23-064_1.pdf (detailing that "a large majority of the needs identified and tracked by the BOP remain unfunded," to the tune of nearly $2 billion); *Oversight of the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime and Fed. Gov't Surveillance of the H. Comm. on the Judiciary*, 118th Cong. 14 (2024) (statement of Colleen S. Peters, Dir., Fed. Bureau of Prisons) ("For the past two years, we have worked to stabilize an agency in crisis."). *See generally Program Fact Sheet*, FED. BUREAU OF PRISONS (Oct. 31, 2021), https://www.bop.gov/about/statistics/docs/program_fact_sheet_122021.pdf.
[47] *See* Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 178 (2009) ("[A] key finding of our review is that the great majority of studies point to a null or criminogenic effect of the prison experience on subsequent offending."); Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33, 34 (2016) (discussing research "show[ing] that people who had been punished more severely actually engaged in more crime" and finding that "this could be due to the punishment creating a chain reaction of other events which reduce individuals' opportunities for conventional behavior (e.g., stable employment, close family ties) and weakening of social bonds"); Barkow, *supra* note 11, at 220 & nn.163–64 (discussing studies showing that "longer sentences lead to increased recidivism after release"); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1054–72 (cataloging the criminogenic effects of incarceration and arguing that prisons may cause

the community will remain safe if the Commission decreases drug sentences. For example, after the 2018 First Step Act made the eighteen-to-one crack/powder ratio retroactive, studies showed a very low recidivism rate for the 44,000 people who were released early.[48] More broadly, the Commission has repeatedly found no increase in recidivism when sentences are lowered as the result of Commission or congressional action.[49]

4. Responses to specific issues for comment (Subpart 1).

Question 1 (highest base offense levels). As set forth in the attached FCJC proposal and discussed above, we believe the highest BOL should be 25.[50] However, of the options put forward by the Commission, setting the highest BOL at 30 (Part A, Subpart 1, Option 3) is the most appropriate.

Question 2 (reducing all BOLs or BOLs for certain drugs). The most egregious disparity in the current Drug Quantity Table is the differential treatment of methamphetamine mixture, "Ice," and methamphetamine actual. Our perspective on this disparity is contained in Part B below. Additionally, as detailed in our response to Part B, Question 4, we propose that the Commission reconsider the differential treatment of powder cocaine and crack cocaine. Finally, as discussed below, we would ask the Commission to follow our FCJC proposal and reconsider the structure of the drug Guidelines such that BOLs are determined based on function rather than drug type and quantity.[51]

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more crime than they prevent); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. (July 2017), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-prison-paradox_02.pdf:

> At the individual level, there is also some evidence that incarceration itself is criminogenic, meaning that spending time in jail or prison actually increases a person's risk of engaging in crime in the future. This may be because people learn criminal habits or develop criminal networks while incarcerated, but it may also be because of the collateral consequences that derive from even short periods of incarceration, such as loss of employment, loss of stable housing, or disruption of family ties.

[48] *See* Jessie Brenner & Stephanie Wylie, *Analyzing the First Step Act's Impact on Criminal Justice*, BRENNAN CTR. FOR JUST. (Aug. 20, 2024), https://www.brennancenter.org/our-work/analysis-opinion/analyzing-first-step-acts-impact-criminal-justice (showing that recidivism rates for this population were 9.7%, as compared with 46% for all people released from the BOP in 2018).

[49] *See, e.g.*, U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 3 (2018) [hereinafter U.S. SENT'G COMM'N, 2011 FAIR SENTENCING ACT] ("The recidivism rates were virtually identical for offenders who were released early through retroactive application of the [2011] FSA Guideline Amendment and offenders who had served their full sentences before the FSA guideline reduction retroactively took effect."); U.S. SENT'G COMM'N, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 6 (2020) [hereinafter U.S. SENT'G COMM'N, DRUGS MINUS TWO] (similarly finding no increase in recidivism rates for those whose sentences were reduced based on the 2014 "drugs minus two" Guideline amendment); U.S. SENT'G COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 3 (2014) [hereinafter U.S. SENT'G COMM'N, CRACK COCAINE AMENDMENT] (similarly finding no increase in recidivism rates for those whose sentences were reduced based on the 2007 crack cocaine amendment).

[50] FCJC REVISED GUIDELINE, *supra* note 13, at 1.

[51] *See infra* Part I.B.4.

Question 3 (mitigating role cap). The mitigating role cap should continue to function if any of the options in Part A, Subpart 1 are adopted. Specifically, the mitigating role cap should continue to have the same relativistic effect—that is, all of the BOL triggers in § 2D1.1(a)(5) should decrease by the same amount as the maximum BOL decreases. For example, if Option 1 is adopted (a 4-level reduction to the maximum BOL), then minimal participants should have a capped BOL of 28 and other offenders who received an adjustment under § 2B1.2 should have the following reductions: offenders with a BOL of 34 should receive a decrease of 4 levels; offenders with a BOL of 32 or 30 should receive a decrease of 3 levels; and offenders with a BOL of 28 should receive a decrease of 2 levels.

Additionally, we note that the proper resolution of Question 3 depends on whether and how the proposals contained in Part A, Subpart 2 are adopted. But, as a general matter, we believe that the trigger for the § 2D1.1(a)(5) caps should be updated to the new function adjustment if Subpart 2 is adopted. See our responses to Questions 4 and 5 in Subpart 2 below for more detail.

Question 4 (amending the chemical quantity tables). The adoption of any of the options in Subpart 1 should flow through to the chemical quantity tables in § 2D1.11.

Question 5 (interaction between BOLs and revisions to the Drug Quantity Table for methamphetamine). Parts A and B independently serve as positive steps forward, away from the excessively punitive, quantity-based regime that currently exists. Accordingly, implementation of Part A does not take away from the necessity of implementing Part B, and vice versa. Specifically, Part A reduces the overly harsh Guideline ranges available for all drug offenses, while Part B eliminates the invidious sentencing disparity between methamphetamine (actual), "Ice," and methamphetamine mixture. This unjust and ill-informed disparity will not be eliminated by simply lowering all BOLs. Therefore, the Commission should implement both Parts A and B.

B. Subpart 2: New Low-Level Trafficking Functions Adjustment

1. The Commission should elevate offender function over drug quantity by adopting a rule-like, minus-6-level function adjustment.

Turning to Part A, Subpart 2, the Commission should adopt Option 1 of its proposed "New Trafficking Functions Adjustment," and should enact an across-the-board minus-6-level function adjustment for people who perform "low-level trafficking functions."[52]

As discussed above, offender function is a better proxy for culpability than drug type and quantity. In fact, these culpability judgments are already reflected in the sentencing data. As the Commission's Public Data Briefing highlights, only 10% of the methamphetamine (meth) couriers sentenced in 2022 were given a within-Guideline sentence—the lowest percentage of any functional group identified by the Commission.[53] This is true across drug types, with a

[52] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 70, 72, 77.
[53] *See* U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 31, at 14.

similarly low 16.5% of fentanyl couriers receiving a within-range sentence, the lowest of any fentanyl function category.[54] And perhaps most stunningly, 0 out of the 450 meth couriers, employees/workers, and brokers sentenced in 2022 were given an above-Guideline sentence.[55]

A key strength of Subpart 2's proposal is its objectiveness. Unlike the current Mitigating Role adjustment,[56] there is no amorphous, totality-of-the-circumstances "minimal" and "minor" determination for district judges to make.[57] Instead, judges will simply be asked to make fact-bound determinations. For example, the question of whether the individual "carried one or more controlled substances . . . on their person,"[58] will be decided purely on the facts the defense or prosecution can bring forward. This will reduce unwarranted sentencing disparities based on geography, ideological differences, and the vagaries of how the law has developed in different courts of appeals.

The Mitigating Role adjustment, in contrast, has resulted in widely disparate applications. For example, in the drug context, some districts grant Mitigating Role adjustments in nearly 80% of cases, while others do so in less than 20% of cases.[59] Perversely, the people most in need of a downward adjustment—that is, couriers and mules facing extremely high Guideline ranges—often do not receive the Mitigating Role adjustment because of the quantity of drugs they were carrying.[60] Other minor differentiators have also been used to justify not granting a Mitigating Role adjustment: courts have denied reductions for couriers who "acted as a courier or mule on multiple occasions, had a relationship with the organization's leadership, or [were] well-compensated for transporting the drugs."[61]

To best capture the benefits of Subpart 2's objective analysis, the Commission should adopt Option 1's more rule-like structure. This is a far superior way to serve the Commission's mandate to "reduc[e] unwarranted sentence disparities."[62] At the same time, Option 1 would not unduly constrain judicial discretion given the advisory nature of the Guidelines post-*Booker*.

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[54] *See id.* at 17.
[55] *See id.* at 14. Similarly, for fentanyl, only 1 out of 186 couriers, employees/workers, and brokers received an above-Guideline sentence. *See id.* at 17.
[56] U.S. SENT'G GUIDELINES MANUAL § 3B1.2 (U.S. SENT'G COMM'N 2024).
[57] *Id.* § 3B1.2 & cmt. 3(C).
[58] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 72 (setting forth eligibility for the low-level trafficking functions reduction in proposed subsection (b)(17)(C)(i)).
[59] *See Commission Datafiles*, *supra* note 30.
[60] *See, e.g.*, United States v. Rodriguez-Castro, 641 F.3d 1189, 1193 (9th Cir. 2011) (noting that couriers can be denied a downward Mitigating Role adjustment for importing "a substantial amount of drugs," and affirming denial of reduction where the offense involved 33.46 kilograms of cocaine, which "was a substantial amount").
[61] U.S. SENT'G COMM'N, AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS 19 (2024) (footnotes omitted) (citing cases).
[62] 28 U.S.C. § 994(f).

2. Option 2's standard-like structure risks unwarranted sentencing disparities and should be rejected.

Part A, Subpart 2's Option 2 should not be implemented as it would recreate all of the problems and disparities created by the amorphous and overly discretionary Mitigating Role adjustment. While Option 1 sets out a clear rule, Option 2 merely provides examples of "low-level trafficking functions" that "*may* qualify" a defendant for the adjustment.[63] This nebulous standard will result in highly idiosyncratic sentences, not only reintroducing the risk of geographic disparities, but also surely creating both inter-circuit and even intra-district disagreements. Drafting the function adjustment in this subjective manner fails to live up to the Commission's mandate to reduce unwarranted sentencing disparities.[64] And, again, any concerns about overinclusiveness with respect to Option 1 can be addressed by—and are more appropriately funneled through—the sentencing court's § 3553(a) assessment.

3. A 2-level or 4-level function adjustment would inadequately address the flaws of the current drug-quantity-based regime.

To truly capture culpability, and avoid making certain defendants *worse off*, Subpart 2's function adjustment should be *at least* a 6-level reduction—if not more. The proposed 6-level reduction is the only way to address the Colson Report's concerns, to reflect the Commission's own culpability determinations,[65] and to respond to the decades-long chorus of criticism from practitioners and academics.

Critically, if the function adjustment is limited to a 2-level reduction, individuals who currently qualify for the 4-level Mitigating Role Adjustment will be made ***worse off*** by this change. For example, a courier/mule in CHC I caught with 1 kilogram of heroin who qualified as a "minimal participant" under § 3B1.2 would currently receive an offense level of 26 (BOL of 30, less the 4-level adjustment), resulting in a Guideline range of 63–78 months. However, under the 2-level version of the proposed regime the same courier/mule would instead receive an offense level of 28 (BOL of 30, less the 2-level adjustment), resulting in a higher Guideline range of 78–97 months.[66]

While the 4-level version of the adjustment would avoid the catastrophic results of the 2-level reduction and be better than nothing, it does not move the needle. As identified above, offenders currently receiving the Minimal Participant reduction would not benefit ***at all*** from a 4-level function adjustment. A 4-level reduction would effectively be putting lipstick on the pig of what would remain a quantity-driven system.

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[63] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 73 (emphasis added).
[64] 28 U.S.C. § 994(f).
[65] *See, e.g.*, 2024 METH REPORT, *supra* note 7, at 36–37 ("The functions are ranked by the seriousness of the conduct from a high-level supplier to a low-level employee.").
[66] This analysis assumes, consistent with the current proposal, that qualifying for the function adjustment renders an offender ineligible for the application of Mitigating Role. U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 75.

4. An even better solution would be to use function to assign base offense levels, rather than adjusting for function on the back end.

The FCJC's alternative proposal uses the ten function categories the Commission has previously identified[67]—instead of using drug type and quantity—as the starting point for the drug Guidelines (see attached). Specifically, we propose consolidating the Commission's "offender functions" into four broad "Function Categories" that track increasing levels of culpability[68]:

- Function Category 1 (least culpable): Mules, Couriers, and Employees/Workers
- Function Category 2: Street-Level Dealers and Brokers/Steerers
- Function Category 3: Managers/Supervisors and Wholesalers
- Function Category 4 (most culpable): High-level Suppliers/Importers, Organizers/Leaders, and Growers/Manufacturers

We then propose assigning BOLs to each Function Category based on pre-Guidelines sentences. Finally, we suggest the use of a single, slimmed-down aggravating adjustment containing only the most commonly used of the current specific offense characteristic adjustments. For more details on the FCJC proposal, see attached.

5. Responses to specific issues for comment (Subpart 2).

Question 1 (application and extent of function adjustment). As discussed above, the Commission should adopt the 6-level version of the function adjustment.

The Commission should also apply this adjustment consistently across the board, rather than "tiering" the adjustment in any manner. First, tiering must be avoided because the proposed adjustment already effectively builds in a tiered approach: it renders ineligible (1) offenders who use or threaten violence, *see* (b)(2); (2) offenders who possess a dangerous weapon (potentially), *see* (b)17(B); and (3) street-level dealers for whom certain mitigating circumstances are not present, *see* (b)(17)(C)(iii). Second, any additional tiering would add complexity to the Guidelines at a time where the Commission is actively pursuing a simplification agenda.[69] Third and finally, a subjective, tiered approach that distinguishes between offenders performing the same function would allow the existing geographic disparities in the application of the Mitigating Role adjustment to persist and deepen, undercutting the Commission's goal of eliminating unwarranted disparities.

Question 2 (how to properly capture low-level trafficking functions). The Commission should *not* exclude from the function adjustment offenders who merely possessed a firearm or dangerous weapon in connection with the offense (*see* (b)(17)(B)). As a threshold matter,

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[67] 2017 MANDATORY MINIMUM REPORT, *supra* note 9, at 44.

[68] Category 1 combines functions 8–10 of the Commission's ten-category function taxonomy; Category 2 combines functions 6 and 7, Category 3 combines functions 4 and 5, and Category 4 combines functions 1–3. *See id.* at 44. Note that the Commission's low-level trafficking functions adjustment includes the functions captured in Function Categories 1 and 2.

[69] *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 57–63 (2024) (discussing the Commission's proposed simplification of the three-step process contained in § 1B1.1).

offenders who used, threatened, or directed the use of violence are already excluded from the function adjustment by subsection (b)(17)(A).[70] Therefore, (b)(17)(B) *exclusively* punishes the *mere possession* of a firearm. Such punishment is contrary to the judiciary's increasingly pro–Second Amendment jurisprudence[71] and recent executive action by President Donald Trump.[72] Further, excluding offenders with dangerous weapons from the function adjustment imposes an excessive and duplicative punishment. Namely, there is already a Specific Offense Characteristic that raises the offense level by 2 for possession of a dangerous weapon.[73] As a result, the possession of dangerous weapon could result in an 8-offense-level swing—generating Guideline ranges that are unjustifiably disparate.[74]

Question 3 (street-level dealers). The mitigating factors the Commission identified in (b)(17)(C)(iii) effectively capture street-level dealers with lower levels of culpability. Appropriately cabined to offenders with at least one of these mitigators, street-level dealers should be eligible for the low-level function adjustment.

However, the Commission should clarify that these mitigators are *not* required for offenders categorized as "Broker/Go-Between" to be eligible for the function adjustment. As the Commission's own hierarchy of functions acknowledges, so-called brokers are *less* culpable than street-level dealers.[75] And the sentencing data reflect this determination: In 2022, only 23% of the meth brokers received a within-Guideline sentence and none received an above-Guideline sentence.[76] This holds true across drug type, as only 25% of fentanyl brokers received a within-Guideline sentence and none received an above-Guideline sentence.[77] In fact, the sentencing distribution of brokers (i.e., the share of brokers with above-, within-, and below-Guideline sentences) most closely resembles that of offenders the commission has categorized as

[70] Both proposed options for the function adjustment render ineligible anyone for whom subsection (b)(2) applies. U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 72–73.
[71] *See generally, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); Range v. Att'y Gen. U.S., 124 F.4th 218 (3rd Cir. 2024) (holding—even after the Supreme Court's decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024)—that the felon-in-possession law violated the Second Amendment as applied to a defendant with a nonviolent prior offense).
[72] *See* Exec. Order No. 14,206, 90 Fed. Reg. 9503 (Feb. 7, 2025) (requiring the Attorney General to "examine all orders, regulations, guidance, plans, international agreements, and other actions of executive departments and agencies (agencies) to assess any ongoing infringements of the Second Amendment rights of our citizens," including the positions taken by the United States in "ongoing and potential litigation that affects or could affect the ability of Americans to exercise their Second Amendment rights").
[73] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(1) ("If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.").
[74] While the Commission does not appear to be soliciting input on whether the application of § 2D1.1(b)(2) (use or threat of violence) should also render an offender ineligible for the function adjustment, we note that the same concerns about double counting and excessive punishment are applicable in this context as well.
[75] *See* 2024 METH REPORT, *supra* note 7, at 36–37 (stating that "[t]he functions are ranked by the seriousness of the conduct" and placing "Street-Level Dealer" above "Broker/Go-Between").
[76] *See* U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 31, at 14.
[77] *See id.* at 17.

employees/workers.[78] As such, these two functions should be treated similarly for purposes of the new adjustment.

Additionally, while we support Option 1's more rule-like structure, we suggest that the Commission make clear that its enumeration of certain "low-level function[s]" in (b)(17)(C)(ii) is not an exclusive, closed set of function archetypes. The draft language already indicates that this is not an exhaustive list,[79] but to avoid all doubt we propose a minor rewrite below.

Specifically, we ask the Commission to explicitly clarify that the enumerated list of low-level functions is not exhaustive and includes offenders whom the Commission terms Brokers/Go-Betweens in the final version of (b)(17)(C)(ii). Our preferred language is presented below, with additions in red and bold[80]:

> (ii) performed any low-level function in the offense other than the selling of controlled substances (**including, but not limited to,** ~~such as~~ running errands, sending or receiving phone calls or messages, scouting, receiving packages, packaging controlled substances, acting as a lookout, storing controlled substances, ~~or~~ acting as a deckhand or crew member on a vessel or aircraft used to transport controlled substances**, arranging for two parties to buy/sell drugs, or directing potential buyers to a potential seller**), without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense; or

Question 4 (amendment of § 2D1.1(a)(5)). Consistent with both proposed options in Subpart 2, the Commission should replace the trigger for § 2D1.1(a)(5)'s application from Mitigating Role to the new function adjustment.

Question 5 (minimal participant adjustment). Consistent with our response to Question 4 and both proposed options in Subpart 2, the Commission should keep the cap on BOL for those who qualify for the new function adjustment. However, the draft language of § 2D1.1(a)(5), as it currently stands, is confusing and full of surplusage due to the interplay with Mitigating Role's tiered approach. For example, as written, a courier/mule with an initial BOL of 38 would first have their BOL reduced to 34 per the terms of (a)(5)(B)(iii). But then the last sentence of (a)(5) would appear to kick in, resulting in a final BOL of 32.

To minimize any risk of confusion, we propose folding the BOL cap into the adjustments set forth at the beginning of (a)(5). This results in a single-step analysis, rather than the two-step analysis detailed above. For example, if the same maximum BOLs are kept, we recommend revising the adjustment in (a)(5)(i) to provide low-level offenders initially assigned a BOL 38 with a 6-level reduction, rather than a 4-level reduction followed by the application of the BOL cap.

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[78] *See id.* at 14, 17.

[79] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 72 (preceding a list of low-level functions with the qualifier "such as").

[80] The added language is pulled nearly verbatim from the Commission's definition of the "Broker/Go-Between" category. 2024 METH REPORT, *supra* note 7, at 37.

Question 6 (application of Mitigating Role). The Commission should clearly delineate between the new low-level function analysis and the old Mitigating Role inquiry. Otherwise, the Mitigating Role case law will improperly impact judges' application of the new function adjustment in Subpart 2. These are two conceptually distinct analyses. Considerations of relative participation are simply irrelevant for the purpose of determining someone's function.

However, some offenders who do not qualify for the low-level function adjustment may nevertheless qualify for Mitigating Role. For example, a courier who possessed a gun but never used it threateningly would be ineligible for the low-level function adjustment (at least as currently written) but could still plausibly argue for the application of Mitigating Role. As such, we propose a two-step analysis: First, conduct the function analysis under Subpart 2. Second, if offender doesn't qualify for a function reduction, conduct the standard Mitigating Role analysis.

To implement our proposed two-step analysis, the proposed Special Instruction (e)(2) should be replaced with the following new subsections:

(2) If subsection (b)(17) applies, do not apply §3B1.2 (Mitigating Role).

(3) If subsection (b)(17) does not apply, then apply §3B1.2 (Mitigating Role).

Question 7 (cross references to § 2D1.1). Not addressed.

Question 8 (proposed Application Note 21). The Commission should include draft Application Note 21(A), but exclude draft Application Note 21(B). Note 21(A) is essential, as it makes clear that the function analysis should be undertaken even if others in the drug trafficking organization are not charged. On the other hand, Note 21(B) inappropriately incorporates a comparative culpability analysis from the old Mitigating Role framework into the new function analysis—a consideration that is anathema to the rule-like approach to the function adjustment discussed above. Considerations such as this are best left to sentencing judges at the § 3553(a) stage.

II. Part B Removes Unnecessary Disparities in Methamphetamine Sentencing

Part B proposes two positive changes to methamphetamine sentencing. In Subpart 1, the Commission proposes "delet[ing] all references to 'Ice'" in the Drug Quantity Table at § 2D1.1(c), as well as "bracket[ing] the possibility of adding a new specific offense characteristic . . . that would provide a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form."[81] In Subpart 2, the proposed amendment addresses "the 10:1 quantity ratio for methamphetamine mixture and methamphetamine (actual) by deleting all references to 'methamphetamine (actual)' from the Drug Quantity Table at §2D1.1(c)."[82]

We urge the Commission to adopt Part B, Subpart 1 in its entirety and to implement Option 1 of Subpart 2 by setting the quantity thresholds for all forms of meth at the current level

[81] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 81.
[82] *Id.*

for meth mixture.[83] Below, we explain the current problems with meth sentencing and how Part B will rectify such problems.

A. Methamphetamine Sentencing Unduly Emphasizes Drug Purity

The current sentencing regime for meth suffers from two fatal flaws. First, by overemphasizing meth purity, the current Guidelines result in sentences that are greater than necessary to achieve the purposes of punishment in § 3553(a). Second, this emphasis on drug purity leads to unwarranted disparities under § 3553(a)(6). Implementing Subpart 1 and Subpart 2, Option 1 would be a promising step toward rectifying these injustices.

1. The current sentencing regime for methamphetamine imposes sentences that are greater than necessary under § 3553(a).

National experience has shown that sentences that rely on drug weight do not track culpability, leading judges across the country to routinely issue sentences below the Guidelines.[84] In meth cases in 2023, for example, judges granted significantly below-Guideline sentences to individuals of varying culpabilities (e.g., high-level suppliers, street-level dealers, couriers, etc.).[85]

Moreover, higher sentences for pure meth are substantially greater than necessary to achieve § 3553(a)'s purposes because they do not appropriately track culpability.[86] In fact, the government has previously conceded that there is "no empirical basis for the Sentencing Commission's 10-to-1 weight disparity between actual methamphetamine and methamphetamine mixture."[87] High sentences for pure meth were intended for kingpins, but the Commission has found that couriers are twice as likely to be sentenced for pure meth than meth mixture.[88] And, as the Commission's Public Data Briefing shows, the *average* purity of meth, regardless of type, ranges from 91% to 98%—well above the 80% purity threshold for a given sample to qualify as "Ice."[89] Lastly, the *potency* of a meth sample, as opposed to its *purity*, is what has the most

[83] *Id.*
[84] *See supra* Part I; U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 31, at 6.
[85] 2024 METH REPORT, *supra* note 7, at 46–48 (noting, in particular, that couriers were on average sentenced to less than half the Guideline sentence).
[86] *Robinson*, 2022 WL 17904534, at *3 (Reeves, J.) ("In the context of methamphetamine, though, purity is no longer probative of the defendant's culpability.").
[87] *Id.* (citing United States v. Nawanna, 321 F. Supp. 3d 943, 950–51 (N.D. Iowa 2018)).
[88] 2024 METH REPORT, *supra* note 7, at 38.
[89] U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 31, at 23; *accord* Edmond E. Chang, Comm. on Crim. Law of the Jud. Conf. of the U.S., Comment Letter on Proposed 2024–2025 Priorities 2 (July 15, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf ("[B]ecause practically all methamphetamine currently trafficked in the United States is highly pure, that correlation between purity and culpability or organizational rank has substantially diminished."); *Robinson*, 2022 WL 17904534, at *3 ("The DEA data show that most methamphetamine confiscated today is 'pure' regardless of whether the defendant is a kingpin or a low-level addict."); 2024 METH REPORT, *supra* note 7, at 4 (noting that meth tested in 2022 was on average 93.2% pure).

significant effect on a user's body.[90] Yet the potency and purity of a meth sample are not necessarily correlated, which further undermines the rationale for a sentencing disparity based on purity.[91]

2. The current distinction between methamphetamine (actual), methamphetamine mixture, and "Ice" leads to unjust disparities under § 3553(a)(6).

The existing sentencing disparities between meth (actual), meth mixture, and "Ice" give the government undue control over sentences and produces unwarranted disparities. Specifically, the government may choose whether or not to purity test seized meth, which substantially affects the ultimate sentence. Furthermore, drug testing for purity levels is not done consistently across all districts, as border districts are 15% more likely to purity test a meth sample than nonborder districts.[92] As the Federal Defenders have observed, this makes meth sentencing a "game of chance."[93] Lastly, unwarranted racial disparities have resulted from the meth Guidelines, with people of color amounting to nearly 60% of those sentenced for meth offenses.[94] Each of these unwarranted sentencing disparities are contrary to § 3553(a)(6) and must be rectified.

B. Part B Addresses the Flaws of the Current Regime by Deemphasizing Drug Purity

Part B offers a promising step forward in rectifying the injustices in the current meth sentencing regime. In what follows, we specify why and in what form the Commission should adopt Part B before offering responses to select issues for comment.

1. The Commission should adopt Subpart 1 in its entirety, thus deleting all references to "Ice" and adding a new specific offense characteristic for non-smokable, non-crystalline methamphetamine offenses.

Implementing Subpart 1 would satisfy § 3553(a) by ensuring that the Guidelines do not recommend sentences that are greater than necessary. The Commission should adopt both aspects of Subpart 1:

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[90] *See Methamphetamine Seizures Continue to Climb in the Midwest*, U.S. DRUG ENF'T ADMIN. (July 10, 2019), https://www.dea.gov/stories/2019/2019-07/2019-07-10/methamphetamine-seizures-continue-climb-midwest.

[91] *See id.* ("It's possible to make a highly pure methamphetamine with a low potency that wouldn't cause much effect to the body."); United States v. Rodriguez, No. 3:17-CR-00031, 2019 WL 1508036, at *3 n.27 (D. Alaska Apr. 5, 2019) (noting an increase in methamphetamine purity does not necessarily correlate to an increase in potency).

[92] 2024 METH REPORT, *supra* note 7, at 31 (noting disparity in border district purity testing); *see also* United States v. Havel, No. 4:21-CR-3075, 2023 WL 1930686, at *5 (D. Neb. Feb. 10, 2023) ("[W]hether or not testing occurs for some or all of the methamphetamine for which a defendant is being held responsible is largely dependent on arbitrary conditions that have no bearing on the § 3553(a) factors which should be driving sentencing decisions.").

[93] Heather Williams, Fed. Def. Sent'g Guidelines Comm., *Proposed Priorities for the 2024–2025 Amendment Cycle* 7 (May 15, 2024), https://src.fd.org/sites/src/files/blog/2024-06/20240515%20Defender%20Annual%20Letter%20_0.pdf.

[94] 2024 METH REPORT, *supra* note 7, at 21.

- "[A]mend the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to §2D1.1 to delete all references to 'Ice.'"[95]
- Add "a new specific offense characteristic . . . that would provide a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form."[96]

Subpart 1 will eliminate the unwarranted disparity between different types of meth and will also mitigate the racial disparities that have resulted from "Ice" sentences in particular.[97] Given the uniform purity of all forms of meth today,[98] there is no reason to sentence "Ice" offenses (and meth (actual) offenses) ten times more aggressively than meth mixture offenses.

2. Further, the Commission should adopt a 2-level reduction for all methamphetamine sentences *across the board* in the Drug Quantity Table at § 2D1.1(c).

While Subpart 1's new 2-level specific offense characteristic reduction is a good start, a better sentencing regime would go further. We propose adopting a 2-level reduction for all meth sentences to entirely remove *all* sentencing disparities between the various forms of meth—whether in crystalline, smokable form, or otherwise. Equalizing sentences in this way would make sense given the high purity of all forms of meth,[99] not to mention the lack of any empirical basis to support a sentencing disparity in the first place.[100] This would eliminate the need for Subpart 1's additional specific offense characteristic.

However, we recognize that such an across-the-board change might be barred by the 1990 congressional directive,[101] which instructed the Commission to "assign[] an offense level [for offenses involving smoking crystal methamphetamine] which is two levels above that which would have been assigned to the same offense involving other forms of methamphetamine."[102] The new proposed specific offense characteristic providing a reduction for non-smokeable meth will at least serve as an improvement over the current regime and will reduce the harsh sentences

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[95] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 80–81.
[96] *Id.* at 81.
[97] 2024 METH REPORT, *supra* note 7, at 24.
[98] U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 31, at 23.
[99] *Id.*
[100] *Robinson*, 2022 WL 17904534, at *3 (Reeves, J.) (citing *Nawanna*, 321 F. Supp. at 950–51).
[101] Crime Control Act of 1990, Pub. L. No. 101-647, § 2701, 104 Stat. 4789, 4912.
[102] *Id.* That said, we urge the Commission to consider the argument offered by the Federal Defenders that these directives do not continue to bind the Commission's hands. *See* Fed. Pub. & Cmty. Defs., *Comment Letter on Proposed 2024 Amendments to the Federal Sentencing Guidelines: Simplification of Three-Step Process* 18–24 (Feb. 22, 2024), https://src.fd.org/sites/src/files/blog/2024-03/Simplification%20Comment%20FINAL.pdf. In the context of departure provisions, the Commission has been particularly hesitant to enact provisions contrary to Congressional directives, even though "the terms of those directives do not require the departure provisions that were adopted, or if they do, they don't require the provisions adopted to persist in perpetuity." *Id.* Similarly, the Commission should consider whether the Congressional directive to increase the offense level of smokable, crystalline methamphetamine offenses should continue to have the impact that it was originally interpreted to have.

issued for non-"Ice" meth offenses, which are greater than necessary to achieve § 3553(a)'s purposes.

3. Responses to specific issues for comment (Subpart 1).

Question 1 (deleting references to "Ice"). Deleting all refences to "Ice" in the Guidelines is consistent with the 1990 congressional directive and other provisions of federal law, and achieves sentences that are sufficient but not greater than necessary under § 3553(a).

Question 2 (adding new specific offense characteristic). Our proposed 2-level BOL reduction for *all* meth types would best serve the purposes of § 3553(a). However, the Commission's proposed specific offense characteristic applying a 2-level reduction only for non-smokable, non-crystalline methamphetamine offenses would be a positive step forward and, thus, should be implemented.

4. The Commission should adopt Subpart 2, Option 1, thus deleting all references to "methamphetamine (actual)," and should set quantity thresholds to the current level for methamphetamine mixture.

Implementing Subpart 2, Option 1 would satisfy both § 3553(a), by ensuring that the Guidelines do not recommend sentences that are greater than necessary, and § 3553(a)(6), by eliminating unwarranted disparities. The Commission should adopt Part B, Subpart 2, Option 1 of the proposed amendments. Specifically, the Commission should:

- "[A]ddress the 10:1 quantity ratio for methamphetamine mixture and methamphetamine (actual) by deleting all references to 'methamphetamine (actual)' from the Drug Quantity Table at §2D1.1(c) and the Drug Conversion Tables at Application Note 8(D)."[103]
- Implement Subpart 2, Option 1 by "set[ting] the quantity thresholds for methamphetamine at the current level for methamphetamine mixture."[104]

Adopting Subpart 2, Option 1, by equalizing sentences between meth mixture and meth (actual) will remove once and for all an egregious sentencing disparity that, as the government has conceded, has "no empirical basis."[105] Judges across the country recognize that meth purity does not track with culpability, and thus merits little consideration at sentencing.[106] Furthermore, given the uniform purity of meth, deleting all references to "methamphetamine (actual)" will lessen the government's undue control over meth sentences and the unjust disparities that result.

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[103] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 81.
[104] *Id.*
[105] *Robinson*, 2022 WL 17904534, at *3 (Reeves, J.) (citing *Nawanna*, 321 F. Supp. at 950–51).
[106] *Id.* ("In the context of methamphetamine, though, purity is no longer probative of the defendant's culpability."); *see also* Chang, *supra* note 89, at 3 ("[T]he Committee [on Criminal Law of the Judicial Conference] recommends that the Commission examine amending the Drug Quantity Table and the guidelines commentary as to the significance of the purity distinction.").

In addition, under Subpart 2, Option 1 is vastly superior to Option 2. Sentences for meth offenses are already greater than necessary.[107] The original intent behind distinguishing meth (actual) and meth mixture was to properly calibrate and distinguish between the sentences accorded to kingpins and those issued to lower-level couriers.[108] But we know that this has not happened: the least culpable are twice as likely to be sentenced for meth (actual) or "Ice" than meth mixture.[109] Therefore, implementing Option 2 and setting the quantity thresholds to the current levels for meth (actual), would only exacerbate the culpability disjunction in the current meth sentencing scheme.

5. Responses to specific issues for comment (Subpart 2).

Question 1 (addressing the ten-to-one quantity ratio). The Commission should address the ten-to-one quantity ratio between meth mixture and meth (actual) by implementing Subpart 2, Option 1. There should be no distinction within the Guidelines between meth mixture and meth (actual), and all meth offenses should be sentenced according to the quantity threshold currently set for meth mixture.

Question 2 (implementing Option 2). As discussed above, the Commission should not adopt Option 2. Instead, it should implement Option 1.

Question 3 (quantity thresholds for drugs pinned to methamphetamine threshold). The quantity thresholds in the Drug Quantity Table for meth mixture should not be changed. To the extent that the Commission is looking to alter the quantity thresholds for other substances (e.g., ephedrine, pseudoephedrine, and phenylpropanolamine), we do not address this question.

Question 4 (future action regarding the crack/powder disparity). We strongly urge the Commission to take action in a future amendment cycle and eliminate the eighteen-to-one sentencing disparity between crack and powder cocaine offenses.

This sentencing disparity has been roundly criticized.[110] First, it is yet another driver of immense racial disparity. Eighty percent of those sentenced for crack cocaine offenses in 2023 were Black. According to one Commission study, Black crack cocaine offenders received sentences that were nearly twice as long as those imposed on white offenders (115 months vs. 68 months).[111]

Second, national experience demonstrates that judges consider crack sentences to be too high, with less than 25% of sentences falling within the Guideline range in 2023, while judges

[107] *See supra* Part I.A.1.
[108] Chang, *supra* note 89, at 2 ("In 1988, when Congress set the differing statutory penalties for actual methamphetamine and methamphetamine mixture, purity could serve as a reasonable proxy for culpability or, at the very least, closeness to the source of supply.").
[109] 2024 METH REPORT, *supra* note 7, at 38.
[110] United States v. Lawrence, 1 F.4th 40, 42 (D.C. Cir. 2021) (noting "two decades of criticism" of the "crack-to-powder disparity").
[111] *See* 2011 MANDATORY MINIMUM REPORT, *supra* note 9, at 196.

granted nongovernment sponsored reductions in over 58% of cases.[112] The average sentence length in crack cases has been falling consistently and is currently at its lowest point in the past decade.[113]

Third, there has never been a sound empirical basis for any disparity between crack and powder cocaine offenses.[114] The initial hundred-to-one disparity grew out of public hysteria.[115] But subsequent evidence has established that crack cocaine is "no more addictive than powder cocaine," the two drugs have "indistinguishable pharmacological effects," and those taking crack cocaine "are no more likely to have violent reactions than those who use powder cocaine."[116] Although the disparity has since been reduced to eighteen-to-one, there was never any serious effort by Congress to empirically study the purported differences between crack and powder cocaine or to otherwise justify any continued disparity.[117] The Supreme Court also said as much in *Kimbrough v. United States*,[118] finding that the Commission "did not take account of empirical data and national experience" when it formulated the crack and powder cocaine Guidelines.[119] *Kimbrough* therefore authorized sentencing courts to conclude that the crack Guidelines "yield[] a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[120]

Fourth and finally, eliminating the crack/powder disparity does not pose a risk to public safety. Crack cocaine cases are relatively rare, making up just 4.6% of all federal drug trafficking cases sentenced in 2023.[121] Moreover, people released early due to the retroactive application of the First Step Act's crack/powder disparity reduction had a far lower recidivism rate than people released overall that same year.[122]

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[112] U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.D-14 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf

[113] *Id.* fig.D-12.

[114] *See* Barkow, *supra* note 11, at 215 ("Instead of researching the issue or seeking expert guidance . . . Congress set policy based on nothing more than its assumptions drawn from media accounts.").

[115] *Id.*

[116] *Id.* at 215–16; *see also* Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580, 1581–83 (1996); Craig Reinarman, *5 Myths About That Demon Crack*, WASH. POST (Oct. 14, 2007), https://www.washingtonpost.com/archive/opinions/2007/10/14/5-myths-about-that-demon-crack/cbe1dfaa-5a31-4b52-931e-26f2f0cef618/.

[117] Barkow, *supra* note 11, at 216.

[118] 552 U.S. 85 (2007).

[119] *Id.* at 109.

[120] *Id.* at 110; *see also* Spears v. United States, 555 U.S. 261, 264 (2009) ("*Kimbrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect.").

[121] *QuickFacts: Drug Trafficking Offenses*, U.S. SENT'G COMM'N (May 2024), https://www.ussc.gov/research/quick-facts/drug-trafficking.

[122] *See* Jessie Brenner & Stephanie Wylie, *Analyzing the First Step Act's Impact on Criminal Justice*, BRENNAN CTR. FOR JUST. (Aug. 20, 2024), https://www.brennancenter.org/our-work/analysisopinion/analyzing-first-step-acts-impact-criminal-justice (showing that recidivism rates for this population were 9.7%, as compared with 46% for all people released from the BOP in 2018); *see also* U.S. SENT'G COMM'N, 2011 FAIR SENTENCING ACT, *supra* note 49, at 3 ("The recidivism rates were virtually identical

III. The Commission Should Not Adopt Any of the Options in Part C of the Drug Offense Amendment

Part C of the Drug Offense amendment offers three options to revise § 2D1.1(b)(13), which is a specific offense characteristic for fentanyl. Option 1 contains "no *mens rea* requirement."[123] Option 2 lowers the *mens rea* requirement from "knowingly" to either "knowledge or reason to believe," or "knowledge of or reckless disregard."[124] Option 3 combines the prior two options into one "tiered" approach.[125]

The Commission proposes revising § 2D1.1(b)(13) because commenters say that "courts rarely apply this enhancement,"[126] and further contend that "the enhancement is vague and has led to disagreement on when it should be applied."[127]

We oppose all three options. Options 1 and 3 impose punishment disproportionate to culpability, and all three options are unlikely to resolve commenters' concerns about vagueness and application disagreements. Instead of adopting one of the options, the Commission should add an application note that gives examples of proper applications of § 2D1.1(b)(13).

This Part proceeds in five Sections. First, it argues against Options 1 and 3 because they lack a *mens rea* requirement. Second, it explains that none of the options resolve commenters' concerns. Third, it proposes an application note as an alternative to the Commission's three options. Fourth, it explains that more research is needed on § 2D1.1(b)(13) because it is not evident that its rare application is a problem. Fifth and finally, it reiterates our responses to the Commission's issues for comment.

A. We Oppose Options 1 and 3 Because They Lack a *Mens Rea* Requirement, Which Is an Indispensable Feature of Just Sentencing

We oppose Options 1 and 3 because it is vital that the Commission retain the *mens rea* requirement in §2D1.1(b)(13). Getting rid of the *mens rea* requirement is not "appropriate to address this harm and the culpability of the defendants"[128] because, as Judge Jack Weinstein explained over thirty years ago, "[m]ens rea . . . is crucial in linking punishment to individual

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for offenders who were released early through retroactive application of the [2011] FSA Guideline Amendment and offenders who had served their full sentences before the FSA guideline reduction retroactively took effect."); U.S. SENT'G COMM'N, DRUGS MINUS TWO, *supra* note 49, at 6 (similarly finding no increase in recidivism rates for those whose sentences were reduced based on the 2014 "drugs minus two" Guideline amendment); U.S. SENT'G COMM'N, CRACK COCAINE AMENDMENT, *supra* note 49, at 3 (similarly finding no increase in recidivism rates for those whose sentences were reduced based on the 2007 crack cocaine amendment).

[123] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 104.

[124] *Id*. at 105–06.

[125] *See id*. 104–06.

[126] *Id*. at 104.

[127] *Id*.

[128] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 107.

culpability."[129] The Supreme Court concurs, and has recognized that *mens rea* is critical at sentencing.[130] As the Court recently explained: "our criminal law seeks to punish the 'vicious will.' With few exceptions, 'wrongdoing must be conscious to be criminal.'"[131] The Commission has likewise recognized the importance of a *mens rea* requirement with § 2D1.1(b)(13) itself.[132] Even the DOJ implicitly acknowledged the importance of a *mens rea* requirement with § 2D1.1(b)(13).[133] In response to similar issues for comment in 2023, the DOJ advocated for a rebuttable presumption of knowledge.[134] This is a far cry from no *mens rea* standard.

Judge Weinstein's famous illustration of the importance of a *mens rea* requirement applies with full force to § 2D1.1(b)(13). Judge Weinstein asked the reader to imagine a college student who is asked by her friend to bring a package to a mutual friend.[135] The college student asks what is in the package and the friend replies, "[A] couple of joints."[136] This is a lie. There is actually "more than a kilogram of cocaine in the box," which the police discover during a traffic stop.[137] The college student is charged with possession with intent to distribute and even though the college student's intent related "to two marijuana cigarettes . . . the government contends that she should be punished for transporting a kilogram of cocaine."[138] Now imagine in 2025 that another college student is asked by their friend to bring a mutual friend a package. The college student asks what is in the package and the friend replies, "It is Adderall." This is a lie. There is actually a mixture containing fentanyl, which the police discover during a traffic stop. Under Options 1 and 3, the college student will receive at least a 2-level upward adjustment because the offense "involved representing or marketing a mixture or substance containing fentanyl . . . as

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[129] Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G REP. 121, 121 (1994).
[130] *See id.*
[131] Ruan v. United States, 597 U.S. 450, 457 (2022) (quoting Morissette v. United States, 342 U.S. 246, 251 (1952) and Elonis v. United States, 575 U.S. 723, 734 (2015)); *see also* Enmund v. Florida, 458 U.S. 782, 798 (1982) ("It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968))); *id.* at 800 ("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability.'" (alteration in original) (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975))); *Morissette*, 342 U.S. at 250–51:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. . . . A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

[132] *See* U.S. SENT'G COMM'N, FENTANYL AND FENTANYL ANALOGUES: FEDERAL TRENDS AND TRAFFICKING PATTERNS 13 (2021) [hereinafter U.S. SENT'G COMM'N, FENTANYL REPORT] ("The specific offense characteristic includes a *mens rea* requirement to ensure that only the most culpable offenders are subject to these increased penalties.").
[133] *See* U.S. Dep't of Just., Comment Letter on Sentencing Guidelines for United States Courts 50 (Feb. 27, 2023).
[134] *Id.*
[135] Weinstein & Bernstein, *supra* note 129, at 122.
[136] *Id.*
[137] *Id.*
[138] *Id.*

any other substance."[139] This upward adjustment is disproportionate to the limited culpability of by the college student.[140]

In sum, to prevent imposing punishment grossly disproportionate to defendants' culpability, the Commission should retain the *mens rea* requirement in § 2D1.1(b)(13) and reject Options 1 and 3.

B. The Commission's Three Options Do Not Resolve Commenters' Concerns

None of the Commission's three options are "appropriate to address the concerns raised by commenters."[141] According to the Commission, commenters are concerned that (1) courts rarely apply the enhancement, (2) the enhancement is vague, and (3) people disagree on when to apply the enhancement.[142] None of the three options will resolve these concerns.

1. Options 1, 2, and 3 are unlikely to result in a notable increase in the application of § 2D1.1(b)(13) because the data and case law establish that the *mens rea* requirement is not limiting the application of that Guideline.

Options 1, 2, and 3 seek to increase the application of § 2D1.1(b)(13) by eliminating or lowering the existing *mens rea* requirement, but this strategy is misguided. The contention that "subsection (b)(13) is applied so infrequently in part because the current enhancement requires the government to demonstrate actual knowledge that the substance contains fentanyl or a fentanyl analogue" is simply unsupported by the empirical evidence and case law.[143]

The pool of possible people that escape the crosshairs of § 2D1.1(b)(13) because of the *mens rea* requirement is very small, as demonstrated empirically by the Commission's recent fentanyl report. Section 2D1.1(b)(13) currently requires the government to prove that the defendant committed the act "knowingly."[144] The Commission's own data shows that the government almost never only fails to meet this burden. In its 2021 report, the Commission took defendants at their word that they did not know that the substance contained fentanyl or fentanyl analogue, "even if the declaration appeared deceitful," but nonetheless concluded that only a small number did not have the requisite *mens rea*: "[f]ifty-two fentanyl offenders (5.9%) and ten fentanyl analogue offenders (4.3%) sold the drug directly to a consumer as another drug without knowing the substance contained fentanyl or a fentanyl analogue."[145] This finding alone should doom Options 1, 2, and 3. Notably, the dataset of the handful of people who did not meet the *mens rea* requirement was as inclusive as possible, since it incorporated declarations that "appeared deceitful" and that a court could reasonably discredit.

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[139] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 106.
[140] To the extent that the Commission believes that prosecutorial discretion can solve this problem, in the words of Judge Weinstein, "The government might not do this to your daughter, but it has done it to other people's daughters . . . ." Weinstein & Bernstein, *supra* note 129, at 122.
[141] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 3, at 107.
[142] *Id*. at 104.
[143] U.S. Dep't of Just., Comment Letter, *supra* note 133, at 51.
[144] *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(13).
[145] U.S. SENT'G COMM'N, FENTANYL REPORT, *supra* note 132, at 32 n.159.

The case law confirms what the Commission's report shows—proving *mens rea* under § 2D1.1(b)(13) is not a substantial roadblock to its application. In addition to a confession or admission, the government can meet its burden of establishing *mens rea* by simply introducing evidence about the defendant's actions, or the actions and testimony of others. Consider the recent example of *United States v. Wiley*, 122 F.4th 725 (8th Cir. 2024), in which the Eighth Circuit affirmed the application of the current § 2D1.1(b)(13) with little difficulty:

> Wiley advertised his drugs by several names—"perks," "perk 30s," and "perk 30"—without any reference to the fentanyl in them. After overdosing himself on similar pills, Wiley knew the pills contained fentanyl. The district court found that Wiley's overdose indicates he conspired to distribute pills that were not legitimate Percocet prescription pills. Several witnesses confirmed what Wiley knew. . . . By advertising the pills as "perks," the accepted name for prescription Percocet, with the knowledge that they were not, Wiley knowingly marketed a substance containing fentanyl as another substance.[146]

In another case, the court applied the enhancement based on the defendant's admission and because a witness told the defendant about an overdose.[147] Courts have also applied the enhancement based on as little as "a phone call made to . . . co-defendants during which the caller told the co-defendant . . . that the heroin he and [the defendant] were selling contained fentanyl."[148]

Courts have even applied the enhancement when the government argued that it *did not* apply.[149] The fact that a court can apply § 2D1.1(b)(13) when all parties oppose its application confirms that § 2D1.1(b)(13)'s *mens rea* requirement is not a significant roadblock and must be retained.

2. Options 1, 2, and 3 all fail to solve the commenters' vagueness concerns and disagreements over how to apply § 2D1.1(b)(13).

None of the three options resolve the vagueness concerns and application disagreements that the Commission argues justify this change. No stakeholder is confused about what the mental state of "knowingly" requires. Rather, the commenters' mistaken contention that the *mens rea* requirement limits the application of § 2D1.1(b)(13) is premised on the assumption that stakeholders understand what the mental state of "knowingly" requires. In other words, the three options fail to make § 2D1.1(b)(13) less vague, or easier to apply because it changes a part of the Guideline that no one is confused about.

There is only one way to resolve an application problem like this: add an application note with examples. Unlike the three options, an application note solves the problem because it explains the Guideline and thus resolves uncertainty.

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[146] United States v. Wiley, 122 F.4th 725, 731 (8th Cir. 2024).
[147] United States v. Marion, 648 F. Supp. 3d 1048, 1053 (N.D. Ind. 2022).
[148] United States v. Allen, No. 21-3900, 2022 WL 7980905, at *3 (6th Cir. Oct. 14, 2022).
[149] United States v. Simmonds, 62 F.4th 961, 966 (6th Cir. 2023).

C. Adding an Application Note Addresses Commenters' Concerns

Rather than adopt one of the three options, to address the concerns over vagueness and application disagreements, the Commission should instead add an application note that gives examples of proper applications of § 2D1.1(b)(13). A thoughtful application note would decrease ambiguity and disagreement by giving stakeholders examples of § 2D1.1(b)(13) in action, while still maintaining the *mens rea* requirement.

Specifically, we propose the following application note:

> Application of Subsection (b)(13).—Subsection (b)(13) does not require an admission that a defendant misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl. For example, subsection (b)(13)(A) would apply if the defendant tells a customer that they are selling marihuana but instead sells them marihuana laced with fentanyl, and, before the sale, the defendant themselves overdoses on the same product they are selling. In such a case, the overdose is evidence of knowledge. In contrast, subsection (b)(13)(A) would not apply if the defendant tells a customer that the heroin they are selling contains fentanyl. In such a case, even though knowledge is established, the defendant did not misrepresent the mixture containing fentanyl.

This application note solves the commenters' concerns by providing concrete guidance, without the harms of eliminating the *mens rea* requirement. We urge the Commission to adopt this application note or something similar and retain the *mens rea* requirement in § 2D1.1(b)(13).[150]

D. Additional Research Is Needed Because We Do Not Know If § 2D1.1(b)(13) Is Being Improperly Applied

More research is needed on the concern by commenters that courts rarely apply § 2D1.1(b)(13) because the Commission's data seemingly contradicts the commenters' claims. The number of § 2D1.1(b)(13) applications is actually increasing—undercutting the need for the proposed changes. The DOJ has claimed that "of 5,711 defendants who were sentenced for trafficking in fentanyl or fentanyl analogues between fiscal years 2019 and 2021, only 57 received the 4-level increase at (b)(13) for misrepresenting fentanyl as another substance."[151] However, in 2023 the Commission reported that the 4-level increase at § 2D1.1(b)(13) was applied 84 times.[152] And the Commission's Data Briefing suggests a further increase to at least

[150] If the Commission nonetheless decides to adopt one of the options, Option 2 is the best option because it retains a *mens rea* requirement, and as such better reflects culpability than Options 1 or 3.
[151] U.S. Dep't of Just., Comment Letter, *supra* note 133, at 50–51.
[152] *See* U.S. SENT'G COMM'N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: GUIDELINE CALCULATION BASED FISCAL YEAR 2023, at 58. The Commission's Data Briefing lists 70 offenders to which the enhancement was applied in 2023, with the difference appearing to relate to the Data Briefing only considering offenders with a primary drug type of fentanyl or fentanyl analogue. *See* U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 31, at 27–28.

94 applications in 2024.[153] That is a nearly 400% increase in per-year applications, demonstrating that—even without intervention from the Commission—§ 2D1.1(b)(13) is being applied more frequently.

More generally, the raw number of applications does not tell us whether § 2D1.1(b)(13) should be amended because "[n]umbers require comparisons to elicit meaning."[154] The appropriate comparison is the number of times that § 2D1.1(b)(13) is applied as compared to the number of times that § 2D1.1(b)(13) should have been applied.[155] And the only entity that can determine this information is the Commission, because it alone has access to all of the underlying data.

Therefore, instead of relying on anecdotes, the Commission should conduct a thorough study that examines every fentanyl presentence investigation and determines whether the commenters' concerns about the *mens rea* requirement are empirically well founded. The question that needs answering is: What percentage of the time did courts fail to apply the enhancement when the evidence supported applying it? Given that the Commission has prioritized "evidence-based approaches to offense and individual characteristics,"[156] without the answer to that question, the Commission should not abandon the Guidelines' *mens rea* requirement or make any other changes to the text of § 2D1.1(b)(13).

E. Responses to Specific Issues for Comment

Question 1 (does Part C address the concerns of commentators). As discussed above in Part III.B, none of the three options address the concerns raised by commenters.

Question 2 (does Part C address the harm and culpability of offenders). As discussed above in Part III.A, Option 1's and Option 3's elimination of the *mens rea* requirement is inappropriate because *mens rea* is a critical link to culpability in sentencing.

IV. The Commission Should Implement Part E and Clarify that In-Person Meetings Are Not Required for Safety Valve Relief

Part E's amendment provides necessary clarification that defendants need not submit to in-person debriefing by the government to qualify for a safety valve reduction under § 5C1.2. As the Commission rightly identified, commenters and practitioners have expressed concern that individuals often forego the safety valve benefit out of fears associated with meeting in person with the government.

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[153] *See* U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 31, at 27–28. As discussed in the prior footnote, this is likely an understatement, as the fentanyl misrepresentation enhancement has historically also been applied to offenders who did not have a primary drug type of fentanyl or fentanyl analog.
[154] THOMAS A. KING, THE NUMERATE LEADER: HOW TO PULL GAME-CHANGING INSIGHTS FROM STATISTICAL DATA 24 (2021).
[155] *See id.*
[156] Final Priorities for Amendment Cycle, 89 Fed. Reg. 66,176, 66,177 (Aug. 14, 2024).

In clarifying that individuals are not required to meet with the government in person to receive the safety valve benefit, the proposed amendment: (1) remedies misconceptions conflating the § 5C1.2 requirements with the § 5K1.1 requirements and aligns § 5C1.2 with the Commission's and Congress's intent in 18 U.S.C. § 3553(f); (2) remedies unfair geographic disparities; (3) acknowledges social and cultural barriers to disclosure while helping the government to obtain essential information about crimes and criminal enterprises; and (4) supports equal justice for individuals facing mandatory minimums.

A. Part E Remedies a Common Misconception that Improperly Conflates the § 5C1.2 Requirements with Those for § 5K1.1

Section 5C1.2 was intentionally created to be distinct from § 5K1.1, both with respect to the information that was required and the steps a defendant needed to take to obtain a safety valve reduction. Congress enacted § 3553(f) and the Commission consequently promulgated § 5C1.2 to address inequities created by the substantial assistance departure in § 5K1.1.

Historically, substantial assistance departures under § 5K1.1 led to a marked inequity. The government determined eligibility for substantial assistance departures, and courts considered granting this departure, primarily based on the "significance and usefulness" of the information a defendant provides and whether that information could lead to further arrests or prosecutions.[157] Consequently, individuals higher up in a criminal enterprise can exchange information for a substantial assistance departure, while individuals who play low-level functions generally lack that insider knowledge and therefore would not receive a departure.[158]

To address that inequity, Congress passed § 3553(f) and the Commission subsequently created § 5C1.2, which permits a judge to sentence below the mandatory minimum for a defendant who fully and truthfully provides information regarding their crimes to the government.[159] The substantial assistance departure and the safety valve reduction have distinct

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[157] U.S. SENT'G GUIDELINES MANUAL § 5K1.1(a)(1).

[158] *See* Gerald W. Heaney, *The Reality of Guideline Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 198–99 (1991):

> Because the availability of this departure turns on the defendant's access to, and willingness to disclose, information useful to law enforcement agents, the departure tends to benefit those most deeply involved in crime. Minor participants with limited knowledge of the crimes of others often may have no information that authorities do not already possess.

See also United States v. Arrington, 73 F.3d 144, 147 (7th Cir. 1996):

> Thus, under the old system, defendants who had more information to provide fared better, and these were often higher-level dealers whose greater involvement in criminal activity resulted in their having more information. "Mules," lower-level dealers, or defendants whose co-conspirators had already talked to the government often had no new or useful information to trade. Even if they told the authorities everything that they knew, they did not receive departures under § 3553(e) and often received longer sentences than other, more culpable defendants.

[159] *See* United States v. Montanez, 82 F.3d 520, 522 (1st Cir. 1996) (explaining that "Congress discovered that substantial assistance may commonly be available from highly culpable drug-ring organizers but often not from less culpable street dealers or 'mules' who merely transport drugs," and that § 3553(f) was enacted to address this issue and to "reward[] low level offenders who meet the other conditions specified

purposes and, therefore, distinct requirements. While § 5K1.2 substantial assistance departures were created to help prosecutors investigate and prosecute others, the § 5C1.2 safety valve provision was created to help low-level, nonviolent drug offenders with limited criminal histories avoid mandatory minimums. As a result, Congress and the Commission *intentionally* did not require in-person debriefing for § 5C1.2, even though it is required for § 5K1.1.[160]

Nonetheless, in federal courts throughout this country there are still pervasive misunderstandings surrounding § 5C1.2 and its requirements that materially prevent defendants from obtaining safety valve relief. Thankfully, this proposed amendment would remedy the misconception that conflates the requirements for § 5C1.2 with those for § 5K1.1.

B. Part E Codifies the Existing Practice of Many Courts and Remedies an Unfair Geographic Disparity

This amendment is needed because the application of § 5C1.2 is inconsistent and varies from courthouse to courthouse. In some district courts, in-person debriefing is not required to receive a safety valve reduction. In that sense, the proposed amendment codifies the existing practice in some courts. However, in numerous other courts, the U.S. Attorney's Office's (USAO) practice is to require defendants to engage in in-person debriefing to receive the reduction. This has created significant, unfair, and unequal geographic sentencing disparities across districts. These disparities are deepened by the strange disconnect between case law and on-the-ground practices: USAOs in some districts require in-person safety valve proffers, even though their courts of appeals have observed that such a practice is not mandated by statute or the Guidelines.

The amendment would codify some district courts' practice of not requiring in-person debriefing. This practice makes sense, as the text of § 5C1.2 does not require an in-person debriefing.[161] And, relying largely on the text, a number of courts of appeals have held that such a debriefing is not required for § 5C1.2 safety valve eligibility.[162] As a result, it may be the

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(*e.g.*, non-violence, little criminal history) and who truthfully provide all of the information and evidence they have, even if it does not prove useful").

[160] *See id.* ("Section 3553(f) could easily have required a debriefing; certainly that would have provided a brighter line than merely to require that the defendant 'truthfully provide [his information and evidence]' in some unspecified form. But the fact remains that Congress wrote the statute as it did."); United States v. Acosta-Olivas, 71 F.3d 375 (10th Cir. 1995) ("Section 5K1.1 concerning substantial assistance operates very differently from § 5C1.2.").

[161] *See* U.S. SENT'G GUIDELINES MANUAL § 5C1.2(a)(5), *see also* United States v. Tate, 630 F.3d 194, 200 (D.C. Cir. 2011) ("The plain text of the statute does not require a debriefing . . . .").

[162] *See, e.g.*, *Montanez*, 82 F.3d at 522:

> All that Congress said is that the defendant be found by the time of the sentencing to have "truthfully provided to the Government" all the information and evidence that he has. Nothing in the statute, nor in any legislative history drawn to our attention, specifies the form or place or manner of the disclosure.

See also Tate, 630 F.3d at 200–01 ("The plain text of the statute does not require a debriefing, i.e., a face-to-face interrogation with government prosecutors. That a proffer of information is written rather than oral is of no consequence because the safety-valve provision focuses on the completeness and truthfulness of the information provided by a defendant."); United States v. Altamirano-Quintero, 511 F.3d 1087,

common practice in some districts to do exactly what this proposed amendment describes. For example, anecdotal information obtained from Federal Public Defenders in the District of Arizona reveals that the USAO there will accept written debriefings as safety valve proffers and will sometimes even deem statements made during a Presentence Interview as satisfying § 5C1.2. In this sense, the Commission's proposed amendment merely reinforces what some districts already know and practice.

However, the misconception that § 5C1.2 requires in-person debriefing is particularly problematic because its application depends on the happenstance of the district where the defendant is prosecuted. Even within circuits where the court of appeals appears to have authorized written safety valve proffers,[163] certain USAOs systematically require the individual to submit to an in-person debriefing and oppose § 5C1.2 reductions in the absence of such a debriefing. Based on our own practice experience and anecdotal information obtained from Federal Public Defenders, some of the districts that regularly or always require in-person debriefings include the Northern District of Illinois (N.D. Ill.), the Southern District of New York (S.D.N.Y.), the Southern District of Iowa (S.D. Iowa), the Northern District of Iowa (N.D. Iowa), the Western District of Washington (W.D. Wash.), the Eastern District of Michigan (E.D. Mich.), and the District of Minnesota (D. Minn.). These districts essentially conflate § 5C1.2 with § 5K1.1, despite Congress's clear intent to distinguish between them.[164] And this is by no means an exhaustive list; the only districts we surveyed are those mentioned in this section.

Troublingly, a number of the districts that require in-person safety valve proffers are in Circuits that have ostensibly authorized written proffers.[165] This disjunction between the law as written and on-the-ground practices further supports the need for the proposed amendment, which will provide circuit-wide and nationwide clarity and consistency.

1092 n.7 (10th Cir. 2007) (explaining that § 3553(f) "does not specifically mention debriefing" nor does it "further prescribe how the defendant must convey this information to the government," such that "[t]here may be many ways that a defendant could provide the Government with information sufficient to satisfy § 3553(f)(5)"); United States v. Schreiber, 191 F.3d 103, 108 (2d Cir. 1999) ("A defendant may comply with the safety valve without ever submitting to a debriefing."); United States v. Mejia-Pimental, 477 F.3d 1100, 1107 n.12 (9th Cir. 2007) ("That the proffer was written and not oral is of no consequence, because the safety valve 'allows any provision of information in any context to suffice, so long as the defendant is truthful and complete.'" (quoting United States v. Real-Hernandez, 90 F.3d 356, 361 (9th Cir. 1996))); United States v. Ramirez, 94 F.3d 1095, 1100 (7th Cir. 1996) ("Nothing in the statute or its legislative history 'specifies the form or place or manner of the disclosure,' but truthful full disclosure there must be." (citation omitted) (quoting *Montanez*, 82 F.3d at 522)).

[163] This includes the First, Second, Seventh, Ninth, Tenth, and D.C. Circuits. *See supra* note 162.

[164] *See generally* George H. Newman, *Fighting for the Safety Valve Reduction (Without Cooperation)*, CHAMPION, Mar. 2009, at 24.

[165] For example, the USAO in the S.D.N.Y. requires in-person debriefing despite the Second Circuit's clear holding that "[a] defendant may comply with the safety valve without ever submitting to a debriefing," *Schreiber*, 191 F.3d at 108, and the USAO in the N.D. Ill. requires in-person debriefing despite the Seventh Circuit's interpretation that neither the statute nor the Guidelines mandate that practice, *Ramirez*, 94 F.3d at 1100.

For example, take the Northern District of Illinois, where the USAO appears to require in-person proffers despite permissive Seventh Circuit precedent.[166] In this district, I have never been able to receive a safety valve reduction for a client without taking them into the USAO for an in-person debriefing, and I have been litigating criminal cases in federal court in Chicago for the past twenty-three years (first as a Staff Attorney with the Federal Defender for six years and subsequently as a CJA panel attorney for the past seventeen years).

I have also obtained qualitative data from attorneys currently with the Chicago Federal Defender's office and on the CJA panel, as well as attorneys formerly with the Chicago USAO, which reveals that the USAO in our district requires in-person safety valve proffers. In fact, one Federal Defender explained that they are not aware of any case in our district where the government has accepted a written proffer in lieu of an oral, in-person statement (although some oral proffers were conducted over Zoom during and after the pandemic). A CJA panel attorney who has been practicing for nearly twenty-five years similarly stated: "I've never heard of a written statement being used. I'm sure the Government would strongly oppose that." Further, three former AUSAs from the N.D. Ill., including a former Chief of the Criminal Division, have confirmed that it has consistently been the office's practice to require in-person debriefing, with one stating, "Even if it is a small, simple case, the government will still want . . . the defendant [to] come in for an interview."

The proposed amendment will ensure that practices adhere more closely to the intent and text of the Guidelines, clarify the law for districts who are misusing § 5C1.2, and lead to greater uniformity in sentencing.[167] Under the current regime, a defendant in Chicago or New York is yoked to a mandatory minimum, even when they "truthfully provide[] the Government all information" as § 5C1.2 requires,[168] while a defendant in Arizona can meet the safety valve criteria without an in-person debriefing. Unwarranted, district-dependent disparities undermine principles of equal justice and basic fairness. Clarifying the meaning of § 5C1.2 will help remedy these disparities.

C. Part E Will Have Salutary Systemic Impacts by Encouraging More Defendants to Come Forward and Provide Prosecutors with Information About Ongoing Crimes and Criminal Enterprises

Requiring in-person debriefing to obtain safety valve relief is problematic because it ignores social and cultural barriers to disclosure. When a defendant engages in an in-person debriefing with the government, others incarcerated at the same jail, members of that person's family or the community, and higher-ups in the drug organization often believe that the defendant is cooperating with the government or "snitching." The subtle difference between a cooperation proffer and a safety valve proffer is lost on laypeople, and that confusion both puts the defendant at risk and has a chilling effect, dissuading people from engaging in safety valve

[166] *See Ramirez*, 94 F.3d at 1100 ("Nothing in the statute or its legislative history 'specifies the form or place or manner of the disclosure' . . . ." (quoting *Montanez*, 82 F.3d at 522)).
[167] *See* 28 U.S.C. § 994(f) (instructing the Commission to promulgate Guidelines "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities").
[168] U.S. SENT'G GUIDELINES MANUAL § 5C1.2(a)(5).

proffers. This, in turn, not only deprives the person of the benefits of a safety valve reduction but also deprives the government of potentially valuable information.

Anti-snitching culture is pervasive and arises from both individual intimidation and community-wide intimidation of potential informants.[169] A DOJ-sponsored study found that 80% of respondents faced implicit threats to prevent them from snitching, 63% received explicit threats of violence, 53% faced actual physical violence, and 45% experienced property damage as a threat or as retribution.[170] An in-person debriefing thus exposes the defendant to very real risks of retaliation, and many defendants will forego the safety valve benefit out of fear for their lives and families if they are forced to debrief in person.

Moreover, from my own experience and from speaking with Defenders across the country, the USAO frequently expects defendants to name their supplier, insisting that such information is necessary to obtain a safety valve reduction. That is incredibly problematic, since identifying one's supplier can put a person at great risk and should rightly be seen as in the domain of § 5K1.1 cooperation, not safety valve reductions. This is not what Congress intended, nor is it what the Commission mandated when it wrote § 5C1.2.[171]

Part E's clear statement that an in-person debriefing is not required is therefore a win-win for defendants and the government. If individuals have the opportunity to fully and honestly share all of their information without fear of backlash for "snitching," USAOs will receive more information to help them achieve justice—whether for the particular crime charged or for ongoing crimes/criminal enterprises. The proposed amendment will help give defendants the opportunity to come clean while protecting them from retaliation and violence, and it will lead to prosecutors' offices receiving more information.

D. Part E Continues to Require Complete Truthfulness, Undercutting Any Concerns About the Proposal

The government has previously argued that anything less than an in-person debriefing will not meet § 5C1.2's truthfulness requirements.[172] However, if the government believes that a written statement is incomplete, the "government is perfectly free to point out the suspicious omissions at sentencing, and the district court is entitled to make a common sense judgment."[173] Thus, Part E of the proposed amendment will not reduce the truthfulness requirement for defendants, as the government has contended. Rather, it will expand the government's ability to obtain information[174] and will more clearly carry out the intent of Congress and the Commission.

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[169] MELANIE BANIA & SARAH HEATH, DON'T SNITCH: RESPONSES TO NEIGHBORHOOD INTIMIDATION (2016), https://www.crimepreventionottawa.ca/wp-content/uploads/2019/02/Don-t-snitch-responses-to-Neighbourhoods-Intimidation.pdf.

[170] POLICE EXEC. RSCH. F., THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE 14 (2009), https://portal.cops.usdoj.gov/resourcecenter/RIC/Publications/cops-p158-pub.pdf.

[171] *See supra* Part IV.A.

[172] *Montanez*, 82 F.3d at 523.

[173] *Id.*

[174] *See supra* Part IV.C.

E. Part E is Critical to Ensuring Equal Justice for Individuals Who Face Mandatory Minimums

Part E enables defendants to avoid the Cooperation Paradox. In addition to "snitching" culture chilling people from participating in in-person debriefings, the Cooperation Paradox also disadvantages less culpable parties. The Cooperation Paradox allows "[b]ig fish who are more culpable and have information about other criminal activity [to] avoid a mandatory minimum by collaborating in the prosecution of others" while "less culpable little fish are yoked with high mandatory minimums" because they often lack sufficient information to receive a § 5K1.1 substantial assistance departure.[175] This system leads to less culpable individuals receiving more severe penalties than those higher up in the drug trafficking operation who can offer information leading to more prosecutions.

The ability to depart from mandatory minimums is also essential for ensuring racial justice. Mandatory minimums exacerbate sentencing disparities along racial lines. Prosecutors bring mandatory minimum charges against Black people 65% more often than their white counterparts, leading to Black individuals serving longer sentences for the exact same crimes.[176] "Eliminating this charging disparity would 'reduce the . . . number of [B]lack men in federal prison by almost 11,000' and would result in a cost savings of over $230 million per year."[177] Given the existence of this charging disparity, Part E would further the Commission's mandate to reduce unwarranted sentencing disparities,[178] as a person's race should never result in them receiving a harsher sentence.

Safety valve relief is integral to remedying these sentencing disparities, and Part E provides necessary clarification about what a person must do to access this relief.

F. Responses to Specific Issues for Comment

Question 1 (clarifying that in-person meetings are not required for safety valve eligibility). The biggest concern of commenters and practitioners is that defendants often do not seek the safety valve for fear of being considered a "snitch." As discussed above, this proposal squarely addresses that concern by removing the widespread misunderstanding that § 5C1.2 requires an in-person meeting/debriefing to obtain a reduction.

V. Conclusion

The Commission's Proposed Drug Amendments are a positive step toward more just drug Guidelines, and we therefore advocate for their adoption (with some modifications). Part A's two subparts address the excesses of the current weight-based regime by reducing the outrageously long sentences at the top and creating a new low-level functions reduction for offenders at the bottom. Part B largely eliminates the unjustified purity distinction in methamphetamine

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[175] Alison Siegler, *End Mandatory Minimums*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums.
[176] *Id.*
[177] *Id.* (quoting M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1324, 1349, 1350 (2014)).
[178] *See* 28 U.S.C. § 994(f).

sentencing. And Part E's clarification of safety value eligibility will benefit both offenders and the government by facilitating the flow of more information to prosecutors. Our only substantial concerns are with the proposed changes to fentanyl sentencing contained in Part C, which undermine the critical role that *mens rea* plays in sentencing.

Thank you for considering these views on the Commission's Proposed Drug Amendments, all of which are submitted in our individual capacities. Please do not hesitate to reach out with any question or concerns at [redacted]

Sincerely,

Alison Siegler
Founding Director of the Federal Criminal Justice Clinic
Clinical Professor of Law

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Attachment:

NEW GUIDELINE: Federal Criminal Justice Clinic's Revised USSG § 2D1.1 (Dec. 15, 2024)

NEW GUIDELINE:
Federal Criminal Justice Clinic's Revised USSG § 2D1.1

§ 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) **10**, if the defendant is a Courier, Mule, or Employee/Worker (Function Category 1);[1]
(2) **15**, if the defendant is a Broker/Steerer or Street-Level Dealer (Function Category 2);
(3) **20**, if the defendant is a Manager/Supervisor or Wholesaler (Function Category 3);
(4) **25**, if the defendant is a High-Level Supplier/Importer, Organizer/Leader, or Grower/Manufacturer (Function Category 4);
(5) **26**, if death or serious bodily injury otherwise resulted from the use of the substance.[2]
(6) **32**, if serious bodily injury resulted from the use of the substance and the defendant distributed the substance knowing or having reason to know that it contained a lethal dose; or
(7) **38**, if death resulted from the use of the substance and the defendant distributed the substance knowing or having reason to know that it contained a lethal dose.

(b) Specific Offense Characteristics

(1) After considering the culpability factors listed in (b)(2);
  (A) if six or more culpability factors are present, or three to five culpability factors are present to a high degree, increase by **3** levels;
  (B) if three to five culpability factors are present, or two or more culpability factors are present to a high degree, increase by **2** levels; or
  (C) if one to two culpability factors are present, increase by **1** level.
(2) Culpability Factors
  (A) Amount of Personal Profit[3]

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[1] As discussed in the accompanying Proposal letter, the Base Offense Levels (BOLs) detailed in subsection (a)(1)–(4) are set based on pre-1984 sentencing practices, which unlike current sentencing practices are not anchored to the current Guidelines' excessive recommendations nor impacted by the Bail Reform Act's sentencing-enhancing effects. The Function Categories in this Guideline are drawn from and closely resemble prior categorizations created by the Commission. *See, e.g.*, U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 43–44 (2017) [hereinafter 2017 MANDATORY MINIMUM REPORT]; U.S. SENT'G COMM'N, *Mandatory Minimum Penalties for Drug Offenses*, *in* 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 149, 166–67 (2011) [hereinafter 2011 MANDATORY MINIMUM REPORT].

[2] The Base Offense Levels (BOLs) detailed in subsection (a)(5)–(7) are pulled from Professor Wroblewski's proposed revisions to § 2D1.1. *See* Jonathan J. Wroblewski, *A Better Federal Drug Guideline*, SENTENCING MATTERS (Oct. 14, 2024), https://sentencing.substack.com/p/a-better-federal-drug-guideline.

[3] This culpability factor is inspired Professor Mark Osler's work advocating for a profit-centered sentencing system, rather than one based on drug type and quantity. *See generally, e.g.*, Mark Osler, *The Weight*, FED. SENT'G REP. (forthcoming), https://ssrn.com/abstract=4958105. Profit is no harder to

i. Actual profit, as opposed to promised or speculative profit, should be utilized.
ii. This factor should be evaluated in comparison to the profits of other charged and uncharged members of the criminal enterprise.

(B) Drug Type/Quantity
i. This factor is inversely relevant to function (i.e., the involvement of a large quantity of drugs makes a High-Level Supplier/Importer more culpable than a Courier transporting the same drug quantity).
ii. Limited to the drug types and quantities known to the offender.
iii. Where there are unusually large drug amounts involved in the offense, the court may consider this factor present to a high degree.[4]

(C) Motive
i. This factor is not present if the offender is motivated by financial need, threats, fear, intimate family relationships, or addiction.[5]

(D) Duration
i. Sustained participation in a criminal enterprise is more culpable than one-off or limited participation.

(E) Ownership of Drugs

(F) Number of Other Participants
i. This factor is only applicable if the offense falls in Function Category 3 or 4.
ii. The court may consider this factor present to a high degree if there are more than ten charged co-defendants.

(G) If a dangerous weapon (including a firearm) was possessed.[6]

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calculate or estimate than quantity. Just as the government uses statements by cooperators to estimate and extrapolate drug weight far beyond the actual quantity of drugs recovered, the government could also introduce evidence of a defendant's purchases and compare that with the person's lawful sources of income. In addition, although drug "traffickers continue to primarily use cash," the U.S. Government Accountability Office recently reported to Congress that drug "traffickers are increasingly using online marketplaces and virtual currencies to connect with buyers and obscure the source of payments." *Trafficking: Use of Online Marketplaces and Virtual Currencies in Drug and Human Trafficking*, U.S. GOV'T ACCOUNTABILITY OFF. (Feb. 14, 2022), https://www.gao.gov/products/gao-22-105101. This provides yet another potential source of information about profits.

[4] This upward adjustment for offenses involving unusually large quantities of drugs is based on a proposal by the Commission's 1992 Drug/Role/Harmonization Working Group. *See Report of Drug/Role/Harmonization Working Group*, U.S. SENT'G COMM'N 66 (Nov. 10, 1992) [hereinafter *1992 Drug Working Group Report*], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/drugs/111992_Drugs_Role.pdf. Application note (2) contains more detail on what constitutes an unusually large amount.

[5] *See, e.g.*, § 2D1.1(b)(17) (authorizing an additional reduction if "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"). In addition, data show that drug addiction is common among federal drug offenders: 84% of people charged with federal drug offenses who were released pretrial were ordered to undergo drug treatment. *See* George E. Browne & Suzanne M. Strong, *Pretrial Release and Misconduct in Federal District Courts, Fiscal Years 2011–2018*, BUREAU OF JUST. STAT. 7 (Mar. 2022), https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf [https://perma.cc/C7CP-LYAN].

[6] This consideration is currently a standalone enhancement. *See* § 2D1.1(b)(1).

(H) If the defendant used or threatened violence.[7]
(I) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance.[8]

(c) Additional Considerations Under 18 U.S.C. § 3553(a)[9]

(1) Mitigating considerations, including but not limited to those listed in (c)(2), should be considered by the court when determining if a below-Guidelines sentence is sufficient, but not greater than necessary, to comply with the 18 U.S.C. § 3553(a) purposes of punishment.

(2) Some relevant mitigating considerations in drug cases (This is a non-exclusive list.):
(A) Profited proportionally less than others;[10]
(B) No or limited knowledge of drug type/quantity (mens rea);[11]
(C) Motivated by financial need, threats, fear, intimate family relationships, addiction or drug and alcohol problems, or mental health problems;[12]

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[7] This consideration is currently a standalone enhancement, *see* §2D1.1(b)(2), and was congressionally directed, *see* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 5, 124 Stat. 2372, 2373 (directing the Commission to "review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense").

[8] This consideration is currently a standalone enhancement, *see* § 2D1.1(b)(12), and was congressionally directed, *see* Fair Sentencing Act of 2010, at § 6, 124 Stat. at 2373–74 (directing the Commission to "review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels" if the defendant was involved in bribery, maintained a drug establishment, or gets an aggravated role adjustment, and also his offense involved one or more listed "super-aggravating factors").

[9] This section uses the "additional considerations" language proposed by the Commission in its proposal to simplify the Guidelines. *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 124 (Dec. 26, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf. In the alternative, this section of our proposed revision could be cut to account for the many 2024 Comments that suggested simplifying the Guidelines by not attempting to enumerate § 3553(a) considerations. *See, e.g.*, Fed. Pub. & Cmty. Defs., *Comment Letter on Proposed 2024 Amendments to the Federal Sentencing Guidelines: Simplification of Three-Step Process* 10–12 (Feb. 22, 2024), https://src.fd.org/sites/src/files/blog/2024-03/Simplification%20Comment%20FINAL.pdf.

[10] This mitigating consideration is based on aspects of the mitigating role adjustment, *see* § 3B1.2 application note 3(C)(v) ("the degree to which the defendant stood to benefit from the criminal activity"), and the aggravating role adjustment, *see* § 3B1.1 application note 4 ("[T]he court should consider . . . "the claimed right to a larger share of the fruits of the crime.").

[11] Couriers and mules often do not know what type of drug they are carrying, and such knowledge is not required for a conviction. *See, e.g.*, NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 12.1 (2024) ("It does not matter whether the defendant knew that the substance was [*specify controlled substance*]. It is sufficient that the defendant knew that it was some kind of a federally controlled substance."); United States v. Soto-Zungia, 837 F.3d 992, 1004–05 (9th Cir. 2016) ("[K]nowledge of the type and quantity of the drugs found in his car is not an element under 21 U.S.C. § 841.").

[12] *See, e.g.*, § 2D1.1(b)(17); *see also* Browne & Strong, *supra* note 5, at 7 (addiction is prevalent among federal drug offenders).

(D) One-off or limited participation, compared to others in same case/operation and/or nationally;
(E) Limited planning, compared to others in same case and/or nationally;[13]
(F) Less discretion or decision-making authority than others in same case and/or nationally;[14] and
(G) Mitigating personal characteristics, such as significant family responsibilities, health considerations, etc.

Application Notes:[15]

(1) Application of Subsection (a)(1)–(4).—
(A) The court must first determine the offender's function to determine the base offense level. In general, the most serious function an offender performed during an offense should be used. However, where an offender performed a more serious function in a one-off manner, the most serious function the offender commonly performed should instead be used.[16]
(B) The definition of each Function Category is detailed below.[17] If an offender does not clearly fit into one of the categories, they should be categorized into one of the four Function Categories based on their similarity to the functions listed below and significance to operation of the criminal enterprise.
i. Function Category 1:
I. Mule: Transports or carries drugs internally or on his or her person.
II. Courier: Transports or carries drugs using a vehicle or other equipment.
III. Employee/Worker: Performs ~~very~~ limited, low-level function in the offense (whether or not ongoing); includes running errands, answering the telephone, scouts, receiving packages, packaging the drugs, manual labor, acting as a lookout to provide early warnings ~~[during meetings,~~

[13] This mitigating consideration is based on aspects of the mitigating role adjustment, *see* § 3B1.2 application note 3(C)(ii), and the aggravating role adjustment, *see* § 3B1.1 application note 4 ("[T]he court should consider . . . the degree of participation in planning or organizing the offense.").
[14] This mitigating consideration is based on aspects of the mitigating role adjustment, *see* § 3B1.2 application note 3(C)(iii)–(iv), and the aggravating role adjustment, *see* § 3B1.1 application note 4 ("[T]he court should consider . . . the degree of control and authority exercised over others.").
[15] Of course, if there are any concerns about the authority of the application notes under *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019), the Commission could move language from the application notes into the text of the Guideline. The Commission has done this recently for other parts of the Guidelines. *See, e.g.*, *Amendments to the Sent'g Guidelines*, U.S. SENT'G COMM'N 96 (Apr. 27, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.
[16] This slightly modifies the methodology previously used by the Commission by adding a carveout for one-off offender conduct. *See* 2017 MANDATORY MINIMUM REPORT, *supra* note 1, at 43.
[17] The definitions within each of the four Function Categories are quoted directly from the 2011 MANDATORY MINIMUM REPORT, *supra* note 1, at 165–66, with the exception of the Employee/Worker definition, which comes from the 2017 MANDATORY MINIMUM REPORT, *supra* note 1, at 44. Any alterations from the original are indicated by red text and strikethroughs.

~~exchanges, or on/ offloading]~~, passengers in vehicles, or acting as a deckhand/crew member on vessel or aircraft used to transport large quantities of drugs.

ii. Function Category 2:
   I. Broker/Steerer: Arranges for drug sales by directing potential buyers to potential sellers.
   II. Street-Level Dealer: Distributes retail quantities ~~(less than one ounce)~~ directly to users.

iii. Function Category 3:
   I. Manager/Supervisor: Takes instruction from higher-level individual(s) and manages a significant portion of drug business or supervises at least ~~one~~ ten other coparticipants but has ~~limited~~ less authority than at least one other participant.
   II. Wholesaler: Sells or purchases significantly more than retail/user-level quantities ~~(more than one ounce) in a single transaction~~, ~~purchases two or more ounces in a single transaction,~~ or possesses significantly more than retail/user-level quantities ~~two ounces or more on a single occasion~~, or sells any amount to another dealer for resale.

iv. Function Category 4:
   I. Grower/Manufacturer: Cultivates or manufactures a controlled substance and is the principal owner of the drugs.
   II. Organizer/Leader: Organizes or leads a drug distribution organization; has the largest share of the profits; possesses the most decision-making authority.
   III. High-Level Supplier/Importer: Imports or supplies large quantities of drugs ~~(one kilogram or more)~~; is near the top of the distribution chain; has ownership interest in the drugs; usually supplies drugs to other drug distributors and generally does not deal in retail amounts.

(2) Application of Subsection (b)(2)(B).—In determining if the drug quantity/type culpability factor is present to a high degree, the following is a partial listing of unusually large drug amounts* by drug type:[18]

- At least 30 KG but less than 90 KG of Heroin;
- At least 150 KG but less than 450 KG of Cocaine or of Cocaine Base;[19]
- At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual);

[18] These quantities correspond to those triggering a BOL of 36 in the current Drug Quantity Table. This concept of enumerating unusually large quantities of drug amounts is based on a proposal by the 1992 Drug Working Group. *See 1992 Drug Working Group Report*, *supra* note 4, at 66.

[19] This is a change from the current Drug Quantity Table. To respond to extensive and long-standing criticism of the crack/powder disparity, this subsection equalizes the treatment of powder cocaine and cocaine base. *See, e.g.*, United States v. Lawrence, 1 F.4th 40, 42 (D.C. Cir. 2021) (noting "two decades of criticism" of the "crack-to-powder disparity").

- At least 15 KG but less than 45 KG of Methamphetamine, Methamphetamine (actual), or "Ice";[20]
- 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- 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.

  *Note that depending on the district or region, these quantities may overstate seriousness and might not be representative of quantities considered "usually large."

(3) [Retain Application Note 5]
(4) [Retain Application Note 6]
(5) [Retain Application Note 7]
(6) [Retain Application Note 8]
(7) [Retain Application Note 9]
(8) [Retain Application Note 10]
(9) Application of Subsection (b)(2)(G).—Definitions of "***firearm***" and "***dangerous weapon***" are found in the Commentary to § 1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(2)(G) 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,

[20] This is a change from the current Drug Quantity Table. This subsection responds to criticism by equalizing the treatment of methamphetamine mixtures, methamphetamine actual, and methamphetamine "Ice." *See, e.g.*, United States v. Robinson, No. 3:21-CR-14, 2022 WL 17904534, at *3 (S.D. Miss. Dec. 23, 2022) ("The DEA data show that most methamphetamine confiscated today is 'pure' regardless of whether the defendant is a kingpin or a low-level addict."); Edmond E. Chang, Comm. on Crim. Law of the Jud. Conf. of the U.S., *Feedback on Proposed 2024–2025 Priorities*, *in* U.S. SENT'G COMM'N, 2024-2025 AMENDMENT CYCLE: PUBLIC COMMENT ON PROPOSED PRIORITIES 10, 11 (July 15, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf ("[B]ecause practically all methamphetamine currently trafficked in the United States is highly pure, that correlation between purity and culpability or organizational rank has substantially diminished.").

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).[21]

(10) [Retain Application Note 17]

(11) [Retain Application Note 24]

(12) [Retain Application Note 25]

(13) [Retain Application Note 26]

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[21] This is a modified version of current § 2D1.1 application note 11(A) reflecting updated subsection numbering from our proposed guideline.

Memorandum

February 27, 2025

To: United States Sentencing Commission

From: Dr. Catherine Burke

Assistant Professor and Psychologist

Yale University School of Medicine

Law and Psychiatry Division

Thank you for the invitation to submit a comment on the proposed Sentencing Guidelines revisions. I am a forensic psychologist working in an addiction clinic in New Haven, Connecticut and provide direct care to individuals who have a history of addiction and are returning to the community after incarceration. The population that I serve every day will be impacted by these guidelines the most and, as such, I appreciate the opportunity to present my opinion on the matter. The following opinions are my own and not the opinions of my employer.

Researchers have consistently and repeatedly shown that addiction fundamentally alters the structure of the brain and is a chronic, relapsing disease.[1] It heavily impacts areas of the brain responsible for judgment, learning, and behavioral control, illuminating the primary involuntary undercurrents of the disorder from the long-believed "issue of free will."[2] As such, we have a much greater understanding of what addiction does to the brains and wiring of those who suffer from the disease and we have a greater understanding of how to treat it.

I can cite no evidence-based treatment that dictates the removal of care for someone suffering from addiction. Similar to how we would never withdraw treatment from someone with diabetes who is struggling with uncontrolled blood sugar, we should also extend that same level of care and compassion to someone struggling with addiction. Both conditions are medical disorders, but we treat them very differently. Violating someone who is in the midst of a relapse can prevent them from accessing the care that would help manage their condition when they need it the most. The triggers for use (disrupted familial relationships, financial troubles, employment difficulties, poor mental health) are exacerbated by incarceration, so people are often in a worse place when they are released after a violation than when they initially relapsed. Although there have been a very minute set of cases at my clinic in which the treatment team has recommended incarceration as the preferred plan, they are few and far between and only in cases where the patient was using fentanyl intravenously and refused all avenues of treatment. The first response to a relapse is nearly always to increase the level of support that the patient is receiving. The science has clearly demonstrated that relapses are a part of the addiction cycle, so increasing the level of care that

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[1] Leshner, A.I. (2003). Addiction is a brain disease, and it matters. *Focus, 1*(2), 190-193.

[2] Fowler, J.S., Volkow, N.D., Kassed, C.A., & Chang, L. (2007). Imaging the addicted human brain. Sci Pract Perspect 3(2), 4-16.

someone is receiving is nearly always the most appropriate next step in stabilizing someone so that they can remain in the community.

I collaborate closely with community supervisors through my work at the clinic and often consider them a helpful part of the treatment team. I see the utility of having a community supervisor daily in my work, but I also see that untrained and overworked supervisors can struggle to understand the utility of various interventions. When I have treated folks in the past who were on supervision and they were beginning to relapse, I saw a marked difference in their willingness to share their concerns and engage in treatment planning based on their assigned community supervisor. Patients who were paired with therapeutic supervisors and those who had received adequate training in addiction and mental health were much more open to discussing their concerns, as their supervisors were much more supportive of increases in care. Those that were paired with supervisors who were less familiar with the science of addiction were often more reluctant to discuss their triggers and relapses, as they were afraid that they would be reincarcerated if they revealed that they were struggling. I have found that the ability to discuss potential lapses and treatment planning hugely beneficial to support a much more successful outcome. Patients who were afraid of a punitive response by their supervisors did not benefit from being able to treatment plan, safety plan, and engage in relapse prevention planning around the specific triggers that they were experiencing, leaving them significantly more vulnerable to relapse.

For example, take “Jane,” a young single mother who was placed on community supervisory release after incarceration for drug possession. She has been working with the Department of Children and Family Services for the four months since her release trying to regain custody of her children. Jane has been working full time and has been engaging in treatment, but recently has been having thoughts of relapse. The stress of re-entering the community, rebuilding the things that she lost when she was incarcerated (car, apartment, custody of her children, familial relationships), maintaining compliance with her community supervision, and overwhelming mental health symptoms has led to a relapse on cocaine. Jane’s community supervisor has been extensively educated on the brain science of addiction and, as such, immediately recognized the need for a transition to care. He and I worked closely together to transition Jane to a residential treatment program so that she could receive the care that she needed. After completing residential, she was stepped down to more intensive outpatient services, and ultimately returned to me. Despite her relapse, Jane did not lose her housing and maintained visitation with her children. Had she been assigned to an officer who was less knowledgeable about addiction, she may have been immediately violated, exacerbating the stressors that led to her relapse in the first place.

Much like you and me, all of my patients have unique risk and protective factors. Some folks have incredibly supportive families and that support is so great that it transcends their risk factors and enables them to remain in the community. Other folks have such significant and profound trauma histories that it takes months to engage them in treatment before they are even ready to trust me enough to work on relapse prevention planning. A one size fits all approach to supervision is misaligned with what we know about the heterogeneity of addiction, risk and

protective factors, and individual characteristics. An individual approach to supervision, if supervision is deemed necessary, will unburden the system from having to manage an unnecessarily high load of supervisees and allow supervisors to target resources to those that are most in need of services.

Some patients thrive under supervision and it allows them to return to the community while still benefiting from the structure and oversight of the court. However, other patients become almost paralyzed with fear of reincarceration, inhibiting them from truly engaging in treatment. Others have made such significant changes while they were incarcerated that I wonder why they are on a caseload for a supervisor at all.

The sentencing guidelines regarding supervised release have not been updated in decades. In that time, the field has developed and validated numerous risk assessments and have made significant progress toward tailoring plans to successfully manage risk. I see that supervisors are overburdened and tasked with managing large caseloads. Resources are not increasing with the caseloads, so supervisors are tasked with stretching means further to accommodate their supervisees who are struggling. A better allocation of resources would be to target those that are truly in need of support and structure, allowing community supervisors to reduce their burden and allowing low-risk folks to be released to their communities without the added stress of unnecessary supervision.

Acknowledging the many decades of scientific research on addiction will enable judges and community supervisors to make more evidence-based recommendations and interventions. Recognizing addiction as a disease instead of as a moral failing will help all parties involved move toward a common goal: reducing recidivism and making our communities safer for all of us.

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3 March 2024

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Methamphetamine Guideline Amendments

Dear Judge Reeves:

My name is Lex Coleman. We met at the Fourth Circuit appellate seminar this past December in Richmond, where we briefly got to connect the dots between Como and Yazoo City after your presentation. While I am the Senior Litigator for the Office of the Federal Public Defender for the Southern District of West Virginia, this comment is being submitted as my own and is not intended to reflect, contradict or detract from any positions of the Federal Public Defender Organization as a whole, Sentencing Resource Counsel, my own defender office, or any policies established by my federal defender.

I have been a federal public defender since 2006, and previously was on the CJA panel for the Eastern District of Tennessee from 1998 to 2006. I was also on the CJA panels for the Sixth Circuit and Eleventh Circuit Courts of Appeals and the Northern District of Georgia before assuming my current duty station in Charleston. I previously testified before this Commission in 2015.

Over the past eighteen years my federal criminal defense practice has primarily involved drugs and guns. My first federal jury trials were domestic methamphetamine production cases, and I have represented hundreds of indigent defendants charged with various federal methamphetamine offenses. Through those representations I have watched methamphetamine-related criminal conduct go from

the operation of crude domestic "red P" labs cooking down Sudafed from Walmart, to transitory shake and bake backpack "labs", to what is now a commercial level production apparatus existing entirely outside the United States. I have simultaneously watched very low purity domestic backroom methamphetamine sold at very high prices evolve into widely distributed 98% pure crystal methamphetamine sold for less than $ 20 an eight-ball. The surge in purity and quantity being trafficked into the United States has been unprecedented – particularly over the past four years. Our communities have been completely inundated by what I call the "third opium war" with foreign sovereign actors flooding fentanyl and incredibly cheap methamphetamine through our open southern border. Lacking any meaningful transaction costs or other barriers to entry into the United States – Chinese interests and Mexican cartels have made what used to be low purity, street level gram transactions into sales conducted in half ounce, ounce, and even multiple pound quantities[1] – even in the rural hollows of West Virginia. This is not just my personal anecdotal observation, but what has already been fully acknowledged by the DEA.[2] And all this has transpired despite Congress and this Commission imposing more and more serious penalties for methamphetamine offenses from 1998 to the present. Even in the face of extremely harsh punishments, methamphetamine demand, supply, and criminal conduct has remained resiliently stable for over twenty-five years.

Clearly, existing sentencing policy is not working. What needs to happen instead, is to adopt a simpler and more rational structure to address methamphetamine offenses. The proposed amendments are a very good step in that direction. I encourage, if not implore, that the Commission adopt both changes suggested by Part B of your January 24, 2025 proposed amendments – which is to dispense with any further disparity between any forms of methamphetamine: ice, "actual" or mixture and continue to address all forms of methamphetamine at the mixture conversion ratio of 2 kilograms. In support, I simply repeat the arguments I now make in every methamphetamine sentencing memorandum since reading Judge Mark Bennett's opinion in *United States v. Hayes*, 948 F. Supp.2d 1009 (N.D. Iowa 2013).

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[1] Josh White, *1 ton of meth, hidden in truckload of celery, seized from farmers market, DEA says*, WSAZ (Aug.13, 2024) https://www.wsaz.com/2024/08/13/1-ton-meth-hidden-truckload-celery-seized-farmers-market-dea-says/ (last viewed March 1, 2025).

[2] United States Drug Enforcement Administration, National Drug Threat Assessment 2024 (May 24, 2024), https://www.dea.gov/documents/2024/2024-05/2024-05-24/national-drug-threat-assessment-2024 (last viewed March 1, 2024).

As the Commissioners are well aware, through the Sentencing Reform Act of 1984, Congress not only created this Commission – it expressly charged it with promulgating sentencing guidelines "*which assure the meeting of the purposes of sentencing as set forth in"* 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. §§ 991(b)(1)(A) & 994(a)(1), (a)(2), (f) & (g). The Supreme Court has recognized that Congress established the Commission to formulate and constantly refine national sentencing standards. *Kimbrough v. United States*, 552 U.S. 85, 109, 128 S. Ct. 558, 575 (2007). In this context – "the Commission is intended to fill an important institutional role: it has the capacity courts lack to base its determinations on empirical data and national experience, guided by professional staff with appropriate expertise." *Id.*

As you also already know, the Supreme Court has found that the Commission did not fulfill its institutional role, using empirical data and national experience, to enact U.S.S.G. § 2D1.1. *See Kimbrough, supra*, 552 U.S. at 109, 128 S. Ct., at 575; *Spears v. United States*, 555 U.S. 261, 264-66, 268, 129 S. Ct. 840, 843-45 (2009). While through the Fair Sentencing Act of 2010, Congress in part corrected its own and the Commission's past approach to crack cocaine sentencing, *see, e.g.,* 124 Stat. 2372 & *Dorsey v. United States*, 567 U.S. 260, 265-70; 132 S. Ct. 2321, 2327-2330 (2012), it did nothing for sentences involving other controlled substances like methamphetamine and fentanyl. Guidelines for other substances remain determined by gross quantities of drug type – supposedly tied to whether a given defendant was a serious or major drug trafficker under the Anti-Drug Abuse Act of 1986. While amended several times since 2010, the Commission has left the core of § 2D1.1 intact without any further consideration of actual defendant culpability or relative drug potency – for substances listed in the § 2D1.1(c) DQT, or in Application Note 8(D) DET / Converted Drug Weight Tables. At least until now, with the proposed methamphetamine amendments. Given Congress' directive, the guidelines' current treatment of "ice" and methamphetamine "actual" fails to effectively advance the purposes of sentencing under § 3553(a).

In 2021, the Federal Sentencing Reporter published my article *Crack 2.0: Federal Methamphetamine Sentencing Policy, the Crack/Meth Sentencing Disparity, and the Meth/Meth-Mixture Ratio – Why Drug Type, Quatity, and Purity Remain "Incredibly Poor Proxies" for Sentencing Culpability Under 21 U.S.C. § 841B) and U.S.S.G. § 2D1.1,* 34 Fed. Sen. R. 29 (Oct. 1, 2021). The annual federal defender amendment priorities letter referenced this piece for the past two years. I am attaching a copy for the Commission's review now, where it more fully goes into how purity is no longer a proxy for culpability as well as why the overarching emphasis on drug type, quantity and purity fails to advance the purposes of sentencing under 18 U.S.C. § 3553(a). All of the reasons detailed in that article wholly support the Commission's proposed amendments to remove both "ice" and meth "actual" from §

2D1.1, while retaining the meth mixture conversion ratio of 2 kilograms for all forms of methamphetamine.

Beyond the points covered in the article, several courts have varied from the Commission's meth actual advice for policy reasons. *See e.g. United States v. Robinson*, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022)(Reeves, J.); *United States v. Brittain,* ___ F. Supp. 3d ___ , 2022 WL 36902 (D. Idaho, Jan. 4, 2022) (Winmill, J.); *United States v. Carrillo*, ___ F. Supp. 3d ___, 2020 WL 885582 (E.D. Ca. Feb. 24, 2020) (Mueller, J.); *United States v. Johnson*, 379 F. Supp. 3d 1213 (M.D. Ala. 2019) (Thompson, J.); *United States v. Moreno*, 2019 WL 3557889, * 2-*4 (W.D. Va. Aug. 5, 2019)(Urbanski, J.); *United States v. Pereda*, 2019 WL 463027 (D. Col. Feb. 6, 2019) (Arguello, J.); *United States v. Bean*, 371 F. Supp. 3d 46, 51 (D.N.H. 2019) (McCafferty, J.); *United States v. Requena*, No.4:18-cr-175-BLW, 2019 WL 177932, *2 (D. Idaho Jan. 11, 2019)(Winmill, J.); *United States v. Hoover*, No. 4:17-cr-327-BLW, 2018 WL 5924500 (D. Idaho Nov. 13, 2018)(Winmill, J); *United States v. Ferguson*, No. Cr 17-204 (JRT/BRT), 2018 WL 3682509, *3 (D. Minn. Aug. 2, 2018) (Tunheim, J.). *United States v. Nawanna*, 321 F. Supp. 3d 943, 957 (N.D. Iowa 2018), *United States v. Harry,* 313 F. Supp. 3d 969 (N.D. Iowa 2018) (Strand, J.); *United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249 1253 (D.N.M. 2017)(Brack, J.); *United States v. Hartle*, No. 4:16-cr-00233, 2017 WL 2608221 (D. Idaho, June 15, 2017)(Winmill CJ.); *United States v. Jennings*, No. 4:16-cr-00048-BLW, 2017 WL 2609038, at *2-*4 (D. Idaho, June 15, 2017)(Winmill, CJ).

Beyond disagreements over to what extent methamphetamine purity is a valid proxy for criminal culpability, the existing methamphetamine disparity is also exacerbated due to the following on-the-ground circumstances practically influencing local federal prosecutions:

> Lack of uniformity in purity testing (lack of legal significance; limited lab resources);
>
> Lack of purity testing due to discretionary reasons (i.e. charge and plea negotiation; proximity to the southwestern border);
>
> Differing local perceptions about the seriousness of the problem;
>
> Varying law enforcement priorities.

Only deleting "ice" from § 2D21.1, while maintaining a meth actual disparity will not affect any of these considerations, nor would adopting a multiplier for all forms of methamphetamine *other than* 2 kilograms.

During April, 2024, in the context of wanting to challenge JSIN methamphetamine data in a presentence report, I contacted the United States District Court Clerk to obtain Southern District of West Virginia methamphetamine case data for FY2019-FY2023. The Clerk subsequently provided an Excel spreadsheet of meth cases prosecuted from October 1, 2018 to April 6, 2024. As pertinent case data was not searchable in-house, the Clerk's office, or otherwise available from the Commission (at least not in a form I could access), I proceeded to manually pull each case on PACER, and organize the available public information to further analyze the number and distribution of meth cases by judge within our district, the quantity and purity of drugs involved in each case, what the Commission's advice was for each defendant, whether and what variance sentence was imposed, and to what extent any policy disagreement with the methamphetamine (actual)/"ice" conversion ratio was addressed by the court. This exercise involved examining charging instruments, plea agreements (particularly factual stipulations), sentencing memoranda, sentencing minutes and final judgments. With actual FPD cases, I was also able to further consult final PSRs and SORs.

While the complete case study will be published later this year, certain observations are pertinent now. The Southern District of West Virginia is comprised of twenty-three counties, distributed over four administrative divisions: Charleston, Huntington, Beckley, and Bluefield. Seven United States District Court judges sentenced defendants over the five-year case study period, two of which are senior status.

Over the past five fiscal years, methamphetamine cases made up between 42 and 48.5 percent of drug trafficking cases nationally. *See* Table 1. The Southern District of West Virginia's meth case load has been slightly above the nation average. *See* Table 2.

Table 1: National percentage of meth cases

FY	*Total cases*	*drug trafficking cases*	*DT% of total*	*Meth % of DT*
2024*	61,137	18,057	29.5	45.8
2023**	64,124	19,007	29.6	47.3
2022	64,142	19,998	31.1	48.5
2021	57,287	17,608	30.7	48.0
2020	64,565	16,390	25.4	45.7
2019	76,538	19,830	25.9	42.2

* United States Sentencing Commission, Fig. 11 Distribution of Primary Drug Type in Federal Drug Cases, 4th Quarter 2024 Preliminary Cumulative Data (October 1, 2023, through September 30, 2024).

** FY2019 through FY 2023: United States Sentencing Commission. WVS Statistical Information Packet, Fig.B, Distribution of Primary Drug Type in Federal Drug Cases; Table 1, Distribution of Federal Offenders by Type of Crime (drug trafficking only).

Table 2: SDWV percentage meth cases comparison*

FY	*Total cases*	*drug trafficking cases*	*DT %*	*Meth % of DT*
2024	230	*no other data available*		
2023	227	96	42.3	52.6
2022	269	136	50.6	51.5
2021	220	123	55.9	52.8
2020	262	142	54.2	44.4
2019	315	163	51.7	42.4

* United States Sentencing Commission – WVS Statistical Information Packet, Fig.B, Distribution of Primary Drug Type in Federal Drug Cases; Table 1, Distribution of Federal Offenders by Type of Crime (drug trafficking only).

The Southern District of West Virginia case study distributed the number of methamphetamine defendants and cases per judge as depicted in Table 3 below:

Table 3: Distribution of SDWV methamphetamine cases by Judge (October 1, 2018 to April 6, 2024).

ICB	61 defendants	37 cases
RCC	172 defendants	100 cases
JTC	68 defendants	52 cases
DAF	35 defendants	32 cases
JRG	80 defendants	45 cases
TEJ	31 defendants	14 cases
FWV	22 defendants	17 cases

In the meantime, from June 11, 2018 to March 14, 2024, five of my district's judges adopted a 1:1 meth actual to mixture ratios varying from the Commission's advice on policy grounds.[3] On July 7, 2024, the sixth judge adopted a 2:1 ratio for the

[3] Judge Robert C. Chambers was the first division of our district to adopt the 1:1 meth ratio in *United States v. Malcolm Hodges*, 2:18-cr-28 (3:17-cr-184)(June 11, 2018). Over the five fiscal year case study, he handled twice as many methamphetamine cases as any of our other six judges. Judge Joseph Goodwin followed suit in *United*

same reasons.[4] We now have an intra-district split with 6 out of 7 judges applying the meth mixture guideline or something close to it to all forms of methamphetamine based on policy disagreements with the "ice" / methamphetamine "actual" drug ratio. Consistent with this intra-district split, for FY2024, the Southern District of West Virginia had 125 drug trafficking cases with a 54.3% downward variance rate. *See* U.S.S.C., Table 9 Sentence Imposed Relative to the Guideline Range in Each Circuit and District (4th Qtr 2024 prelim cumulative data (October 1, 2023, through September 30, 2024). Where only one of seven of SDWV judges adhered to the Commission's advice – this has produced a sentencing disparity of 434 defendants in 265 cases receiving substantial downward variance sentences – while the remaining 35 defendants in 32 cases were given sentences based on the "ice" / meth "actual" guideline. If this is not what constitutes an unwarranted sentencing disparity under Section 3553(a), it is unclear what does.

The intra-district disparity has practical implications for all meth defendants prosecuted here. In divisions that follow the 1:1 ratio, AUSA's do not consistently incur the expense or delay to obtain drug purity testing. Putative plea offers come in earlier, even at the grand jury target stage, with guideline agreements including factual stipulations based on meth mixture - even when the actual drugs involved were obviously ice. I have separately had target letter appointments, where I have successfully convinced AUSAs – that if the case conduct at any time occurred in a division with a 1:1 judge – to indict them there and frame the indictment to stay there. Still other AUSAs will start a case charging only meth mixture 0 to 20 offenses – saving more serious charges and mandatory statutory exposures based on purity for a superseding indictment if the case appears to be going to trial.

States v. Jon Green, 2:18-cr-101 (Nov. 28, 2018). The next year, between February and April 2019, Judge Irene Berger also adopted the 1:1 meth actual to mixture ratio based on her policy disagreements with the meth guidelines. *See United States v. Maurice Flint*, 2:18-cr-92 (Feb. 13, 2019); *United States v. Jason Haddox*, 2:18-cr-129 (Apr. 03, 2019). Then Chief Judge Thomas Johnston later adopted the 1:1 ratio in *United States v. Anthony Webb*, 2:22-cr-123 (June 26, 2023), as did now Chief Judge Frank Volk in *United States v. Lorenzo Herbert*, 5:22-cr-193 (March 14, 2024).

[4] Senior Judge John T. Copenhaver, who previously had used a 5:1 meth actual to mixture ratio, came down to a 2:1 ratio based on further policy disagreements with the meth actual guideline in *United States v. Willie Sanders*, 2:23-cr-164 (July 7, 2024). This has left Senior Judge David Faber as the only continuing guideline adherent, given his belief "although the commission formula may be subject to criticism, it is for Congress or the Sentencing Commission - not the court – to change it." *United States v. Terrindez Bryant*, 2:19-cr-244 (Aug 16, 2021).

During May 2024, as an offshoot of my own district's meth case study, I separately surveyed the treatment of methamphetamine under state law for all fifty states and the District of Columbia. For ten states and the District of Columbia, only the drug type and/or schedule were relevant.[5] For thirty-eight other states – only drug type, sometimes also the schedule, and drug quantity were relevant.[6] This left

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[5] ***Alaska***: AS §§ 11.71.150 Schedule IIA(e)(2); 11,17.021; 11.17.030; 12.55.125; 12.55.155; **Arizona**: A.R.S. §§ 13-3401(6)(c)(xxxviii);13-3407; 13-3407.01; 13-3408; ***Connecticut***: C.G.S. §§ 21a-243; 21a-240(9); 21a-266; 21a-277; 21a-278; 21a-278a; 21a-279; ***Florida***: FL ST. §§ 893.03(2)(c)(5), Schedule II; 893.13(1)(a)(1) – whoever violates with respect to methamphetamine – commits second degree felony; 775.082(3)(d) imprisonment not exceeding 15 years; ***Maine***: M.R.S.A. §§ 1103, 1105-A, 1105-C, 1106, 1124, 1107-A(1)(A)(3)&(B)(7); ***Massachusetts*:** M.G.L. 94C §§ 2; 31(c)(2)(Class B); 32A; ***Nevada***: N.R.S. §§ 453.321; 193.130; 453.3351; 453.3385; ***New Mexico***: N.M.S. §§ 30-31-7. Schedule II(3)(c); 30-31-20; 30-31-22; 30-31-23; 31-18-15; ***Texas***: V.R.S. §§ 481.112; 481.102(6); ***Utah***: U.C.A. §§ 58-37-4(b)(iii)(B); 58-37-8; 58-37d-5; ***District of Columbia***: D.C. St. §§ 48-902.06.Schedule II(3)(B); 48-904.01.

[6] ***Alabama***: Alabama Code 1975 §§ 20-2-27, Schedule III (a)(1)(c); 13A-12-211(c)(6); 13A-12-212; 13A-12-217; 13A-12-218; 13A-12-231(11); ***Arkansas***: A.C.A. §§ 5-10-201(9); 5-64-419; 5-64-420; 5-64-422; 5-64-423; 5-64-440; 5-64-1102; ***Colorado***: C.R.S. §§ 18-18-204, Schedule II(c)(II);18-18-405; 18-1.3-401.5(7); ***Delaware***: 16 Del.C §§ 4716 Schedule II(d)(3); 4751C; ***Georgia***: O.C.G.A §§ 16-13-26, Sched. II (3)(B), 16-13-30 punishing based on aggregate weight, 16-5-73(a)(4); ***Hawaii***: H.R.S. §§ 712-1240.7; 712-1240.9; ***Idaho***: I.C. §§ 37-2707, Schedule II(d)(3); 37-2732; 37-2732B(a)(3) & (4); 37-2739B; ***Illinois***: Ch.720 I.L.C.S. Act. 646, §§ 55 (meth delivery); 56 (meth trafficking); ***Indiana***: I.C. §§ 35-48-4-1.1; 35-48-4-6.1; 35-48-4-1.2; ***Iowa***: I.C.A. §§ 124.206m Schedule II(4)(b); 124.401; 124.401E; 902.9; 902.8A; ***Kansas***: K.S.A. §§ 21-5705(d)(3); 21-5703(b)(3); 21-5706; 21-5707; 21-6805 (Sentencing grid); ***Kentucky***: K.R.S. §§ 218A-1412 (trafficking); 218A-1413 (trafficking 2nd deg.); 218A-1432 (manufacturing); ***Louisiana***: L.S.A.-R.S. §§ 964, 966, 967; 983; C.Cr.P. Art. 894.1; ***Maryland***: MD Code §§ 5-602, 5-403. Schedule II; 5-612; ***Michigan***: M.C.L. §§ 333.7401, 333.7401a; ***Minnesota***: M.S.A. §§ 152.02 Subd.3. Schedule II(d)(2); 152.021; 152.022; 152.023; 152.024; 152.025; ***Mississippi***: Miss. Code §§ 41-29-115. Schedule II(d)(3); 41-29-139; ***Missouri***: V.A.M.S. §§ 579.020; 579.055; 579 065 1.(8); 579.068 1.(8); ***Montana***: M.C. §§ 50-32-101(6); 50-32-202; 50-32-224(3)(d); 45-9-101; 45-9-102; 45-9-103; ***Nebraska***: Neb. Rev. St. §§ 28-405 Schedule II(c)(3); 28-457; 28-416; ***New Hampshire***: N.H. Rev. Stat. §§ 318-D:2; 318-B:26; 639-A:2; ***New Jersey***: N.J.S. §§ 2C35-5(b)(8) & (9); 2C:43-6; 2C:43-7; ***New York***: McKinney's Penal Law §§ 220.18; 220.21; 220.43; 220.73; 220.74; 220.75; ***North Carolina***: N.C.G.S.A. §§ 90-90(3)(c); 90-95(3b); 15A-1340.16D; ***North Dakota***: N.D.C.C. §§ 19-03.1-07. Schedule II 5.(c); 19-03.1-23(1)(a); 19-03.1-23.1; ***Ohio***: O.R.C. §§ 2925.01(D)(1)(g) & (II)),

just two states, and only under limited conditions, where drug type and *form* (not purity, but form) were relevant.[7] In no state did methamphetamine purity determine anything – either with respect to offense charging or sentencing.

What all this boils down to is that the current guideline "ice" and "actual" methamphetamine sentencing policy creates unwarranted sentencing disparities on multiple levels – intra-district, between districts, and between federal and state prosecutions for the same conduct involving the same substances. These widespread disparities completely undermine the perception of just punishment and with it the overall credibility of the criminal justice system and effectiveness of deterrence contemplated by Section 3553(a). Getting rid of only an enhanced penalty for "ice", while keeping the "actual" / "mixture" disparity will not solve the problem. Treating all forms of methamphetamine the same, on the other hand - particularly given the current drug market dynamics, introduces a level of uniformity and certainty that can be better understood by offending defendants, and thereby better advance the purposes of just punishment and effective deterrence.

Note, formally adopting the 1:1 ratio already being used by many district courts – would certainly facilitate guideline adherent's ability to join those judges in more consistent sentencing practices. Also, unless or until the Commission is going to proportionately restructure both the entire drug quantity table and drug equivalency tables (something that has not been proposed this amendment cycle) – it makes no sense to abandon the two kilogram multiplier for methamphetamine

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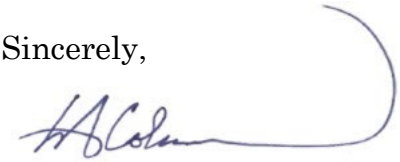
2925.03 (trafficking & penalties); 2925.04 (manufacturing); 2925.05 (funding drug trafficking); 2925.11 (possession); 3719.41; 2929.14 (prison terms); ***Oklahoma***: 63 Okl. St. Ann. §§ 2-402-407; 2-415(C)(4); ***Oregon***: O.R.S. §§ 475.894; 475.890; 475.886; 475.925; 475.930; ***Pennsylvania***: 35 P.S. §§ 780-113; 780-113.3; 18 P.S. § 7508; ***Rhode Island***: R.I. Gen. Laws 1956 §§ 21-28-2.08(c)(2); 21-28-4.01; 21-28-4.01.1; 21-28-4.01.2; ***South Carolina***: S.C. Code 1976 §§ 44-53-210(d)(2); 44-53-110(28); 44-53-370; 44-53-375; 44-53-392; ***South Dakota***: SDCL §§ 22-42-4.3; 22-42-2; ***Tennessee***: T.C.A. §§ 39-17-408.Schedule II(d)(2); 39-17-402; 39-17-434; 39-17-417; ***Vermont***: 18 V.S.A. §§ 4201(29)(F); 4234a; ***Washington***: R.C.W. §§ 69.50.206 Schedule II(d)(2); 69.50.401(1)(b) & (2)(b); 9.94A.518; 9.94A.533; ***West Virginia***: W.Va.Code §§ 60A-2-206 Schedule II(a)-(c); 60A-4-409(c)-(e); 60A-4-401(a)(i); ***Wisconsin***: W.S. §§ 961.16. Schedule II(5)(b); 961.41(1)(e), (1m)(e), (1r) & (3g)(g); 973.017(8)(a)(3) & (c); 961.49; ***Wyoming***: W.S. 1977 §§ 35-7-1016 Schedule II(d)(ii); 35-7-1031(a) & (c).

[7] ***California***: Cal. Health & S. Code §§ 11055 Schedule II (d)(2), 11377,11379, 11379.6, 11379.8 ; Cal. Pen. Code §§ 1170.74 (crystalline form as an aggravating factor); ***Virginia***: Va. Code §§ 18.2-248(d)(4)(distinguishing between meth and meth mixture); 18.2-248.03.

mixture. That conversion ratio is already familiar to the courts, stakeholders, and sentenced defendants – at least all of those sentenced over the past five years in my district under the 1:1 ratio. Should the resulting amendments be made retroactive, a different hybridized ratio would potentially require resentencing in every prior methamphetamine case going back to at least when Congress cut the triggering statutory quantities in half. Adopting the existing mixture ratio, however, would ensure what retroactive application if considered would be consistent with those courts which have already adopted at 1:1 practice, and as will the guidelines used with future sentences in federal methamphetamine cases. As the Commission has not proposed a complete overhaul of the DQT or DET, consistency with what is already familiar makes sense – while further harmonizing with Section 3553(a)'s parsimony provision. The methamphetamine mixture guideline has been, and will remain sufficient but no greater than necessary to ensure just punishment. Which also advances the purposes of sentencing, as mandated by the Sentencing Reform Act. As a consequence, my sincere hope is that the Commission will fully amend § 2D1.1 to remove all references to "ice" or "actual", while leaving the conversion ratio for all forms of methamphetamine at 2 kilograms.

Thank you for considering my comments and perspectives. Should you or any of the other Commissioners have any further questions – please do not hesitate to contact me.

Sincerely,



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cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
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Scott A. C. Meisler, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Crack 2.0: Federal Methamphetamine Sentencing Policy, the Crack/Meth Sentencing Disparity, and the Meth/Meth-Mixture Ratio—Why Drug Type, Quantity, and Purity Remain "Incredibly Poor Proxies" for Sentencing Culpability Under 21 U.S.C. § 841(b) and U.S.S.G. § 2D1.1.

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I. Introduction

I have worked as a federal public defender in the Southern District of West Virginia for fifteen years, following an eight-year stint as Criminal Justice Act panel attorney in the Eastern District of Tennessee. Over all that time, with *any* new federal felony drug trafficking case, the first questions to the United States have always been (and had to be) what drug was involved, in what quantity, and in what purity ("Have you sent off the lab report [or gotten it back] yet?"). This is because in every federal drug trafficking case, drug identity, quantity, and purity tend to exclusively drive the burdens and showings necessary for pretrial release under the Bail Reform Act (*see* 18 U.S.C. § 3142(e)(3)(A) & (f)(1)(C)), whether a client is subject to any mandatory minimum sentence (uncharged or not) under the Controlled Substances Act (*see* 21 U.S.C. § 841(b)(1)), and what the advisory sentencing guideline range will most likely be under U.S.S.G. § 2D1.1 if the new client is convicted on the pending charge(s) (or charges the United States could later bring).

Depending on drug type, quantity, and purity alone, the applicable statutory and guideline penalties vary widely. This is despite the fact that a given defendant/client in one case did exactly the same thing another defendant did in another case—but with a different controlled substance. This is also despite the fact that the elements[1] of the offense under 21 U.S.C. § 841(a)(1) don't even depend on the identity or quantity of the controlled substance involved—so long as *any* controlled substance is involved.[2] Of course, if the United States is pursuing specific mandatory minimum punishments based on a given drug and drug quantity, the specific drug type and quantity must be alleged in the indictment and constitute an additional element of the offense under § 841(a)(1) & (b)(1).[3]

As opposed to what a given defendant did that supposedly constituted a crime, whether they are actually guilty, and (if so) how those behaviors should best be addressed under 18 U.S.C. § 3553(a), the emphasis for purposes of federal drug sentencing policy—by virtue of the drug type/quantity/purity model—centers entirely on the disparate treatment of both different controlled substances *and* different forms of the same controlled substance (*see, e.g.*, 21 U.S.C. §§ 841(b)(1)(A)(ii),(iii),(vi) & (viii), and (b)(1)(B)(ii),(iii), (vi) & (viii)). More often than not, such substances are chemically similar (if not identical), they are certainly similar in terms of their effects on the human body, they present very similar addiction profiles, and they are similar in their drug market dynamics.[4] More often than not, the disparate treatment of similar controlled substances and different forms of the same controlled substance has been completely detached from pharmacological considerations, relative potency, actual relative clinical dangerousness, drug market dynamics, and ultimately actual criminal culpability. As a consequence, *for over thirty-five years*, thousands of American citizens have been subjected to unduly harsh—and, more importantly, *arbitrarily disparate*—sentences after committing essentially the same substantive drug trafficking offenses.

As of May 28, 2021, the Federal Bureau of Prisons held 152,832 inmates in custody. This was down markedly from the 177,214 that were in custody in FY2019.[5] Among that 2021 inmate population, however, 66,205 (or 46.3%) were imprisoned for drug offenses.[6] Whatever one's position on the future contours of federal drug sentencing policy, it seems undisputed that the current type/quantity/purity model has certainly contributed to the mass incarceration problem in the United States—even *after* the collective impacts of the Fair Sentencing Act, the Drugs Minus Two Amendment, *Johnson II*, the First Step Act, and over a year of COVID-19 compassionate release litigation.[7]

The glaring defects inherent in the core type/quantity/potency model can be illustrated by comparing historical federal sentencing policies for cocaine powder and cocaine base (or "crack") with corresponding federal sentencing policies for methamphetamine mixture, "actual" methamphetamine, and "ice." The criticisms, defects, and unfairness inherent to federal cocaine sentencing policy since 1986[8] have been just as manifest in methamphetamine

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sentencing policy since 1988. Federal methamphetamine sentencing policy *is* crack 2.0, and a frustrating continuation of the type/quantity/purity punishment model the Supreme Court rightly criticized in *Kimbrough*,[9] *Gall*,[10] and *Spears*.[11] This is very important, as the resulting sentencing disparities continue to undermine both citizen perceptions of fundamental fairness in federal sentencing and public confidence in the legitimacy of federal drug sentencing policy as a whole. It doesn't take much consideration of the 2020 summer riots across the United States to fully appreciate why this is a very bad thing that needs to be avoided.

The 1986 type/quantity/purity model no longer wages (to the extent it ever did) an effective "war on drugs" (unless getting slaughtered losing it has some quantitative or qualitative significance that defies perception, let alone comprehension). The stable to increasing annual number of federal drug trafficking offenses overall shows how harsher punishment has had little or no deterrent effect over time. The model also fails to meaningfully advance the purposes of federal sentencing enumerated by 18 U.S.C. § 3553(a)—which include reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, affording adequate deterrence, protecting the public, and avoiding unwarranted sentencing disparities—through sentences that are sufficient but no greater than necessary to meet those purposes. Post-pandemic, to the extent the United States government opts to continue any so-called "war," it is time to transition away from the inaccurate notion that drug type, quantity, and purity are effective measures of criminal culpability and just punishment.[12] This conclusion is hardly groundbreaking, given that perceptive jurists like Judge Nancy Gertner and Judge Michael Bennett acknowledged as much going back to at least 2008.

Enactment of the Fair Sentencing Act in 2010, after more than a generation of disproportionate sentencing for crack cocaine offenses, demonstrates how stepping back from a rigid type/quantity/purity model is warranted. Dramatically cutting crack sentences in 2010 did *not* produce the wave of new crack offenses many opponents of sentencing reform feared and anticipated. Yet, despite the very real-world experience developed between 1987 and 2010 regarding federal cocaine sentencing policy, Congress, the U.S. Sentencing Commission, and many federal courts have remained largely tone deaf in applying the lessons learned to offenses involving other drugs regulated by the Controlled Substances Act.

While *Booker* and *Spears* variances have thankfully ameliorated some of the impacts of quantity/purity-based sentencing guidelines, and the First Step Act's more recent expanded safety valve, 18 U.S.C. § 3553(f), has been mitigating other aspects of the mandatory minimum sentences in 21 U.S.C. § 841(b)(1), both have operated more as bandages stanching the bleeding from structural defects inherent to the type/quantity/purity model.[13] This has particularly been the case with methamphetamine offenses, which are currently punished 5.6× more seriously than offenses involving crack, and 10× more seriously for meth in its crystalline form ("ice") than as a methamphetamine hydrochloride mixture.

II. A Tale of Two Stimulants—Cocaine and Methamphetamine

Cocaine is a central nervous system (CNS) stimulant and local anesthetic derived from two species of coca plant indigenous to South America. Human ingestion of coca leaves and derived byproducts has been occurring since before recorded history. Cocaine binds to the dopamine, serotonin, and norepinephrine transport proteins in the human body and inhibits the reuptake of these substances into presynaptic neurons in the brain.[14] Cocaine is a DEA Schedule II controlled substance—having legitimate medical uses in the United States, but also having a high potential for abuse leading to severe psychological and physical dependence.[15]

Cocaine's most commonly abused forms consist of alkaloidal cocaine base or "crack" ($C_{17}H_{21}NO_4$), suitable for smoking; and hydrochloride powder ($C_{17}H_{22}CINO_4$), suitable for nasal or intravenous use.[16] Powder cocaine is water soluble; crack is not.[17] Crack may be readily manufactured from boiling powder cocaine in a solution of water and baking soda (sodium bicarbonate).[18]

According to *Goodman and Gilman's The Pharmacological Basis of Therapeutics*, cocaine in either alkaloidal or hydrochloride form produces a dose-dependent increase in heart rate and blood pressure accompanied by increased arousal, improved performance in tasks of vigilance and alertness, and a sense of self-confidence and well-being.[19] Higher doses produce euphoria of brief duration, often followed by a desire for more of the drug.[20] Repeated doses may lead to involuntary motor activity, stereotyped behavior, and paranoia. Irritability and increased risk of violence are found among heavy chronic users. The primary metabolic process for cocaine is a hydrolysis reaction—similar to that for aspirin. The half-life of cocaine in plasma is about fifty minutes, but inhalant/crack users typically want more cocaine after only ten to thirty minutes.[21] Beyond its potential for addiction, cocaine use creates risks of cardiac arrhythmia, myocardial ischemia, myocarditis, aortic dissection, cerebral vasoconstriction, and seizures. Cocaine has been reported to produce prolonged and intense orgasm if taken prior to intercourse; however, chronic cocaine use reduces sex drive. Chronic use has been associated with certain psychiatric disorders, including anxiety, depression, and psychosis.[22]

Methamphetamine ($C_{10}H_{15}N_1$), another CNS stimulant, was first synthesized from ephedrine in 1893 by Japanese chemist Nagayoshi Nagai.[23] It is a full agonist that strongly binds and activates the TAAR1 receptors in the brain to produce certain biological responses.[24] It exists as two enantiomers (i.e., molecules that are mirror images of one another; they are structurally identical but have opposite orientation): levo-methamphetamine and dextro-methamphetamine.

Methamphetamine consists of an equal mixture of levo-methamphetamine and dextro-methamphetamine. Dextro-methamphetamine is a much stronger CNS stimulant than levo-methamphetamine. Levo-methamphetamine is available as an over-the-counter drug for use as a nasal decongestant. Methamphetamine hydrochloride is also used as a second-line treatment for ADHD and as a short-term appetite suppressant for exogenous obesity (i.e., Desoxyn tablets, 5 mg methamphetamine hydrochloride; usual effective dosage for ADHD is 20–25 mg daily; for obesity, the usual effective dosage is one 5 mg tablet taken a half hour before each meal).[25]

Unlike opioids, which tend to decrease motility and depress respiration, methamphetamine actually has a mild bronchodilator and respiratory stimulant action. Methamphetamine is rapidly absorbed into the bloodstream through the gastrointestinal tract; it is then metabolized primarily in the liver.[26] The metabolic process for methamphetamine is similar to that for cocaine. Metabolic clearance represents >50% of total plasma clearance.[27] Because methamphetamine is highly lipophilic, it can move through the blood-brain barrier faster than other stimulants. Peak plasma concentrations are achieved in three to six hours after ingestion. Methamphetamine has a half-life of four to five hours; ~62% of an oral dose is eliminated in urine within the first twenty-four hours of use. About one-third of the intact drug is eliminated, the remainder consisting of metabolites.[28]

In low doses, methamphetamine can elevate mood; increase alertness, concentration, and energy; and reduce appetite. At higher doses, it can induce psychosis, breakdown of skeletal muscles, seizures, and bleeding in the brain. Unlike amphetamine, methamphetamine is directly neurotoxic to midbrain dopaminergic neurons. Methamphetamine elevates blood pressure, increases sexual desire, and reportedly enables users to engage in sexual activity continuously for several days. Methamphetamine has been designated as having a high psychological addiction liability, and like cocaine has been included in Schedule II by the DEA.[29]

Methamphetamine was first manufactured in crystalline form in 1919, by Nagai's student Akira Ogata. In terms of speed of onset, duration of psychoactive effects, and other pharmacokinetic properties, crystalline methamphetamine is no different than any other mixture or compound containing a detectable amount of methamphetamine. While higher purity can produce more intense initial effects, the mechanisms of metabolism, receptor attachment, receptor activation, and the resulting biological responses remain the same. Methamphetamine hydrochloride is still the crystalline form of methamphetamine, whether it is present as highly pure large crystals, physically crushed to produce smaller crystals, or further physically crushed to the point that it is easier to mix with cut or other substances (in water, in ethanol, or with dry components) with a diluted purity.

Again, both methamphetamine and cocaine, in all their various forms, are CNS stimulants. The physiological effects on the human body of both substances are very similar, and the dangers of addiction for both are also very similar.[30]

III. Historical Drug Market Dynamics for Cocaine and Methamphetamine

For over twenty years, the U.S. Drug Enforcement Administration (DEA) has published an annual "National Drug Threat Assessment Summary" detailing drug market dynamics and the nature of "threats" to the United States categorized by different controlled substances.[31] For over twenty years, through that annual summary, the DEA has depicted drug market dynamics for cocaine and methamphetamine as being similar if not the same, while acknowledging the controlling role that Mexico-based "criminal groups"—and, more recently, Mexican "transnational drug trafficking organizations"—have in the production, wholesale distribution, and retail distribution of cocaine and methamphetamine in the United States.[32] As early as 2002 and 2003, noting that crack was not transported in large quantities and that retail distributors converted powdered cocaine into crack near their market areas, the DEA characterized cocaine as "the greatest drug threat to the country." Methamphetamine, which originally was limited to California and adjacent western states due to the exclusive involvement of outlaw motorcycle gangs, was perceived as having less availability and demand than cocaine in the United States—particularly in the eastern half of the country.[33]

Mexican criminal groups took over cocaine distribution from Central America through Mexico into the United States from coca-producing countries like Columbia, Peru, and Bolivia over fifteen years ago. In the case of methamphetamine, producers in Mexico, Canada, and Southeast Asia were attributed with the bulk of nondomestic production, while Mexican criminal groups dominated clandestine production *inside* the United States. Although clandestine domestic production was also occurring, it never got close to the capacity or reach of foreign groups operating illicitly inside the United States.

In 2001–2002, methamphetamine found in the United States was priced between $20 and $200 per gram, with an average purity of 35.3%. By 2003, when crack was priced from $3 to $50 per rock (0.1 g to 0.5 g), retail cocaine purity was down, from 69% to 56%. Methamphetamine was still priced between $20 and $300 per gram. The DEA felt that the threat from methamphetamine would rise going forward because of increasing availability in the eastern United States, increasing purity levels, and increased availability of ice. The DEA nevertheless concluded that "despite the rising threat, methamphetamine is not likely to surpass the overall threat posed to the United States by powder cocaine and crack cocaine in the near term."[34]

By 2005, for the first time, DEA decided that the threat from methamphetamine to the United States "now exceeds any other drug." While powdered methamphetamine was still the predominant type available, ice or crystal methamphetamine availability was increasing. Illicit

methamphetamine production operations inside the United States started having difficulty obtaining bulk pseudoephedrine from Canada, while Mexico-based operations could easily buy bulk precursor materials from China. As the Mexico-based product became more available domestically, so did ice. Mexico-based sellers could realize higher profits on ice. Powder methamphetamine prices ranged from $270 to $5,000 per ounce, and from $20 to $300 per gram. Ice prices ranged from $500 to $3,100 per ounce, and from $60 to $700 per gram. Methamphetamine's average purity increased sharply, from 40% in 2001, to 43.8% in 2002, to 57.4% in 2003.[35]

By 2006, domestic methamphetamine production started materially decreasing, due to the decreased supplies of bulk pseudoephedrine in the United States. The drop in domestic production, however, was offset by increased production in Mexico. The DEA expected domestic production to continue decreasing sharply, because of state and national restrictions on the sale and use of precursors. Meth purity was up due to increasing availability of foreign-produced ice.[36]

By 2009, Mexican "Transnational Criminal Organizations" (TCOs) controlled both cocaine and methamphetamine distribution into and throughout the United States. Cocaine was priced, on average, at $164.91 per gram, while being 46.99% pure. Methamphetamine prices peaked at $286.39 per gram in 2007, at 40.4% average purity. By 2010, methamphetamine cost only $105.49 per gram, at up to >80% purity.[37]

Jumping forward, the most recent 2020 DEA National Drug Threat Assessment Summary still maintains that "Mexican TCOs are the greatest drug trafficking threat to the United States." After noting that illicit fentanyl is primarily responsible for fueling the ongoing opioid crisis, DEA has continued to acknowledge that most of the methamphetamine available in the United States is clandestinely produced in Mexico and smuggled "across the SWB" (southwest border). Methamphetamine purity and potency have remained very high, while prices have remained relatively low. For the first half of 2019, methamphetamine purity averaged 97.2%, while methamphetamine potency averaged 97.5%. Methamphetamine was priced at an average of $56 per gram. In the meantime, domestic lab seizures have fallen to the lowest level in nineteen years.[38] Cocaine supply and availability have also remained stable in the United States. Mexican TCOs have continued to obtain multiton shipments of powder cocaine from South American producers and traffickers, and then smuggle them over our southwest border as well. Mexican TCOs dominate cocaine transportation throughout the United States, but rely on local criminal groups for retail-level distribution. Crack production and distribution are handled mainly by local criminal groups and street gangs.[39]

The U.S.-Mexico border, which consists of forty-eight crossing points and 330 ports of entry, remains the primary source of illicit methamphetamine and cocaine entering the United States.[40] The border's total length is 1,954 miles, of which 1,254 miles are in Texas; it is the tenth-longest border between two countries in the world.[41] Methamphetamine seizures along the southwest border increased by 74%, from 39,268 kg in 2018 to 68,355 kg in 2019; cocaine seizures, by contrast, decreased slightly, from 10,662 kg in 2018 to 10,653 kg in 2019. By the end of June 2021, 768.4 pounds of fentanyl had already been seized at the border. Methamphetamine seizures also increased dramatically, from 852 pounds in May 2020 to 1,403 pounds in May 2021.[42] The United States' largely unsecured and physically porous southern border is providing parity of entry and parity of low transaction costs for foreign cocaine and methamphetamine traffickers.[43] As a consequence, the domestic supply of both drugs is stable, available, high, and cheap.

IV. Historical Congressional Sentencing Policies for Cocaine and Methamphetamine

Modern federal drug sentencing policy has been directed through the Controlled Substances Act (CSA) since 1970. Introduced in the House by West Virginia Second District Congressman Harley Orin Staggers, the CSA was signed into law by President Richard M. Nixon on October 27, 1970. With the exception of defendants maintaining organizational, management, or other leadership roles in continuing criminal enterprises,[44] the CSA eliminated *all* other mandatory minimum sentences for federal drug trafficking offenses.

As an extension of Congress's commerce power, the CSA created a closed system for manufacturing, distributing, dispensing, and possessing controlled substances in the United States. The Act established five schedules of "controlled substances"—categorized by whether or not they had a current legitimate medical use in treatment in the United States, as well as to what extent they had a potential for abuse and were physically or psychologically addictive. The schedules were to be updated and republished semiannually for the first two years after the CSA's enactment. Otherwise, except where control was required by international treaty on the effective date of the CSA, a drug could not be placed in any schedule without following procedural steps required by the Act, and only after express findings were made that fit the requirements of the schedule into which a given substance was to be placed.

Coca leaves, their isomers, and all derivatives having similar effects, as well as methamphetamine in an injectable liquid form, were all initially listed in Schedule II of the CSA. Schedule II consisted of substances having a currently accepted medical use in treatment in the United States, while having a *high* potential for abuse that could lead to psychological or physical dependence. All other forms of methamphetamine (and amphetamine), including their salts and isomers, were originally listed in Schedule III. Schedule III consisted of substances having a currently accepted medical use in treatment in the United States,

while having *a* potential for abuse that may lead to moderate or low physical dependence or high psychological dependence.[45]

President Nixon first declared the "war on drugs" during a press conference on June 17, 1971.[46] Effective less than a month later, on July 7, 1971, all forms of amphetamine and methamphetamine were moved to Schedule II through the new rule-making authority of the Bureau of Narcotics and Dangerous Drugs under the CSA.[47]

Pursuant to the CSA enforcement provision,[48] someone convicted of knowingly and intentionally manufacturing, distributing, dispensing, or possessing with the intent to do so *any* quantity of a controlled substance listed in Schedule I or II could be sentenced to no more than fifteen years imprisonment, fined up to $25,000, or both.[49] A special parole term of at least three years was also imposed following any term of imprisonment.[50] If revoked, the original term of imprisonment would be increased by the term of special parole, with no credit for any time previously spent on parole.[51]

Powder cocaine, crack cocaine, and methamphetamine possession, manufacturing, and trafficking offenses all remained subject to this statutory penalty structure—irrespective of quantity or purity—from 1971 until 1984. Then the Controlled Substances Penalties Amendments Act of 1984 added a new paragraph (A) to 21 U.S.C. § 841(b)(1) (effective October 12, 1984). Through that amendment, individuals convicted of knowingly and intentionally manufacturing, distributing, dispensing, or possessing with the intent to do so ≥100 g of a controlled substance in Schedule I or II—including a mixture containing a detectable amount of a narcotic drug *other than* a narcotic drug consisting of coca leaves or related substances—could be punished by zero to twenty years of imprisonment. The amendment further expressly punished persons convicted of manufacturing, distributing, dispensing, or possessing with the intent to do so ≥1 kg of any other controlled substance in Schedule I or II which was a narcotic drug with zero to twenty years imprisonment. Section 224(a)(2) of the Controlled Substances Penalties Amendments Act struck the special parole terms previously referenced by § 401(c) in the CSA.[52]

Two years later, Congress passed the Anti-Drug Abuse Act of 1986.[53] Title I, Anti-Drug Enforcement, Subtitle A, included the Narcotics Penalties and Enforcement Act of 1986, which further amended CSA § 401(b)(1) to include new five- and ten-year mandatory minimum prison sentences for "serious" and "major" drug traffickers. The new type/quantity/purity mandatory minimums, however, applied only to offenses involving seven substances—heroin, cocaine, cocaine base, PCP, LSD, fentanyl, and marijuana—and did *not* apply to methamphetamine offenses. Methamphetamine instead remained punishable under the new 21 U.S.C. § 841(b)(1)(C) (the former § 841(b)(1)(A)), still imposing a statutory term of imprisonment from zero to twenty years.[54]

The Anti-Drug Abuse Act of 1988 further imposed a term of imprisonment of five to twenty years for *simple* possession of ≥5 g of crack. The Act also finally established mandatory minimum penalties for methamphetamine offenses. As with crack and cocaine, the Act distinguished between "actual" methamphetamine and "a mixture or substance containing a detectable amount of methamphetamine" (i.e., "methamphetamine mixture" or "meth mixture"). Offenses involving ≥100 g of methamphetamine or ≥1,000 g of meth mixture were punished by ten years to life imprisonment. Offenses involving ≥10 g of methamphetamine or ≥100 g of meth mixture were punished by five to forty years imprisonment. At this point, by statute, crack offenses were punished twice as seriously as methamphetamine offenses.

From 1988 going forward, *statutory*[55] cocaine sentencing policy remained relatively stable until the Fair Sentencing Act of 2010—with drug trafficking offenses involving ≥5 g of crack punishable by five to forty years imprisonment, and drug trafficking offenses involving ≥50 g of crack punishable by ten years to life imprisonment.

Congress approached methamphetamine sentencing policy separately, in two ways. First, once drug trafficking offenses involving methamphetamine were subjected to mandatory minimum sentences, Congress focused on criminalizing and harshly punishing the importation, possession, and use of precursor chemicals in methamphetamine manufacturing. Over several years, Congress either directly added new offenses and enhanced punishments for child endangerment or environmental damage associated with manufacturing, or directed the Sentencing Commission to review and revise methamphetamine sentencing guidelines to account for such concerns. Second, Congress directed that the Sentencing Commission increase penalties for methamphetamine-related offenses,[56] while Congress itself made statutory punishments for methamphetamine drug trafficking offenses increasingly severe—myopically channeling the Andrea True Connection hit song "More, More, More."[57]

The Methamphetamine Trafficking Penalty Enhancement Act of 1998 cut the quantities of both actual meth and meth mixture that would trigger mandatory minimum penalties *in half*. Under amended 21 U.S.C. § 841(b)(1)(A)(viii), ≥50 g of actual meth or ≥500 g of meth mixture triggered a sentence of ten years to life in prison. Under amended 21 U.S.C. § 841(b)(1)(B)(viii), in turn, offenses involving ≥5 g of actual meth or ≥50 g of meth mixture triggered a five- to forty-year prison sentence.[58] This meant that a defendant guilty of possessing 9 g of methamphetamine the day before the MTPA effective date had no mandatory minimum sentence to be concerned about, while a defendant possessing the same quantity the next day was going to jail for at least five years. The quantity change had the practical impact of equating crack and methamphetamine punishments for the first time under the CSA. Subsequently, the Methamphetamine Anti-Proliferation Act of 2000 further equated statutory amphetamine quantities and sentences with crack and methamphetamine, and directed the Sentencing Commission to amend the sentencing guidelines to use the base

offense levels (BOLs) for methamphetamine trafficking offenses with amphetamine offenses.[59] By 1998, crack was statutorily punished in relation to powder cocaine at a ratio of 100:1, while methamphetamine was punished in relation to methamphetamine mixture at a ratio of 10:1. Methamphetamine was punished in relation to crack at a ratio of 1:1.

The USA PATRIOT Improvement and Reauthorization Act of 2005, which included the Combat Methamphetamine Epidemic Act (CMEA),[60] added a new consecutive sentence of up to twenty years imprisonment for methamphetamine manufacturing, trafficking, and possession-with-intent offenses in which a minor was present.[61] The same Act also added 21 U.S.C. § 865, which provided a separate mandatory consecutive sentence of not more than fifteen years imprisonment for any drug offense involving the smuggling of methamphetamine or any listed chemical while using a facilitated entry program into the United States. Congress never enacted any similar statutory consecutive sentences for crack trafficking offenses. Congress's added consecutive statutory punishments also did not distinguish between different formulations of methamphetamine, their quantity, or their purity. The CMEA further initiated additional controls for precursor chemicals used to illicitly manufacture methamphetamine in the United States, limited imports of meth precursors into the United States, limited the amounts of over-the-counter cold and sinus medicines that could be purchased by consumers, and required retailers to maintain a registry of citizens purchasing meth-related OTC medications.

On August 3, 2010, President Barack Obama signed the Fair Sentencing Act (FSA), which increased the quantity of crack triggering a five-year mandatory minimum prison sentence from 5 g to 28 g, or roughly an ounce. The Act further increased the quantity of crack triggering a ten-year mandatory minimum prison sentence from 50 g to 280 g (or ~10 ounces). The Act eliminated any mandatory minimum for simple possession of crack. The statutory crack-to-powder ratio was reduced from 100:1 to 18:1.[62] With the FSA, therefore, methamphetamine drug trafficking offenses started being punished 5.6× more seriously than crack drug trafficking offenses. After the flip in relative severity, this is where congressional methamphetamine sentencing policy has remained for the past decade. Looking back at just the relevant drug market dynamics, however, this statutory sentencing disparity seems completely unwarranted. Keep in mind that this stated disparity takes into account *only* type/quantity/purity comparisons, and does *not* take into account other methamphetamine-related enhancements addressed by Congress's various substantial risk directives that could further apply to convictions for methamphetamine drug trafficking offenses.

V. Evolution of Sentencing Commission Policies for Cocaine and Methamphetamine.

The Sentencing Commission's first set of guidelines became effective on November 1, 1987, utilizing a drug quantity table (DQT) spanning BOLs of 1 to 43 (on *one* page). Nothing in that table expressly mentioned methamphetamine or cocaine. Instead, the original § 2D1.1 (there was no subsection (c)) established a BOL of 20 for "20 KG + Schedule III or other Schedule I or II controlled substances." Less than 125 g of "Schedule III or other Schedule I or II controlled substances" was punished at a BOL of 6. That was essentially it.[63]

Effective November 1, 1989, the Sentencing Commission adopted a completely new DQT, in which methamphetamine quantities were listed for offense levels 12 through 42—in amounts tied to or extrapolated from the statutory mandatory minimums enacted November 17, 1988.[64] The amendment also added drug equivalency tables (DETs), which equated 1 g of methamphetamine to 5 g of cocaine or 1 g of heroin. Five years later, the Sentencing Commission deleted BOLs 40 and 42 from the DQT, setting the upper limit for non-career-offender drug trafficking offenses at 38 (≥3 kg actual meth or ice, ≥30 kg meth mixture, ≥1.5 kg cocaine base, ≥150 kg cocaine).[65]

Effective May 1, 1997, the Commission increased the top offense level for List I chemicals (mainly all methamphetamine precursors) from 28 to 30, and expanded lists of List I and List II chemicals that are methamphetamine precursors.[66] Effective November 1, 1997, the Commission increased the specific offense characteristic for importing or manufacturing methamphetamine by two offense *levels*, added a new SOC for hazardous discharge/exposure increasing another two offense levels, and cut the quantities of methamphetamine mixture in half throughout the entire DQT. The amendment did not cut related quantities of actual methamphetamine or ice, but did increase the DET marijuana equivalency factor from 1 kg to 2 kg in then U.S.S.G. 2D1.1, Application Note 10.[67]

Because the Methamphetamine Trafficking Penalty Enhancement Act of 1998 did not require the Sentencing Commission to change quantities of actual methamphetamine/ice in the DQT, the Commission did not further amend the methamphetamine sentencing guidelines for two years. During that time, the Commission briefly considered treating actual methamphetamine and mixture the same throughout the DQT, with the term *actual* being stricken from the guidelines. On May 1, 2000, however, the Commission repeated what it had done with the 1989 DQT—by working off the five- and ten-year mandatory minimums from the Code revising the quantities of actual methamphetamine and ice at each level of the DQT in U.S.S.G. § 2D1.1(c).[68]

In 2007, the Commission reduced crack cocaine BOLs in the DQT by two offense levels.[69] After Congress passed the FSA, the Commission then further reduced all crack and cocaine BOLs through the DQT to match the new statutory 18:1 crack-to-powder ratio established by the FSA.[70] Four years later, the Commission reduced the BOLs for all drug trafficking offenses in the DQT by two levels, effective by November 1, 2015.[71]

Through Amendment 808, the marijuana equivalency multipliers in the DET under Application Note 8(D) were

stricken and replaced with "converted drug weight" multipliers effective November 1, 2018. The Commission has subsequently not had a quorum since the 2018 amendment cycle, such that further amendments could be enacted resolving circuit conflicts over certain guideline issues, and incorporating provisions of the First Step Act of 2018.[72]

VI. Summarizing Where Methamphetamine Sentencing Policy Is Now

As stated previously, under the CSA, any drug trafficking offense involving ≥5 g of methamphetamine or ≥50 g of methamphetamine mixture is punishable by five to forty years imprisonment; any drug trafficking offense involving ≥50 g of methamphetamine or ≥500 g of methamphetamine mixture is punishable by ten years to life imprisonment. The comparable quantities for offenses involving cocaine base are 28 g and 280 g.

Under the Sentencing Guidelines, the DQT in U.S.S.G. § 2D1.1(c)(8) assigns a BOL of 24 for offenses involving ≥50 g but <200 g of methamphetamine mixture, or ≥5 g but <20 g of actual methamphetamine or ice. The same section of the DQT applies to ≥28 g, but <112 g of cocaine base. U.S.S.G. § 2D1.1(c)(5), in turn, assigns a BOL of 30 to ≥500 g but <1.5 kg of methamphetamine mixture, or ≥50 g but <150 g of actual methamphetamine or ice. Again, the same section of the DQT applies to ≥280 g but <840 g of cocaine base.

The DET under U.S.S.G. § 2D1.1, Application Note 8(D) assigns a converted drug weight multiplier of 20 kg to both actual amphetamine and actual methamphetamine, as well as ice. The DET only assigns a converted drug weight multiplier of 2 kg to methamphetamine mixture. For comparison purposes, the same table assigns a converted drug weight of 3,571 g, or just over 3.5 kg, to cocaine base. Note that on the preceding Schedule I and II opiate conversion table, actual fentanyl has a converted drug weight factor of 2.5 kg; fentanyl analogues in the same table have a conversion factor of 10 kg. The only other controlled substance having a higher DET multiplier than actual methamphetamine or ice is LSD, with a 100 kg multiplier.

VII. Hypothetical Application

Let's take a fictional "D1," standing on a street corner in anywhere USA, who on a given day sells a bag of *something*. D1 works alone; he does not use or possess any kind of weapon; his conduct does not involve any violence or threats of violence; his conduct does not occur near a protected location; his conduct does not produce any environmental hazards or involve children; he is not a leader, organizer, manager, or otherwise supervising other people; he is not a "serious" or "major" drug trafficker as defined by the Anti-Drug Abuse Act of 1986; he is not maintaining a residence for the purpose of distributing controlled substances; and he sells what he does in broad daylight on that street corner. He barely makes enough money to re-up for the next day and still cover his own addiction—not just to what he is selling, but to a number of other controlled substances, some licit, some illicit. Let's also assume that across the street, "D2" is doing the exact same thing. Let's further assume that D1 sold what he believed to be some form of methamphetamine, while D2 sold cocaine base. As the hypothetical runs its course, keep asking "what did D1 do that is any different or any worse than what D2 did"—beyond the identity, quantity, and purity of the controlled substance involved.

A. Scenario 1

Assume that, without packaging, what D1 actually sold was 5.1 g of "actual" methamphetamine, or alternately a mixture that had a detectable amount of ice. The rule under the sentencing guidelines is that if a detectable amount of a more seriously punished controlled substance is present, the entire drug quantity is counted as that controlled substance.[73] This would be the case even if D1 believed he was only selling methamphetamine mixture.[74]

Sticking with the applicable statutory penalties, we already know that D1 is facing at least five years in a federal prison if arrested and convicted. Prior to 2010, D2 would also be facing the same sentence—but, thanks to the FSA, he is instead facing a sentence with no mandatory minimum prison term.

Under the Sentencing Guidelines, D1 has a BOL of 24 (*see* U.S.S.G. § 2D1.1(c)(8); ≥5 g but <20 g of actual methamphetamine). D2's guidelines, on the other hand, will start with a BOL of 14 (*see* U.S.S.G. 2D1.1(c)(13); ≥2.8 g but <5.6 g of cocaine base). Assuming that both have no criminal history, no other enhancements apply, and they both receive credit for acceptance of responsibility under U.S.S.G. § 3E1.1, D1's advisory guideline range would be thirty to thirty-six months of imprisonment, while D2's advisory guideline range would be ten to sixteen months imprisonment. Of course, should D1 have a prior conviction or other circumstance disqualifying him from at least the two-offense-level guideline safety valve (*see* U.S.S.G. § 2D1.1(b)(18)), then his advisory guideline range would be thirty-seven to forty-six months but would not apply, since he would still be subject to the statutory mandatory minimum sentence of five years imprisonment.

Given the similar characteristics of the two controlled substances in relation to their historical drug market dynamics and their classification as Schedule II stimulants, why should D1 be punished any more severely than D2 at all, let alone *three times* as much at the low end of the guideline ranges? And, when D1 is punished three times as severely as D2, how is that going to be perceived as just or fair, much less provide a deterrent against third parties committing the same offense in the future? Again, crack 2.0—right?

B. Scenario 2

Of course, if what D1 sold was methamphetamine mixture *or* if what he sold as "actual" meth or ice was never lab tested for purity, with the post–First Step Act *statutory*

safety valve under 18 U.S.C. § 3553(f), D1 and D2 would have the same guideline range. More hoops to jump through, but at least the outcome of the meth mixture scenario makes more sense, because both D1 and D2 did the exact same thing. But then, the nagging question remains—why should what D1 sold being mixture (or not being tested to be anything else but mixture) produce a sentence that is over half of what he would have received if he had been caught selling the same quantity of actual meth or ice? Remember, the 2019 DEA National Drug Threat Assessment Summary found that the average purity of *all* meth seizures was >97.5%, with meth being priced at $56 per gram![75]

Recall that Congress cut the quantities of methamphetamine triggering mandatory minimum penalties in 1998. The intention of Congress, as interpreted by the Sentencing Commission, was that offenses involving methamphetamine needed to be treated at least as severely as offenses involving cocaine base.[76] Prior to the FSA, Congress actually achieved that purpose. After the FSA, however, actual/ice trafficking offenses are punished 5.6× more seriously than cocaine base trafficking offenses. Should the EQUAL Act become law later in 2021,[77] crack and cocaine powder offenses will be punished the same—leaving all methamphetamine offenses punished between 10× and 100× more seriously than all cocaine trafficking offenses. The problem is that someone selling meth is not being 5.6× or 10×, and certainly not 100×, more dangerous, culpable, or criminal than someone else selling crack cocaine.

VIII. Why the Drug Type/Quantity/Purity Model Simply Does Not Work

Through the Sentencing Reform Act of 1984, Congress not only created the Sentencing Commission—it expressly charged that Commission with promulgating sentencing guidelines "which assure the meeting of the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2)."[78] The Supreme Court has recognized that Congress established the Commission to formulate and constantly refine national sentencing standards.[79] In this context, "the Commission is intended to fill an important institutional role: it has the capacity courts lack to base its determinations on empirical data and national experience, guided by professional staff with appropriate expertise."[80]

The Supreme Court has already found that the Commission did *not* fulfill its institutional role, using empirical data and national experience, to enact U.S.S.G. § 2D1.1.[81] While, through the Fair Sentencing Act of 2010, Congress in part corrected the Commission's approach to *crack cocaine* sentencing,[82] it did nothing for sentences involving other controlled substances.[83]

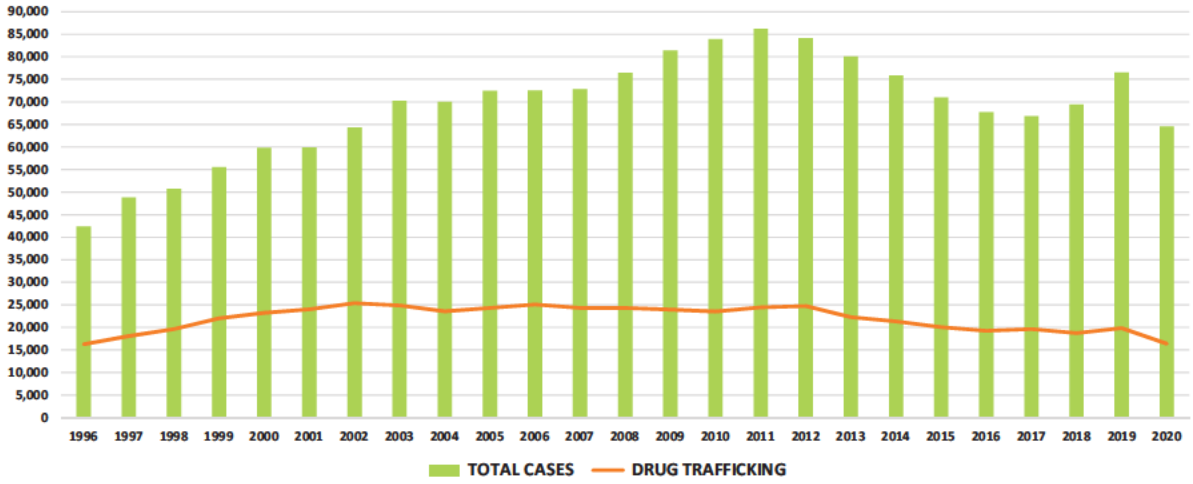
Despite the Commission's 2014 Drugs Minus Two Amendment, the guidelines for other controlled substances still remain determined by gross quantities and purity—supposedly indicative of whether a given defendant was a serious or major drug trafficker under the Anti-Drug Abuse Act of 1986, and extrapolated from statutory mandatory minimums of five and ten years. While amending it several times since 2010, the Commission has left the core of U.S.S.G. § 2D1.1 as is, without any further consideration of actual defendant culpability and relative drug potency (for substances listed in the § 2D1.1 (c) DQT and in the Application Note 8(D) DET/Converted Drug Weight Tables). In substance, the type/quantity/purity model—while certainly effective at producing a lot of math and busy work and contributing to mass incarceration—completely fails to meaningfully address questions of just punishment for citizens convicted of federal felony drug trafficking offenses.

Going back to the D1 hypothetical, it obviously matters whether or not the seized drugs were tested for purity. Fifty states, and countless local jurisdictions within those states, all budget and pay for drug testing differently, and all use differing submission procedures. Testing for purity could be a function of the additional time needed to do it, what testing equipment the lab has available to test for purity, the lab's capacity for storing and managing submitted samples, the cost of the additional testing or analysis, and whether drug purity is even legally significant under a given jurisdiction's criminal law. As a consequence, there is no national consistency in testing for drug purity, such that any default would necessarily be to drug type—which matters a great deal in methamphetamine cases.

Separately, there is the question of prosecutorial discretion. Some prosecutors do not like to lead with a mandatory minimum drug sentence, which might be so bad that a defendant has no other choice than to go to trial. Others may prefer to have the leverage of a potential superseding indictment to motivate a defendant to resolve his case on a less serious offense. Still others may not have a lab report back within the time an indictment needs to be presented, such that they are left to go forward with only a field test for the initial probable cause finding. Then there are prosecutors who deliberately refrain from testing suspected ice for purity as part of charge plea bargaining.

There is nothing wrong with either individual prosecutors or prosecuting units having personal preferences about charging and plea-bargaining strategies. However, lack of uniformity in prosecutorial preferences can have substantial impacts on individual methamphetamine defendants' cases. This is compounded nationally, as Department of Justice policy directives have been materially inconsistent. Following the Supreme Court's decision in *Alleyne*, Attorney General Eric Holder's Charging Memorandum of August 12, 2013, excepted nonviolent, low-level drug offenders and reserved the most severe mandatory minimum penalties for serious, high-level, or violent drug traffickers.[84] By May 10, 2017, however, Attorney General Jeff Sessions had rescinded the Holder memo and ordered all federal prosecutors to "charge and pursue the most serious, readily provable offense." Sessions further defined such offenses as "those that carry the most substantial guidelines

Figure 1.
Total Sentenced Cases vs. Drug Trafficking Cases Under § 2D1.1



sentence, including mandatory minimum sentences."[85] But on January 29, 2021, acting Attorney General Robert Wilkinson revoked the Sessions memorandum,[86] reverting back to an earlier Holder charging policy issued May 19, 2010 (which did not go as far as the 2013 memo, but which did give federal prosecutors more discretion in charging and sentencing decisions).[87]

A related consideration involves the discretion of law enforcement and prosecutors about what types of drug cases they want to pursue—both in targeting particular forms of the same drug, such as methamphetamine, and in whether they perceive the drug problem in their respective jurisdictions to be driven by crack, methamphetamine, or some other controlled substance. Law enforcement entities likewise need to justify their existence, or at least demonstrate the effectiveness of their work, in order to maintain or grow their levels of staffing and consumption of limited public resources. Nothing does that better than high numbers of drug busts producing convictions and long prison sentences. Again, these are very subjective dynamics that may differ from individual to individual as well as among localities, states, and agencies.

Finally, there is the question of drug market dynamics. It has been accepted for over fifteen years that most (if not all) of the methamphetamine in the United States is extremely pure and extremely inexpensive—such that the idea that purity is reliably correlative to certain levels of criminal culpability is no longer true. Particularly given the ease with which cartels can move pure methamphetamine across the U.S.-Mexico border, lacking any meaningful additional transaction costs or barriers of entry, purity no longer indicates anything about proximity or access to the producing source, or about the level of control a given defendant may have in the drug distribution chain.

Twenty-five years of Sentencing Commission data (FY1996–FY2020) indicate that the annual total number of sentenced federal cases ranged from 42,436 in FY1996 to a peak of 86,201 in FY2011, and then dropped to 64,565 at the end of FY2020.[88] Drug trafficking cases sentenced under U.S.S.G. § 2D1.1 ranged from 16,251 in FY1996 to a high of 25,376 in FY2002, and then dropped to 16,390 by the end of FY2020. Thus, for twenty-five years, federal drug trafficking cases have consistently totaled somewhere between 16,000 and 25,500 cases annually (Figure 1).[89]

In FY2020, methamphetamine cases (all forms combined) made up 45.7% of federal drug cases, while crack cases made up only 7.4%.[90] Cocaine powder made up 16.5%; *combined* powder and crack cocaine still accounted for only 23.9%. The trends in cocaine and methamphetamine cases have essentially flipped since 1996 (Figure 2). In FY1996, 1,555 methamphetamine cases and 4,355 cocaine base cases were sentenced under U.S.S.G. § 2D1.1.[91] Crack cases under U.S.S.G. § 2D1.1 peaked in FY2008 at 5,913. Methamphetamine cases under U.S.S.G. § 2D1.1 peaked in FY2019 at 8,394. In FY2020, there were 7,460 methamphetamine cases and 1,168 cocaine base cases sentenced under U.S.S.G. § 2D1.1.[92] The combined 3,687 powder and cocaine cases was still less than half the total methamphetamine cases for FY2020 (Figure 3).[93] Commission data separately indicate that both crack and powder cocaine offenses historically have more frequently involved weapons,[94] as well as defendants with more extensive criminal histories.[95] Methamphetamine offenders, by comparison, consistently included a high number (although recently diminishing somewhat) of first-time offenders without criminal histories.[96]

From FY1996 to FY2020, the percentage of crack offenders subject to mandatory minimum sentences peaked at 81.6% in FY2007, only to drop to 41.3% by FY2020.[97] The percentage of cocaine powder offenders subject to mandatory minimum sentences peaked at 79.2% in FY2008, only to drop to 69.6% in FY2020.[98] Over the same period, the mean length of prison sentences fell from

Figure 2.
Methamphetamine vs. Crack vs. Powder Cases Under § 2D1.1

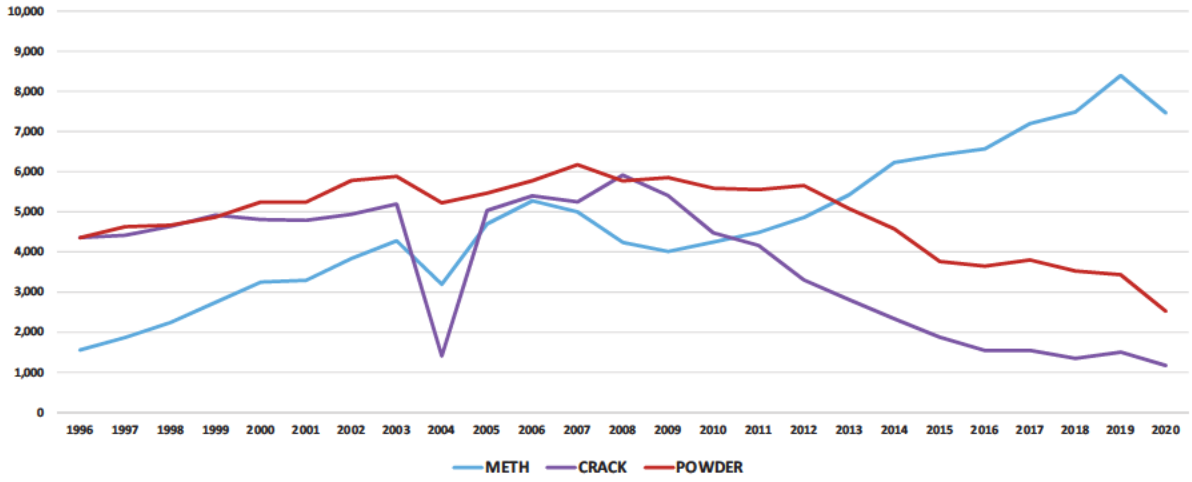
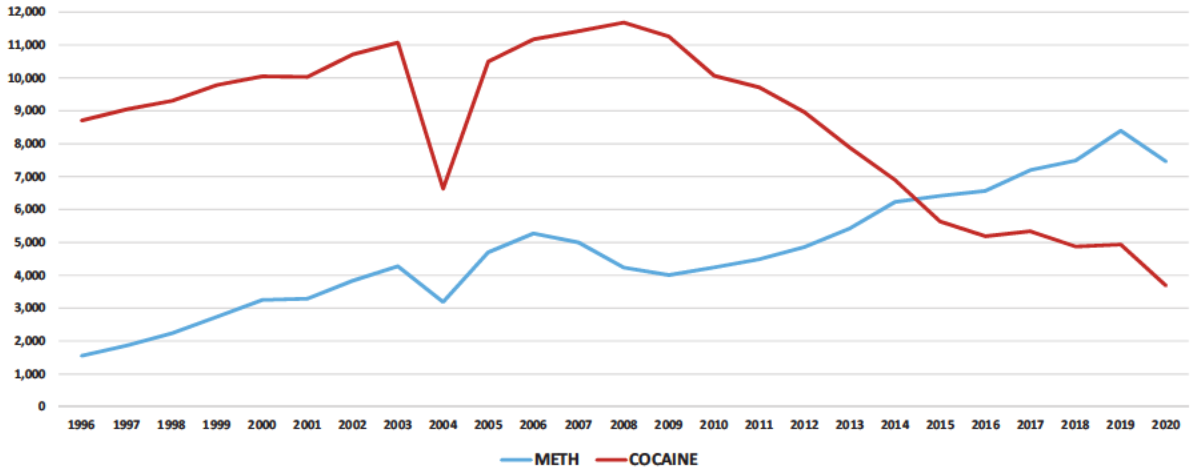


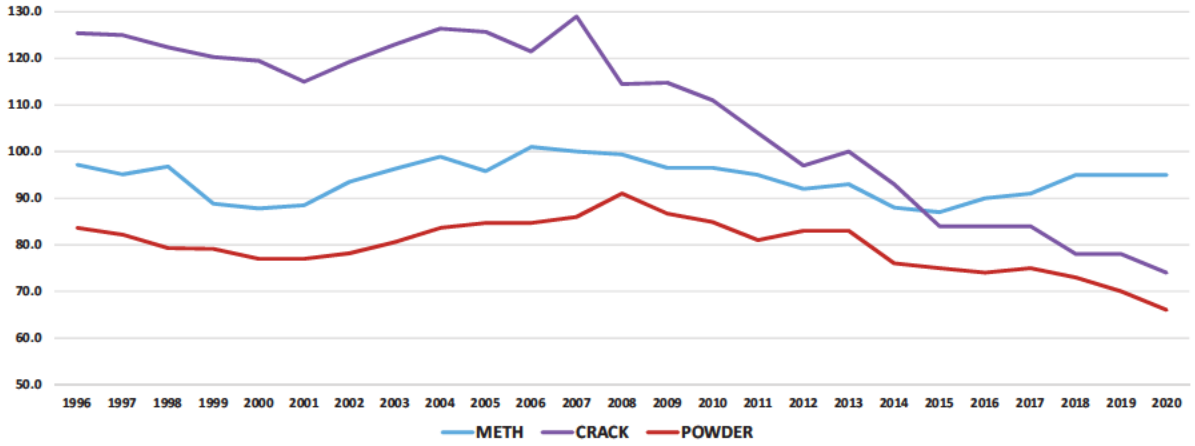
Figure 3.
Methamphetamine vs. Combined Cocaine Cases Under § 2D1.1



129 months in FY2007 to only seventy-four months in FY2020 for crack trafficking offenses, while the mean prison sentence for powder cocaine fell from a high of ninety-one months in FY2008 to sixty-six months in FY2020 (Figure 4). By comparison, the percentage of methamphetamine offenders subject to mandatory minimum sentences increased from 73% in FY1996 to 82.2% in FY2020. Coming off a peak of 101 months in FY2006, methamphetamine offenders received an average sentence of ninety-five months imprisonment in FY2020. This is close to, if not exactly, where the average methamphetamine sentence was in FY1996. Post-FSA, methamphetamine sentencing policy is markedly more severe than crack cocaine sentencing policy, yet the number of methamphetamine cases has increased by almost 500% since Congress cut the drug quantities that trigger mandatory minimum penalties in half. Therefore, maintaining increasingly harsh sentences for methamphetamine drug trafficking offenses, based on drug type, quantity, and purity, is obviously not having any meaningful deterrent effect.

Continued application of a type/quantity/purity sentencing model does not appear to have previously been examined through the disparity between crack and methamphetamine sentences. Numerous courts, however, have considered the model in rejecting application of the ratio of actual methamphetamine/ice to meth mixture on policy grounds.[99] Additionally, courts have subsequently categorically rejected application of the higher conversion ratio for methamphetamine drug quantities.[100] Nevertheless, some district courts are still denying motions for downward variances based on the actual meth/meth mixture disparity—erroneously believing that the disparity is justified by purer methamphetamine being more popular, having more profound effects on the human body, and having closer ties to international drug crime and traffickers.[101] Which is both

Figure 4.
Methamphetamine vs. Crack vs. Powder Mean Sentence Length



incredibly unfortunate and frustrating where *all* forms of methamphetamine (as well as all cocaine, and most opioids) today have close ties to international crime and cartels, and where all methamphetamine in the United States is practically 100% pure.

IX. Conclusion

There is so much more that goes into defending and sentencing a federal drug trafficking defendant than the identity, quantity, and purity of a particular controlled substance that is involved.[102] Drug dealers, particularly street-level dealers, and their customers are not chemists. More often than not, drug trafficking defendants have no idea what the chemical composition of anything they are selling is, much less what legal consequences may be based on that composition if they are arrested and subsequently convicted of a felony offense. The type/quantity/purity model, however, assumes that individual defendants have and act with that knowledge. The type/quantity/purity model was adopted as a mechanism to hold more sophisticated "major" and "serious" drug dealers accountable. Rather than consistently doing that, however, the model's unwarranted distinctions between different but similar controlled substances, and between different forms of the same controlled substance, have had devastating impacts on collateral targets: street-level, indigent drug dealers. In application, the model has completely missed its intended purpose of meaningfully deterring drug trafficking crimes in our communities.

The final illustration supporting this contention is related to a separate, *crack 4.0* analysis of federal heroin and fentanyl sentencing policy. On July 4, 2021, the Centers for Disease Control and Prevention (CDC) announced that the provisional total of drug overdose deaths for 2020 was 93,331 people—which represents a 30% increase from pre-pandemic statistics.[103] The CDC has attributed this increase to the increased adulteration of all illicit drug types with fentanyl (even methamphetamine).[104]

Despite the current "huge, historic, un-heard-of" impact of fentanyl, the Anti-Drug Abuse Act of 1986 still requires 1 kg of heroin, 5 kg of cocaine, 280 g of crack, or *400 g of fentanyl* to invoke the mandatory minimum ten-year sentence that also applies to drug trafficking offenses involving only *50 g of methamphetamine* under 21 U.S.C. § 841(b)(1)(A). Similarly, the Act further requires 100 g of heroin, 500 g of cocaine, 28 g of crack, or *40 g of fentanyl* to invoke the mandatory minimum five-year sentence that also applies to drug trafficking offenses involving only *5 g of methamphetamine* under 21 U.S.C. § 841(b)(1)(B). Keep in mind that fentanyl was first synthesized in 1960 by Janssen Pharmaceutica as a clinical-setting *sedative*—not an analgesic—and is still prescribed in *microgram* (i.e., *millionth of a gram*) dosages. Yet, statutorily, it still takes *eight times more* fentanyl than methamphetamine to send an American citizen to jail for five years. Turn the "Etch A Sketch" in whatever direction you want—this type/quantity/purity model no longer reflects what is happening on the ground in the United States.

Predictably, the Sentencing Commission's approach has been no better, with fentanyl punished *eight times less seriously* than methamphetamine in the DET. Like cocaine and methamphetamine, illicit fentanyl is also being manufactured outside the United States (in/by China) and brought into the country by "transnational drug trafficking organizations" (Mexican drug cartels) over the southwest border. So while the United States struggles to fend off a de facto Third Opium War with foreign actors, federal drug trafficking policy still centers on an outdated type/quantity/purity model as the main measure of criminal culpability and the basis for meting out criminal punishment. Again, this is where the bulk of U.S. citizens being prosecuted (who are *not* serious or major drug traffickers) are all guilty of doing the same damn thing.

If the federal criminal justice system is to maintain any future credibility with our citizens,[105] and through such public confidence ensure societal respect for the law, *this*

must change. In the short term, beyond repealing quantity/purity-based mandatory minimum sentences and restructuring federal drug sentencing policy to focus on factors other than drug type, quantity, and purity (the Controlled Substances Act originally just focused on a given Schedule although today marijuana's continued inclusion in Schedule I makes that approach much more problematic), if Congress really wants to damage the cartels' existing business model, our border needs to be fully controlled. That step alone will dramatically impact the supply side of the drug trafficking problem in the United States, and accomplish more of the stated goals than continuing to punish criminal conduct on the basis of ambiguous disparities among drug type, quantity, and purity.

Notes

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1 "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction,'" Black's Law Dictionary 634 (10th ed. 2014). At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant (*see* Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L.Ed.2d 985 (1999)) and, at a plea hearing, they are what the defendant necessarily admits when he pleads guilty (*see* McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); Mathis v. United States, 136 S. Ct. 2243, 2258 (2016)).

2 *See, e.g.*, United States v. Ali, 735 F.3d 176, 185–87 (4th Cir. 2013) (citing cases); United States v. Brower, 336 F.3d 274, 276 (4th Cir. 2003).

3 *See* Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 2155 (2013); United States v. Booker, 543 U.S. 220, 232, 125 S.Ct. 738 (2005); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000); United States v. Johnson, 878 F.3d 925, 927–931 (10th Cir. 2017); Jones v. United States, 431 F. Supp.3d 740, 751 (E.D.Va. 2020).

4 *See* Part II.

5 *See* https://www.bop.gov/about/statistics/population_statistics.jsp (last viewed May 28, 2021).

6 The next highest offense category was for weapons, explosives, and arson, at 29,366 inmates, or 20.5% of the federal prison population. *See* Federal Bureau of Prisons, Inmate Statistics by Offense, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated May 22, 2021; last viewed May 28, 2021).

7 *See* Mark Motivans, BJS Statistician, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Justice Statistics 2017–2018 (April 2021), https://www.bjs.gov/content/pub/pdf/fjs1718.pdf (last viewed May 28, 2021). *See also* Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DePaul J. Soc. Just. 117, 124–29 (2014).

8 Starting with the Sentencing Commission's May 1, 1995, recommendation to adopt a 1:1 drug quantity ratio, 60 Fed. Reg. 25074, which was rejected by Congress on October 30, 1995 (Pub. L. 104–38, 109 Stat. 334), and progressing to eventual passage of the Fair Sentencing Act of 2010, eventually reducing the drug quantity ratio for crack and powder cocaine from 100:1 to 18:1. *See* Terry v. United States, 141 S.Ct. 1858, 1864–68 (Sotoyamor concurring). *See also* U.S. Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy (May 2007), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf; U.S. Sentencing Comm'n, Report to Congress: Federal Cocaine Sentencing Policy (May 2002), https://www.ussc.gov/research/congressional-reports/2002-report-congress-federal-cocaine-sentencing-policy; U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy (May 1997), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/19970429_RtC_Cocaine_Sentencing_Policy.pdf; U.S. Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy (Feb. 1995), https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy.

9 552 U.S. 85, 109, 128 S.Ct. 558, 575 (2007).

10 552 U.S. 38, 128 S.Ct. 586, 602 (2007).

11 555 U.S. 261, 264–66, 268, 129 S.Ct. 840, 843–45 (2009).

12 Drug type and drug quantity are poor proxies for culpability. United States v. Hayes, 948 F.Supp.2d 1009, 1016, 1028–33. (N.D.Iowa 2013) (Bennett, J.); United States v. Diaz, 2013 WL 322243, * 7 (E.D.N.Y. 2013) (Gleeson, J.). "False uniformity occurs when we treat equally individuals who are not remotely equal because we permit a single consideration, like drug quantity, to mask other important factors." *Hayes*, at 1028, quoting United States v. Cabrera, 567 F.Supp.2d 271, 273 (D. Mass 2008) (Gertner, J.). *See also* Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 Rutgers L. Rev. 873 (2013–14).

13 With *Terry* now holding that the Fair Setencing Act does not apply to offenses and convictions under 21 U.S.C. 841(b)(1)(C). *See* 141 S.Ct. at 1862–64.

14 PubChem, "Cocaine," NIH Nat'l Library of Medicine, Nat'l Ctr. for Biotech. Info., https://pubchem.ncbi.nlm.nih.gov/compound/Cocaine (last viewed May 11, 2021); Foye's Principles of Medicinal Chemistry (7th ed. 2013), at 650–52.

15 21 U.S.C. §§ 812, Sched. II(a)(4).

16 Goodman & Gilman's The Pharmacological Basis of Therapeutics (12th ed. 2011) [hereinafter Goodman & Gilman's], at 661–63.

17 *See, e.g.*, Crack Cocaine, Pharmacology, Release.org, https://www.release.org.uk/drugs/crack-cocaine/pharmacology (last viewed May 11, 2021).

18 D. Hatukami, M. Fischman, *Crack Cocaine and Cocaine Hydrocholoride, Are the Differences Myth or Reality?*, 276 JAMA 1580 (1996). *See also* M. Miller, American Addiction Centers, How Cocaine Is Made, April 27, 2021, https://www.recovery.org/cocaines/how-made/ (last viewed May 11, 2021).

19 Goodman & Gilman's, *supra* note 16, at 662.

20 *Id.*

21 *Id.*

22 *Id.*

23 *See* National Institute on Drug Abuse, Methamphetamine, https://www.drugabuse.gov/publications/research-reports/methamphetamine/what-methamphetamine (last viewed Aug. 1, 2021); Narconon, Short Overview of the History of Methamphetamine, https://www.narconon.org/drug-information/meth-short-overview.html (last viewed Aug. 1, 2021); Benjamin Breen, *Meiji Meth: The Deep History of Illicit Drugs*, Appendix (Oct. 2, 2013), https://benjaminpbreen.com/2013/10/02/255/ (last viewed July 31, 2021); S. Laskow, *Brewing Bad, The All-Natural Origins of Meth*, Atlantic (Oct. 3, 2014), https://www.theatlantic.com/technology/archive/2014/10/brewing-bad-the-all-natural-origins-of-meth/381045/ (last viewed June 12, 2020).

[24] G. M. Miller, *The Emerging Role of Trace Amine-Associated Receptor 1 in the Functional Regulation of Monoamine Transporters and Dopaminergic Activity*, 116 J. Neurochem. (2011), https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1471-4159.2010.07109.x (last viewed June 12, 2020). *See also* J. Liu & J. Li, *TAAR1 in Addiction: Looking Beyond the Tip of the Iceberg*, 9 Frontiers in Pharmacology 279 (2018).

[25] *See* https://www.drugs.com/dosage/desoxyn.html (last viewed June 12, 2020).

[26] *See* DrugBank (University of Alberta), Methamphetamine, Pharmacology (Oct. 2, 2017), https://www.drugbank.ca/drugs/DB01577#pharmacology (last viewed June 12, 2020).

[27] *See* R. Torre et al., *MDMA, Methamphetamine, and CYP2D6 Pharmacogenetics: What Is Clinically Relevant?*, 3 *Frontiers in Genetics* 235 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3495276/pdf/fgene-03-00235.pdf (last viewed May 11, 2021).

[28] *See* https://www.drugs.com/pro/desoxyn.html and https://www.accessdata.fda.gov/drugsatfda_docs/label/2013/005378s028lbl.pdf (last viewed June 12, 2020).

[29] *See* 21 C.F.R. § 1308.12 Schedule II (d)(2).

[30] Goodman & Gilman's, *supra* note 16, at 663.

[31] 2001–2020 DEA National Drug Threat Assessment Summary.

[32] *Id.*

[33] 2001 DEA National Drug Threat Assessment, at vi, vii, 1–16 (cocaine), 17–28 (methamphetamine); 2002 DEA National Drug Threat Assessment, at vi, 3–14 (cocaine), 27–38 (methamphetamine).

[34] 2003 DEA National Drug Threat Assessment, at v, vi, 1–12 (cocaine), 13–25 (methamphetamine).

[35] 2005 DEA National Drug Threat Assessment Summary, "Cocaine" & "Methamphetamine."

[36] 2006 DEA National Drug Threat Assessment Summary, "Cocaine" & "Methamphetamine."

[37] 2009 DEA National Drug Threat Assessment Summary, at 1–3, 19, 24–26, fig.7 (cocaine), 23, 32–35 (methamphetamine), fig.11.

[38] From 9,064 in 2000 to 890 in 2019. *See* 2020 DEA National Drug Threat Assessment Summary, at 22, fig.14.

[39] *See* 2020 DEA National Drug Threat Assessment Summary at 19–28 (methamphetamine), 29–36 (cocaine).

[40] *See* 2020 DEA National Drug Threat Assessment Summary at 24, 33–35.

[41] *See* https://www.mapsofworld.com/answers/united-states/many-states-mexico-border/attachment/infographic-us-states-border-mexico/.

[42] Jordan Williams, *Seizures of Fentanyl See Staggering Rise at Southern Border*, Hill (June 30, 2021), https://thehill.com/blogs/blog-briefing-room/news/560894-seizures-of-fentanyl-see-staggering-rise-at-southern-border.

[43] *See* Sen. Rob Portman & Rep. John Katko, *Biden's Border Policies Are Worsening the Opioid Crisis*, Roll Call (June 11, 2021), https://www.rollcall.com/2021/06/11/bidens-border-policies-are-worsening-the-opioid-crisis/ (last viewed July 30, 2021).

[44] *See* 21 U.S.C. § 848.

[45] *See* Pub. L. 91–513, § 202(c), Sched. II(c), Sched. III(a)(1) & (3); 84 Stat. 1236, 1250 & 1251 (effective October 27, 1970). *See also* CSA §§ 202(b)(2) & (3), 84 Stat. 1247.

[46] *See* Chris Barber, Public Enemy Number One: A Pragmatic Approach to America's Drug Problem, Richard Nixon Foundation (June 29, 2016), https://www.nixonfoundation.org/2016/06/26404/ (last viewed July 30, 2021); Hearings, Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform, House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security (June 17, 2021), https://judiciary.house.gov/calendar/eventsingle.aspx? EventID 4589 (last viewed July 31, 2021).

[47] *See* 36 Fed.Reg. 12734–35.

[48] *See* CSA § 401(b)(1)(A)(1970) (then codified as 21 U.S.C. § 841(b)(1)(A)).

[49] *See* 84 Stat. 1261.

[50] *Id.*

[51] *See* CSA, Title II, § 401(c), 84 Stat. 1261.

[52] *See* 98 Stat. 2·68·69; 21 U.S.C. § 841(b)(1)(A)(1984). These changes were included as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98–473, 98 Stat 1837, which among other things included the Armed Career Criminal Act (*see* 98 Stat. 2185); the Sentencing Reform Act (*see* 84 Stat. 1987–2017); the Bail Reform Act (*see* 98 Stat. 1976–87); and created the Sentencing Commission (*see* 98 Stat. 2017–34).

[53] Pub. L. 99–570, 100 Stat. 3207 (10/27/86).

[54] *See* 100 Stat. 3207–2, 2207–4. Sec. 841(b)(1)(C). Sec. 1007 separately amended 18 U.S.C. § 3553 to add a new subsection (e) allowing for the statutory safety valve. Sec. 1008 similarly amended 28 U.S.C. § 994 directing the Commission to assure that the guidelines reflected the "general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence . . . lower than the established . . . minimum sentence." Sec. 1009 provided for corresponding amendments to Fed. R. Crim. P. 35(b).

[55] The Sentencing Commission's history was quite the opposite, as evidenced by the 1995, 1997, 2002, and 2007 Reports to Congress; *see supra* note 8.

[56] Comprehensive Methamphetamine Control Act of 1996 (15 pgs), Pub. L. 104–237, Secs. 101–02, 201, 203 and 301; 110 Stat. 3099–3013. Congress expressly directed the Commission to amend its guidelines and policy statements "to provide for increased penalties for unlawful manufacturing, importing, exporting, and trafficking of methamphetamine. . . ." The Commission shall ensure that the sentencing guidelines " . . . reflect the heinous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine." Sec. 301, 110 Stat. 3105.

[57] "More, More, More," Gregg Diamond author, Buddah Records 1975/1976, https://www.youtube.com/watch?v IQVw0pnZ3U (last viewed July 4, 2021); https://www.youtube.com/watch? v 73RYirgeLV4 (extended audio) (last heard July 30, 2021).

[58] Pub. L. 105–277, div. E, 112 Stat. 2681 (Oct. 21, 1998).

[59] Pub. L. 106–310, div. B, title XXXVI, 114 Stat. 1227 (Oct. 17, 2000).

[60] Pub. L. 109–177, Title VII, Secs. 701–756, the Combat Methamphetamine Epidemic Act of 2005, 120 Stat. 192, 256–277 (Mar. 9, 2006).

[61] *See* 21 U.S.C. § 860a.

[62] Prior to passage of the FSA, the Justice Department advocated adoption of a 1:1 crack-to-powder drug quantity ratio; 4/29/2009 Statement of Asst. Atty. Gen. Lanny A. Breuer, to Senate Judiciary Committee, "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity," at 1–12. The consensus has been since 2010 that the current 18:1 crack to powder cocaine ratio was nothing more than a legislative compromise. The Sentencing Project, Federal Crack Cocaine Sentencing; *see also* United States v. Williams, 788 F. Supp.2d 847 (N.D. Iowa 2011) (detailing Congress's adoption of the 18:1 ratio). What was quite telling at that time (and now) was that only thirteen out of fifty states treated crack and powder cocaine differently for sentencing purposes: Alabama, Arizona, Iowa, California, Maine, Maryland, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, Vermont, and Virginia. *See* N. Porter, V. Wright, The Sentencing Project, Cracked Justice (Mar. 2011), at 3.

[63] *See* U.S.S.G. § 2D1.1 (1987).

[64] *See* U.S.S.G. Appendix C, Amend. 123 & 125.

[65] *See* U.S.S.G. Appendix C, Amend. 505, eff. Nov. 1, 1994.

[66] *See* U.S.S.G. Appendix C, Amend 541 [emphasis added]:

> The United States Sentencing Commission today sent to Congress amendments to the federal sentencing guidelines that *will significantly increase penalties for importing and trafficking in methamphetamine*. The amendments will also increase sentences for any drug offense that results in environmental damage C a concern especially associated with clandestine "meth labs."
>
> "We believe these amendments respond to the concerns of Congress, the President, and the American people, and appropriately address very serious drug crimes," said Judge Richard P. Conaboy, Chairman of the Sentencing Commission. In a White House statement issued Tuesday, *President Clinton said he was "pleased that the Sentencing Commission has increased penalties for methamphetamine offenses," and indicated that the Commission's actions will "toughen penalties on this emerging drug to prevent the kind of epidemic we saw in the 1980s with cocaine use."*

[67] *See* U.S.S.G., Appendix C, Amendment 555, effective Nov. 1, 1997.

[68] *See* U.S.S.G., Appendix C, Amend. 594, cut quantities of actual meth and ice in half, extrapolating from the Methamphetamine Trafficking Penalty Enhancement Act of 1998 for the entire DQT, effective November 1, 2000 (no additional changes were made to meth mixture, which had previously been cut in half through the 1997 amendment cycle):

> Consistent with the Methamphetamine Trafficking Enhancement Act of 1998, the Commission voted to increase penalties for methamphetamine trafficking. In recent years, law enforcement has seen a marked increase in methamphetamine, also known by the street names of "speed" or "crank." Traditionally associated with motorcycle gangs such as the Pagans, the use of this illegal drug in recent years has spread far beyond the confines of membership in these groups. Methamphetamine is a central nervous system stimulant which can be smoked, snorted, injected, or eaten. According to the Drug Enforcement Administration, methamphetamine use results in "euphoria, increased alertness, increased energy, and tremors," and large doses frequently result in irritability, aggression, anxiety, delusions, auditory hallucinations, and paranoia. Drug Czar, General McCaffrey, has indicated that methamphetamines have a serious potential nationally to become the next large-scale drug epidemic.

See *also* U.S. Sentencing Comm'n, Methamphetamine Final Report (Nov. 1999), https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf (last viewed Aug. 1, 2021).

[69] The "Crack Minus Two Amendment"—U.S.S.G., Appendix C, amends. 706, 711 & 713 (eff. Nov. 1, 2007 & Mar. 3, 2008).

[70] *See* U.S.S.G., App. C, amend. 750 & amend. 759 (making FSA changes retroactive).

[71] The Drugs Minus Two Amendment. *See* U.S.S.G., App. C, amend. 782 & 788 (Nov. 1, 2014).

[72] *See* Pub. L. 115–391, Title IV, Sentencing Reform—§§ 401–404, 132 Stat. 5194 (Dec. 21, 2018).

[73] *See* U.S.S.G. § 2D1.1(c), DQT, note (A): "...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...").

[74] *See supra* note 2.

[75] 2018 DEA National Drug Threat Assessment Summary, at 44–46 & fig.36, fig.37.

[76] *See* U.S. Sentencing Comm'n, Final Report of Methamphetamine Policy Team regarding implementation of the Methamphetamine Trafficking Penalty Enhancement Act of 1998 (Nov. 1999), at 12.

[77] The "Eliminating a Quantifiably Unjust Application of the Law Act" or the "EQUAL Act," S. 79, https://www.congress.gov/bill/117th-congress/senate-bill/79/text (last viewed July 31, 2021). The bill repeals 21 U.S.C. §§8 41(b)(1)(A)(iii) and (b)(1)(B)(iii), making all crack offenses punishable at the same quantities as power cocaine. The Biden administration, the ONCDP, and the Department of Justice all support the proposed legislation. *See* Sarah N. Lynch, Reuters, *U.S. Justice Department Backs Bill to End Disparities in Crack Cocaine Sentences*, U.S. News & World Report (June 21, 2021), https://www.usnews.com/news/top-news/articles/2021-06-21/us-justice-department-backs-bill-to-end-disparities-in-crack-cocaine-sentences; DOJ final written testimony, June 22, 2021, https://sentencing.typepad.com/files/doj-equal-act-testimony —final.pdf; https://www.judiciary.senate.gov/meetings/examining-federal-sentencing-for-crack-and-powder-cocaine (June 22, 2021, full Senate judiciary committee hearing); testimony of Regina LaBelle, Acting Director of the ONDCP (June 22, 2021), https://www.judiciary.senate.gov/imo/media/doc/ONDCP%20%20LaBelle%20Testimony%20-%20Senate%20Judiciary%20-%20Crack%20Cocaine%20Disparity%20to%20Committee.pdf; Sean Sullivan & Seung Min Kim, *Biden Administration Endorses Bill to End Disparity in Drug Sentencing Between Crack and Powder Cocaine*, Wash. Post (June 22, 2021), https://www.washingtonpost.com/politics/biden-drugs-sentencing-cocaine/2021/06/21/cd0c5e26-d2dc-11eb-ae54-515e2f63d37d_story.html (last viewed Aug. 1, 2021); Douglas A. Berman, *Shouldn't Federal Prosecutors Already Be Doing What They Can to Minimize the Unjust Crack-Powder Sentencing Disparity?*, Sentencing Law and Policy (July 26, 2021) (attaching DOJ June 22, 2021 statement to Senate Judiciary Committee), https://sentencing.typepad.com/sentencing_law_and_policy/2021/07/shouldnt-federal-prosecutors-already-be-doing-what-they-can-to-minimize-the-unjust-crack-powder-sent.html. Following a Senate Judiciary Committee hearing on June 22, 2021, the House Judiciary Committee voted 36 to 5 to advance the Act. *See* Douglas A. Berman, *House Judiciary Committee Votes 36 to 5 to Advance the EQUAL Act to Reduce Federal Crack Sentences*, Sentencing Law and Policy (July 22, 2021), https://sentencing.typepad.com/sentencing_law_and_policy/2021/07/house-judiciary-committee-votes-36-to-5-to-advance-the-equal-act-to-reduce-federal-crack-sentences-.html (all last viewed July 31, 2021). On September 28, 2021, the House passed its version of the EQUAL Act · H.R. 1693 by a vote of 361 to 66. *See* https://www.reuters.com/world/us/us-house-passes-bill-end-disparities-crack-cocaine-sentences-2021-09-28/ (last viewed September 30, 2021). *See also* H.Rpt. 117–128, 117th Congress (2021–2022)(9/27/2021), to be read with H. R. 1693, https://www.congress.gov/congressional-report/117th-congress/house-report/128/1?q=%7B%22search%22%3A%5B%22%22%5D%7D&s=1&r=4 (last viewed September 30, 2021).

[78] *See* 28 U.S.C. §§ 991(b)(1)(A) & 994(a)(1), (a)(2), (f) & (g).

[79] *See* Kimbrough v. United States, 552 U.S. 85, 109, 128 S.Ct. 558, 575 (2007).

[80] *Id.*

[81] *Id.,* 552 U.S. at 109, 128 S.Ct., at 575. *See also* Spears v. United States, 555 U.S. 261, 264–66, 268, 129 S.Ct. 840, 843–45 (2009); Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 Rutgers L. Rev. 873 (2014).

[82] *See, e.g.,* 124 Stat 2372; Dorsey v. United States, 567 U.S. 260, 265–70; 132 S.Ct. 2321, 2327–2330 (2012).

[83] *See* United States v. Diaz, 2013 WL 322243 (E.D.N.Y. 1/28/2013) (Gleason, J.) (discussing at length his policy disagreements with guideline ranges for drug trafficking offenses).

[84] *See* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf (last viewed July 31, 2021).

[85] *See* https://www.justice.gov/archives/opa/press-release/file/965896/download.

[86] *See* https://www.justice.gov/ag/page/file/1362411/download.

[87] *See* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf.

[88] *See* U.S.S.C. Sourcebook, tbl.3, Guideline Offenders in Each Primary Offense Category—Drug Trafficking (1996–2007); tbl.3, Change in Guideline Offenders in Each Primary Offense Category (2008–2017); and tbl.4, Change in Guideline Offenders in Each Primary Offense Category (2018–2020).

[89] *Id.*

[90] *See* U.S. Sentencing Comm'n, 2020 Sourcebook of Federal Sentencing Statistics, fig.D-1.

[91] *See* United States Sourcebook of Federal Sentencing Statistics (1996–2020), tbl.28 (1996 only), tbl.33 (1997–2017) & tbl.D-1 (2018–2020), Primary Drug Type of Offenders Sentenced Under Drug Guidelines—number of drug trafficking cases sentenced under U.S.S.G. 2D1.1 involving methamphetamine, "actual" methamphetamine, and ice (combined), or crack/cocaine base.

[92] *Id.*

[93] *Id.*

[94] *See* USSC Sourcebook of Federal Sentencing Statistics, tbl.34 (96), tbl.39 (1997–2017), tbl.D-8 (2018–2020).

[95] *See* USSC Sourcebook of Federal Sentencing Statistics, tbl.32 (96), tbl.37 (1997–2017), tbl.D-7 (2018–2020).

[96] *Id.* Ranging between as much as 45% and 50% of offenders until 2015, with the number and percentage declining slightly, to 2,778 or 37%, by FY2020.

[97] *See* USSC Sourcebook of Federal Sentencing Statistics, tbl. 38, Crack (1996), tbl.37, Crack (1997–2017), tbl.D-7 Crack (2018–2020).

[98] *See* USSC Sourcebook of Federal Sentencing Statistics, tbl. 38, Cocaine (1996), tbl.37, Cocaine (1997–2017), tbl.D-7 Cocaine (2018–2020).

[99] *See, e.g.,* United States v. Nawanna, 321 F.Supp.3d 943, 957 (N.D. Iowa 2018) (Bennett, J.), United States v. Harry, 313 F. Supp.3d 969 (N.D. Iowa 2018) (Strand, J.); United States v. Ibarra-Sandoval, 265 F. Supp. 3d 1249 1253 (D.N.M. 2017) (Brack, J.); United States v. Hartle, No. 4:16-cr-00233, 2017 WL 2608221 (D. Idaho, June 15, 2017) (Winmill CJ.); United States v. Jennings, No. 4:16-cr-00048-BLW, 2017 WL 2609038, at *2-*4 (D. Idaho, June 15, 2017) (Winmill, CJ); United States v. Hayes, 948 F. Supp.2d 1009 (N.D. Iowa 2013) (Bennett, J.).

[100] *See, e.g.,* United States v. Carrillo, ___ F.Supp.3d ___, 2020 WL 885582 (E.D.Ca., Feb. 24, 2020) (Mueller, J.); United States v. Johnson, 379 F.Supp.3d 1213 (M.D.Ala. 2019) (Thompson, J.); United States v. Moreno, 2019 WL 3557889, * 2-*4 (W.D.Va., Aug. 5, 2019) (Urbanski, J.); United States v. Pereda, 2019 WL 463027 (D.Col., Feb. 6, 2019) (Arguello, J.); United States v. Bean, 371 F.Supp.3d 46, 51 (D.N.H. 2019) (citing cases) (McCafferty, J.); United States v. Requena, No.4:18-cr-175-BLW, 2019 WL 177932, * 2 (D. Idaho, Jan. 11, 2019) (Winmill, J.); United States v. Green, No. 2:18-cr-00101 (S.D.W.V. Nov. 28, 2018) (Goodwin, J.); United States v. Hoover, No. 4:17-cr-327-BLW, 2018 WL 5924500 (D. Idaho, Nov. 13, 2018) (Winmill, J); United States v. Ferguson, No. Cr 17–204 (JRT/BRT), 2018 WL 3682509, *3 (D. Minn., Aug. 2, 2018) (Tunheim, J.); United States v. Hodge, 3:17-cr-184 / 2:18-cr-28 (S.D.W.V. June 11, 2018) (Chambers, J.).

[101] United States v. Shaw, 5:20-cr-124, Trans. of Video Sentencing, Dkt. No. 64, at 45 (Apr. 23, 2021). The case involved a twenty-three-year-old African American defendant, in criminal history Category I, who made five controlled sales to an informant involving a total of 60.99 g of ice (averaging 97% purity). The highest sale was for $225, with an average price of $16.55 per gram. The difference in base offense level created by the actual-to-mixture disparity was 30:24, or six levels. The differing guideline ranges were fifty-seven to seventy-one months versus thirty to thirty-seven months, or twenty-seven months to the low end. The Court considered 60.99 g of "very pure methamphetamine" to be a "relatively significant" quantity. Defendant was indicted on five five- to forty-year counts, and pled guilty to one sale. Defendant was eligible for the First Step Act statutory safety valve, such that the Court ultimately imposed a forty-five-month prison sentence—varying downward from sixty months on grounds other than the actual/mixture disparity.

[102] *See, e.g.,* Koon v. United States, 518 U.S. 81, 113 (1996) (Our courts are to consider "... every convicted person as an individual and every case as a unique study in human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue.").

[103] Centers for Disease Control and Prevention, Vital Statistics Rapid Release, Provisional Drug Overdose Death Counts for 2020 (July 4, 2021), https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (last viewed July 31, 2021).

[104] Josh Katz, Margot Sanger-Katz, "*It's Huge, It's Historic, It's Unheard-of": Drug Overdose Death's Spike*, N.Y. Times (July 14, 2021), https://www.nytimes.com/interactive/2021/07/14/upshot/drug-overdose-deaths.html (last viewed July 31, 2021).

[105] Ronn Blitzer, *Justice Breyer Opposes Politics Surrounding Supreme Court, Supports One Possible Reform*, Fox News online (Sept. 12, 2021), https://www.foxnews.com/politics/supreme-court-justice-stephen-breyer-political-reforms. *See also* Stephen Breyer, The Authority of the Court and the Peril of Politics (The Scalia Lecture, 2021) (Harvard Univ. Press. 2021).

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Susan Conforti, Jewish

Topics:

Supervised Release

Drug Offenses

Comments:

Please use mercy to temper justice.

Submitted on: January 27, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Dr. Chase Cookson and I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. I applaud your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4]

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works
[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)
[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf
[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal

This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

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of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

[13] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of

[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?**

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

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[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

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[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/
[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf
[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

* * *

<u>Call for Retroactive Application</u>

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

* * *

Sincerely,

Dr. Chase Cookson

[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Amy Fan, CJA Panel

Topics:

Drug Offenses

Comments:

The proposed amendments at (a)(5) and (a)(17) for mitigating role itself and its application to 2D1.1 drug guidelines substantially affects many many low level defendants who will NOT be able to receive a reduced adjustment if a gun or dangerous weapon is possessed.

Currently, gun possession DOES NOT preclude adjustments under (a)(5) or in chapter 3 mitigating role. Rather, currently, mitigating role is determined under (a)(5) -- THEN, if a gun was possessed, there is an increase of 2 levels (under (b)(1) which you are not proposing any changes). The current application note 11 does support precluding a reduction for mitigating role w/ gun possession. So why such a profound change that would exclude swaths of lo level defendants that would otherwise qualify for mitigating role?

The proposal has effectively shifted the gun assessment from subsection (b) to subsection (a) without any basis or rational. This change precludes any mitigating role adjustment AND further penalize a LOW LEVEL defendant with the ADDITIONAL increase of 2 levels for the gun possession - penalizing a defendant twice.

NO low level participant who would otherwise receive the reduction NOW -- would ever be able to receive the reduction come Nov 2025.

Despite the proposed lowered drug offense max, this portion of the proposed amendments makes 2D1 worse.
The proposal to lower the maximum drug quantity offense level does not mean to also eliminate further reductions for qualified low level participants. Any concern of gun possession is ALREADY considered by (b)(1) with a two level increase.

A defendant acting as courier, mule, or low level participant and gun possession are NOT mutually exclusive factors and exist in many cases together - affecting low level defendants.

What is the basis for this adverse proposal? Defendants with narcotic offenses already face the drug quantity table's high offense levels, statutory mandatory minimums, and sentencing gun enhancement with some facing additional 924(c) charges.
Hopefully, you will reconsider and not include the presence of a gun as a factor that precludes a mitigating role reduction.

Also, comment for the newly proposed (a)(17), the low level participants "functions" should listed as "examples" and not "triggering factors". Every case is FACT sensitive and proposing a limited and finite list of "triggering factors" would again exclude many defendants that are in fact low level participants but can't get the square peg in the round hole.

Lastly, the reduction of the maximum drug offense level to 30 is definitely warranted.

As indicated above, the proposals identified above will result in disparate treatment of defendants within the same case - due to simply whether or not a gun was possession - a factor already addressed by (b)(1). There is no reasoning to include gun possession/dangerous weapon, as an exclusion for role reduction.

Submitted on: February 26, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Lauren Gainey, Paralegal

Topics:

Drug Offenses

Comments:

Drug offenses account for a significant percentage of crimes in federal court. From October 1, 2023, through September 30, 2024, drug sentences made up nearly 30% of all federal sentences. And for too long, sentences called for in the drug guidelines have been among the lengthiest sentences the guidelines provide.

Quantity is not a good measure for culpability. This is especially so given that relevant conduct rules can mean that one low-level participant in a wide-ranging conspiracy is sentenced based on drug quantities they had little to do with.

To this end, I urge the Commission to set the base offense level cut-off at 30. And when considering the specific offense characteristic for low-level traffickers, the Commission should provide a 6-level-reduction to people who meet the definition.

Moreover, I support the Commission's proposal to abolish the purity distinction for methamphetamine offenses and believe that the methamphetamine drug weight should be tethered to the punishment for a mixture of methamphetamine, rather than actual methamphetamine.

In thinking about disparate drug sentences, few disparities are as pernicious and outdated as the

crack/powder disparity. I urge the Commission to eradicate this disparity as soon as possible.

At the end of the day, I hope that all changes the Commission makes to these amendments will reduce the number of people serving excessive drug sentences.

Submitted on: February 26, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Margo Gross, Marriage & Family Therapist

Topics:

Drug Offenses

Comments:

Margo Ruth Gross, LMFT, LLC

February 27, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Dr. Margo Ruth Gross, LLMFT OTR/L, EdD., and I am submitting this comment letter on behalf of my Private Practice. I provide therapy for individuals, couples, and families via telemedicine currently, yet am interested in being able to provide in-person therapy using authorized substances to enhance the psychotherapeutic process. I have been trained by MAPS in 2022 and await the possibility that these psychedelics: e.g., psilocybin, LSD, MDMA, ketamine, ibogaine, and DMT will be available to assist the many clients patiently waiting for access to these alternative ways of healing.

I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. I applaud your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table

1. Should the Commission consider setting the highest base offense level at another level? If so,

what is the appropriate highest base offense level for the Drug Quantity Table?
Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually increase crime and recidivism rates in certain circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.
Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions. This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings. Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous . At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized. According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.
Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children , and community. For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.
Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is less than one year. Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.
Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.
In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.
2. The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics. Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD. Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder. Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019 , and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024. There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?

The Commission should retain all the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should

maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?

No

Submitted on: February 27, 2025

College of Law
Clinical Law Program
University of Iowa
380 Boyd Law Building
Iowa City, Iowa 52242-1113
[redacted]

March 3, 2025

The Honorable Carlton W. Reeves
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments to the U.S. Sentencing Guidelines, Supervised Release (Jan. 24, 2025)

Dear Judge Reeves,

I am writing to respond to the Commission's request for comment on the Proposed Amendments to the Supervised Release Guidelines issued on January 24, 2025.[1]

I am a Clinical Professor at the University of Iowa College of Law where I direct the Federal Criminal Defense Clinic and teach courses in criminal law, criminal adjudication, and the federal courts.[2] In my Clinic, students and I represent people who have been charged with federal offenses in the U.S. District Courts for the Northern and Southern Districts of Iowa, as well as work on post-conviction litigation across the country. Prior to entering the legal academy, I was the Supervising Attorney for the Federal Defenders of Eastern Washington and Idaho, where I represented indigent people charged with federal offenses. Apart from two, year-long federal circuit court clerkships, I have worked in the federal criminal system for the entirety of my legal career.

For the past 15 years, in particular, I have litigated over, taught about, presented on, and published about supervised release ("S/R"). Through this work, I have seen firsthand the need to amend the S/R Guidelines to offer additional individualization and transparency to people laboring under, administering, and adjudicating their terms. I commend the Commission for its thoughtful work in tackling S/R so intentionally. I have limited my comments here to the Commission's requests related to Chapter 5, Part D.

[1] U.S. Sent'g Comm'n, Proposed Amendment: Supervised Release in *Proposed Amendments to the Sentencing Guidelines* 1–53 (Jan. 24, 2025).

[2] I submit this letter in my individual, not institutional, capacity.

Table of Contents

I. Comments to "Part A," Chapter 5, Part D.

A. § 5D1.1, § 5D1.2 (Issue for Comment 1(A), 1(B)) – Supervised release should not be the default, and requiring an individualized assessment using the statutory criteria in 18 U.S.C. §§ 3583(c), (d) as a touchstone is appropriate.

The proposal to eliminate § 5D1.1(a)'s default recommendation that courts impose S/R in most cases and, instead, to direct courts to focus on the specific, individual needs of the people before them when deciding (1) whether to impose S/R, (2) its length, and (3) the specific conditions is a laudable and necessary amendment.

Given S/R's rehabilitative purpose,[3] an individualized approach has always been the program's intent, and this purpose is reflected throughout federal law.[4] Amending Chapter 5 to remind stakeholders of the non-punitive purpose of S/R and why supervision, if any, must be tailored through deliberate, individualized consideration helps redirect the program's resources to the people who most need them and away from those for whom supervision will do more harm than good.[5] Individualization is key to S/R's success.

Moreover, including and using 18 U.S.C. §§ 3583(c), (d) as a touchstone for the individualized analysis is particularly useful for two reasons. First is the need to capitalize on institutional knowledge and conserve adjudicatory resources. By proposing courts "state on the record the reasons for imposing or not imposing a term of supervised release" and make a more considered determination of what conditions, if any, are appropriate,[6] the

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[3] *See generally* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958 (2013).

[4] *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983); 18 U.S.C. §§ 3583(c), (d); *Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Supervised release . . . [gave] district courts the freedom to provide postrelease supervision for those, and only those, who needed it."); *Tapia v. United States*, 131 S. Ct. 2382, 2390 (2011) ("[T]he SRA instructs courts, in deciding whether to impose . . . supervised release, to consider whether an offender could benefit from training and treatment programs.").

[5] *See* Haci Duru et. al, *Does Reducing Supervision for Low-Risk Probationers Jeopardize Community Safety*, 84 Fed. Prob. 21, 22 (June 2020) (discussing the empirical research that has concluded "low-risk individuals subject to intensive treatment and supervision tend to fare worse than low-risk individuals that are given minimal supervision"); Alex Roth, Sandhya Kajeepeta, & Alex Boldin, *The Perils of Probation: How Supervision Contributes to Jail Populations*, Vera Inst. of Just. 6 (Oct. 2021) ("Intensive supervision of people for compliance with [technical conditions] tends to increase rather than decrease violations and revocations."); Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. St. Thomas L.J. 521, 522–23 (2006) ("[R]esearch has clearly demonstrated that when we place low-risk [individuals] in our more intense programs, we often increase their failure rates (and this reduces the overall effectiveness of the program)" by exposing them to "anti-social behavior" and "disrupt[ing] their pro-social networks."); Christopher T. Lowenkamp, Edward J. Latessa, & Alexander M. Holsinger, *The Risk Principle in Action: What Have we Learned from 13,676 Offenders and 97 Correctional Programs?*, 52 Crime & Delinquency 77, 77–93 (2006).

[6] U.S. Sent'g Comm'n, *supra* note 1, at 6, 8.

amendments will require additional work. This may be work that overburdened courts[7] are likely to resist. But adhering to the well-worn statutory standards that stakeholders litigate or adjudicate daily—namely, the § 3553(a) factors—helps mitigate some of this concern. Much of what the Commission is suggesting courts do is required,[8] and because courts engage in this exact type of analysis to enable review of their sentencing decisions already,[9] competency building would be limited.

Second, the use of 18 U.S.C. §§ 3583(c), (d) as a touchstone for the individualized analysis is appropriate because those statutory standards preserve courts' broad discretion. "Discretion," defined generally, is the "power of free decision or latitude of choice within certain legal bounds."[10] The more circumscribed those legal bounds become, the more that real sentencing "discretion" dies a slow death,[11] thus undermining the enterprise of ensuring that a S/R term and its conditions, if any, are right-sized for the person it seeks to assist. The key to discretion is that it provides courts with the ability to determine what they believe is feasible, practicable, and appropriate within the limits that Congress has set given the facts before them. The Guidelines' legal bounds should track those of Congress.

For this same reason, I would suggest removing § 5D1.2's commentary directing courts to evaluate criminal history and substance use.[12] The individualized assessment using the statutory factors as a touchstone must include a person's history and characteristics, and § 5D1.2's commentary is duplicative.

Yet the next question may be: if individualization is already required for the lawful exercise of discretion, then what good do these proposed amendments do? Plenty. Data shows that courts habitually fail to articulate any justification prior to imposing a term of S/R or selecting its conditions.[13] A directive from the Commission will help fix this

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[7] *The Need for Additional Judgeships: Litigants Suffer When Cases Linger*, Admin. Off. of the U.S. Courts (Nov. 18, 2024) (describing the "growing caseloads" for Article III judges nationwide).

[8] *See* 18 U.S.C. §§ 3583(c)–(d); 18 U.S.C. § 3553(a); *see also United States v. Siegel*, 753 F.3d 705, 714 (7th Cir. 2014) ("But remember that the judge is not required to accept the parties' agreed-upon sentencing recommendations, or even permitted to do so without first complying with his independent duty to determine the reasonableness of every part of a sentence, including the conditions of supervised release.").

[9] *Gall v. United States*, 552 U.S. 38, 50–51 (2007); *Rita v. United States*, 551 U.S. 338, 357 (2007).

[10] *Discretion*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014); *Discretion*, *Oxford English Dictionary* (2013) ("Law. The power of a court, tribunal, government minister, or other authority to decide the application of a law . . . subject to any expressed or implied limits.").

[11] *See* Hon. Robert Pratt, *The Discretion to Sentence*, 28 Fed. Sent. Rep. 161, 161–64 (2016).

[12] *See* U.S.S.G. § 5D1.2 cmt.3(B)–(C) (2024).

[13] Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Supervised Release*, 18 Berkeley J. Crim. L. 180, 215 (2014) ("Although it is possible that they are engaging in reasoned decisions with respect to its imposition, their reasoning is not explained on the record . . . ."); *Siegel*, 753 F.3d at 711 ("[The judge] will merely repeat what is in the Sentencing Recommendation in or attached to the

problem. The Guidelines remain the lodestar in courts' determinations as to S/R's imposition, length, and conditions.[14] And given the impact they play in sentencing, highlighting the need for stakeholders to engage in a more intentional analysis on the record is a necessary step toward much-needed reform.[15]

Finally, the proposed amendments' push for a more individualized analysis on the record is an appropriate way to recenter S/R-related sentencing discretion in the Article III courts, rather than with the U.S. Probation Office ("USPO"). It is uncontroversial that the imposition of a term of S/R and its conditions is a "core judicial function."[16] But one that all too often—and for a variety of reasons, including the routine and regular adoption of suggested conditions of supervision without analysis—appears to rest with the USPO.[17]

In short, I support the Commission's proposed individualization amendments, and I believe that using 18 U.S.C. §§ 3583(c), (d) as a touchstone for the individualized analysis is appropriate given the need to balance the individual interests of the people facing supervision with the resources and competencies of the courts.

B. § 5D1.1, § 5D1.2 (Issue for Comment 4) – Although supervision should not be imposed when unnecessary, the new policy statement should advise courts that the failure to impose supervision can impact programming in the Bureau of Prisons and some term may be appropriate to further 18 U.S.C. §§ 3553(a)(2)(B) and (a)(2)(D).

Given that the proposed amendments' goal is to encourage a more individualized assessment of supervision—which should result in courts imposing fewer terms of S/R—it is important to inform courts about the potential consequence of declining to impose a term of supervision on a person's eligibility for First Step Act earned time credits while in the custody of the Federal Bureau of Prisons ("BOP").[18] Under 18 U.S.C. § 3624(g)(3), the BOP

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presentence report. [The judge] will not explain how the recommendation comparts with the sentencing factors. . . .").

[14] U.S. Sent'g Comm'n, *Federal Offenders Sentenced to Supervised Release* 3 (2010); *see also Peugh v. United States*, 569 U.S. 530, 536 (2013) (noting the Guidelines are always the starting point in the sentencing analysis).

[15] Safer Supervision Act, S.2861, H.R. 5005, 118th Cong. (2023).

[16] *United States v. Kent*, 209 F.3d 1073, 1078 (8th Cir. 2000) ("[T]he imposition of a sentence, including any terms for probation or supervised release, is a core judicial function." (quoting *United States v. Johnson*, 48 F.3d 806, 808 (4th Cir. 1995))); *cf. United States v. Martinez*, 987 F.3d 432, 435 (5th Cir. 2021) ("While probation officers may manage aspects of sentences and oversee the conditions of supervised release, a probation officer may not exercise the core judicial function of imposing a sentence, including the terms and conditions of supervised release." (cleaned up)).

[17] *See Siegel*, 753 F.3d at 711 (describing why "judges seem not to look behind the [USPO] recommendations" and questioning the ability of the USPO to make judgments with respect to the appropriate conditions given their areas of expertise).

[18] U.S. Sent'g Comm'n, *supra* note 1, at 24 (Issue for Comment 4).

may apply a person's First Step Act earned time credits so that they can begin their term of S/R up to 12 months earlier than the person otherwise would. However, the statute allows this only "[i]f the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment."[19] How long the BOP requires an S/R term to be to enable a person to "cash in" 12 months of credits remains unclear; although at least one court has imposed a one-month term.[20]

In light of the interplay between 18 U.S.C. § 3634(g)(3) and the potential amendments, I would suggest adding the following language to § 5D1.1's commentary:

> **Supervision to incentivize participation in evidence-based recidivism reduction programming or productive activities while in Bureau of Prisons' custody**: In some circumstances when supervised release would not otherwise be appropriate, the court may wish to impose a term of supervision (not to exceed 12 months) to incentivize a defendant to participate in evidence-based recidivism reduction programming or productive activities while in the Federal Bureau of Prisons' custody. Under The First Step Act of 2018, Pub. L. 115–391, eligible people who have successfully participated in certain programs can earn earned time credits that the Bureau of Prisons "shall" apply "toward time in prerelease custody or supervised release." 18 U.S.C. § 3632(d)(4)(C). Some term of supervised release would ensure that a person who successfully participates in programming is able to benefit from the incentives the statute provides. *See* 18 U.S.C. § 3624(g)(3).

In the individualized analysis, whether to impose a term of supervision for this custodial-programming purpose may reflect the need "to afford adequate deterrence to criminal conduct" upon release,[21] or "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training."[22]

C. § 5D1.3 (Issue for Comment 5) – Relabeling "standard conditions" as "examples of common conditions" would encourage courts to conduct the required individual analysis, but the proposal still contains too many suggestions for "examples of common conditions."

[19] 18 U.S.C. § 3624(g)(3); 28 C.F.R. § 523.44(d); *see Saleen v. Pullen*, No. 3:23-CV-147 (AWT), 2023 WL 3603423, at *1 (D. Conn. Apr. 12, 2023) ("[T]he Bureau of Prisons cannot apply any First Step Act credits toward early transfer to supervised release because the petitioner's sentence does not include a term of supervised release.").

[20] *United States v. Nunez-Hernandez*, No. CR 14-20(8) (MJD), 2023 WL 3166466, at *1 (D. Minn. Apr. 27, 2023) (granting a motion to reduce a sentence "to include a one-month term of supervised release so that [the petitioner] may benefit from a new BOP earned-time credit rule promulgated pursuant to the First Step Act").

[21] 18 U.S.C. § 3583(c) (directing consideration of 18 U.S.C. § 3553(a)(2)(B)).

[22] *Id.* (directing consideration of 18 U.S.C. § 3553(a)(2)(D)).

I commend the Commission for thinking carefully about how to untether courts from the reflexive nature of the imposition of many S/R conditions by suggesting a term other than "standard conditions."[23] I would encourage the Commission to adopt "examples of common conditions" in lieu of "standard," as "standard" is generally defined as "an accepted norm against which something can be compared."[24] In other words, the default. Using the term "standard" runs the risk of undermining a great deal of the work that the proposed amendments do to encourage individuality.

Moreover, I would encourage the Commission to take this opportunity to evaluate the number of current "standard conditions" to make sure that each "common condition" reflects the rehabilitative purpose of S/R. The Administrative Office of the Courts published the *Overview of Probation and Supervised Release Conditions* in July 2024, and it walks through each of the "standard" conditions to identify its statutory purpose.[25] Yet many of those conditions do not appropriately further the proposed purposes. As just an example, "standard" condition § 5D1.3(c)(3) prohibits leaving the judicial district without advance permission.[26] And the purported purpose is that it

> enables the probation officer to . . .to be responsible for any defendant known to be in the judicial district, instruct the defendant about the conditions of supervision specified by the sentencing court, keep informed of the conduct and condition of the defendant, report the defendant's conduct and condition to the sentencing court, and aid the defendant and bring about improvements in his or her conduct and condition. 18 U.S.C. §§ 3603(1)-(4) and (7), 3563(d), 3583(f).[27]

But there are much more narrowly tailored ways to achieve those objectives rather than a blanket prohibition on travel, regardless of duration and regardless of purpose.

Even assuming a standard condition is designed to appropriately further a stated purpose, there must still be an analysis of whether the particular person on supervision needs that intervention. As mentioned above, over-supervising people can be counterproductive and boost recidivism.[28] If conditions are truly tailored to an individual's needs, then there will be very few standard conditions because everyone's needs are

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[23] U.S. Sent'g Comm'n, *supra* note 1, at 12.

[24] *Standard*, *Oxford English Dictionary* (2022).

[25] Admin. Off. of the U.S. Cts., Prob. & Pretrial Servs. Off., *Overview of Probation and Supervised Release Conditions* 13–41 (July 2024).

[26] U.S.S.G. § 5D1.3(c)(3) (2024).

[27] Admin. Off. of the U.S. Cts., Prob. & Pretrial Servs. Off., *supra* note 25, at 19.

[28] *See supra* note 5.

unique.[29] "Moreover, standard conditions often consist of directives or restrictions, providing little to no treatment or interventions to facilitate behavioral change," so they are not aligned with S/R's rehabilitative function.[30] As scholars at the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota opine, "[t]o adhere to the risk principle effectively, standard conditions should be eliminated or limited to the minimum necessary to define the requirements of supervision."[31]

Of course, I understand that the most impactful change to the reflexive imposition of standard conditions would require collaboration with the Criminal Law Committee and the Administrative Office of the Courts; it is ultimately the Judicial Conference of the United States that must approve the revisions to the national judgment forms. And because those forms contain a pre-printed list of "standard" conditions,[32] absent a change to those forms, I have reservations about the impact of this particular proposed amendment. Nevertheless, I think the change in terminology coupled with the individualized analysis is progress.

D. § 5D1.4(a) (Issue for Comment 1(B)) – A new policy statement encouraging a "second look" for supervision appropriately reinforces supervised release's rehabilitative function.

I commend the Commission on the proposal to create a new policy statement, § 5D1.4 (Modification, Early Termination, and Extension of Supervised Release),[33] which focuses, in part, on the need to "right size" S/R to reflect people's actual needs and thereby reinforce the program's core rehabilitative function.

The proposed § 5D1.4(a) would encourage at least one post-release review for potential necessary modifications to both S/R's length and conditions: a "second look" for

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[29] "Standard conditions are the least aligned with RNR principles because they are not tailored to the individual's risk or needs." Kelly Lyn Mitchell et. al, Univ. of Minn. Robina Inst., *Policy Brief: Aligning Supervision Conditions with the Risk-Needs-Responsivity Framework* 4 (2023).

[30] *Id.* ("In other words, standard conditions are like telling a person with high cholesterol that they need to change their diet by providing a list of foods they can no longer eat without any other support to help that person change their eating behavior.").

[31] *Id.*; *see also* Doherty, *supra* note 3 at 1025 ("In evaluating the utility of any particular condition, courts should distinguish between conditions that are aimed simply at establishing control over 'criminals' and conditions that provide reintegrative services, such as job-training or mental health treatment. They should consider the regulatory and administrative costs of any condition they impose and require proof that this condition will actually lead to some desired societal goal.").

[32] *Judgment in a Criminal Case*, Admin. Off. of the U.S. Cts. (Sept. 1, 2019) (forms); *see also* Doherty, *supra* note 3, at 1013 ("The thirteen 'standard' conditions have been pre-incorporated into Form AO-245B, the nationwide template for judgments in criminal cases. By way of the AO-245B, people on probation and supervised release are mechanically made subject to exactly the same thirteen standard conditions." (internal citation omitted)).

[33] U.S. Sent'g Comm'n, *supra* note 1, at 18–19.

supervision.[34] This would be an important and long-overdue amendment. Given its importance, the amendment should reflect a strong directive for courts to conduct a regularized re-evaluation, using the proposed "should" instead of "may."[35]

First, the most obvious reason that a second look for S/R is important is because it will ensure that the term is tailored to a person's rehabilitative needs at the moment when they are actually on supervision.[36] Given the length of federal sentences, there can be decades between a term's imposition and its actual implementation. Encouraging courts to revisit and revise S/R would help increase supervision effectiveness by aligning it more strongly with the risk-needs-responsivity framework that the U.S. Probation and Pretrial Services Office already uses.[37]

Moreover, imposing and refining supervision conditions on the back end of a prison term is not a novel idea; it is a regular practice in the criminal legal system across jurisdictions. In the federal parole system, conditions are set in the Certificate of Release when the person is paroled, and there is an appeal if the "parolee believes the conditions" are "unfair."[38] The majority of state parole systems require risk assessments before setting conditions of supervision to help ensure that monitoring is responsive to the person.[39] In

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[34] "Second-look proceedings refer broadly to the universe of mechanisms by which people can petition to have sentences reduced, be granted parole, or otherwise be released from prison early based on a wide range of legal theories." Meredith Esser, *Unpunishment Purposes*, 109 Minn. L. Rev. 1229, 1232–33 n.4 (2025).

[35] U.S. Sent'g Comm'n, *supra* note 1 at 18.

[36] *See* Scott-Hayward, *supra* note 13 at 216 ("Judges cannot predict with any certainty what impact serving a prison sentence will have on an individual's risk and needs. For this reason, the sentencing hearing is not the best time to make a decision about future risks or needs." (citation omitted)); *Siegel*, 753 F.3d at 710 ("[I]t is doubtful that even experienced judges, who have sentenced a great many criminals, acquire from that experience a sophisticated understanding of the likely behavior of convicted criminals upon their release from prison and how that behavior can be altered by imposing post-release restrictions before, often long before, a prisoner's release."); *see also* Fed. R. Crim. P. 32.1(b) Advisory Committee Note (noting that 18 U.S.C. § 3583(e) recognizes that "the sentencing court must be able to respond to changes in the [defendant's] circumstances as well as new ideas and methods of rehabilitation.").

[37] Prob. & Pretrial Servs., *Evidence-Based Practices*, Admin. Off. of the U.S. Cts. (last visited Feb. 28, 2025) ("The Risk-Need-Responsivity Model is used to guide effective assessment and supervision practices in the federal system.").

[38] U.S. Parole Comm'n, *Frequently Asked Questions: May Any of the Conditions of Release Be Changed by the Commission*, U.S. Dep't of Just. (last visited Feb. 28, 2025).

[39] Amanda Essex, Nat'l Conference of State Legislatures, *Legislative Primer Series on Community Supervision: Tailoring Conditions of Supervision* 3 (2020).

Although the U.S. Probation Office uses the Post Conviction Risk Assessment ("PCRA") "to improve the effectiveness and efficiency of post-conviction supervision," that assessment is being used to evaluate who "to target for correctional interventions," which of the "characteristics or needs" they should address with each individual, and "[h]ow to deliver supervision and treatment in a way that produces the best outcomes." Admin. Offi. of the U.S. Cts., Prob. & Pretrial Servs. Off.,

short, adopting a suggestion that back-end review be a regular part of the supervision process furthers S/R's rehabilitative purpose and increases the likelihood of success.

Second, a second look for S/R is also appropriate because the legal validity, practical feasibility, and wisdom of the previously imposed conditions may have changed over time, regardless of the individual needs of the person being supervised. As an example, in 2016, several changes to the standard and special conditions went into effect.[40] Although the amendments were the product of many concerns, one driver was litigation over the ambiguity and vagueness of several conditions' language and whether people on supervision reasonably could be expected to understand what they were being asked to do.[41]

Although the 2016 changes have been important prospectively, because there is no regularized reevaluation of S/R, courts must continue to grapple with the enforceability and wisdom of the now-rejected conditions during the supervision and revocation proceedings of people sentenced prior to 2016.[42] And not only that, but courts prohibit facial challenges to the validity of previously imposed conditions in a revocation proceeding,[43] even if courts have since deemed those conditions suspect or unlawful.[44] Litigation over these questionable conditions could be avoided with regularized and systematic review, resulting in more equitable and less disparate outcomes for all people on S/R at any one time.

Post Conviction Risk Assessment (last visited Feb. 28, 2025). I have been unable to find any data signifying that the U.S. Probation Office considers the Post Conviction Risk Assessment ("PCRA") score to suggest a modification hearing under 18 U.S. Code § 3583(e)(2) when fewer and less onerous conditions may be warranted. Instead, in my experience, modification hearings tend to be a one-way rachet used to increase conditions when someone is believed to be at risk for violation or has, in fact, violated. *See also Siegel*, 753 F.3d at 708 ("[M]odification is a bother for the judge, especially when, as must be common in cases involving very long sentences, modification becomes the responsibility of the sentencing judge's successor because the sentencing judge has retired in the meantime.").

[40] U.S.S.G. App. C, amend. 803 (effective Nov. 1, 2016).

[41] *See generally* Stephen E. Vance, *Conditions of Supervision in Federal Criminal Sentencing: A Review of Recent Changes*, 81 Fed. Prob. J. 3, 5 (June 2017) (describing the litigation history that led to the changes to the conditions' language).

[42] *See, e.g.*, *United States v. Robledo*, 2:16-cr-01015-CJW-MAR, Doc. 91 (N.D. Iowa Mar. 3, 2022) (litigating whether a person violated pre-amendment standard condition USSG § 5D1.3(c)(5) (2016), almost 6 years after it was removed from the Guidelines); *United States v. Nielsen*, No. 21-8087, 2022 WL 3226309, at *4–*5 (10th Cir. Aug. 10, 2022) (unpublished) (detailing the substantial litigation during a revocation proceeding premised on a condition imposed years before the Circuit raised concerns about its constitutionality).

[43] *See United States v. Warren*, 335 F.3d 76, 78 (2d Cir. 2003) ("We join other circuits in holding that the validity of an underlying conviction or sentence may not be collaterally attacked in a supervised release revocation proceeding and may be challenged only on direct appeal or through a habeas corpus proceeding." (citing cases from the Fifth, Eleventh, Ninth, Seventh, and Second Circuits)); *United States v. Miller*, 557 F.3d 910, 913 (8th Cir. 2009) (same); *United States v. LeCompte*, 800 F.3d 1209, 1214 n.6 (10th Cir. 2015) (same).

[44] *See, e.g.*, *Nielsen*, No. 21-8087, 2022 WL 3226309, at *2.

In short, amending the Guidelines to strongly encourage courts to conduct an "individualized assessment of the appropriateness" of a person's conditions "as soon as practicable after" their "release from imprisonment"[45] is both wise and overdue given S/R's rehabilitative purpose and the ever-evolving understanding of the appropriateness of various supervision conditions. Although conducting this second look may, again, require additional work for stakeholders involved in the process, when coupled with the proposed amendment to eliminate the S/R default, the number of people on supervision—and for whom this review would be required—will be fewer than it is today.

E. § 5D1.4(b) (Issue for Comment 1(B) and 3) – A new policy statement governing the early termination of supervised release is an appropriate approach to provide additional transparency for people on supervision, create greater uniformity across the districts, and offer "unpunishment" guidance.

The proposed § 5D1.4(b) would establish a framework for courts to consider motions for early termination and encourage courts to exercise their discretion to terminate after a year.[46] Such guidance should be included in the new policy statement, and it must reflect a strong directive for courts to terminate S/R when appropriate, using the proposed "should" instead of "may."[47] People must not be supervised longer than necessary,[48] and they should be evaluated for early termination as soon as permissible under the statute.[49]

Moreover, the Commission's proposal to include within the policy statement a list of non-exhaustive factors for courts to evaluate in early termination motions is appropriate in light of (1) the need to provide people on supervision with greater direction as to how they can succeed, (2) the need to create greater uniformity as to what may justify early termination, and (3) the difficulty associated with relying solely on the statutory criteria set forth in 18 U.S.C. § 3583(e) in this rehabilitation-focused context.

First, enumerating factors that courts should use as a metric for success—as measured by the right to live freely and without supervision—provides greater transparency for those on S/R. At present, there is no plainly articulated path to early termination.[50] Having represented hundreds of people on S/R over the past 15 years in three different

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[45] U.S. Sent'g Comm'n, *supra* note 1, at 18.

[46] *Id.*

[47] *Id.*

[48] 18 U.S.C. §§ 3583(c), (e)(1); *see also* 18 U.S.C. § 3553(a).

[49] *Id.* § 3583(e)(1).

[50] The Guide to Judiciary Policy articulates criteria that the U.S. Probation Office may consider in determining whether to recommend early termination. *See* Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* (Vol. 8E, Ch. 3, § 360.20). But courts across jurisdictions approach the task with widely different perspectives. *See generally* Jacob Schuman, *Terminating Supervision Early*, 62 Am. Crim. L. Rev. ___ (forthcoming 2025).

federal districts, one of the hardest questions to answer is: "How do I get off my paper early? And is it even possible?" Without clear and understandable criteria against which people on S/R are able to measure whether they can achieve this goal, S/R undermines some of the same values that it seeks to instill in those laboring under its conditions: increased agency and prosocial motivation.

Put simply, we must make it easier for people on S/R to understand how courts may evaluate what they should do to be free from supervision early without the need to consult with a lawyer and before they are brought before a court. This allows them to make choices in light of clear and defined targets, help design and recommend effective conditions to reach those goals, intelligently request particular outreach strategies, and receive an accurate accounting of their progress. In other words, greater transparency is helpful, so that people on S/R can be appropriately involved in their own lives.[51]

Second, including early-termination criteria akin to what the Commission has proposed would help make plain that a person need not show extraordinary or exceptional behavior to warrant early termination. Instead, as contemplated by 18 U.S.C. § 3583(e),[52] when a person's "conduct" and the "interests of justice" require, doing well on S/R can be sufficient on its own. This clarification is important because courts have debated for decades whether 18 U.S.C. § 3583(e) "requires a showing of new, unforeseen, or extraordinary or exceptional circumstances,"[53] and, even if not statutorily required, whether early termination "should generally occur only when . . . something exceptional or extraordinary warrants it."[54]

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[51] As a clinical law professor, I am required by the American Bar Association to articulate "specific and measurable" "learning outcomes" for my students each semester and in each course I teach. *See* Am. Bar Ass'n, *Standard 302. Learning Outcomes* (Feb. 2025). I struggle to understand as a pedagogical matter how we can expect people on S/R to be active participants in their rehabilitation—a form of "education" or "re-education" related to social norms and behaviors— if we do not give them benchmarks against which they will be judged for success as measured by early termination. *See also generally* Rebecca B. Orr et. al, *Writing and Using Learning Objectives*, Life Scis. Educ., Sept. 2022, at 1, 3 (describing the care and detail required to craft effective learning objectives–i.e., objectives that convey clearly what we intend to teach and how we intend to measure learning).

[52] The only thing that the statute requires is that termination be "warranted by the conduct of the defendant . . . and the interest of justice." 18 U.S.C. § 3583(e). As several Circuits have held, "[t]he expansive phrases 'conduct of the defendant' and 'interest of justice' make clear that a district court enjoys discretion to consider a wide range of circumstances when determining whether to grant early termination." *United States v. Melvin*, 978 F.3d 49, 52 (3d Cir. 2020) (quoting *United States v. Emmett*, 749 F.3d 817, 819 (9th Cir. 2014)); *United States v. Hale*, 127 F.4th 638, 639 (6th Cir. 2025) (same).

[53] *Melvin*, 978 F.3d at 53 (discussing *United States v. Lussier*, 104 F.3d 32, 36 (2d Cir. 1997)); *see also Hale*, 127 F.4th at 641 ("The text [of 18 U.S.C. § 3583(e)(1)] does not make 'exceptionally good' conduct an absolute prerequisite to relief" and discussing the various misinterpretations of § 3583(e)(1)); Schuman, *supra* note 50, at 27–31.

[54] *Melvin*, 978 F.3d at 53.

Although the Circuits to address the question directly now agree that there is nothing in 18 U.S.C. § 3583(e) that requires "extraordinary" or "exceptional" behavior,[55] there is still disagreement among district courts in Circuits without binding opinions.[56] And there is also disagreement about whether "just doing what supervised release requires" [57] or "mere compliance"[58] can ever warrant early termination.[59] Courts wary of considering "mere compliance" as a justification for early termination often note that "[i]f 'unblemished' postrelease conduct warranted termination of supervised release, then 'the exception would swallow the rule,' i.e., diligent service of the full period of supervised release imposed at sentencing."[60]

But requiring more than "mere compliance" and concluding that because a S/R term was imposed the person must serve it, misunderstands the rehabilitative function of S/R in a way that these proposed amendments seek to remind the courts. Given § 3583(e)'s text,

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[55] *See United States v. Parisi*, 821 F.3d 343, 347 (2d Cir. 2016); *Melvin*, 978 F.3d at 53; *United States v. Ponce*, 22 F.4th 1045, 1047 (9th Cir. 2022); *Hale*, 127 F.4th at 641–42.

[56] *See, e.g.*, *United States v. Reisner*, 4:06-CR-077, 2008 WL 3896010, at *1 (N.D. Fla. Aug. 20, 2008) ("Defendant has not cited facts that demonstrate exceptionally good behavior or other extraordinary circumstances sufficient to warrant early termination . . . ."); *United States v. Branscumb*, No. 1:09-CR-10023, 2019 WL 6501208, at *3 (C.D. Ill. Nov. 12, 2019) ("[A] defendant should demonstrate exceptionally good behavior or unforeseen circumstances . . . ."); *United States v. Reed*, No. 15-100, 2020 WL 4530582, at *3 (E.D. La. June 5, 2020) (noting a defendant had not "demonstrate[d] 'exceptionally good behavior'"); *United States v. Thomas*, No. 1:01-CR-0071, 2025 WL 494983, at *2 (N.D. Ind. Feb. 14, 2025) ("Early termination . . . should occur only when the sentencing judge is satisfied that 'new or unforeseen circumstances' warrants it.") (internal citation omitted); *United States v. Courmier*, No. 1:16-CR-19(6), 2023 WL 5434756, at *4 (E.D. Tex. Aug. 22, 2023) ("Generally, early termination of supervised release is not granted unless there are significant medical concerns, substantial limitations on employment, or extraordinary post-release accomplishments that would warrant such a release.").

[57] *United States v. Gutierrez*, 925 F. Supp. 2d 1196, 1202 (D.N.M. 2013) ("Certainly a defendant does not have to save a child from a burning building or start a major nonprofit to feed the poor to show sufficient progress. On the other hand, just doing what supervised release requires also may not be enough.").

[58] *United States v. Scanlon*, No. 14-CR-007, 2024 WL 1716645, at *3 (D.D.C. Apr. 22, 2024) ("[W]hile a defendant need not show extraordinary or unusual conduct' to warrant termination of supervised release, . . . 'mere compliance with the conditions of release' is insufficient to merit early termination because model conduct and compliance is expected of a person under the magnifying glass of supervised release.'" (internal citations omitted)).

[59] *See, e.g.*, *United States v. Pruitt*, No. 06-CR-30062, 2014 WL 4270008, at *3 (C.D. Ill. Aug. 28, 2014) ("The Court also notes that many district courts and other Courts of Appeals have held that the conduct of the defendant necessary to justify early termination should include something more than just following the rules of supervision. . . ."); *United States v. Seymore*, No. 07-358, 2023 WL 3976200, at *1 (E.D. La. June 13, 2023) (collecting cases explaining that mere compliance with supervision will not generally justify early termination).

[60] *United States v. Vary*, 683 F. Supp. 3d 666, 669 (E.D. Mich. 2023) (quoting *United States v. Medina*, 17 F. Supp. 2d 245, 247 (S.D.N.Y. 1998)).

"mere compliance" can be enough. If a court determines that the "conduct of the defendant" and the "interests of justice" show that a person need not be on S/R after a review of the relevant factors under 18 U.S.C. § 3553(a), then termination is required. Otherwise, the sentence is greater than necessary to serve the purposes of punishment.[61] And to rigidly require service of the "the full period of supervised release imposed at sentencing"[62] fails to account for the life lived and the lessons learned in the interim.

Even the Administrative Office of the Courts has noted:

> It is a common misconception that early termination under § 3583(e)(l) must be based on an offender's significantly changed circumstances or extraordinarily good performance under supervision. The offender's conduct while under supervision is only one of many factors that a district judge must consider . . . . [A] court must simply be satisfied that the termination is warranted and is in the interest of justice . . . .[63]

In short, placing suggested criteria in the policy statement would help courts better implement § 3583(e)'s mandate by providing guidance as courts evaluate and frame compliance. And this could, in turn, help reduce significant district-to-district disparities in rates of early termination.[64]

Third, providing courts with more explicit guidance as to the criteria they should consider in the early termination analysis does not infringe upon a court's discretion and provides needed guidance. Unlike when electing to impose S/R or selecting the term's length,[65] using § 3583(e) as the only touchstone in the early termination realm is insufficient. This is because the criteria § 3583(e) references are mostly the same § 3553(a) factors that courts consider when imposing imprisonment.[66] Yet those § 3553(a) factors have one primary valence: punishment.[67] Since no statute guides a court on how to

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[61] 18 U.S.C. § 3553(a).

[62] *Vary*, 683 F. Supp. 3d at 669.

[63] *United States v. Trotter*, 321 F. Supp. 3d 337, 364–65 (E.D.N.Y. 2018) (quoting Letter from Joe Gergits, Assistant General Counsel for the Admin. Off. of the United States Courts to Ellie N. Hayase Asasaki, United States Probation (July 20, 2009)) (internal quotation marks omitted).

[64] *See* Schuman, *supra* note 50, at 40–41.

[65] *See supra* Part A (advocating that the statutory factors are sufficient to provide both discretion and useful guidance related to the question of S/R imposition and length).

[66] *See* 18 U.S.C. § 3583(e) (including the § 3553(a) factors except for § 3553(a)(2)(A)).

[67] *See* Esser, *supra* note 34, at 1243–50, 1273–79 ("[T]he purposes of punishment in many contexts are not suited to the second-look context, partially because the purposes generally point in the direction of more incarceration rather than less. With the possible exception of rehabilitative purposes, judges, when determining whether to grant a sentence reduction, are stuck with punishment purposes that reinforce the default mode of incarceration."); *see also* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. Rev. 161, 205 (2016) ("[I]t

"unpunish,"suggestions from the Commission as to the type of factors the court should consider when deciding whether to set someone free are useful and necessary.

F. § 5D1.4(b)(1)–(6) (Issues for Comments 1(B), 3, and 6) – The early termination policy statement should provide specific criteria for courts to consider, and the Commission's proposal requires some additions to better achieve transparency and uniformity and reflect supervised release's rehabilitative purpose.

The specific criteria the Commission has proposed including in § 5D1.4(b)(1)–(6) is a good starting point. That said, I would urge some refinements and additions to help better achieve the transparency, uniformity, and unpunishment goals I believe should be reflected in the policy statement. I have included a marked-up version of § 5D1.4(b) below. Specific comments related to the justification for the proposed changes are in the footnotes for ease of reading:

> In determining whether termination is warranted, the court should consider the following non-exhaustive list of factors:
>
> (1) any history of court-reported violations over the term of supervision, considering the relative gravity of the behavior and what steps the defendant may have taken into order to mitigate or remedy the behavior;[68]
>
> (2) the defendant's demonstrated ability not to commit a crime ~~of the defendant to lawfully self-manage~~ beyond the period of supervision;[69]

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is unclear why one should approach the decision not to punish (or to punish less) the same way as the decision to impose punishment (or to punish more).")

[68] Because the purpose of S/R is rehabilitative, courts should be directed to look to the ameliorative justifications behind any reported violations or requests for modifications and not simply default to the consideration of a person's behavior under a punitive framework. Some of the S/R modification and revocation cases that my Clinic has litigated in the past three years provide examples: the person may have self-disclosed the violation; they may have missed treatment or a urinalysis test because of illness, *United States v. Reed*, No. 3:21-cr-00043-SHL-SBJ, Doc. 83 at 2–4 (S.D. Iowa Feb. 19, 2025); they may have been suffering mental-health difficulties that inhibited full compliance, *United States v. Campbell*, 6:19-cr-02001-CJW-MAR, Doc. 71 at 4–5 (N.D. Iowa Sept. 23, 2021); they could have been confused about their obligations or received conflicting advice, *Reed*, No. 3:21-cr-00043-SHL-SBJ, Doc. 83 at 2–4; or the U.S. Probation Office could have misunderstood the circumstances of what was occurring on supervision, *United States v. Hickman*, 3:10-cr-00070-RGE-SBJ, Doc. 252 (Gov't Mot. to Dismiss) (S.D. Iowa Mar. 28, 2024) ("Due to the updated information provided to the Probation Office, the Probation Office along with the U.S. Attorney's Office is no longer requesting a Motion to Modify.").

[69] Because the amendment should aim to provide clarity to those under supervision, it would help to eliminate unclear terms of art. "Lawfully self-manage" is a phrase that appears in the *Guide to Judiciary Policy*, and it is defined as "[t]he person's demonstrated ability not to commit a crime during the period of supervision and beyond." *See* Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* 3 (Vol. 8E, Ch. 1, § 140). The proposed policy statement should state that plainly.

(3) the defendant's substantial compliance with all conditions of supervision, recognizing that perfect, exceptional, or extraordinary compliance or behavior are not required;[70]

(4) the defendant's engagement in appropriate prosocial activities, including but not limited to[71] employment, education, volunteering, providing emotional or financial support, participating in spiritual or religious activities, participating in community-centered activities, participating in treatment programs, and participating in or successful competition of court-sponsored reentry courts[72] and the existence or lack of prosocial support to remain ~~lawful~~ law-abiding[73] beyond the period of supervision;

(5) a demonstrated reduction in risk level over the period of supervision or maintenance of a risk level in cases where a reduction is not possible through no fault of the defendant;[74]

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[70] Because there is no consensus across jurisdictions as to whether compliance with the terms of supervision without some heightened showing is required for early termination, *see supra* notes 53–62, the policy statement should state a position. And this proposed position—that simple compliance can be enough depending on the individual and the interests of justice—is consistent with both 18 U.S.C. § 3583(e) and the circuit court caselaw interpreting its terms.

[71] Because the amendment should aim to provide clarity to those under supervision, it would help to define terms that are not readily definable. I failed to find a comprehensive or illustrative definition of what "prosocial" means. *See generally* Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* (Vol. 8E, Ch. 1, § 140). The amendment should state clearly those activities that the court would consider squarely "prosocial."

[72] Because the proposed amendment lists "prosocial activities" as a consideration when determining whether to terminate S/R, then it seems necessary to include, as an example of a plainly prosocial activity, participation in or completion of "reentry programs." *See* U.S. Sent'g Comm'n, *supra* note 1, at 25 (requesting comment on whether "completion of reentry programs . . . should be considered by a court when determining whether to terminate the supervision."). In line with the belief that perfect compliance should not be required for early termination, successful competition of a program should not be required for it to qualify as a "prosocial" experience.

[73] A person is not "lawful" or "unlawful." Rather, a person engages in behavior that is coded as such. For clarity's sake, "law-abiding" is a better choice.

[74] The inclusion of (b)(5) is particularly commendable because it recognizes that courts should meet people where they are in their rehabilitation and require only progress. Given that the PCRA and other risk assessments combine both static and dynamic factors, Admin. Off. of the U.S. Cts., Prob. and Pretrial Servs. Off., Post Conviction Risk Assessment (last visited Feb. 28, 2025), flexibility in the risk level allowed or required for early termination prevents overreliance on static factors that would place early termination out of reach for some despite no lack of trying. The proposed additional language would ensure that people who are not able to lower their level (e.g., they start at the lowest level or are unable to lower their level due to static factors) are not excluded.

(6) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's disciplinary, educational, and vocational record while incarcerated, the defendant's age, the defendant's health,[75] the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information provided by the victims of the offense, and other factors the court finds relevant.

Additionally, I suggest the inclusion of one additional factor:

(7) whether the defendant earned sentence-reduction incentives in custody through rehabilitative programming, such as earned-time credits under the First Step Act of 2018, that were not properly credited toward the defendant's sentence or pre-release custody.

This final criteria is necessary given the BOP's sustained failure to calculate and apply earned time credits under the First Step Act of 2018 to people who have participated in rehabilitative programming while in federal custody.[76] For those who otherwise qualify, the incentive for participating in that programming was intended to be a mandatory reduction in a term of imprisonment (up to 365 days) and expanded time in pre-release custody.[77] But the BOP has failed to uphold its end of the bargain, leaving many people without an acknowledgment of the hard work they did and access to the entitlement they earned. Suggesting courts can consider uncredited sentence-reduction incentives would provide credit for carceral overservice in a context where it is appropriate—when evaluating rehabilitation and the person's programming.[78]

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[75] Although the need to consider public safety is a factor that courts are allowed to consider, this proposed criterion should not be a one-way ratchet in favor of supervision by being primarily backwards looking to the crime and a person's criminal history. The criteria should also include individualized factors that speak to public safety, including prison rehabilitation, age, and health. *See generally* U.S. Sent. Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* (2017).

[76] Letter to the Honorable Merrick Garland, Attorney Gen., from Sen. Richard J. Durbin and Sen. Charles E. Grassley (Nov. 16, 2022) (detailing the stories of people who "were unable to receive the benefit they earned for participating in recidivism reduction programs and productive activities"); *see also* Complaint, *Crowe v. Fed. Bureau of Prisons*, 1:24-cv-03582, Doc. 1 (D.D.C. Dec. 20, 2024) (alleging thousands of people have been unlawfully denied pre-release custody and seeking both declaratory and injunctive relief); Elizabeth Weill-Greenberg, *Incarcerated Protesters Say Federal Prisons Refuse to Release People on Time*, The Appeal (Sept. 30, 2024) (detailing the various ways that the BOP is refusing to award earned time credits).

[77] 18 U.S.C. §§ 3624(g)(2)–(3); *see also* 18 U.S.C. § 3632.

[78] *See, e.g.*, Order Denying Am. Pet. for Writ of Habeas Corpus, *White v. Lauritsen*, No. 4:23-CV-00027-RGE (S.D. Iowa Apr. 1, 2024) (denying a § 2241 petition seeking the application of uncredited earned time credits towards a term of supervised release but noting the court it "can and would consider [Ms.] White's excess time spent in prison in connection with [an early termination] motion"); *Gonzalez v. Pierre-Mike*, No. 1:23-CV-11665-IT, 2023 WL 5984522, at *5 (D. Mass. Sept. 14, 2023) (denying a § 2241 petition seeking the application of uncredited earned time credits but

G. § 5D1.4(b) (Issue for Comment 7) – The Commission should rely on Federal Rule of Criminal Procedure 32.1 for the appropriate early termination procedures and include language in the commentary urging courts to establish district-appropriate procedures and articulate their disposition justifications to increase transparency and accurate data collection

The Commission has requested comment on "the appropriate procedures to employ when determining whether to terminate a term of supervised release" under § 5D1.4.[79]

The procedures that govern motions for early termination of S/R are set forth in Federal Rule of Criminal Procedure 32.1.[80] Courts must hold a hearing before conditions of supervised release can be properly modified.[81] A hearing is not necessary, however, if (1) the modification is favorable to the defendant; (2) the modification "does not extend the term" of S/R; and (3) the United States is aware of the proposed modification and does not object.[82] A hearing is also not required if the court declines to terminate S/R.[83]

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noting that the defendant was "not precluded from requesting early termination of his supervised release at a later time"); *Harrison v. Fed. Bureau of Prisons*, No. 22-14312, 2022 WL 17093441, at *2 (S.D. Fla., Nov. 21, 2022) (same); *cf. United States v. Johnson*, 529 U.S. 53, 60 (2000) ("There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term. The statutory structure provides a means to address these concerns in large part. . . . [T]he court may terminate an individual's supervised release obligations at any time after the expiration of one year . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." (internal quotations omitted)); *Pope v. Perdue*, 889 F.3d 410, 414 (7th Cir. 2018) (noting that a finding someone spent "too much time in prison" would carry "great weight in a § 3583(e) motion to reduce [an S/R] term" (internal citation omitted)).

[79] U.S. Sent'g Comm'n, *supra* note 1, at 25.

[80] 18 U.S.C. § 3583(e)(1) (providing that S/R may be terminated "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation").

[81] Fed. R. Crim. P. 32.1(c)(1).

[82] *Id.*

[83] Although a hearing is required pursuant to Federal Rule of Criminal Procedure 32.1 before the Court may modify a term of supervised release, "the Court need not conduct a hearing if, upon consideration of the record, the Court determines that a requested modification will not be approved." *United States v. Thinh Quoc Kieu*, No. CR-02-177-D, 2012 WL 2087387, at *1 (W.D. Okla. June 8, 2012); *see also Karacsonyi v. United States*, 152 F.3d 918 (Table), 1998 WL 401273, at *1–*2 (2d Cir. June 10, 1998) (concluding that, because defendant's "term of supervised release was not modified," Rule 32.1 "did not call for a hearing"); *United States v. Laughton*, 658 F. Supp. 3d 540, 543 (E.D. Mich. 2023) (concluding that because the court was denying the motion for early termination, the "motion will be resolved on the papers").

At this time, I do not believe further procedural guidance is warranted. Districts vary widely with respect to the number of people on S/R[84] and the resources of their courts, U.S. Probation Offices, Federal Defender Offices, and U.S. Attorneys' Offices. I do not believe we can know enough about how the policy statement would impact the early termination process to provide accurate and feasible additional guidance.

Rather, in lieu of providing specific guidance right now, the Commission should include language in the commentary that does two things. First, encourage stakeholders in each district to work together to develop practices to implement the new policy statement. In some districts—perhaps those with the highest denial rates for early termination—stakeholders may believe that counsel would be appropriate in some instances. But, in other districts, submission on the papers may help better achieve the policy statement's goals.

Second, the Commission should encourage courts to collect and report data on the number of motions for early termination brought (and by whom), the disposition of those motions, and the justifications for those dispositions. I litigate S/R cases primary in the district courts in the Eighth Circuit, which lamentably stands as the "outlier" in concluding that "[n]either 18 U.S.C. § 3583(e) nor relevant case law requires the district court to explain its denial of early termination of supervised release."[85]Although justifications may not be required in the Eighth Circuit, given the rehabilitative purposes of S/R they are undoubtedly helpful for both the person on supervision and the public. Not only would encouraging courts to state justifications for motion dispositions on the record further transparency for those on S/R,[86] but it would also allow the Commission to better collect data it could then use to evaluate the effectiveness of the proposed amendments and to revisit the early termination process in the future.

II. Conclusion

In conclusion, the Commission's proposed amendments to Chapter 5, Part D are commendable. The proposal to encourage a shift back to S/R's original rehabilitative purpose by requiring increased individualization will help ensure that S/R is more effective and transparent for those laboring under its terms. And this, of course, is also a win for the public writ large. Certainly, these proposed amendments will require all stakeholders to change their default practices. But the learning curve is shallow, and the benefits are great.

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[84] Admin. Off. of the U.S. Cts., *Federal Judicial Caseload Statistics 2024 Tables*, Fed. Prob. System, tbls. E-1, E-2, and E-3 (Mar. 31, 2024).

[85] *United States v. Norris*, 62 F.4th 441, 450 n.4 (8th Cir. 2023) ("The Eighth Circuit is routinely cited as the outlier."). Other Circuits to address the issue require, at the very least, "an explanation that would permit meaningful appellate review and justify the court's conclusion in light of the parties' nonfrivolous arguments and the legal standard." *Emmett*, 749 F.3d at 822; *see also United States v. Gammarano,* 321 F.3d 311, 315–16 (2d Cir. 2003); *Melvin*, 978 F.3d at 52–53; *United States v. Johnson*, 877 F.3d 993, 998 (11th Cir. 2017); *United States v. Mathis-Gardner*, 783 F.3d 1286, 1287 (D.C. Cir. 2015). This does not necessarily require "explicit findings as to each of the factors," *United States v. Lowe,* 632 F.3d 996, 998 (7th Cir. 2011), but it does require a statement that the court has considered the statutory factors, *Gammarano*, 321 F.3d at 315–16; *see United States v. Pregent*, 190 F.3d 279, 283 (4th Cir. 1999).

[86] *See supra* Part E.

Thank you for the opportunity to comment.

Sincerely,

Alison K. Guernsey
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REENA KAPOOR, MD
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34 Park Street
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[redacted]

February 27, 2025

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Dear Commissioners:

Thank you for undertaking the huge task of revising the Supervised Release guidelines. I am a forensic psychiatrist at the Yale University School of Medicine, and I have worked with hundreds of patients on supervised release (state and federal) over nearly two decades. I greatly appreciate the Commission's move toward individualized assessments and narrowly tailoring conditions to an individual's needs and risks. Such an approach is consistent with modern principles of mental health treatment and risk management, and it gives individuals the greatest chance of success in the community.

While I support the Commission's overall approach, I ask that you consider incorporating a medical model of substance use and mental health disorders into your framework for supervised release and probation:

- Several sections of the document (e.g., §5D1.1, §5D1.3, §5H.1.4) include the term "substance abuse" and refer to a defendant as "an abuser of narcotics, other controlled substances, or alcohol." This language is highly stigmatizing and out of step with the current medical understanding of substance use disorders. Person-first and non-pejorative language is preferable, e.g., "an individual who uses or has used drugs or alcohol" or "an individual with a substance use disorder."

- When considering what conditions of release to impose, courts and probation officers should recognize that a substance use disorder is not a moral failing, but rather a treatable illness. Licensed health professionals should be consulted about what the appropriate course of treatment is, and an individual's release conditions should be flexible enough to allow the health professional's recommendations to be followed.

- For example, if an individual uses drugs or alcohol while on supervised release, revocation and/or incarceration should not be the first—or even second—step. As the adage in substance use disorder treatment goes, "Relapse is part of recovery." In many cases, an individual can be referred to a higher level of care for their substance use disorder, such as an intensive outpatient program or an inpatient facility. An individual's health insurance may pay for this treatment if recommended by a health

professional, making it accessible and affordable even in the absence of providers who have contracted with probation to provide such services.

- Confidentiality is a key principle in medical treatment, including for substance use and mental health disorders. Although some limits on confidentiality for individuals on supervised release are reasonable, courts and probation officers should not have the expectation that every detail of treatment will be shared with them. The opposite should be true: the minimum necessary information, often just a letter stating that the patient has been attending treatment and "remains in good standing" is sufficient. Details such as the content of therapy discussions, medication names and doses, or personal stressors need not be shared routinely, as such disclosures can undermine the therapeutic relationship between healthcare provider and patient.

- Education for probation officers and other relevant court personnel about the basics of mental illness and substance use disorders can be helpful in fostering empathy and understanding. Officers should have access to such training as part of their pre-service and in-service training. However, such training should not be confused for the expertise of a licensed health professional, and the treatment recommendations of appropriately qualified professionals should be respected.

In my years of psychiatric practice, I have seen successful examples of collaboration between mental health providers and probation officers, but these relationships require a shared understanding of roles and boundaries. I hope you will agree that adopting the principles I have outlined above, along with narrowly tailoring release conditions to an individual's risk and treatment needs, will help ensure the efficacy and integrity of the supervised release program.

Sincerely,

Reena Kapoor, MD
Associate Professor of Psychiatry
Director, Law & Psychiatry Division
Yale University School of Medicine

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

John Marshall, Rhode Island

Topics:

Supervised Release

Comments:

I would agree there remain many challenges in federal sentencing, however only see U.S. Probation as part of any potential solution vs. part of the problem. These amendments appear to be primarily focused on reducing and/or removing supervised release in may cases. While I cannot speak to the work of each of our 94 districts, I can for mine (and many others given my national work and experience, particularly in the 1st Circuit). Effective supervision positively impacts the lives of so many we supervise; breaking long cycles of abuse and misconduct. The byproduct of this work increases the number of productive members of our society, while improving community safety. It typically takes many years of criminal conduct for an individual to find their way into our federal court system. If sentenced to jail, they often come out worse off than when they went in. U.S. Probation is there to help individuals successfully re-enter society; removing obstacles, addressing needs, while holding them accountable to the orders of the Court, to any victims, their families, and for needed behavioral changes. This work does not happen overnight, often taking years to effectuate long-lasting benefits.

Reducing supervised release across the board, which is really what these amendments will do, shrinks the U.S. Probation workforce in a significant and long-term manner. I anticipate a dramatic negative impact on our work reducing recidivism and assisting those in our system to lead more productive lives. Doing so also impacts and limits our ability to serve our U.S. District Courts, whether that is at the pretrial phase (most districts are combined for both functions), at sentencing or during post-conviction supervision efforts, which often include our support of Court lead initiatives such as problem-solving courts across the country. With smaller staffs, come less funding, thus less treatment and rehabilitative services, including second chance act spending (for housing as an example) will be available.

This is an extremely concerning set of amendments as it negatively and most directly impacts a group that is doing the critical work of behavior change that has both short term and long-term positive consequences. If terms of supervised release are too long, the Courts already have the

necessary discretion in many cases to set limits as they see fit, both at initial sentencing and at revocation, in addition to the use of Early Termination, which immediately ends any term of supervised release upon order.

I ask that you please reconsider such a hard push to eliminate such a valuable tool. Thank you for your consideration.

Submitted on: February 5, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Yahaira Perez, minister

Topics:

Supervised Release

Comments:

"I strongly support the proposed 2025 amendments to the Federal Sentencing Guidelines, particularly the changes affecting drug offenders. These reforms will help address the overly harsh sentencing practices of the past, which have disproportionately impacted marginalized communities.

By eliminating unnecessary departure provisions and allowing for more individualized sentencing through variances, these amendments will enable judges to impose more fair and effective sentences. This will not only reduce unnecessary incarceration but also promote rehabilitation and reintegration into society.

More chances to those in minimum security such as camps to come home and reintegrate themselves into community again.

I urge the Commission to move forward with these amendments, which will help create a more just and equitable sentencing system for all."

Submitted on: February 27, 2025

TO: United States Sentencing Commission

FROM: Ryan T. Sakoda
Associate Professor of Law
University of Iowa College of Law

DATE: March 3, 2025

RE: Proposed Amendments to Supervised Release

I am an Associate Professor of Law at the University of Iowa College of Law where I teach criminal law, criminal procedure, and quantitative reasoning for lawyers. My research focuses on the empirical analysis of crime and criminal justice policy. I write this comment to highlight research relevant to the Commission's proposed amendments to supervised release.

In a recent study (attached below), I analyze the effectiveness of post-release supervision. Specifically, I examine the effects of two distinct changes to state law that eliminated (in 2000) and then reinstated (in 2013) post-release supervision for a relatively large subset of the population released from Kansas state prisons. This subset of the population consisted of individuals who were originally serving a sentence of probation but ended up serving time in prison as a result of a probation revocation. In the years prior to the 2000 law change, these individuals made up about a third of the population released from Kansas state prisons.

These policy changes provide the opportunity to study the effects of post-release supervision on reincarceration and public safety for the subset of the population whose post-release supervision requirement was affected. My analysis of both of these policy changes yielded the same finding: post-release supervision caused large increases in reimprisonment with no detectable impact on reoffending. I find that the elimination of post-release supervision in 2000 decreased the one-year reimprisonment rate of affected individuals by 28.5 percentage points from a baseline of 35 percent (about an 80 percent decrease) with no detectable increase in reoffending. In 2013, the reinstatement of post-release supervision caused a 17.5 percentage point increase in the one-year reimprisonment rate of affected individuals (bringing the reimprisonment rate back to approximately 30 percent) with no detectable decrease in reoffending. Furthermore, I find that the elimination of post-release supervision in 2000 completely closed the racial gap in the three-year reimprisonment rate of affected individuals. These results suggest that, for a substantial portion of the population released from prisons, the elimination of supervision can drastically reduce the rate of reincarceration while having no apparent cost to public safety. Therefore, this research provides empirical evidence to support policies that decrease the use of post-release supervision. Given these findings, I am encouraged by the Commission's proposed amendments that would promote a reduction in the use of supervised release. The full study is attached below.

Abolish or Reform?
An Analysis of Post-Release Supervision

Ryan T. Sakoda*

Version: June 14, 2024

Abstract

At year-end 2021, there were nearly four million individuals serving a term of probation, parole, or post-release supervision in the United States. This paper uses a unique and detailed dataset to study two distinct changes to state law that eliminated and then reinstated post-release supervision for a subset of the population released from Kansas prisons. Each of these changes occurred in very different periods of criminal justice policy (2000 and 2013 respectively), but yielded the same result: post-release supervision caused large increases in reimprisonment with no detectable impact on reoffending. Using a difference-in-differences strategy, I find that the elimination of post-release supervision in 2000 decreased the one-year reimprisonment rate of affected individuals by 28.5 percentage points from a baseline of 35 percent (about an 80 percent decrease). In 2013, the reinstatement of post-release supervision caused a 17.5 percentage point increase in reimprisonment (bringing the reimprisonment rate back to approximately 30 percent) with no detectable decrease in reoffending. Furthermore, I find that the elimination of post-release supervision in 2000 completely closed the racial gap in reimprisonment rates among the impacted individuals. These results provide support for policies that would reduce the use of community supervision, not only to lower reincarceration rates, but as a promising opportunity to eliminate a major source of racial inequality in the criminal legal system.

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At year-end 2021, there were nearly four million individuals in the United States serving all or a portion of their criminal sentence under probation, parole, or post-release supervision (Kaeble 2023). These forms of supervision, also referred to as community supervision, are used as alternatives to incarceration or tacked on to the end of custodial sentences as periods of transition following release. Although these sentences are served in the community, the enforcement of community supervision conditions generates a cycle of reincarceration that has played a significant role in perpetuating mass incarceration and, as this paper shows, can exacerbate racial disparities in criminal justice outcomes. The findings of this paper challenge policies calling for the broad use of community supervision and add to the mounting evidence that racial inequality pervades every part of the criminal legal system.[1]

Reincarceration of individuals for conditions violations has made up between 20 percent and 40 percent of all prison admissions in recent decades (Travis, Western and Redburn 2014) which has amounted to between 150,000 and 250,000 readmissions annually (Carson and Golinelli 2013). Enforcement of these conditions is intended to further the objectives of supervision,[2] but the high rate of reincarceration can exact a profound toll on the lives of individuals caught in the revolving door of the system and imposes substantial burdens on state prison systems. In many cases, carceral penalties are imposed even though the violation may involve behavior that would not otherwise be considered illegal such as breaking curfew, failure to pay court fees, or missing meetings with a parole officer. These violations are referred to as "technical violations," and a Bureau of Justice Statistics (BJS) study of prisoners released in 2005 found that approximately 56 percent of the individuals reincarcerated within three years of release were reincarcerated solely due to technical violations of their community supervision conditions (Durose, Cooper and Snyder

[1] A growing number of studies find evidence of racial disparities at each stage of the criminal legal process: police search (Antonovics and Knight 2009), police use of force (Fryer 2016), bail decisions (Arnold, Dobbie and Yang 2018), prosecutorial charging practices (Rehavi and Starr 2014), jury trial outcomes (Anwar, Bayer and Hjalmarsson 2012), sentencing (Abrams, Bertrand and Mullainathan 2012; Yang 2015), probation (Rose 2021; Sakoda 2023), and solitary confinement (Sakoda and Simes 2021).

[2] The use and structure of community supervision varies from state to state, but the goals of modern day supervision programs can be split into two main categories: (1) helping to facilitate rehabilitation and reintegration into the community by providing programs such as employment services and drug treatment ("support") and (2) monitoring and deterring supervisees from engaging in new criminal activity ("surveillance") (Piehl and LoBuglio 2005). To achieve these goals, numerous conditions are imposed on the individuals under community supervision and are enforced by the threat of incarceration.

2014).[3]

The use of community supervision, however, has not always been as prevalent as it is today. Just over one million individuals were on some form of community supervision in 1980, but by 2007, the population peaked at over 5.1 million.[4] A significant factor contributing to this growth was the widespread adoption of mandatory periods of post-release supervision in addition and subsequent to a period of incarceration. Although advocates for these reforms viewed post-release supervision as an opportunity to mandate programming and services intended to help individuals transition back into the community, it was the prevailing political climate of fear surrounding the release of individuals from prison that was a major driving force behind these policies.

Many jurisdictions implemented post-release supervision requirements during the 1980's and 1990's in conjunction with the enactment of sentencing guidelines, which often eliminated discretionary parole.[5] The federal system, for example, introduced supervised release in 1984 with the Federal Sentencing Guidelines. This form of post-release supervision completely replaced parole for crimes committed after November 1, 1987, and the number of individuals on federal supervised release has grown to exceed 100,000 since 2010. Many states made similar reforms to their sentencing laws, and now more than half the states impose some form of post-release supervision. In 2019 alone, 608,026 individuals were released from state and federal prisons (Carson 2020), 413,985 of which entered some form of community supervision after release—188,045

[3]These results closely mirror the results found by an earlier BJS study of prisoners released in 1994 where technical violators made up 51 percent of those reincarcerated within three years (Langan and Levin 2002).

[4]In 2021, 30 percent of the probation population was Black, but 37 percent of the post-release supervision and parole population was Black (Kaeble 2023). Abrams, Bertrand and Mullainathan (2012) finds substantial variation between judges in the incarceration rates imposed on African-American and white defendants. This result suggests that race plays a role in sentencing decisions at the extensive margin of incarceration which could help account for the difference in racial composition of the probation and post-release supervision populations.

[5]For the purposes of this paper, the terms post-release supervision and parole should be understood as follows: Parole is a period of community supervision that follows a release from prison and is granted at the discretion of a state parole board. In general, an individual will become eligible for parole after some fixed amount of time in prison as determined by the sentencing court and/or by statute (e.g. an individual might be given a ten-year prison sentence with the possibility of parole after five years). Post-release supervision is a period of community supervision following the completion of a prison sentence. This type of supervision differs from parole because it is mandated by the sentencing court—not subject to the discretion of a parole board—and occurs after the completion of a determinate prison sentence. See Appendix A for more detailed descriptions of these terms.

under a mandatory regime (Oudekerk and Kaeble 2021).

As the population under community supervision surged past five million in the early 2000's, however, many jurisdictions questioned the wisdom of their supervision regimes and began to initiate reform efforts. These changes to community supervision can be placed into two main categories: 1) efforts to reform the quality of supervision (e.g., the integration of new programs, adjusting the intensity of supervision, or changing the structure of sanctions); and 2) eliminating the requirement of supervision altogether.

Research on reforms to the quality of supervision is plentiful, dating back to early initiatives aimed at developing effective community supervision programs (Petersilia 2003; Petersilia and Turner 1993). Numerous jurisdictions have experimented with integrating a wide range of programs into community supervision, and researchers have studied the impact of these programs in areas such as job training (Visher, Winterfield and Coggeshall 2005; Bauldry and McClanahan 2008; Redcross et al. 2011; Newton et al. 2016), cognitive-behavioral therapy (Farabee, Prendergast and Anglin 1998; Pearson et al. 2002; Lipsey, Landenberger and Wilson 2007; Barnes, Hyatt and Sherman 2017), housing assistance (Metraux and Culhane 2004; Walker 2007; Kirk 2009; Prescott and Rockoff 2011), and integrated social systems (Braga, Piehl and Hureau 2009), finding largely mixed results (See Wilson and Petersilia [2011] and Doleac [2023] for a thorough review of this literature).

Changing the intensity of supervision has also been a major trend in community supervision reform. In the 1980's and 1990's, the federal government provided financial support to explore alternatives to traditional forms of punishment, with the aim of bolstering innovation in rehabilitation and surveillance within community-based supervision. Most of the funding, however, was utilized to increase surveillance of supervisees through measures such as increased drug testing and electronic monitoring. Studies of these programs showed that they did little in terms of rehabilitation, but did result in the identification of more conditions violations resulting in high rates of reincarceration (Petersilia 2003). Research in Philadelphia has examined changes to the intensity of supervision and found that it had no significant impact on reoffending among the studied population (Barnes et al. 2010, 2012; Hyatt and Barnes 2017). In New York City, the probation department introduced an automated reporting system, allowing low-risk probationers to check in via kiosk rather than meeting in person with their probation officer. Wilson, Naro

and Austin (2007) find that re-arrests declined for those under the automated reporting system as well as for high-risk probationers who received more intense supervision during the same period of time. Due to the limitations in study design, however, it is difficult to say whether the change in supervision intensity was responsible for these reduced arrest rates or whether they were part of a general decline in arrests among all probationers.

Other states have focused on the structure of incentives involved in supervision programs. In Hawaii, Judge Steven Alm introduced a program (Hawaii's Probation Opportunity with Enforcement (HOPE)) that changed the structure of punishment for probation violators from a slow and uncertain process common in most states to one that is swift and certain with penalties of short duration (e.g. two days in jail). Hawken and Kleiman (2009) study the HOPE program and find large decreases in arrests and positive drug tests among participants. Implementation of programs modeled after HOPE in other states, however, have found mixed results (Duriez, Cullen and Manchak 2014). In North Carolina, a 2011 Justice Reinvestment Act reform enacted new limits on probation revocations for technical violations and also implemented shorter, graduated sanctions including two- to three-day jail sanctions and 90-day periods of incarceration for technical violations (Justice Reinvestment Act (2011)). A recent study of these reforms shows that the restriction on revocations for technical violations resulted in a reduction in one-year revocation rates by about 5.2 percentage points, with only a two percentage-point increase in arrests (Rose 2021). Furthermore, Rose (2021) finds that North Carolina's five percentage point Black-white gap in technical revocations was eliminated by the reforms.

With respect to policies that eliminate the requirement of supervision altogether, however, the literature is much more sparse. The few existing studies that do evaluate such policies have methodological limitations, which make their results susceptible to potential selection issues. For example, a 2005 Urban Institute study (Solomon, Kachnowski and Bhati 2005) using BJS data reports lower rearrest rates for those released through discretionary parole compared to those released without supervision, and no difference in rearrest rates between individuals released with mandatory post-release supervision and those without. The authors control for observable variables, but do not have a research design to address the potential differences in unobserved characteristics between individuals released with and without supervision.

In a series of reports, Pew presents findings and policy recommendations encouraging states to require a period of post-release supervision (Pew Charitable Trusts 2013, 2014*a*,*b*). A Pew study of New Jersey's parole system concludes that parole supervision significantly reduces the probability of new criminal behavior within three years of release (Pew Charitable Trusts 2013). These results are estimated by comparing individuals granted early release onto parole with individuals who were denied parole and, therefore, served out their entire sentence in prison. The authors control for risk factors such as age, sentence length, offense, and criminal history, but do not have a source of exogenous variation to address the possibility of omitted variable bias. This bias could be substantial as it is likely that the state parole board considered factors unobservable in the data during their parole review process.[6] A Pew study of Kentucky's mandatory post-release supervision program concludes that it reduces reoffending within one year of release and saves taxpayer money, even though it increases reincarceration due to technical violations (Pew Charitable Trusts 2014*a*). Because this new Kentucky policy affected all individuals, the study conducts a pre-post analysis, which relies on the assumption that other determinants of crime during the period of the study were not driving the results.

* * *

In this paper, I employ a quasi-experimental research design to study the impact of eliminating and reinstating post-release supervision. A law passed by the Kansas legislature in 2000 (SB 323) eliminated post-release supervision for about a third of the population released from prison.[7] In 2013, Kansas reversed course with the enactment of HB 2170, reinstating post-release supervision for all individuals released from prison. The nature of these changes allows me

[6]In her 2013 paper, Ilyana Kuziemko exploits quasi-experimental variation in Georgia and finds that the state parole board appears to make parole decisions in an allocatively efficient manner. In other words, the Georgia parole board was less likely to grant parole to those individuals with a higher risk of recidivism as measured by the actual recidivism rates (Kuziemko 2013).

[7]Specifically, SB 323 eliminated the post-release supervision requirement for individuals who were originally serving a sentence of probation but ended up serving time in prison because their probation was revoked due to a violation of their probation conditions. Before SB 323, this group of individuals had to serve a period of post-release supervision after their release from prison, but after SB 323, their sentence was complete upon release from prison and they returned to the community with no supervision. See Section 1.2 for a more detailed explanation of SB 323 and Figure I for a visual depiction of the impact of SB 323 and HB 2170 on sentencing in Kansas.

to employ a difference-in-differences empirical strategy for each reform, where my "treatment group" consists of individuals whose post-release supervision was eliminated by SB 323 (or reinstated by HB 2170) and my "control group" consists of a comparable group of individuals who were subject to post-release supervision throughout the entire period of the study.

The nature and timing of these laws provide a unique opportunity to study the impact of community supervision in two distinct eras of criminal justice policy. The 2000 law was enacted during an era when U.S. incarceration rates were still on the rise and surveillance and enforcement were the focus of community supervision. By 2013, most jurisdictions had become reform minded, trying to find ways to reduce incarceration and shift focus toward reentry and rehabilitation. Kansas was not an exception. In the mid-2000's, Kansas sought to change its philosophy regarding supervision, setting out to reduce the use of imprisonment for conditions violations and place more emphasis on risk reduction through reentry services. Thus, when post-release supervision was reinstated in Kansas in 2013, it had a much more rehabilitation-oriented philosophy than in 2000. Consequently, the 2013 findings do not just serve as a replication exercise to substantiate the findings from 2000, they also answer an important policy question: Can reforming the nature of and approach to community supervision yield outcomes equivalent to or better than eliminating the requirement of community supervision altogether? My findings suggest that the answer to this question is "no," at least for a substantial portion of the population released from prisons and jails.

I find that the elimination of post-release supervision under SB 323 decreased the one-year reimprisonment rate of affected individuals by 28.5 percentage points from a baseline of about 35 percent. This decrease was largely sustained at the three-year horizon.[8] This sizable decrease in incarceration, however, did not cause any detectable change to criminal activity, which I measure by new offenses leading to a prison sentence of any length (for the remainder of the paper, "new prison sentence," and "new prison sentence rate" will refer to this set of offenses unless otherwise specified).[9]

[8]Below, the SB 323 results on reimprisonment and reoffending are reported for time-horizons between six months and five years. The results for the HB 2170 policy change are reported for one-year time horizons due to the right-censoring of the data. These time-horizons are consistent with the range of recidivism periods commonly used in the literature.

[9]This definition of recidivism is consistent with measures of recidivism used in Bureau of Justice Statistics studies of released prisoners—specifically, the recidivism measures called "imprisonment" in Durose, Cooper and Snyder (2014) and "resentenced" in Langan and

These results are reinforced by my analysis of HB 2170. The reinstatement of post-release supervision under HB 2170 had a very similar but inverse impact on reimprisonment even though, as discussed above, the approach to supervision had been overhauled in the years between these two interventions. I find that the reinstatement of post-release supervision under HB 2170 increased reimprisonment by 17.5 percentage points on a baseline of 10.4 percent (or nearly a threefold increase) with no perceptible decrease in new prison sentences or new felonies.[10]

Furthermore, I find that the elimination of post-release supervision in 2000 removed a major source of racial disparity in the criminal legal system. The impact of SB 323 on reimprisonment was larger for Black individuals, completely eliminating the racial gap in the three-year reimprisonment rates among individuals released without supervision. Before SB 323 was enacted, Black individuals in the treatment group had a three-year reimprisonment rate of 57.1 percent while the three-year rate for non-Blacks was 45.5 percent. After post-release supervision was eliminated, these rates were 22.8 percent and 23.0 percent respectively. Interestingly, this gap in the reimprisonment rate does not reemerge when post-release supervision is reinstated in 2013. I explore some potential explanations for the different effects of SB 323 and HB 2170 on racial disparities in Section 3.

In addition, I use employment data from 2005-2012 to study the long-run impact of SB 323 on employment and earnings. I find that SB 323 did not have a statistically significant effect on long-run earnings and employment outcomes (neither positive nor negative).

These results suggest that the imposition of post-release supervision on individuals convicted of low-level offenses generates significant reimprisonment costs and little if any benefits to public safety. Therefore, a more sparing use of community supervision could lower reincarceration rates without jeopardizing public safety and also substantially reduce a major source of racial inequality in the criminal legal system.

I present several robustness checks to address potential concerns regarding the composition of the treatment and control groups, the measurement of

Levin (2002).

[10]The Kansas Sentencing Commission data used in this paper covers the period when HB 2170 was enacted, and allows me to estimate the impact of the law on all felonies regardless of sentence type. For the remainder of the paper, "any new felony," and "new felony rate" will refer to any offense leading to a felony conviction regardless of sentence type.

outcomes, and possible behavioral adjustment by criminal justice actors. The results are robust to all of these checks.

The remainder of this paper is organized as follows. Section 1 provides background on community supervision, Kansas Senate Bill 323 (SB 323), and Kansas House Bill 2170 (HB 2170). Section 2 describes the data and the difference-in-differences empirical strategy. Section 3 reports the effects of eliminating (SB 323 in 2000) and reinstating (HB 2170 in 2013) post-release supervision. Section 4 discusses policy implications. Section 5 concludes.

1 Institutional Background

1.1 Post-release Supervision in Kansas

In 1993, Kansas adopted sentencing guidelines following the prevailing national trend. The new guidelines were characterized by determinate prison sentences and mandatory periods of post-release supervision.[11] The guidelines required a 12 or 24 month period of post-release supervision for every individual who served time in prison (Kansas Sentencing Commission 1993).[12] This included individuals who were serving time in prison solely due to a violation of probation.[13] In 1995, new post-release supervision periods were adopted for crimes committed on or after April 20, 1995. The modified guidelines impose a presumptive post-release supervision period of 36 month for the most severe crimes and 24 months for all other crimes (Kansas Sentencing Commission 1995). In addition, the penalty for a technical violation of the conditions of post-release supervision increased from 90 to 180 days (K.S.A. 1994 Supp.

[11] In Kansas, virtually all felony offenses are assigned a severity level and every defendant is assigned a criminal history score. The crime severity level and the criminal history score correspond to a box on the Kansas sentencing grid. Each box is either a presumptive probation box, a presumptive prison box, or a border box. A presumptive probation box, for example, corresponds to a crime severity/criminal history pair which should draw a presumptive sentence to probation. The border boxes impose no presumption of probation or prison on the sentencing decision. A crime severity/criminal history pair falling within a presumptive prison box may still receive a probation sentence if the court determines that a downward departure is appropriate.

[12] The Kansas Department of Corrections Internal Management Policy and Procedure (KDOC IMPP) regarding conditions of post-release supervision states that "[s]etting and applying conditions should be done with the goals of reducing the likelihood of unlawful, high risk, or anti-social behavior. The goal should also be to encourage and reinforce positive, pro-social behavior, and ultimately, the successful reintegration of the offender." KDOC IMPP 14-110.

[13] In Kansas, a sentence to probation includes an underlying prison sentence which will be imposed if the individual's probation is revoked due to a condition violation.

75-5217). Parole board review remained only for those individuals sentenced prior to the adoption of the guidelines and for individuals serving life sentences (Kansas Sentencing Commission 2015).

Under this new regime, when an individual is released from a Kansas prison, he is given a set of "suitable civilian-type clothing" (KDOC IMPP 4-105A), a cash gratuity in the amount of $100 (K.S.A. 75-5211), and a long list of conditions to be followed while under post-release supervision. The specific list of conditions varies with each individual, however, there is a standard set of conditions imposed on everyone.[14]

If a parole officer receives information that a supervisee has been arrested or has violated a condition of release, an investigation will be initiated. Once the parole officer has investigated the facts of the alleged violation, she will determine whether revocation is appropriate and if so, conference the alleged violation with the parole supervisor. After this case conference, the parole supervisor will determine whether revocation is appropriate or whether a less severe intervention such as increased reporting or community service would be sufficient. If revocation is recommended, the parole officer will issue a condition violation warrant which allows law enforcement to detain the supervisee so that he may face the charges against him. Once the supervisee has been taken into custody, he will be presented with a statement of the alleged violation(s) and an explanation of the revocation process (see KDOC IMPP 14-142).

Within 14 days of arrest or the lodging of the condition violation warrant, the supervisee is entitled to a preliminary hearing in front of a neutral hearing officer who will determine whether probable cause exists to support the alleged violation. If probable cause is established and the supervisee does not choose to waive the final revocation hearing in front of the Kansas Parole Board ("the Board"), there will be a hearing where the Board or any member of the Board will, after considering all pertinent evidence, enter an order either reinstating or revoking post-release supervision. Upon a determination of revocation,

[14]These include restrictions on travel; regular reporting to a parole officer; geographic restrictions on residency; requirements to obey all state and federal laws; restriction from owning any weapons; prohibition on association with anyone engaged in criminal activity; prohibition on association with any victims of the supervisee's crime; a requirement to secure and maintain employment; a requirement to make progress toward a GED if one has not already been attained; a requirement to pay any restitution, court costs, or other costs owed; a requirement to complete any treatment programs prescribed by the parole officer; and a requirement to allow the parole officer to search the supervisee, his residence, or any other property under his control with or without a search warrant (KDOC IMPP 14-110).

the supervisee will be sentenced to a six-month period of confinement or the remaining balance of their post-release supervision period, whichever is shorter (see *State v. Gaudina*, 284 Kan. 354, 361 (2007); K.S.A. 75-5217).

1.2 Kansas Senate Bill 323

Like many other community supervision programs across the country, post-release supervision in Kansas has resulted in the reincarceration of many individuals due to technical violations. In fact, probation and post-release supervision violations make up the majority of all admissions to Kansas prisons as shown in the top panel of Appendix Figure B.1. Therefore, to reduce admissions and avoid prison overcrowding in the late-1990's, the state legislature decided to eliminate post-release supervision for most probation violators under SB 323. This reform occurred during the decades long expansion of the carceral state in the U.S. when incarceration rates and the community supervision population continued to rise to new heights across the country. Although SB 323 reduced the reach of post-release supervision, the system of post-release supervision in Kansas was still focused on surveillance and strict enforcement.

SB 323 went into effect on May 25, 2000. The law eliminated post-release supervision for individuals serving time in prison based on a technical violation of probation[15] (this group made up about 35 percent of all individuals released from Kansas prisons in 1999), but did not apply to individuals who had been sentenced to probation for a sexually violent offense or a crime that fell outside of the presumptive probation region of the Kansas sentencing grid.[16] Prior to SB 323, all probation violators were required to serve their underlying prison sentence and then, upon release, serve a period of post-release supervision.[17]

[15]Probation is a sentence to community supervision generally imposed on individuals convicted of lower-level offenses who have no or few prior criminal convictions. Although probation is a non-carceral sentence, a violation of the conditions of probation is punishable by a period of incarceration. See Appendix A for more detailed descriptions of the different forms of community supervision.

[16]SB 323 also reduced the length of probation and post-release supervision sentences for felonies falling within low-severity categories on the Kansas sentencing grid. Specifically, probation was reduced from 24 months to 12 months for offenses falling within severity levels 9 and 10 of the non-drug grid and severity level 4 of the drug grid (the non-drug grid ranges from 1-10 and the drug grid from 1-4 with category 1 indicating the most serious offenses). Non-drug offenses in severity level 8 had probation reduced from 24 months to 18 months. Post-release supervision was reduced from 24 months to 12 months for non-drug offenses in severity levels 7-10 and drug offenses in severity level 4.

[17]For example, at sentencing, a convicted individual may receive 24 months of probation, an 18-month underlying prison term, and a 24-month period of post-release supervision. If

After SB 323 was enacted, eligible probation violators would serve their underlying prison sentence and then be released to the community without any supervision (Figure I provides a flow-chart representation of the changes to supervision before and after SB 323 and HB 2170). I exploit this variation to carry out a difference-in-differences analysis to determine the impact of post-release supervision at the extensive margin on short- and long-run outcomes.

SB 323 was also applied retroactively and required the KDOC to discharge all eligible individuals from supervision (or from incarceration based on a technical violation of post-release supervision) by September 1, 2000. This gave the KDOC a short three-month window to retroactively apply the new law to all individuals no longer required to serve a term of post-release supervision (Kansas Department of Corrections 2001) and generated quasi-experimental variation in the length of time that eligible individuals spent on supervision. In Appendix C, I exploit this variation to study the effect of supervision at the intensive margin.

1.3 KOR3P

In the mid-2000's, the Kansas Department of Corrections (KDOC) made efforts to change its philosophy regarding supervision for those individuals still subject to post-release supervision. Although these efforts were not associated with new legislation, they were formalized as the Kansas Offender Risk Reduction & Reentry Plan (KOR3P) (Kansas Department of Corrections 2006). The KOR3P report describes efforts taken to change the philosophy underlying post-release supervision and spells out specific goals associated with this work including reducing revocations and promoting organizational and cultural change.[18]

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the individual completes the 24 months of probation without a violation, then he will be done with his sentence. But if the individual violates a condition of probation and his probation is revoked, he would have to serve his 18-month underlying prison sentence. Following the completion of this 18-month sentence, the individual would have to serve his 24-month post-release supervision sentence. Prior to the enactment of Senate Bill 323, all individuals who served time in prison—regardless of the reason—were required to serve some period of post-release supervision.

[18]The KDOC's KOR3P report lists these as the first two goals of the reform effort: "Goal #1: Reduce Revocations: To safely reduce the number of revocations from parole supervision (by increasing compliance and successful reintegration) by 50 percent by June 2011. Goal #2: Organizational/Cultural Change: To create an organizational and cultural environment that supports risk reduction and reentry work with offenders." (Kansas Department of Corrections 2006).

This new philosophy marked a switch from a focus on surveillance and enforcement to more emphasis on rehabilitation and support in post-release supervision. The KOR3P report describes this change as follows:

> Risk reduction and reentry is seen by many as a philosophical shift from how corrections has done business in the past. Many corrections professionals have seen their work as more risk-containment oriented and less focused on internal change, or what some call rehabilitation. ... Thus an important part of this [philosophical shift] involves [institutional] change. This includes change in policies, procedures and practices; change in skills that are sought and developed; and change in expectations, role definition and priorities. The degree and nature of the change amount to a change in organizational culture, and redefinition of roles and responsibilities. Thus, through various means, we have established new or different services or practices at various places in the system, within and without KDOC, to move everyone toward a risk reduction philosophy, and a success-oriented and accountability-based model for working with offenders.

(Kansas Department of Corrections 2006).

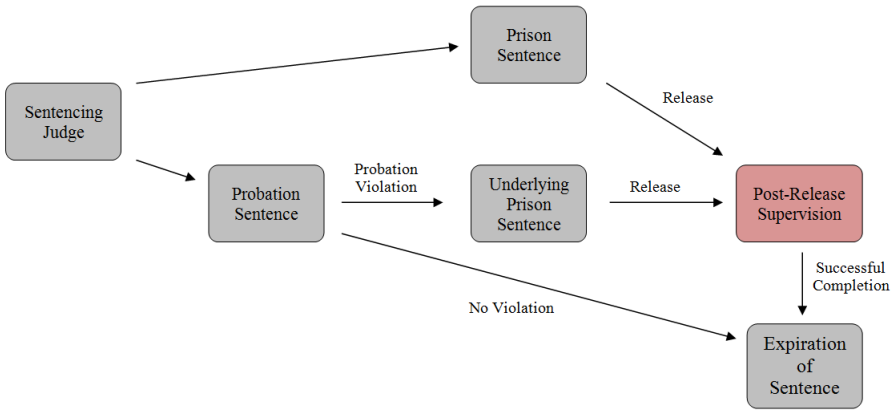
1.4 Kansas House Bill 2170

In 2013, as part of a Justice Reinvestment Working Group and under the guidance of the Council of State Governments Justice Center (CSG Justice Center), the Kansas legislature passed HB 2170. This law reinstated post-release supervision for all individuals who served any time in prison. In a report with recommendations for criminal justice reform in Kansas, the CSG Justice Center called the lack of post-release supervision a "loophole" and asserted that "a period of post-release supervision for those who have repeatedly demonstrated an inability to stay crime-free in the community increases public safety" (The Council of State Governments Justice Center 2013). Testimony to the House Corrections & Juvenile Justice Committee on HB 2170 echoed claims that reinstatement of post-release supervision would improve public safety and, ultimately, HB 2170 reversed the changes made by SB 323.

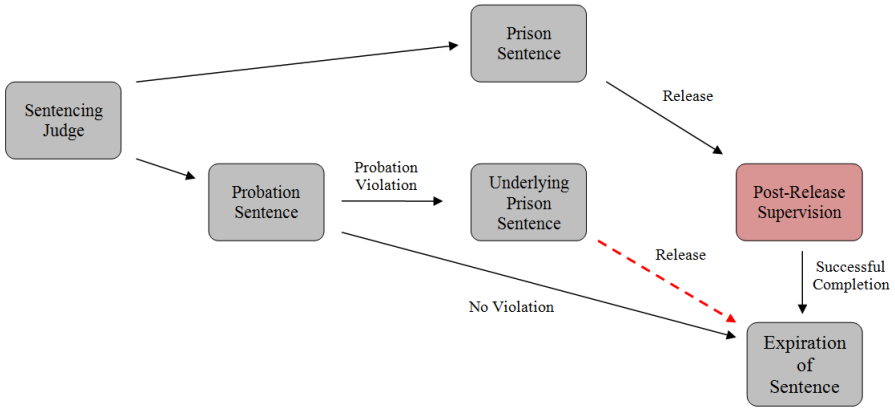
This change of direction regarding post-release supervision, however, occurred after the reform efforts implemented under KOR3P. Therefore, the re-

sults from HB 2170 can be understood as measuring the effect of post-release supervision under the more reentry and rehabilitation-oriented regime put in place under KOR3P, while the results from SB 323 may be understood as the effect of post-release supervision under a more surveillance and enforcement-oriented regime.

HB 2170 also included reforms to the Kansas probation system, introducing a new graduated sanctioning regime. In Section 3 below, I discuss how these changes to probation are accounted for in my post-release supervision analysis.



Pre-SB 323/Post-HB 2170 (pre-2000 & post-2013)



Post-SB 323/Pre-HB 2170 (2000-2013)

Figure I
Kansas SB 323 (2000) & HB 2170 (2013)

Notes: The dashed line in the bottom panel indicates the change resulting from SB 323's elimination of post-release supervision for those incarcerated due to a probation violation

(excluding those individuals whose offense fell within a prison or border box in the Kansas Sentencing grid or who were convicted of a violent sex offense). After the Kansas legislature enacted HB 2170 in 2013, the sentencing regime returned to the structure depicted in the top panel.

2 Data & Empirical Strategy

2.1 Data

The empirical work presented in this paper makes use of administrative data from three Kansas state agencies: the Kansas Department of Corrections (KDOC), the Kansas Sentencing Commission (KSC) and the Kansas Department of Labor (KDOL). The KDOC data set used in this study includes information on every individual incarcerated in the Kansas prison system between the mid-1990's up until early-2020. The KDOC data set is a rich compilation of a number of smaller data sets each of which cover a varying timespan depending on the record-keeping policy of the KDOC. The data include detailed demographic information, dates of and reasons for admission and release from prison, post-release supervision status, information on conditions violations, convictions resulting in prison sentences, among other variables.

The KSC data contains detailed information on all felony cases ending in conviction for the fiscal years 1998 to 2019.[19] This data set includes the county of conviction, date of offense, date of conviction, date of sentencing, specific information about the type of offense and sentence imposed, among other information.

The KSC data, however, cannot be reliably matched to individuals in the early years of the analysis; therefore, the KDOC data is used to construct the measure of reoffending labeled, "new prison sentence," for the analysis of the SB 323 reform in 2000. In the analysis below, the outcome "new prison sentence" is defined as any conviction for a new offense where a prison sentence (as opposed to a probation sentence) was imposed at sentencing.[20] Thus, the

[19] Although the KSC data set does not have information on cases ending in acquittal, this makes up a very small proportion of all cases heard by the courts. In fiscal year 2019, over 95 percent of all felony cases that were not disposed of through dismissal or deferred adjudication ended in either a guilty plea or a guilty verdict (Office of the Judicial Administrator 2019).

[20] The KDOC data include all convictions resulting in prison time, including convictions where a prison sentence was imposed at sentencing as well as convictions where a probation sentence was imposed at sentencing, but prison time was ultimately served due to a violation of probation. The "new prison sentence" measure of reoffending includes only the former set of convictions in the KDOC data.

least serious offenses are excluded from this measure of reoffending, but due to the fact that every individual in my analysis sample has at least one felony conviction, they are much less likely to receive a probation sentence for a new conviction than an individual without a felony on their record.[21] Moreover, unlike many other states, prison sentences of less than 12 months are not uncommon in Kansas. Thus, the "new prison sentence" measure of reoffending includes a relatively wide range of type and severity of offenses.

For my analysis of the HB 2170 reform in 2013, I am able to use the KSC data on felony convictions as an outcome variable. Therefore, I report the effect of HB 2170 on the rate of any new felony conviction (regardless of sentence type) as well as the "new prison sentence" measure of reoffending used for the SB 323 analysis.

Data on employment and earnings span a shorter period of time, only covering the period between the first quarter of 2005 and the second quarter of 2012. These data are based on unemployment insurance (UI) records and were linked to the KDOC data using social security numbers (about 98 percent of the individuals had a recorded social security number). In addition to quarterly employment and earnings, the data set also includes the employer ID and full NAICS code, but does not include hours worked or hourly wage information. The KDOL data is limited in that it only includes formal employment in Kansas. Thus, I cannot distinguish an individual employed outside of Kansas or in the informal sector from someone who is unemployed. About 73 percent of all individuals in the employment analysis had at least one quarter of positive earnings reported between 2005:1 and 2012:2 (individuals who could not be linked to UI records were considered to have zero earnings during the relevant time period). In the analysis described below, all earnings data have been adjusted to 2012 dollars and quarterly earnings have been top coded at 10 times the 2012 poverty threshold.

2.2 Difference-in-Differences Model

The changes in Kansas's use of post-release supervision in 2000 (SB 323) and 2013 (HB 2170) provide two natural experiments to study the impact of community supervision.[22] I use a difference-in-differences approach to study

[21] Indeed, about half of the probation sentences in the KSC data involve defendants without any prior felony convictions.

[22] In the analysis below, I focus on the extensive margin impact of community supervision. Appendix C includes results on the intensive margin impact of post-release supervision.

each of these policy changes.

As described in Section 1 above, prior to these policy changes, every individual who served time in prison was required to serve a period of post-release supervision after release. In 2000, SB 323 completely eliminated post-release supervision for individuals imprisoned due to a technical violation of probation except for those convicted of a sexually violent offense or a crime that fell outside of the presumptive probation region of the Kansas sentencing grid (see supra Section 1.2 for details). In 2013, HB 2170 reinstated the post-release supervision requirement for this group of individuals. This group is the treatment group in my difference-in-differences analysis.

The control group consists of individuals whose post-release supervision was not eliminated by SB 323 (i.e., for this group, the requirement to serve a period of post-release supervision was not impacted by SB 323 or HB 2170). Specifically, the control group consists of probation violators who had an underlying conviction for a sexually violent offense or a crime that fell outside of the presumptive probation region of the Kansas sentencing grid and individuals sentenced to relatively short prison terms, which I define as 36 months or less.[23] Summary statistics for the treatment and control groups are reported in Table I.

[23]In Appendix C, I vary the inclusion criteria for the control group (e.g., expanding the control group to include individuals with prison terms of 60 months or less) and find similar results to those presented below.

Table I
Summary Statistics

Difference-in-Differences Sample				
	SB 323		HB 2170	
	Treatment	Control	Treatment	Control
Demographics:				
Female	0.178	0.0957	0.233	0.118
Black	0.319	0.318	0.262	0.285
Hispanic	0.0725	0.0950	0.0898	0.110
Age	31.21	32.61	32.33	35.11
First Prison Term	0.801	0.622	0.710	0.517
Crime Type:				
Drug	0.191	0.323	0.294	0.278
Violent	0.248	0.280	0.287	0.336
Property	0.414	0.222	0.358	0.262
Sex Offense	0	0.0725	0	0.0456
Weapons	0.0172	0.0227	0.0226	0.0249
Miscellaneous	0.129	0.0798	0.0386	0.0539
Observations	5,927	7,409	6,606	11,970

Notes: This table reports summary statistics for the SB 323 and HB 2170 difference-in-differences samples. The treatment group consists of all probation violators released from their underlying prison sentence between 1997:3 and 2003:2 for the SB 323 sample (2006:1 to 2017:4 for the HB 2170 sample) excluding those individuals whose offense fell within a prison or border box in the Kansas Sentencing grid or who were convicted of a violent sex offense. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 as well as individuals sentenced to prison terms of 36 months or less. The table shows the proportion of the sample in each of the categories listed in the left column. Age is the average age at release.

Below, I estimate the effect of SB 323 and HB 2170 on reimprisonment. Reimprisonment includes an individual's return to prison for any reason including technical violations and new convictions. I conduct a standard difference-in-differences analysis comparing the treatment and control groups before and after the enactment of the new law. The empirical specification is as follows:

$$Y_{it} = \alpha + \beta_1 X_i + \beta_2 Z_t + \beta_3 After_t + \beta_4 Tr_i + \beta_5 After_t \times Tr_i + \varepsilon_{it}$$

where i indexes an individual and t indexes the time period; Y is the outcome variable (reimprisonment or reoffending); X is a vector of individual-level characteristics including sex, race, age (two-year bins), parole office fixed effects, severity level of crime, criminal history and category of crime fixed effects; Z is a vector of year fixed effects; $After$ is a dummy variable taking on the value of one if the individual is released from prison on or after May 25, 2000 or, for the HB 2170 analysis, has an offense date on or after July 1, 2013; Tr is a dummy variable taking on the value of one if the individual is in the treatment group; and $After \times Tr$ is an interaction term between $After$ and Tr which will pick up the effect of SB 323 and HB 2170 on the rate of reimprisonment.

I use an identical specification to determine the effect of SB 323 and HB 2170 on reoffending. For these specifications, the coefficient on $After \times Tr$ is the difference-in-differences estimate of the effect of SB 323 or HB 2170 on reoffending as measured by new prison sentences and new felony convictions. In other words, β_5 will indicate whether the elimination (or reinstatement) of post-release supervision for treated individuals led to an increase in criminal behavior after release. Equivalently, you can view this estimate as measuring the extensive margin effect of post-release supervision in reducing reoffending among probation violators.

I also test for heterogeneous treatment effects between different groups of individuals by estimating the difference-in-differences model above on subsets of the sample. I test for heterogeneous treatment effects by race, sex, and age, as well as between individuals whose probation violation triggered their first prison term versus a second or subsequent prison term, those whose primary offense was a drug versus non-drug offense, and those whose primary offense was a person versus non-person offense.[24]

[24]The Kansas Sentencing Commission Desk Reference Manual defines person and non-person offenses as follows: "The 'person' designation refers generally to crimes that inflict, or could inflict harm to another person. Examples of person crimes are: robbery, rape,

3 Results

3.1 The Effect of Eliminating Post-Release Supevision

Figure II plots the proportion of individuals in the treatment and control groups that are reimprisoned within one and three years after release. The treatment and control groups are binned by quarter of release from prison (for probation violators, this is release from their underlying prison term). The vertical line is placed at the third quarter of 1999 and represents the quarter before SB 323 began to impact individuals released from prison. Although SB 323 was enacted in the second quarter of 2000, individuals released during the quarters just prior to the enactment of SB 323 were partially impacted by SB 323 as their period of post-release supervision was cut short when SB 323 took effect. A large and distinct drop in the proportion of treatment group individuals returning to prison after the enactment of SB 323 can be seen in both the one- and three-year figures. In comparison, there is no discernable decrease in the proportion of the control group population returning to prison at the SB 323 threshold. The dashed line indicates the linear trend before the enactment of SB 323 for the treatment group and the solid line indicates the linear trend for the control group. The trends for the treatment and control groups are close to parallel in the pre-SB 323 period which shows that there were no pre-existing trends in the relative rate of reimprisonment between the treatment and control groups prior to the enactment of SB 323. In addition, Figure III shows the trends in relative outcomes between the treatment group and the control group in an event study type graph. In the top panels of Figure III, the vertical axis shows the difference in one-year and three-year reimprisonment rates between the treatment and control groups (i.e., treatment group reimprisonment rate minus the control group reimprisonment rate) showing that these differences are stable until the enactment of SB 323.

Table II reports the regression results. The six-month reimprisonment rate decreased by 16.8 percentage points from a pre-SB 323 baseline of 17.0 percent and the one- and two-year reimprisonment rates decreased by 28.5 and 28.9 percentage points from pre-SB 323 baselines of 35 percent and 46.8 percent respectively. As described above, technical violations of probation and

aggravated arson, and battery. The 'nonperson' designation refers generally to crimes committed which inflict, or could inflict, damage to property. Nonperson crimes also include offenses such as drug crimes, failure to appear, suspended driver's license, perjury, etc." (Kansas Department of Corrections 2000)

post-release supervision make up a large proportion of all admissions to the Kansas prison system. By eliminating supervision for the treatment group, SB 323 eliminated the possibility that individuals in the treatment group would be reimprisoned because of conditions violations. Table II also shows that most of this decrease persists at the longer horizons. The three- and five-year reimprisonment rates decreased by 25.9 and 22.1 percentage points from the pre-SB 323 baselines of 49.2 percent and 52.9 percent respectively. The decrease in the three-year rate of reimprisonment matches up quite closely with the findings of previous research. In a Bureau of Justice Statistics study, Durose, Cooper and Snyder (2014) find that 27.7 percent of released prisoners returned to prison within three years solely for a technical violation, and a total of 49.7 percent of released prisoners returned to prison within three years for any reason.

During the years covered by this study, post-release supervision ranged from 12 to 36 months and could be shortened by up to half through the accrual of good time.[25] Therefore, the one- and two-year horizons encompass the periods during which the treatment group would likely have been under supervision, while the longer horizons extend to periods beyond their discharge from post-release supervision. Table II shows that the effect of SB 323 on reimprisonment is almost entirely realized within one year of release, demonstrating that even relatively short periods of supervision can have significant and lasting impacts on reincarceration.

The reimprisonment results also show that carceral penalties were used liberally to punish conditions violations and therefore, imprisonment was a credible threat to those under supervision. With a regime of such heavy enforcement, one might expect the behavior of individuals under post-release supervision would be affected. If the enforcement of these conditions had an effect on criminal offending through deterrence, we would see an increase in new offenses after this supervision structure was eliminated. Such an increase, if it exists, would be most apparent in the first two years after release from prison when the treatment group would have been under post-release supervision if not for SB 323.

Figure II plots the proportion of treatment and control group individuals

[25]Individuals can also accumulate good time in prison to earn early release, but the amount of time cut from the prison sentence (up to 15 percent of the original sentence) is added to the post-release supervision sentence (Kansas Department of Corrections 2000).

who received a new prison sentence for an offense committed within one and three years after release. This rate is flat for both the treatment and control groups across the SB 323 threshold. The bottom panels of Figure III show event study graphs of the difference in the rates of new prison sentences between the treatment and control groups and reflect the same pattern. Overall, there is no sharp change in the rate of new prison sentences for either group across the SB 323 threshold which is confirmed by the regression results presented in Table II. At the six-month time horizon, the coefficient on new prison sentences is small in magnitude, statistically insignificant, and negative in sign. The 95 percent confidence interval for new prison sentences within one year of release is -1.6 percentage points to 1.7 percentage points and -1.9 percentage points to 2.3 percentage points within two years of release. Thus, any increase in the rate of reoffending is small in comparison to the large decline in the rate of reimprisonment.

As described in Section 1, in addition to surveillance, post-release supervision programs also provide programming and services aimed to help individuals reintegrate into the community after incarceration and may affect reoffense rates in the long run. Conversations with KDOC parole officers suggest that rehabilitation was not a focus of supervision around the time that SB 323 was passed; and while there were conditions which required programming (such as substance use disorder treatment), these programs were mainly outsourced to community providers. Therefore, while the amount and quality of programming that was lost due to the elimination of supervision is unclear, the results show that there is no statistically significant effect of supervision on new prison sentences at the longer three- and five-year horizons. The coefficient for the three-year horizon is slightly larger in magnitude than the shorter-term horizons, but the coefficient on new prison sentences decreases again at the five-year horizon. Thus, there is no evidence of a trend toward an increased rate of reoffending for the treatment group relative to the control group.

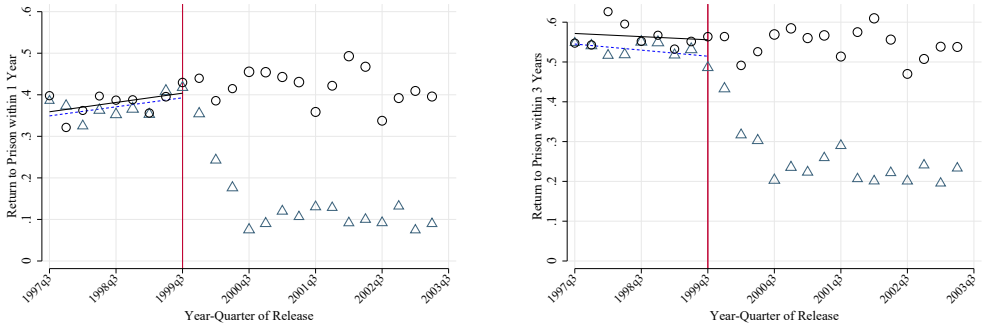
Even if post-release supervision did not impact reoffending through deterrence or rehabilitation, however, one might expect that the elimination of post-release supervision would have caused reoffense rates to increase, because a major source of incapacitation—imprisonment for conditions violations—was removed after SB 323 was enacted. All else equal, if some of the individuals who otherwise would have been incapacitated due to incarceration ended up committing a new offense, one would expect an increase in reoffending. The

fact that there is no increase suggests that reimprisonment may have simply caused a temporal displacement of reoffending or may have actually been criminogenic.

Appendix Table B.1 provides a summary of the type and frequency of conditions violations incurred by individuals on post-release supervision. The vast majority of violations are related to failed alcohol and drug tests or failure to comply with the reporting requirements of supervision. Only about 8 percent of the violations are related to new criminal behavior.

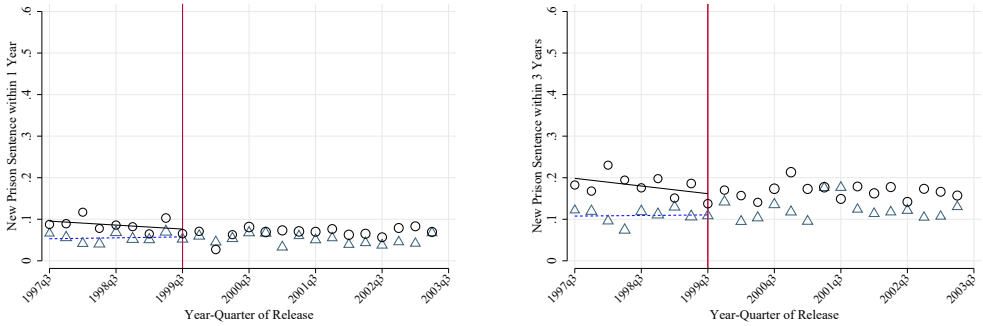
In addition, Appendix Table B.3 shows estimates of SB 323's effect on new prison sentences by category of crime. I test six different crime categories (violent, property, drug, weapons, sex offenses, and miscellaneous) at three time horizons. Each of the coefficients are small in magnitude and none of the estimated coefficients are statistically significant at the 10 percent level. This suggests that there is no statistically significant difference in reoffending by crime type.

Reimprisonment



within 1 Year within 3 Years

New Prison Sentence



within 1 Year within 3 Years

Figure II
SB 323 (2000) Difference-in-Differences

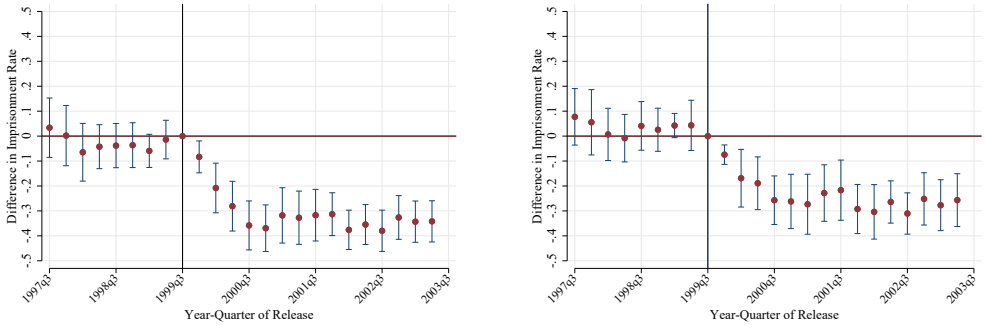
Notes: The upper two figures show reimprisonment rates and the bottom two figures show new prison sentence rates (which includes only those new offenses leading to a conviction where a prison sentence of any length was imposed) by quarter. The dashed lines indicate the linear trends before SB 323 for the treatment group (indicated by the triangles). The solid lines indicate the linear trends for the control group (indicated by the circles). The treatment group consists of the subset of probation violators whose post-release supervision was eliminated by SB 323. The vertical line is placed at Q3 1999, which is one year prior to the enactment of SB 323. Many treatment group individuals starting post-release supervision prior to the enactment of SB 323 were partially impacted by the elimination of post-release supervision, because their period of post-release supervision was cut short when SB 323 took effect. Thus, the period between Q3 1999 and Q3 2000 might be thought of as a transition period when the treatment group was only partially treated. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less.

Table II
SB 323 (2000) Difference-in-Differences Reimprisonment & New Prison Sentences

	Dependent variable: Reimprisonment				
	within 6 Months	within 1 Year	within 2 Years	within 3 Years	within 5 Years
After x Tr	-0.1679***	-0.2852***	-0.2893***	-0.2593***	-0.2212***
	(0.0137)	(0.0189)	(0.0214)	(0.0202)	(0.0181)
Pre-SB 323 Baseline	0.1699	0.3503	0.4679	0.4917	0.5288
	Dependent variable: New Prison Sentence				
	within 6 Months	within 1 Year	within 2 Years	within 3 Years	within 5 Years
After x Tr	-0.0041	0.0003	0.0019	0.0125	0.0067
	(0.0061)	(0.0084)	(0.0108)	(0.0124)	(0.0144)
Pre-SB 323 Baseline	0.0318	0.0543	0.0791	0.1099	0.1573
Year FE	X	X	X	X	X
Demog. Controls	X	X	X	X	X
Crime FE	X	X	X	X	X
Criminal History FE	X	X	X	X	X
Parole Office FE	X	X	X	X	X
Observations	13,336	13,336	13,336	13,336	13,336

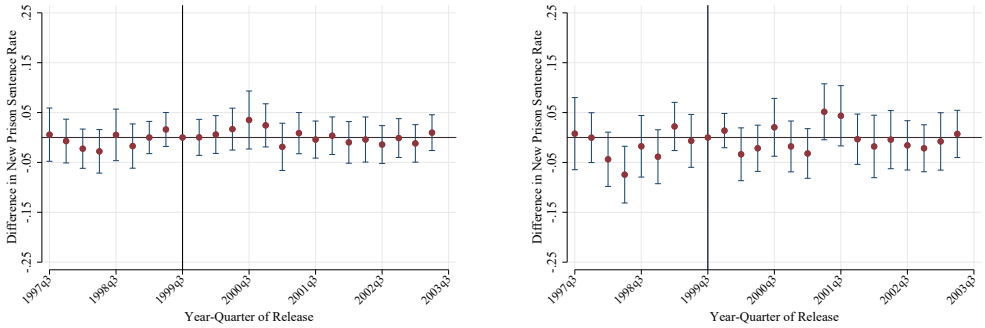
Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *signficant at 10 percent level.

Reimprisonment



within 1 Year within 3 Years

New Prison Sentence



within 1 Year within 3 Years

Figure III
SB 323 (2000) Event Study Figures

Notes: The upper two figures show the differences in reimprisonment rates between the treatment and control groups for each quarter relative to the reference quarter. The reference quarter is Q3 1999, which is one year prior to the enactment of SB 323. Many treatment group individuals starting post-release supervision prior to the enactment of SB 323 were partially impacted by the elimination of post-release supervision, because their period of post-release supervision was cut short when SB 323 took effect. Thus, the period between Q3 1999 and Q3 2000 might be thought of as a transition period when the treatment group was only partially treated. The bottom two figures show the differences in the rate of new prison sentences (which includes only those new offenses leading to a conviction where a prison sentence of any length was imposed) between the treatment and control groups for each quarter relative to the reference quarter. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The point estimates all come from one regression that includes a full set of demographic and case control variables. The vertical lines represent the 95 percent confidence interval for each estimate.

3.2 The Effect of Reinstating Post-Release Supervision

In 2013, HB 2170 reinstated post-release supervision for those individuals who were sentenced to probation for an offense committed on or after July 1, 2013. Therefore, assignment to post-release supervision (i.e., treatment) changed at the July 1, 2013 offense date threshold:

$$Tr_i = \begin{cases} 0 \text{ if Offense Date} < \text{July 1, 2013} \\ 1 \text{ if Offense Date} \geq \text{July 1, 2013} \end{cases}$$

where Tr_i is the treatment assignment variable equal to 1 for those individuals subject to post-release supervision and 0 for those individuals not subject to post-release supervision. I implement the same difference-in-differences strategy described in Section 2 to estimate the effect of post-release supervision on reimprisonment, new prison sentences (measured in the same way as the SB 323 analysis above), and any new felony convictions. Although the sharp offense date cutoff makes a regression discontinuity type design possible, difference-in-differences is my preferred specification for the HB 2170 analysis, because the relatively small number of observations just around the offense date cutoff makes RD estimates very sensitive to model specification. I report RD estimates using linear regression fits and bandwidths of 365 days on either side of the cutoff in Appendix Table B.4, and the results are very similar to the difference-in-differences estimates reported in this section.

In the estimates reported below, I also account for the reforms to probation included in the HB 2170 legislation and enacted on July 1, 2013. HB 2170 introduced new intermediate-level sanctions for probation conditions violations which changed the probation sanctioning regime from an all-or-nothing system of punishment to a more graduated structure of punishment.[26] Because the new graduated probation sanctioning regime went into effect on July 1, 2013 for all probationers (regardless of offense or sentencing date), there are many individuals who spent the initial portion of their probation sentence under the old regime and then were supervised under the new graduated sanctioning structure after it was enacted on July 1, 2013. In light of these changes to probation, I estimate the impact of reinstating post-release supervision on a more restricted sample that accounts for the change in probation supervision

[26]See Sakoda (2023) for details regarding these changes to the probation sanctioning regime.

(hereinafter referred to as the "restricted sample"). The restricted sample only includes individuals sentenced on or after July 1, 2013. Estimates for a larger sample, including individuals released from prison between 2006 and 2017 (hereinafter referred to as the "full sample") are also reported below.

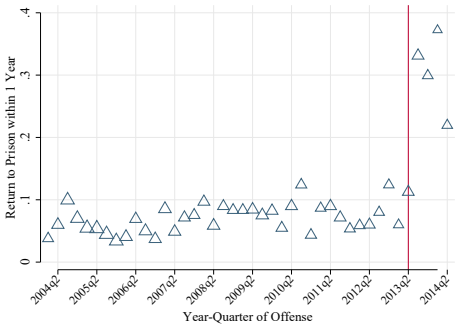
Due to the right-censoring of the data (the Kansas Sentencing Commission data goes up to July 30, 2019), only those probationers with offense dates before July 16, 2014 were included in the analysis. This cutoff date was chosen by accounting for the typical length of time between an offense date and an eventual prison release date for those individuals whose probation was revoked. This period of time varies as it involves the time between an offense being committed, the probation sentence being imposed, the time until the individual's probation is revoked, and the time between the revocation and the eventual release from prison. The 75th percentile length of time between offense date and prison release date was calculated for all treatment group probation revokees with offense dates between July 1, 2013 and July 1, 2014. This length of time was subtracted from January 1, 2018 to get to the July 16, 2014 date.

Figure IV plots the reimprisonment, new prison sentence, and any new felony outcomes of probation revokees (treatment group) by the offense date of the crime leading to their probation sentence. The top panel displays the one-year reimprisonment rates by quarter of offense going back to the beginning of 2004. The vertical line indicates Q2 2013, the quarter before the July 1, 2013 offense date cutoff of HB 2170. Table III reports the results of the difference-in-differences analysis. Consistent with the figures, the coefficients on the reimprisonment outcome are large and statistically significant. There is an increase of 20.9 percentage points for the full sample and 17.5 percentage points for the restricted sample. The reinstatment of post-release supervision brings the one-year reimprisonment rate up to around 30 percent, almost back to the 35 percent pre-SB 323 level.

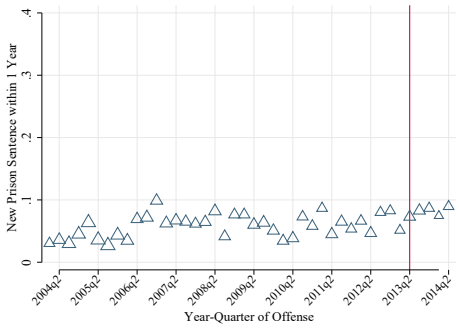
The bottom-left panel of Figure IV plots the one-year rate of new prison sentences. As is the case for the top panel of Figure IV, the vertical line indicates Q2 2013, the quarter prior to the July 1, 2013 offense date cutoff of HB 2170. This figure, in contrast to the reimprisonment figure, does not show a change (either up or down) across the cutoff. The difference-in-differences results reported in Table III are consistent with the figure. The effect of HB 2170 on offenses leading to new prison sentences are small in magnitude and

statistically insignificant. This is true for the full and restricted samples and consistent with the finding of no impact on new prison sentences by the SB 323 reform.

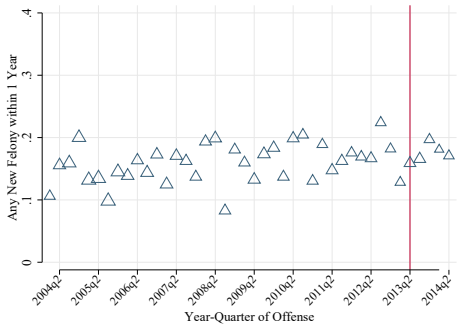
Similarly, the bottom-right panel of Figure IV shows that the rate of committing any new felony does not change across the HB 2170 cutoff (also see Table III). For the sample restricted to individuals sentenced after July 1, 2013, the coefficient for any new felony is positive but not statistically significant. The event study graphs (Figure VI) show that there appears to be a slight upward trend in the rate of any new felony for the treatment group relative to the control group before the enactment of HB 2170. This could explain the positive coefficient reported in Table III. If HB 2170 did have an impact on new felonies, one would expect to see a distinct change at the HB 2170 cutoff, but the bottom-right panel of Figure VI shows that there is no such change at the cutoff.



Reimprisonment



New Prison Sentence



Any New Felony

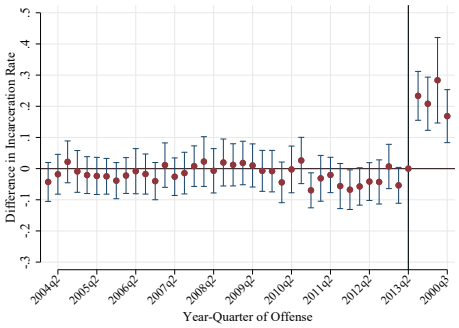
Figure IV
HB 2170 (2013) Treatment Group

Notes: The figures show reimprisonment rates, rate of new prison sentences, and new felony rates for the treatment group by the quarter when the crime of conviction was committed. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The vertical line is placed at Q2 2013, the quarter before HB 2170 was enacted.

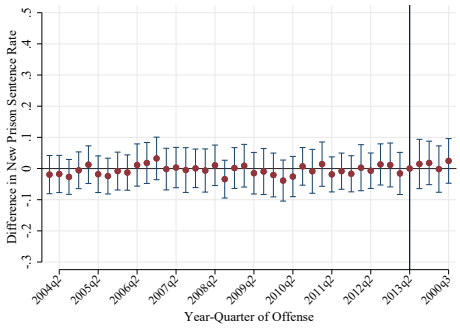
Table III
HB 2170 (2013) Difference-in-Differences

	Reimprisonment	
	Full Sample	Restricted Sample
	within 1 Year	within 1 Year
After x Tr	0.2091***	0.1752***
	(0.0254)	(0.0379)
Pre-HB 2170 Baseline	0.0696	0.1040
	New Prison Sentence	
	within 1 Year	within 1 Year
After x Tr	0.0124	0.0114
	(0.0171)	(0.0240)
Pre-HB 2170 Baseline	0.0570	0.0570
	Any New Felony	
	within 1 Year	within 1 Year
After x Tr	0.0014	0.0349
	(0.0207)	(0.0297)
Pre-HB 2170 Baseline	0.1571	0.1309
Observations	18,576	3,207

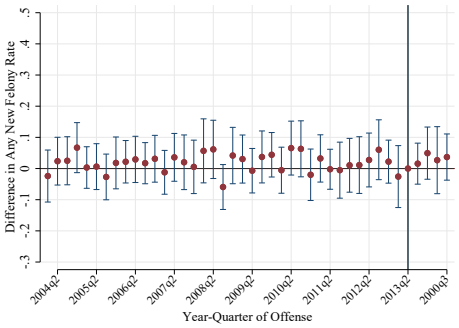
Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). The outcome variable, any new felony, includes any new felony conviction regardless of the sentence imposed. The "full sample"includes individuals who were released from prison between 2006:1 and 2017:4. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The "restricted sample"includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *signficant at 10 percent level.



Reimprisonment



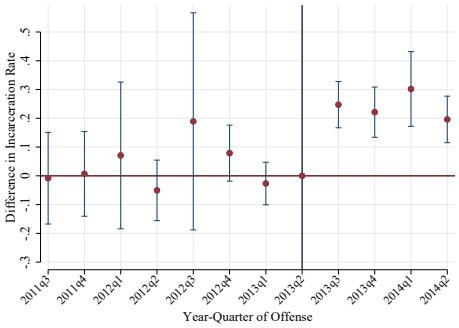
New Prison Sentence



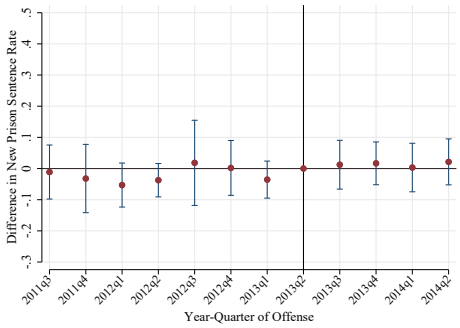
Any New Felony

Figure V
HB 2170 (2013) Event Study Figures (Full Sample)

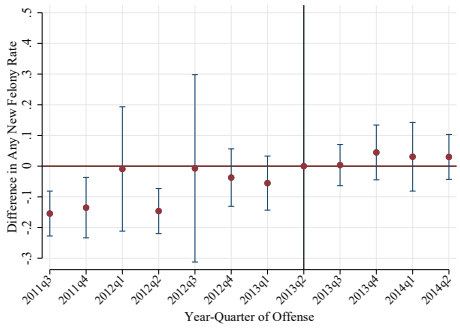
Notes: The figures show the differences in reimprisonment rates, rate of new prison sentences, and new felony rates between the treatment and control groups for each quarter (the quarter that the individual committed their crime of conviction) relative to the reference quarter. The reference quarter is Q2 2013, the quarter before HB 2170 was enacted. The bottom two figures show the difference in the rate of new prison sentences (which includes only those new offenses leading to a conviction where a prison sentence of any length was imposed) and the difference in the rate of any new felony conviction between the treatment and control groups for each quarter relative to the reference quarter. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The point estimates all come from one regression that includes a full set of demographic and case control variables. The vertical lines represent the 95 percent confidence interval for each estimate.



Reimprisonment



New Prison Sentence



Any New Felony

Figure VI
HB 2170 (2013) Event Study Figures (Restricted Sample)

Notes: The figures show the differences in reimprisonment rates, rate of new prison sentences, and new felony rates between the treatment and control groups for each quarter (the quarter that the individual committed their crime of conviction) relative to the reference quarter. The reference quarter is Q2 2013, the quarter before HB 2170 was enacted. The bottom two figures show the difference in the rate of new prison sentences (which includes only those new offenses leading to a conviction where a prison sentence of any length was imposed) and the difference in the rate of any new felony conviction between the treatment and control groups for each quarter relative to the reference quarter. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The sample used in these figures includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The point estimates all come from one regression that includes a full set of demographic and case control variables. The vertical lines represent the 95 percent confidence interval for each estimate.

3.3 Robustness

The results presented above suggest that post-release supervision has an enormous effect on the rate of reimprisonment while having little, if any, effect on the propensity to engage in new criminal activity. The reliability of these difference-in-differences estimates depends on the parallel trends assumption which can be assessed by the plots shown in Figure III and Figure V. The estimates also assume the absence of confounding factors which may have differentially affected the treatment and control groups at the time SB 323 and HB 2170 went into effect. Thus, a potential source of bias would come from the presence of other criminal justice laws passed at the same time as SB 323 and HB 2170. With respect to SB 323, there was a slight change to the probation process which was implemented along with SB 323; however, this change was unlikely to have had much of an effect on the population studied in this paper and, in any case, would have biased the results towards showing an increase in reoffending after SB 323.[27] With respect to HB 2170, in addition to reinstating post-release supervision, changes to the probation sanctioning structure were also part of the HB 2170 legislation. In Section 3.2, I show that the results are similar when using a restricted sample that accounts for these changes.

Another potential concern is my selection of the control group. Sensitivity analysis presented in Appendix C shows that the main results are robust to changing the inclusion criteria of the control group with respect to the length and type of sentence. I also address the possibility that various actors in the criminal legal system (e.g. police, attorneys, and judges) may have changed their behavior in response to the new laws. For example, judges may have sentenced (or prosecutors may have charged) the same underlying criminal conduct differently after the new laws were enacted in order to partially or completely offset the changes to the post-release supervision requirements. Sentencing data, however, show that there were no such changes to prosecutorial or judicial behavior (See Appendix Figures C.1-C.3).[28]

One may also question the extent to which criminal convictions accurately

[27] I discuss the robustness checks with respect to this change to the probation process in greater detail in Appendix C.

[28] I also rerun the main SB 323 difference-in-differences model with the subset of individuals sentenced prior to the introduction of the legislation—and likely prior to any potential behavioral response by prosecutors and judges—and find results consistent with the full sample (see Appendix C).

measure criminal behavior in Kansas after the law changes. It is possible that criminal activity is more likely to be detected and prosecuted when an individual is under community supervision than when they are unsupervised. If this is true, then using criminal convictions as a measure of criminal activity would produce downward biased results. The minimal role of parole officers in law-enforcement-type activities, however, suggests that this is not the case.[29] The Uniform Crime Reports (UCR) provide an additional source of data to measure criminal activity in Kansas and do not show any discernible changes in reported criminal behavior at the time that SB 323 or HB 2170 went into effect (see Appendix C). This supports the conclusion that convictions serve as a reliable proxy for underlying criminal activity over the examined time period.

Lastly, Appendix C(iv) presents analysis of those individuals directly affected by the retroactive application of SB 323 during the summer of 2000. This retroactive application of SB 323 allows me to estimate the effect of post-release supervision at the intensive margin. I do not find any statistically significant evidence that an additional month of supervision had an effect on reoffending, which is consistent with the main results of the paper.

3.4 Characteristics of Reimprisoned Individuals

3.4.1 Racial Disparities

In addition to the overall effects of SB 323, I also test for heterogeneous effects and find that the elimination of post-release supervision had a substantial impact on the racial gap in reimprisonment rates. As shown in Table IV, the three-year reimprisonment rate for Black individuals in the treatment group prior to SB 323 was 57.1 percent and the equivalent rate for non-Blacks was 45.5 percent. After the elimination of post-release supervision, these rates were 22.8 percent for Black individuals and 23.0 percent for non-Black individuals. The difference in the regression coefficients is 8.9 percentage points and

[29]See KDOC IMPP 14-132A for a description of the role and responsibilities of parole officers with respect to law enforcement. Although the governing Kansas statute authorizes the Secretary of Corrections to grant parole officers police and law enforcement powers (K.S.A. 75-5214), the Department of Corrections has not authorized the use of full law enforcement powers. There are about 9 to 12 KDOC special agents who are trained in law enforcement functions, carry firearms, and who focus on capturing and arresting parole absconders. In general, a parole officer's role is confined to case management which includes the responsibility to monitor and enforce conditions of supervision.

significant at the 5 percent level. A racial gap in reimprisonment is present even at very short time horizons. Prior to the elimination of post-release supervision, the Black and non-Black six-month reimprisonment rates were 20.9 percent and 15.2 percent respectively among the treatment group. After SB 323, these rates were 5.4 percent for Blacks and 5.9 percent for non-Blacks. The results show that a substantial racial gap in reimprisonment opens up relatively quickly among those under post-release supervision, but closes when post-release supervision is eliminated.

Table IV reports the effect of SB 323 on reoffending for Black versus non-Black individuals. The point estimates for Black individuals are more negative than non-Black individuals across each of the time horizons, and the difference at the five-year horizon is statistically significant at the 5 percent level. This suggests that the elimination of post-release supervision may have reduced reoffending for Blacks relative to non-Blacks.

In 2013, the racial disparities do not reappear after the reinstatement of post-release supervision. The one-year reimprisonment rates for Black and non-Black individuals were both around 30 percent in the post-HB 2170 period. As reported in Table V, the Black rate of reimprisonment increased by about 3 percentage points more than the non-Black rate, but the difference in these coefficients is not statistically significant at conventional levels. Similarly, for the restricted sample, the difference in the Black and non-Black coefficients on reimprisonment rates is not statistically significant at conventional levels (see Appendix Table B.9). A potential reason why a racial gap did not reemerge after HB 2170 is the KOR3P changes in the approach to supervision occurring between the 2000 and 2013 laws. Indeed, the racial gap in reimprisonment rates declines at the same time as the decrease in the revocation rate between 2005 and 2006 (see Appendix Figure B.2). There may be a connection between a higher threshold for revocation and reduction in racial disparities. A decline in racial disparities corresponding to the implementation of a higher threshold for revocations would be consistent with the decrease in racial disparities in Rose (2021), who found that racial disparities in revocations disappeared after technical revocations were eliminated in North Carolina. In addition, Sakoda (2023) found that racial disparities in reincarceration disappeared after Kansas implemented graduated sanctioning in probation, which required that more moderate sanctions be imposed prior to revocation.

The decrease in the racial disparity at the time the revocation rate declined

in 2005-2006, however, only accounts for about one-third of the total racial gap among the control group. Specifically, the racial gap in the one-year reimprisonment rate among the control group for the years 2001 to 2003 was 6.7 percentage points. This declined to a 4.4 percentage point gap for the years 2007 to 2009. Thus, a racial disparity persisted among the control group even after the substantial decline in the revocation rate around 2005-2006. As shown in the bottom panel of Appendix Figure B.2, the remaining part of the decrease in racial disparities prior to HB 2170 results from an uptick in the non-Black reimprisonment rate in 2012.

Table IV
SB 323 (2000) Heterogeneous Effects by Race

	Dependent variable: Reimprisonment					
	Black			Non-Black		
	within 1 Yr	within 3 Yrs	within 5 Yrs	within 1 Yr	within 3 Yrs	within 5 Yrs
After x Tr	-0.3196***	-0.3204***	-0.2691***	-0.2701***	-0.2318***	-0.2000***
	(0.0358)	(0.0323)	(0.0349)	(0.0197)	(0.0231)	(0.0203)
Pre-SB 323 Baseline	0.4143	0.5708	0.6044	0.3212	0.4552	0.4940
	Dependent variable: New Prison Sentence					
	Black			Non-Black		
	within 1 Yr	within 3 Yrs	within 5 Yrs	within 1 Yr	within 3 Yrs	within 5 Yrs
After x Tr	-0.0142	-0.0121	-0.0347	0.0060	0.0225	0.0246
	(0.0153)	(0.0233)	(0.0259)	(0.0110)	(0.0141)	(0.0163)
Pre-SB 323 Baseline	0.0640	0.1280	0.1878	0.0498	0.1016	0.1432

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The difference in the three-year reimprisonment coefficients is statistically significant at the 5 percent level; the difference in the five-year reimprisonment coefficients is significant at the 10 percent level; and the difference in the five-year new prison sentence coefficients is significant at the 5 percent level. All other differences are not statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table V
SB 2170 (2013) Heterogeneous Effects by Race

	Reimprisonment	
	Black	Non-Black
	within 1 Yr	within 1 Yr
After x Tr	0.2284***	0.1991***
	(0.0528)	(0.0267)
Pre-SB 323 Baseline	0.0625	0.0722
	New Prison Sentence	
	within 1 Yr	within 1 Yr
After x Tr	0.0195	0.0061
	(0.0327)	(0.0175)
Pre-SB 323 Baseline	0.0508	0.0592
	Any New Felony	
	within 1 Yr	within 1 Yr
After x Tr	0.0632	-0.0176
	(0.0411)	(0.0224)
Pre-SB 323 Baseline	0.1519	0.1591

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). The outcome variable, any new felony, includes any new felony conviction regardless of the sentence imposed. Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes individuals who were released from prison between 2006:1 and 2017:4. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The difference in the any new felony coefficients is statistically significant at the 10 percent level. All other differences are not statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *signficant at 10 percent level.

3.4.2 Other Heterogeneous Effects

Appendix Tables B.5 and B.7 show additional estimates for heterogeneous effects of SB 323 on reimprisonment. The decrease in reimprisonment was larger for individuals 32 years of age or older at the time of release versus those under 32 years of age (the mean age at release for the sample). This change is larger among older individuals even though their pre-SB 323 baseline reimprisonment rate is lower than the younger individuals. This difference, however, is only statistically significant at the 10 percent level for the five-year rate. The other notable heterogeneous effect with respect to reimprisonment is between those individuals who served previous prison time and those in their first prison term. The reimprisonment rate among individuals who were serving their second or subsequent prison term decreased by 10.7 and 8.5 percentage points more than individuals with no prior prison time at the one- and three-year horizons. These differences are significant at the 1 percent and 5 percent levels respectively.

Appendix Table B.6 and Appendix Table B.8 report heterogeneous effects of SB 323 on reoffending. The only statistically significant difference in reoffending between these groups is the difference in the three-year new prison sentence coefficients between females and males at the three-year horizon, but this difference is only marginally significant and neither the female nor male coefficient is significantly different from zero. I do not find any other statistically significant differences in reoffending between these groups.

I also test for heterogeneous effects after the HB 2170 reinstatement of post-release supervision (See Appendix Tables B.9-B.14). The only statistically significant difference between groups is the difference in the increase in reimprisonment between first prison term and second or subsequent prison term individuals.[30] The coefficient for second or subsequent prison term individuals is about 11 percentage points larger than first term individuals, and the difference is significant at the 5 percent level. Thus, it appears that both the elimination and reinstatement of post-release supervision had larger effects on the rate of reimprisonment for individuals who had been released from their second or subsequent prison term than those who were serving their first prison term. Appendix Tables B.8, B.13, B.14, however, show that there is no dif-

[30]Due to the limited size of the restricted sample, the standard errors are much larger for this HB 2170 analysis than for the SB 323 analysis, and several coefficients are large in magnitude but statistically insignificant.

ference in the impact of post-release supervision on reoffending between these groups. Therefore, these results show that post-release supervision fails to yield improved outcomes in terms of reoffending for those who have already had multiple interactions with the prison system, but it does perpetuate the ongoing cycle of incarceration for these individuals.

3.4.3 Are Revocations Predictive?

Lastly, I attempt to measure the extent to which post-release revocations are predictive of reoffending. In other words, are revocations of post-release supervision imposed on individuals who are most likely to reoffend? This is difficult to measure since we do not know the counterfactual reoffense rate for individuals imprisoned due to a revocation of post-release supervision, nor do we know the counterfactual revocation rate for individuals not under post-release supervision. Thus, I estimate predicted revocation rates based on a linear regression of revocation within one year of release from prison on the full set of demographic controls, parole office fixed effects, severity level of crime, criminal history and category of crime fixed effects using the treatment group individuals who were subject to post-release supervision either pre-SB 323 or post-HB 2170. I then use the coefficients obtained from the pre-SB 323 sample to calculate predictions for individuals in the treatment group released between 2000:3 and 2003:2 (the post-SB 323 period). The coefficients obtained from the post-HB 2170 sample are used to calculate predictions for individuals in the treatment group released after 2006:1 with offense dates before July 1, 2013 (the pre-HB 2170 period).

Appendix Table B.15 reports these predicted values and the differences between individuals who recidivated within one year and those who did not. The first row of Appendix Table B.15 shows that the predicted revocation rate for individuals who did commit an offense leading to a new prison sentence is about 5 percentage points higher (a statistically significant difference) than the predicted revocation rate for those who did not. There is no statistically significant difference for the pre-HB 2170 sample (see the second row of Appendix Table B.15).

One way to understand the magnitude of the difference in the post-SB 323 predicted revocation rates is to view these predicted rates in the context of the underlying populations. About 5.2 percent of the post-SB 323 treatment group committed an offense leading to a new prison sentence within a year

of release. Therefore, if we take the predicted revocation rates at face value, about 5.9 percent ((.382*.052)/(.382*.052 + .332*.948)) of revocations would be imposed on individuals who ended up committing an offense within one year of release that led to a new prison sentence. This is only slightly higher than the overall 5.2 percent new prison sentence rate among the full treatment group population.

3.5 The Effect of Senate Bill 323 on Employment and Earnings

In addition to estimating the effect of SB 323 on criminal justice outcomes, I also study the long-run employment outcomes by using unemployment insurance (UI) records on quarterly earnings between Q1:2005 and Q2:2012. Unfortunately, due to the limited timespan of the KDOL data set, I am unable to analyze short-run employment outcomes. Understanding the short-run employment effects would be ideal, but determining whether SB 323 had a sustained effect on economic outcomes many years after release is also important in evaluating the overall costs and benefits of the policy change. Because securing and maintaining employment is a standard condition of post-release supervision in Kansas, one might see a relatively high but short-lived employment rate for individuals under community supervision. The long-run employment outcomes can reveal whether the short-run gains in employment outweigh the higher risk of reincarceration due to the enforcement of supervision conditions. I follow the same difference-in-differences strategy described in Section 2 to estimate the effect of SB 323 on employment outcomes seven and a half to nine years after release from prison.[31] Specifically, I estimate the effect on two outcomes: (1) average earnings over the six quarters between years 7.5 and 9 after release; and (2) the employment rate averaged over the six quarters between years 7.5 and 9 after release.

One might have expected that the elimination of post-release supervision and the substantial decrease in reincarceration would have had a lasting and positive impact on the employment outcomes of the treatment group. This does not seem to be the case. There is no evidence of a decline in long-run employment either, which may have occurred if the conditions of supervision prompt individuals to obtain employment immediately after release which re-

[31]For probation violators, this is seven and a half to nine years after completion of their underlying prison sentence. For those individuals initially sentenced to prison, this is seven and a half to nine years after completion of their prison sentence.

sults in better long-run employment outcomes (see Appendix Figure D.1). No clear patterns emerge in the figures, and the regression results reported in Appendix Table D.1 confirm that the elimination of post-release supervision had no statistically identifiable effect on long-run employment outcomes. The point estimates are small and statistically insignificant. I also test for heterogeneous effects by race, age, and sex, and do not find any statistically significant differences between the groups (see Appendix Table D.2).

4 Policy Implications: Abolish or Reform?

The above findings indicate that the elimination of post-release supervision in Kansas under SB 323 resulted in a significant decline in reimprisonment among the treatment group, with no detectable increase in reoffending. My analysis of the reinstatement of post-release supervision in 2013 finds the same, but inverse effect. These results raise an important question for policymakers: Should we attempt to improve community supervision by adjusting various aspects of it, or should we eliminate the requirement of supervision altogether (at least for individuals convicted of less-serious offenses)?

As described above in Section 1.3, Kansas initiated major efforts to reform their approach to supervision in the mid-2000's under the KOR3P plan. These reform efforts, along with the changes enacted through SB 323 and HB 2170 provide the unique opportunity to answer the question posited above. Two of the main goals of the KOR3P reforms were to safely reduce the use of revocations and to shift the emphasis of supervision toward risk reduction and reentry (i.e., rehabilitation). I find that the reforms were successful in reducing prison admissions associated with post-release supervision revocations, but the reforms had no impact on reoffending (see Appendix B).

To estimate these effects, I employ a difference-in-differences strategy similar to that described in Section 2. For this analysis, however, I have switched the roles of the control group and treatment group. The new control group consists of individuals who remained under post-release supervision after SB 323 and were affected by the KOR3P reforms. Conversely, I use the treatment group from the main analysis as the control group, as they were no longer subject to post-release supervision after SB 323. I find that the decrease in the one-year reimprisonment rate between the pre-KOR3P group (which I define as those released between 2001-2003) and the post-KOR3P group (defined as

those released between 2007-2009) is about 15 percentage points (on a baseline of 42 percent), but I find no impact on new prison sentences (see Appendix Table B.16). Thus, even major efforts to reform the approach to and quality of supervision failed to yield any discernible effect on reoffending in Kansas.

To explore the potential mechanisms underlying the decrease in revocations, I analyze KDOC data on conditions violations during this period of reform. The conditions violations data spans the years 1999 to 2020 and includes information on the date and type of violation. It also indicates whether the violation led to a revocation or a non-revocation intervention (specific details regarding the type of non-revocation intervention used, such as verbal reprimand, increased reporting, or increased drug screens, are not available). As can be seen in Appendix Figure B.3, the number of violations resulting in *non-revocation* interventions increased during the same years when the revocation rate declined. These trends suggest that parole officers began using more non-revocation interventions before moving to revoke supervision, and this shift seems to have been applied across all types of probation violations (see Appendix Table B.17).

While these supervision reforms did not involve *de jure* restrictions on the use of revocations, they appear to have effectively increased the number of interventions pursued prior to the initiation of a post-release supervision revocation. Rose (2021) finds remarkably similar effects in the context of North Carolina probation, where a 2011 law increased the threshold for probation revocations by almost completely eliminating the use of revocations in response to technical conditions violations. Rose (2021) reported a 35 percent decrease in the revocation rate, whereas I find a 36 percent decrease in reimprisonment after the KOR3P reforms in Kansas.

Appendix Figure B.3 shows that the increased use of non-revocation interventions persisted up to and after the enactment of HB 2170, indicating a sustained adherence to the KOR3P reforms. Thus, HB 2170 provides the opportunity to study the extensive margin impact of Kansas's reformed version of post-release supervision. The results in Section 3.2, however, show that even after the KOR3P reforms, the reinstatement of post-release supervision caused an increase in reimprisonment to levels nearly as high as in the pre-reform era and did not produce any decrease in reoffending. Given these results, we might view reforms to supervision as capturing only a fraction of the potential benefits from completely eliminating the supervision requirement.

In addition to the impact on new criminal offenses, however, a policymaker may also be interested in the impact of supervision on other life outcomes, such as employment, substance use, and education. As reported in Section 3.5, I do not find evidence of any long-run impact on employment and earnings. In any case, given the ineffectiveness of carceral sanctions for conditions violations to increase public safety, policymakers could pursue other avenues to provide support for employment, substance use disorder, and other needs, which do not involve a carceral stick.

5 Conclusion

This study has analyzed the impact of eliminating and reinstating post-release supervision for a subset of the population released Kansas prisons. Using a difference-in-differences approach, I find that the elimination of post-release supervision for about a third of the population released from Kansas prisons resulted in a very large and significant decline in the rate of reimprisonment among those no longer subject to post-release supervision. The one-year reimprisonment rate of this group decreased by 28.5 percentage points from a baseline of 35 percent. This sizable decrease in the rate of reimprisonment, however, does not appear to have had a substantial, if any, effect on public safety. The point estimate for reoffending (as measured by new offenses leading to a conviction for which a prison sentence of any length was imposed) at the one-year horizon is 0.03 percentage points and statistically insignificant. The 95 percent confidence interval ranges from -1.6 percentage points to 1.7 percentage points. During the years before and after the policy change, reported crime in two of the largest cities in Kansas (Wichita and Topeka) did not change, lending further support to the conclusion that eliminating post-release supervision had no significant effect on criminal activity.

The subsequent changes to Kansas's post-release supervision system in 2013, introduced under HB 2170, offer the unique opportunity to reanalyze the impact of the 2000 reform. My findings with respect to the reinstatement of post-release supervision for probation violators in 2013 reinforce the SB 323 findings. Like the elimination of post-release supervision in 2000, the change in 2013 had a substantial impact on reimprisonment. In addition, there was no evidence that the reinstatement of post-release supervision reduced the rate of reoffending. Using a difference-in-differences design, I find that the

reinstatement of post-release supervision caused about a 17.5 percentage point increase in reimprisonment within one year on a baseline of 10.4 percent, with no perceptible decrease in reoffending among those impacted by the policy change.

Given these results, I can perform back-of-the-envelope calculations to approximate the tradeoff between reimprisonment and reoffending that arose after Kansas changed its laws regarding post-release supervision. SB 323 reduced the one-year reimprisonment rate by about 28.5 percentage points, and the point estimate for the one-year change in new prison sentences is very near zero. Thus, there was very little if any tradeoff between reimprisonment and reoffending. Even If I consider the upper bound of the 95 percent confidence interval for new prison sentences, a hypothetical policymaker would face a tradeoff of one additional felon sentenced to prison for every seventeen individuals who avoid reimprisonment within one year. With respect to HB 2170, the reinstatement of post-release supervision increased reimprisonment within one year by about 17.5 percentage points. The HB 2170 estimates are less precisely estimated than the SB 323 estimates, but all of the reoffending point estimates are positive suggesting that no reduction in reoffending resulted from the reinstatement of post-release supervision and the corresponding increase in reimprisonment.[32]

Furthermore, I show that the elimination of post-release supervision eliminated a major source of racial disparity in the criminal legal system. Prior to the enactment of SB 323, Black individuals in the treatment group were 25 percent more likely than non-Black individuals to be reimprisoned within three years. After SB 323 was enacted, this racial gap was completely eliminated and, in fact, among the treatment group, Black individuals were slightly less likely to be reimprisoned than non-Black individuals. These results imply that revocations of post-release supervision for conditions violations were the source of the racial disparity in reimprisonment. Given the high rates of community supervision revocation throughout the country, these findings could have implications beyond post-release supervision (see Langan and Levin (2002); Durose, Cooper and Snyder (2014); Rose (2021)). The racial gap does not reappear when post-release supervision is reinstated in 2013, however, which may be the

[32]Even given these noisier estimates, if I consider the lower bound of the 95 percent confidence interval for any new felony (-2.3 percentage points), the tradeoff for a hypothetical policymaker would be one less felon for every 7.5 individuals imprisoned.

result of a changed approach to supervision implemented in the mid-2000s.

* * *

The results presented in this article show that, for a substantial portion of the population released from prisons, the elimination of supervision can drastically reduce the number of individuals funneled back into the prison system while having no apparent cost in terms of public safety. Moreover, I provide evidence that post-release supervision can be a substantial source of racial disparities in reincarceration rates. Therefore, these results provide support for policies that would reduce the use of community supervision, not only to lower reincarceration rates, but as a promising opportunity to eliminate a major source of racial inequality in the criminal legal system.

Yet, despite the growing consensus on the overuse of the nation's prisons, there are still voices furthering the presumption that release from prison without community supervision is dangerous (Pew Charitable Trusts 2013, 2014*a*,*b*; The Council of State Governments Justice Center 2013). Mandatory post-release supervision exists in over half the states in the country and in the federal system. The result of Kansas's reduction and then reestablishment of its post-release supervision regime should reframe the prevailing conversation about prisoner reentry and serve as a lesson to reformers across the country that less can be more.

References

Abrams, David S., Marianne Bertrand, and Sendhil Mullainathan. 2012. "Do Judges Vary in Their Treatment of Race?" *Journal of Legal Studies*, 41(2): 347–383.

Antonovics, Kate, and Brian G Knight. 2009. "A New Look at Racial Profiling: Evidence from the Boston Police Department." *The Review of Economics and Statistics*, 91(1): 163–177.

Anwar, Shamena, Patrick Bayer, and Randi Hjalmarsson. 2012. "The Impact of Jury Race in Criminal Trials." *The Quarterly Journal of Economics*, 127(2): 1017–1055.

Arnold, David, Will Dobbie, and Crystal S Yang. 2018. "Racial Bias in Bail Decisions." *The Quarterly Journal of Economics*, 133(4): 1885–1932.

Barnes, Geoffrey C., Jordan M Hyatt, and Lawrence W Sherman. 2017. "Even A Little Big Helps: An Implementation and Experimental Evaluation of Cognitive-Behavioral Therapy for High-Risk Probationers." *Criminal Justice and Behavior*, 44(4): 611–630.

Barnes, Geoffrey C, Jordan M. Hyatt, Lindsay C. Ahlman, and Daniel T.L. Kent. 2012. "The Effects of Low-Intensity Supervision for Lower-Risk Probationers: Updated Results from a Randomized Controlled Trial." *Journal of Crime and Justice*, 35(2): 200–220.

Barnes, Geoffrey C, Lindsay Ahlman, Charlotte Gill, Lawrence W Sherman, Ellen Kurtz, and Robert Malvestuto. 2010. "Low-Intensity Community Supervision for Low-Risk Offenders: A Randomized, Controlled Trial." *Journal of Experimental Criminology*, 6(2): 159–189.

Bauldry, Shawn, and Wendy McClanahan. 2008. *Ready4 Work: Final Research Report.* Washington, DC: US Department of Labor.

Braga, Anthony A, Anne M Piehl, and David Hureau. 2009. "Controlling Violent Offenders Released to the Community: An Evaluation of the Boston Reentry Initiative." *Journal of Research in Crime and Delinquency*, 46(4): 411–436.

Carson, E. Ann. 2020. "Prisoners in 2019." *Washington DC: Bureau of Justice Statistics.*

Carson, E. Ann, and Daniela Golinelli. 2013. "Prisoners in 2012: Trends in Admissions and Releases, 1991-2012." *Washington DC: Bureau of Justice Statistics.*

Doleac, Jennifer. 2023. "Encouraging desistance from crime." *Journal of Economic Literature*, 61(2): 383–427.

Duriez, Stephanie A, Francis T Cullen, and Sarah M Manchak. 2014. "Is Project HOPE Creating a False Sense of Hope: A Case Study in Correctional Popularity." *Federal Probation*, 78: 57.

Durose, Matthew R, Alexia D Cooper, and Howard N Snyder. 2014. "Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010." *Washington DC: Bureau of Justice Statistics.*

Farabee, David, Michael Prendergast, and M Douglas Anglin. 1998. "The Effectiveness of Coerced Treatment for Drug-Abusing Offenders." *Federal Probation*, 62: 3.

Fryer, Roland G. 2016. "An Empirical Analysis of Racial Differences in Police Use of Force." National Bureau of Economic Research.

Hawken, Angela, and Mark Kleiman. 2009. "Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaiis HOPE: Executive Summary." *Washington, DC: National Criminal Justice Reference Services.*

Hyatt, Jordan M., and Geoffrey C Barnes. 2017. "An Experimental Evaluation of the Impact of Intensive Supervision on the Recidivism of High-Risk Probationers." *Crime and Delinquency*, 63(1): 3–38.

Kaeble, Danielle. 2023. "Probation and Parole in the United States, 2021." *Washington DC: Bureau of Justice Statistics.*

Kansas Department of Corrections. 2000. *2000 Corrections Briefing Report.* Topeka, KS.

Kansas Department of Corrections. 2001. *2001 Corrections Briefing Report.* Topeka, KS.

Kansas Department of Corrections. 2006. *KOR3P: Kansas Offender Risk Reduction and Reentry Plan.* Topeka, KS.

Kansas Sentencing Commission. 1993. *Desk Reference Manual.* Topeka, KS.

Kansas Sentencing Commission. 1995. *Desk Reference Manual.* Topeka, KS.

Kansas Sentencing Commission. 2015. *Desk Reference Manual.* Topeka, KS.

Kirk, David S. 2009. "A Natural Experiment on Residential Change and Recidivism: Lessons from Hurricane Katrina." *American Sociological Review*, 74(3): 484–505.

Kuziemko, Ilyana. 2013. "How Should Inmates Be Released from Prison? An Assessment of Parole Versus Fixed-Sentence Regimes." *The Quarterly Journal of Economics*, 128(1): 371–424.

Langan, Patrick A, and David J Levin. 2002. "Recidivism of Prisoners Released in 1994." *Federal Sentencing Reporter*, 15: 58.

Lipsey, Mark W, Nana A Landenberger, and Sandra J Wilson. 2007. "Effects of Cognitive-Behavioral Programs for Criminal Offenders." *Campbell systematic reviews*, 6(1): 27.

Metraux, Stephen, and Dennis P Culhane. 2004. "Homeless Shelter Use and Reincarceration Following Prison Release." *Criminology & Public Policy*, 3(2): 139–160.

Newton, Danielle, Andrew Day, Margaret Giles, Joanne Wodak, Joe Graffam, and Eileen Baldry. 2016. "The Impact of Vocational Education and Training Programs on Recidivism: A Systemic Review of Current Experimental Evidence." *International Journal of Offender Therapy and Comparative Criminology*, 62(1): 187–207.

Office of the Judicial Administrator. 2019. *Annual Report of the Courts of Kansas Fiscal Year 20179.* Topeka, KS: Office of the Judicial Administrator.

Oudekerk, Barbara, and Danielle Kaeble. 2021. "Probation and Parole in the United States, 2019." *Washington DC: Bureau of Justice Statistics.*

Pearson, Frank S, Douglas S Lipton, Charles M Cleland, and Dorline S Yee. 2002. "The Effects of Behavioral/Cognitive-Behavioral Programs on Recidivism." *Crime & Delinquency*, 48(3): 476–496.

Petersilia, Joan. 2003. *When Prisoners Come Home: Parole and Prisoner Reentry.* New York:Oxford University Press.

Petersilia, Joan, and Susan Turner. 1993. "Intensive Probation and Parole." *Crime and justice*, 17: 281–335.

Pew Charitable Trusts. 2013. "The Impact of Parole in New Jersey." *New York: The Pew Charitable Trusts.*

Pew Charitable Trusts. 2014*a*. "Mandatory Reentry Supervision: Evaluating the Kentucky Experience." *New York: Pew Charitable Trusts.*

Pew Charitable Trusts. 2014*b*. "Max Out: The Rise in Prison Inmates Released Without Supervision." *New York: Pew Charitable Trusts.*

Piehl, Anne M, and Stefan F LoBuglio. 2005. "Does Supervision Matter?" In *Prisoner Reentry and Crime in America.* , ed. Jeremy Travis and Christy Visher, 105–138. New York:Cambridge University Press.

Prescott, JJ, and Jonah E Rockoff. 2011. "Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?" *The Journal of Law and Economics*, 54(1): 161–206.

Redcross, Cindy, Megan Millenky, Timothy Rudd, and Valerie Levshin. 2011. *More Than a Job: Final Results from the Evaluation of the Center for Employment Opportunities (CEO) Transitional Jobs Program.* Vol. 18, OPRE Report.

Rehavi, Marit, and Sonja Starr. 2014. "Racial Disparity in Federal Criminal Sentences." *Journal of Political Economy*, 122(6): 1320–1354.

Rose, Evan. 2021. "Who Gets a Second Chance? Effectiveness and Equity in Supervision of Criminal Offenders." *The Quarterly Journal of Economics*, 136(2): 1199–1253.

Sakoda, Ryan T. 2023. "The Architecture of Discretion: Implications of the Structure of Sanctions for Racial Disparities, Severity, and Net Widening." *Northwestern University Law Review*, 117: 1213–1276.

Sakoda, Ryan T, and Jessica T Simes. 2021. "Solitary Confinement and the U.S. Prison Boom." *Criminal Justice Policy Review*, 32(1): 66–102.

Solomon, Amy L, Vera Kachnowski, and Avinash Bhati. 2005. "Does Parole Work? Analyzing the Impact of Postprison Supervision on Rearrest Outcomes." *Washington, DC: Urban Institute.*

The Council of State Governments Justice Center. 2013. "Justice Reinvestment in Kansas." *Council of State Governments Justice Center.*

Travis, Jeremy, Bruce Western, and F Stevens Redburn. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences.* Washington DC: National Academy of Sciences.

Visher, Christy A, Laura Winterfield, and Mark B Coggeshall. 2005. "Ex-Offender Employment Programs and Recidivism: A Meta-Analysis." *Journal of Experimental Criminology*, 1(3): 295–316.

Walker, Jeffrey T. 2007. "Eliminate Residency Restrictions for Sex Offenders." *Criminology & Pub. Pol'y*, 6: 863.

Wilson, James A, Wendy Naro, and JF Austin. 2007. "Innovations in Probation: Assessing New York Citys Automated Reporting System." *Washington, DC: JFA Institute.*

Wilson, James Q, and Joan Petersilia. 2011. *Crime and Public Policy.* New York:Oxford University Press.

Yang, Crystal S. 2015. "Free At Last? Judicial Discretion and Racial Disparities in Federal Sentencing." *The Journal of Legal Studies*, 44(1): 75–111.

APPENDICES

Abolish or Reform?
An Analysis of Post-Release Supervision

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Version: June 14, 2024

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Appendix A: Terminology

The details surrounding probation, parole, and post-release supervision vary by state and the terminology used for these different forms of community supervision vary as well. For the purposes of this paper, the terms **probation**, **parole**, and **post-release supervision** should be understood as follows:

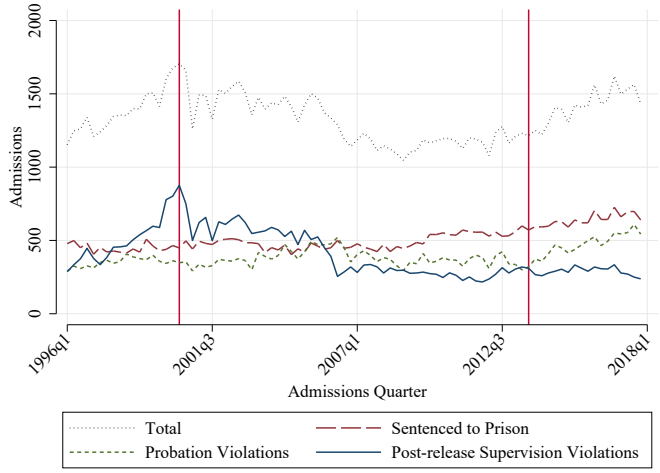
- **Probation** is a nonprison sentence issued by the sentencing court where the probationer must abide by a set of conditions determined by the court and/or by statute. Probation sentences are generally imposed on individuals convicted of lower-level offenses who have no or few prior criminal convictions. Although probation is a nonprison sentence, a violation of these conditions is punishable by a period of incarceration. Individuals under probation are supervised by a probation office which is usually part of the county court where the individual was sentenced.

- **Parole** is a period of community supervision that follows a release from prison and is granted at the discretion of a state parole board. In general, an individual will become eligible for parole after some fixed amount of time in prison as determined by the sentencing court or by statute (e.g. an individual might be given a ten-year prison sentence with the possibility of parole after five years). Once the individual becomes eligible for parole, he is not automatically released from prison but is granted parole hearings at regular intervals. At these parole hearings, the parole board reviews the individual's record, interviews the individual, and hears from other individuals that help assess the individual's suitability for release. In making these parole decisions, the parole board effectively determines the actual length of an individual's prison sentence. This form of sentencing is called "indeterminate" sentencing because the length of the sentence is not known at the time of sentencing, but rather, is determined at a later time through the discretion of the parole board. If an individual is granted parole, he is released from prison, but like probation, is subject to conditions of release. Individuals on parole are supervised by a parole office which is usually part of the state's department of corrections.

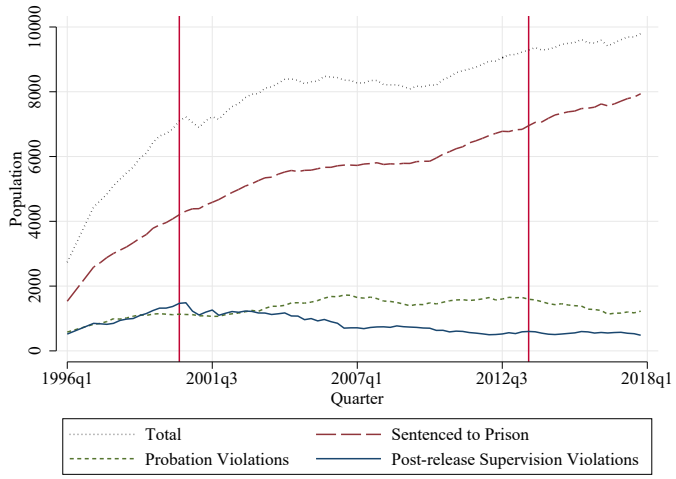
- **Post-release supervision** is a period of community supervision following the completion of a prison sentence. This type of supervision differs from parole because it is mandated by the sentencing court—not subject to the discretion of a parole board—and occurs after the completion of a determinate prison sentence. One prominent example of post-release supervision is supervised release in the federal system. Like probation and parole, post-release supervision includes conditions of release enforced

with prison sanctions. In general, an individual will receive a sentence that includes the possibility of parole or includes a period of post-release supervision, but not both. Some individuals are not sentenced to any form of community supervision after release. These policies vary by jurisdiction and type of crime. Individuals on post-release supervision are generally supervised by a parole office which, as stated above, is usually part of the state's department of corrections.

Appendix B: Supplemental Tables & Figures



Admissions



Population

Figure B.1
Kansas DOC Statistics by Reason for Admission

Notes: These figures indicate the number of admissions into the KDOC and the population of the KDOC by quarter. The vertical lines indicate Q2 2000 when SB 323 was enacted and Q3 2013 when HB 2170 was enacted.

Table B.1
Reasons for Conditions Violations

1999-2018	
Type of Violation	Percent
Narcotics/Alcohol	39.49
Reporting/Travel	34.05
Breaking the Law	8.42
Treatment/Counseling	7.95
Personal Conduct	2.72
Assoc. w/ Prohibited Persons/Locations	2.26
Special Condition/Misc.	1.81
Fees/Costs	1.58
Other	1.73

Notes: This table reports the percentage by type of post-release supervision violations resolved by revocation or non-revocation intervention between 1/1/1999 and 12/31/2018.

Table B.2
SB 323 (2000): Reoffending by Category of Crime

Dependent variable: New Prison Sentence			
	within 1 Year	within 3 Years	within 5 Years
Drug	-0.0000	0.0027	0.0006
	(0.0047)	(0.0059)	(0.0072)
Property	0.0024	0.0087	0.0081
	(0.0051)	(0.0077)	(0.0097)
Sex Offense	0.0021	0.0018	0.0050
	(0.0018)	(0.0026)	(0.0032)
Violent	-0.0021	-0.0055	0.0009
	(0.0058)	(0.0089)	(0.0105)
Weapons	-0.0003	-0.0006	-0.0008
	(0.0020)	(0.0032)	(0.0038)
Miscellaneous	0.0001	-0.0012	-0.0027
	(0.0028)	(0.0038)	(0.0052)

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.3
HB 2170 (2013): New Prison Sentences & New Felonies by Category of Crime

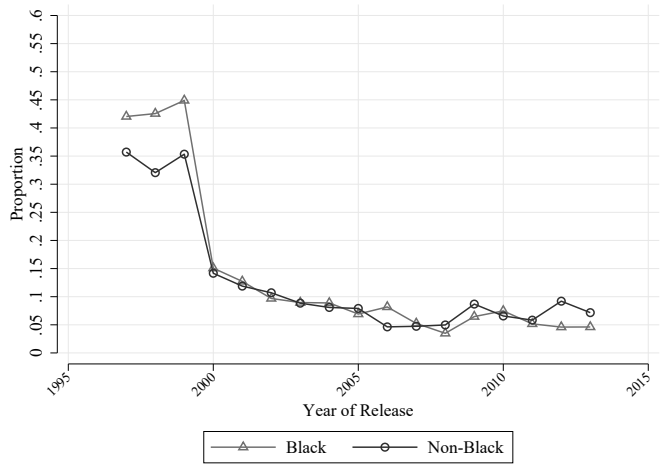
	New Prison Sentence within 1 Year	New Felony within 1 Year
Drug	-0.0127	0.0096
	(0.0132)	(0.0186)
Property	0.0202*	0.0092
	((0.0105)	(0.0189)
Sex Offense	0.0000	0.0021
	(0.0021)	(0.0023)
Violent	-0.0089	-0.0012
	(0.0135)	(0.0154)
Weapons	-0.0027	0.0002
	(0.0046)	(0.0047)
Miscellaneous	0.0048	0.0179*
	(0.0100)	(0.0100)

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). The outcome variable, any new felony, includes any new felony conviction regardless of the sentence imposed. The sample includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

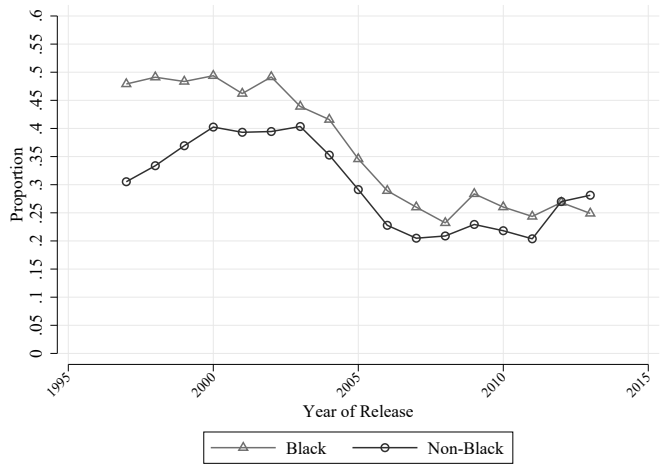
Table B.4
HB 2170 (2013): Regression Discontinuity

	Reimprisonment	New Prison Sentence	Any New Felony
RD Estimate	0.2315***	0.0081	0.0274
	(0.0452)	(0.0312)	(.0438)
Pre-HB 2170 Baseline	0.0901	0.0607	0.1525

Notes: Reimprisonment includes any return to prison within one year of release. New prison sentence includes convictions where a prison sentence of any length was imposed and the offense was committed within one year of release. The outcome variable, any new felony, includes any new felony conviction regardless of the sentence imposed for an offense committed within one year of release. Post-release supervision was reinstated for probation violators convicted of an offense committed on or after July 1, 2013. In order to accommodate the right-censoring of the data, only those probationers with offense dates before July 16, 2014 were included in the sample. This cutoff date was chosen by calculating the 75th percentile of the time between offense date and prison release date for all probation revokees with offense dates between July 1, 2013 and July 1, 2014. Bandwidths were set at 365 days on either side of the offense date cutoff. Linear regression fits are used on either side of the cutoff with a uniform kernel. Standard errors are reported in parentheses. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.



Treatment Group



Control Group

Figure B.2
One-Year Reimprisonment Rates by Race 1997-2013

Notes: The lines show the one-year reimprisonment rates for Black and non-Black individuals released from prison in the year indicated on the horizontal axis. The top panel shows treatment group individuals and the bottom panel shows control group individuals as defined in Section 2 of the main text. Because the horizontal axis indicates *year of release from prison*, the impact of HB 2170 does not appear at the end of the treatment group panel as the reinstatement of post-release supervision under HB 2170 applied to individuals convicted of crimes with *offense dates* on or after July 1, 2013.

Table B.5
SB 323 (2000): Heterogeneous Effects - Reimprisonment

	Demographic Category					
	Under 32 Years Old			32 Years or Older		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
Return to Prison	-0.2709***	-0.2441***	-0.1947***	-0.3030***	-0.2802***	-0.2554***
	(0.0236)	(0.0270)	(0.0239)	(0.0256)	(0.0264)	(0.0256)
Pre-SB 323 Baseline	0.3723	0.5167	0.5555	0.3219	0.4594	0.4943
	Female			Male		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
Return to Prison	-0.2509***	-0.2372***	-0.2005***	-0.2953***	-0.2687***	-0.2299***
	(0.0474)	(0.0539)	(0.0513)	(0.0194)	(0.0203)	(0.0180)
Pre-SB 323 Baseline	0.2931	0.4045	0.4304	0.3628	0.5107	0.5502

Notes: Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The difference in the five-year reimprisonment coefficients between under 32 years old and 32 years or older individuals is statistically significant at the 10 percent level. All other differences are not statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.6
SB 323 (2000): Heterogeneous Effects - New Prison Sentence

	Demographic Category					
	Under 32 Years Old			32 Years or Older		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
New Prison Sentence	0.0020	0.0235	0.0232	-0.0011	0.0002	-0.0118
	(0.0130)	(0.0163)	(0.0186)	(0.0117)	(0.0158)	(0.0189)
Pre-SB 323 Baseline	0.0652	0.1304	0.1814	0.0402	0.0835	0.1260
	Female			Male		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
New Prison Sentence	0.0018	-0.0301	-0.0248	-0.0005	0.0182	0.0104
	(0.0151)	(0.0219)	(0.0264)	(0.0092)	(0.0138)	(0.0157)
Pre-SB 323 Baseline	0.0204	0.0557	0.0872	0.0617	0.1217	0.1725

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The difference in the three-year new prison sentence coefficients between female and male individuals is statistically significant at the 10 percent level. All other differences are not statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.7
SB 323 (2000): Heterogeneous Effects - Reimprisonment

	Category of Criminal History/Conviction					
	First Prison Term			Second or Subsequent Prison Term		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
Return to Prison	-0.2661***	-0.2461***	-0.2179***	-0.3733***	-0.3308***	-0.2485***
	(0.0220)	(0.0236)	(0.0220)	(0.0353)	(0.0295)	(0.0326)
Pre-SB 323 Baseline	0.3309	0.4661	0.5012	0.4391	0.6089	0.6550
	Drug Offense			Non-Drug Offense		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
Return to Prison	-0.2797***	-0.2620***	-0.2554***	-0.2815***	-0.2564***	-0.2146***
	(0.0266)	(0.0366)	(0.0358)	(0.0217)	(0.0219)	(0.0200)
Pre-SB 323 Baseline	0.3016	0.4532	0.4984	0.3629	0.5017	0.5367
	Person Offense			Non-Person Offense		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
Return to Prison	-0.3028***	-0.2954***	-0.2446***	-0.2749***	-0.2440***	-0.2108***
	(0.0291)	(0.0307)	(0.0300)	(0.0213)	(0.0237)	(0.0216)
Pre-SB 323 Baseline	0.3768	0.5543	0.5888	0.3444	0.4777	0.5154

Notes: Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The differences in the one- and three-year reimprisonment coefficients between first prison term and second or subsequent prison term individuals are statistically significant at the 1 percent and 5 percent levels respectively. All other differences are not statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.8
SB 323 (2000): Heterogeneous Effects - New Prison Sentence

	Category of Criminal History/Conviction					
	First Prison Term			Second or Subsequent Prison Term		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
New Prison Sentence	-0.0059	0.0106	0.0072	0.0111	0.0080	-0.0085
	(0.0097)	(0.0122)	(0.0127)	(0.0213)	(0.0372)	(0.0438)
Pre-SB 323 Baseline	0.0517	0.0985	0.1392	0.0664	0.1624	0.2399
	Drug Offense			Non-Drug Offense		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
New Prison Sentence	-0.0123	-0.0011	-0.0165	0.0050	0.0126	0.0091
	(0.0123)	(0.0192)	(0.0218)	(0.0105)	(0.0157)	(0.0170)
Pre-SB 323 Baseline	0.0274	0.0661	0.1097	0.0612	0.1212	0.1696
	Person Offense			Non-Person Offense		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
New Prison Sentence	-0.0129	0.0152	0.0166	0.0014	0.0102	0.0009
	(0.0192)	(0.0232)	(0.0259)	(0.0091)	(0.0143)	(0.0163)
Pre-SB 323 Baseline	0.0833	0.1594	0.2210	0.0478	0.0989	0.1430

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. None of the differences are statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.9
HB 2170 (2013): Heterogeneous Effects - Reimprisonment

	Demographic Category	
	Black	Non-Black
	within 1 Year	within 1 Year
Return to Prison	0.2175***	0.1759***
	(0.0718)	(0.0415)
Pre-SB 323 Baseline	0.1129	0.1017
	Under 32 Years Old	32 Years or Older
	within 1 Year	within 1 Year
Return to Prison	0.1799***	0.1761***
	(0.0513)	(0.0484)
Pre-SB 323 Baseline	0.1382	0.0685
	Female	Male
	within 1 Year	within 1 Year
Return to Prison	0.2043***	0.1723***
	(0.0655)	(0.0468)
Pre-SB 323 Baseline	0.0562	0.1244

Notes: Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. None of the differences are statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.10
HB 2170 (2013): Heterogeneous Effects - New Prison Sentence

Demographic Category		
	Black	Non-Black
	within 1 Year	within 1 Year
New Prison Sentence	0.0257	0.0061
	(0.0414)	(0.0267)
Pre-SB 323 Baseline	0.0484	0.0593
	Under 32 Years Old	32 Years or Older
	within 1 Year	within 1 Year
New Prison Sentence	0.0409	-0.0068
	(0.0428)	(0.0277)
Pre-SB 323 Baseline	0.0789	0.0342
	Female	Male
	within 1 Year	within 1 Year
New Prison Sentence	0.0235	0.0110
	(0.0456)	(0.0346)
Pre-SB 323 Baseline	0.0225	0.0718

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. None of the differences are statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.11
HB 2170 (2013): Heterogeneous Effects - Any New Felony

	Demographic Category	
	Black	Non-Black
	within 1 Year	within 1 Year
Any New Felony	0.1121	0.0223
	(0.0739)	(0.0294)
Pre-SB 323 Baseline	0.1129	0.1356
	Under 32 Years Old	32 Years or Older
	within 1 Year	within 1 Year
Any New Felony	0.0518	0.0294
	(0.0454)	(0.0596)
Pre-SB 323 Baseline	0.1513	0.1096
	Female	Male
	within 1 Year	within 1 Year
Any New Felony	-0.0130	0.0696*
	(0.0707)	(0.0359)
Pre-SB 323 Baseline	0.1685	0.1148

Notes: Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. None of the differences are statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.12
HB 2170 (2013): Heterogeneous Effects - Reimprisonment

Category of Criminal History/Conviction		
	First Prison Term	Second or Subsequent
	within 1 Year	within 1 Year
Return to Prison	0.1274***	0.2367***
	(0.0389)	(0.0543)
Pre-SB 323 Baseline	0.1075	0.0982
	Drug Offense	Non-Drug Offense
	within 1 Year	within 1 Year
Return to Prison	0.2096***	0.1603***
	(0.0758)	(0.0421)
Pre-SB 323 Baseline	0.0732	0.1157
	Person Offense	Non-Person Offense
	within 1 Year	within 1 Year
Return to Prison	0.1128**	0.1837***
	(0.0531)	(0.0430)
Pre-SB 323 Baseline	0.1011	0.1053

Notes: Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The difference in the one-year new prison sentence coefficients between first prison term and second or subsequent prison term individuals is statistically significant at the 5 percent level. All other differences are not statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.13
HB 2170 (2013): Heterogeneous Effects - New Prison Sentence

Category of Criminal History/Conviction		
	First Prison Term	Second or Subsequent
	within 1 Year	within 1 Year
New Prison Sentence	0.0157	0.0127
	(0.0314)	(0.0396)
Pre-SB 323 Baseline	0.0538	0.0625
	Drug Offense	Non-Drug Offense
	within 1 Year	within 1 Year
New Prison Sentence	-0.0086	0.0213
	(0.0333)	(0.0322)
Pre-SB 323 Baseline	0.0244	0.0694
	Person Offense	Non-Person Offense
	within 1 Year	within 1 Year
New Prison Sentence	0.0466	-0.0011
	(0.0442)	(0.0246)
Pre-SB 323 Baseline	0.0449	0.0622

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. None of the differences are statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.14
HB 2170 (2013): Heterogeneous Effects - Any New Felony

Category of Criminal History/Conviction		
	First Prison Term	Second or Subsequent
	within 1 Year	within 1 Year
Any New Felony	0.0368	0.0244
	(0.0396)	(0.0449)
Pre-SB 323 Baseline	0.1237	0.1429
	Drug Offense	Non-Drug Offense
	within 1 Year	within 1 Year
Any New Felony	0.0654	0.0296
	(0.0508)	(0.0420)
Pre-SB 323 Baseline	0.0732	0.1528
	Person Offense	Non-Person Offense
	within 1 Year	within 1 Year
Any New Felony	0.0724	0.0242
	(0.0451)	(0.0391)
Pre-SB 323 Baseline	0.1011	0.1435

Notes: Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. None of the differences are statistically significant at conventional levels. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.15
Predicted Revocation by Actual Reoffending

	New Prison Sentence w/in 1 Year		
	No	Yes	Difference
Predicted Revocation (based on pre-SB 323)	0.3320	0.3819	-0.0499***
			(0.0111)
Predicted Revocation (based on post-HB 2170)	0.4443	0.4229	0.0213
			(0.0175)

Notes: *Predicted Revocation* is the predicted rate of post-release supervision revocations based on a linear regression of an indicator for revocation within one year of release from prison on the full set of demographic controls, parole office fixed effects, severity level of crime, criminal history and category of crime fixed effects using the indicated sample (pre-SB 323 or post-HB 2170) of treatment group individuals. The coefficients obtained from the pre-SB 323 sample are used to calculate predictions for individuals in the treatment group released between 2000:3 and 2003:2 (the post-SB 323 period). The coefficients obtained from the post-HB 2170 sample are used to calculate predictions for individuals in the treatment group released after 2006:1 with offense dates before July 1, 2013 (the pre-HB 2170 period). I report standard errors in parentheses for the difference between the predicted revocation rates. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table B.16
KOR3P Difference-in-Differences

	Reimprisonment	
	Reimprisonment	New Prison Sentence
	within 1 Year	within 1 Year
After x Tr	-0.1522***	0.0064
	(0.0159)	(0.0080)
2001-2003 Baseline	0.4181	0.0698
Observations	13,983	13,983

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). The sample includes a pre-period of individuals who were released from prison between 2001:1 and 2003:4 and a post-period of individuals released from prison between 2007:1 and 2009:4. For this analysis, the treatment group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. These individuals would have been impacted by the philosophical shift in supervision under the Risk Reduction & Reentry Plan (KOR3P). The control group consists of probation violators who were not subject to post-release supervision after SB 323. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

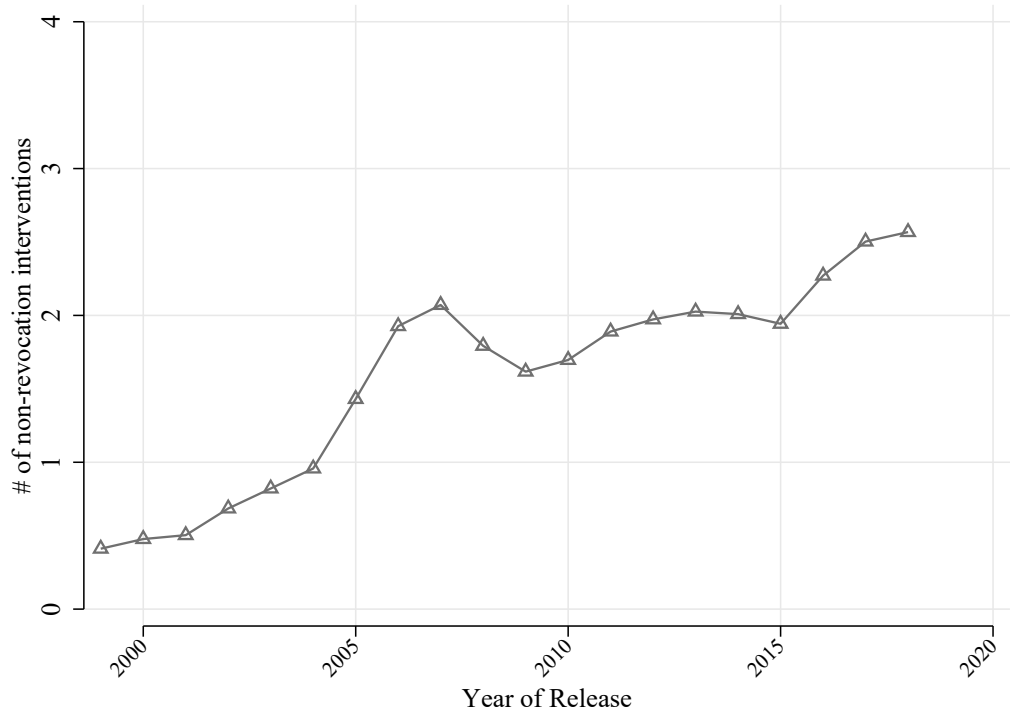


Figure B.3
Non-Revocation Interventions 1999-2018

Notes: The line indicates the average number of non-revocation interventions received in response to conditions violations under post-release supervision within the first year of supervision or, if the individual's post-release supervision was revoked during the first year, the average number of non-revocation interventions received prior to revocation.

Table B.17
Conditions Violations Receiving Non-Revocation Interventions

Average # within 1 Year or Prior to Revocation		
Type of Violation	2001-2003	2007-2009
Narcotics/Alcohol	0.38	0.88
Reporting/Travel	0.18	0.58
Breaking the Law	0.02	0.06
Treatment/Counseling	0.03	0.09
Other	0.06	0.21

Notes: This table reports the average number of non-revocation interventions by type received in response to conditions violations under post-release supervision within the first year of supervision or, if the individual's post-release supervision was revoked during the first year, the average number of non-revocation interventions by type received prior to revocation.

Appendix C: Robustness Checks

The results presented above suggest that the elimination and reinstatement of post-release supervision had an enormous effect on the rate of reimprisonment while having little, if any, effect on the propensity to engage in new criminal activity. The reliability of these difference-in-differences estimates depends on the absence of confounding factors which may have differentially affected the treatment and control groups at the time SB 323 and HB 2170 went into effect. A potential concern is the possibility that SB 323 and HB 2170 may have impacted the behavior of judges, prosecutors, community corrections officers, and law enforcement which in turn may have impacted the outcomes of individuals. The influence of these behavioral changes could bias the results by affecting the composition of the treatment and control groups, thereby confounding the effects of the laws with the impact of behavioral adjustment by judges, prosecutors, and other actors in the criminal legal system.

i) Composition of the Treatment and Control Groups

Under a simple economic model of charging and sentencing, one would expect that the new (and more lenient) sentencing regime for low-level felons under SB 323 would induce a change in the behavior of prosecutors and judges. For example, if prosecutors and judges assign charges and sentences with the goal of punishing criminal behavior according to some stable set of preferences, then a distinct drop in the severity of sentences available for certain types of charges would cause prosecutors to pursue more serious charges for a given underlying criminal act. Such adjustments would result in criminal behavior receiving the same level of punishment as before the law change. Exercising prosecutorial discretion in this way has been well documented in the literature (Glaeser, Kessler and Piehl 2000; Miller 2004; Bjerk 2005; Rehavi and Starr 2014). In the case of SB 323, the sentence to probation itself became less severe because post-release supervision was no longer imposed if a violation occurred. Given this change, we might expect to see prosecutors pursue and judges impose prison sentences for criminal behavior that would have received a probation sentence prior to SB 323. This change in sentencing would generate an increase in the total number of prison sentences all else equal.

The impact on the number of probation sentences is less clear. SB 323 may have resulted in a decrease in the number of probation sentences because of substitution into prison sentences. On the other hand, given the decrease in the severity of a probation sentence, the courts may have responded to SB 323 by imposing more probation sentences on the pool of cases which would have otherwise been dismissed, resolved with a fine, or been referred to some sort of diversion program. Equivalent but inverse forces may have been at work after HB 2170 was enacted.

Figure C.1 plots the total number of felony sentences by quarter as well as the number of sentences broken up by type. There is a distinct drop in the number of probation sentences around the enactment of SB 323 with no similar decrease (nor offsetting increase) in prison sentences. Figure C.2 plots probation sentences by type. It appears that this drop in probation sentences consists of a decrease in sentences for non-drug and non-person offenses. This category of offenses consist mainly of low-level theft. Therefore, contrary to the prediction of a simple model of charging and sentencing, it appears that prosecutors and judges reduced the left tail (less serious group) of individuals sentenced to probation and did not shift the individuals in the right tail (more serious group) of the probation distribution toward prison sentences.[1] This change in sentencing suggests that, on average, the treatment group released post-SB 323 would be composed of individuals who would have been given more serious sentences on average in the pre-SB 323 period which would likely bias my estimates upward (toward finding an increase in the rate of new prison sentences among the treatment group after the elimination of post-release supervision).[2]

In order to address these potential changes to charging and sentencing behavior, I run the difference-in-differences analysis on the subset of individuals sentenced prior to the introduction of SB 323 (January 1, 2000) in the Kansas legislature and likely before any actor in the criminal legal process would alter their behavior in response to the potential policy change. Table C.1 shows the one-, three-, and five-year results for this subsample prior to the introduction of SB 323. The results are consistent with the results for the full sample. As a further robustness check, Table C.4 shows difference-in-differences results after propensity score reweighting where propensity scores were calculated as the conditional probability of an observation being in the pre-SB 323 sample given its covariates. The coefficients on new prison sentences for this reweighted sample are very similar to the original coefficients.

Another factor that may have affected the composition of the treatment and control groups is the SB 323 requirement that all probation violators be placed in a Community Corrections program at least once prior to being incarcerated to serve their underlying prison sentence.[3] In Kansas, individuals sentenced to probation are sentenced to Court Services or Community Corrections. Court Services consists of a lower level of supervision than

[1] I group prosecutors and judges together in the above discussion because the data does not allow me to distinguish between changes in charging behavior by the prosecutors and sentencing behavior by the judges.

[2] Another potential behavioral response by prosecutors could be to view the new sentencing regime as offering a finer gradient of sentences. SB 323 introduced probation sentences that were no longer subject to post-release supervision if a violation occurred. Therefore, if prosecutors had a latent demand for these less severe sentencing options, one might expect to see prosecutors downcharge marginal cases. This should result in a reduction in the number of border box probation sentences, but I do not observe a decrease in these sentences.

[3] This requirement had an exception for those individuals who were found by a court to be a threat to public safety.

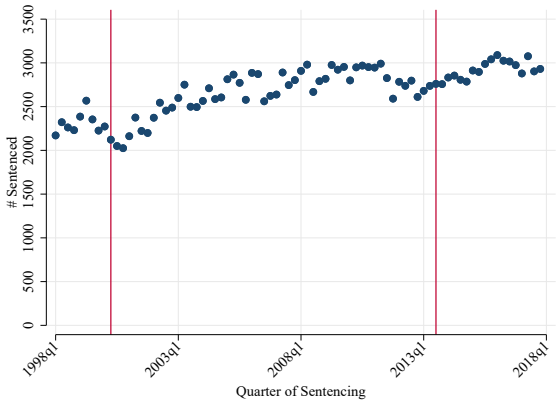
Community Corrections. Therefore, this provision requires that probation violators who begin their sentence in Court Services receive the higher level of supervision before they are placed in a state prison to serve their underlying prison sentence. About half of the felony convictions that receive a probation sentence are sentenced directly to Community Corrections. The purpose of this rule, like the rest of SB 323, was to ease some of the pressure on a crowded Kansas prison system. Although this did not change anything for those individuals sentenced directly to Community Corrections, it did offer another layer of supervision for those individuals who violated their conditions of probation under Court Services. Therefore, a portion of probation violators who compose my treatment group was affected by this provision, but this provision likely had a fairly small impact since the practice of assigning probation violators to Community Corrections before incarcerating them was already in place (but not mandatory). To the extent that this provision did change the treatment group, any change in composition would result in a bias toward showing an increase in reoffending after SB 323. This provision increased the number of conditions violations necessary for a carceral penalty and would have resulted in a higher average risk of recidivism among my treatment group.

Figure C.3 shows the number of probation revocations over time. The figure shows a slight decrease in revocations in the year after SB 323 (revocation rates are shown in the bottom panel of Figure C.3). A decrease in the rate of probation revocations in the year after SB 323 is consistent with the new requirement that individuals be sent to Community Corrections prior to serving their underlying prison sentence. Similar to the approach discussed above, I run the difference-in-differences model on the subset of individuals who violated probation prior to the enactment of SB 323 on May 25, 2000 and find that the coefficients are similar (although somewhat less precise) to those found using the full sample (see Table C.1). These results provide evidence that the potential change in the composition of the treatment group did not have a substantial effect on the results from the full sample.

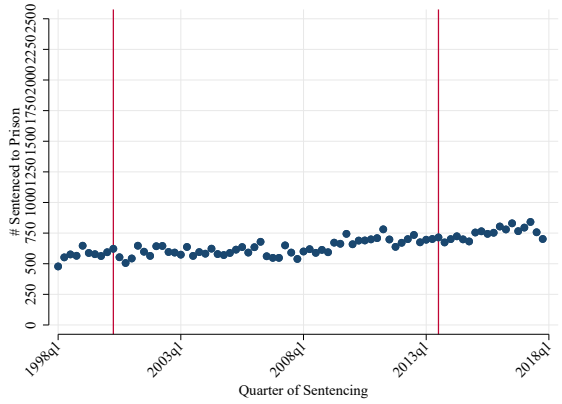
Similarly, HB 2170 could have changed charging or sentencing behavior. As described in Section 3.2, HB 2170 not only reinstated post-release supervision for all probation revokees, but also changed the probation sanctioning regime to include additional intermediate sanctions prior to full revocation. The reinstatement of post-release supervision for all probation revokees made probation a more severe sentence (just as SB 323, in eliminating post-release supervision, reduced the severity of a probation sentence). Therefore, the inverse of the impacts on charging and sentencing behavior described above with respect to SB 323 may have been at play after the enactment of HB 2170. Additionally, HB 2170 introduced new intermediate carceral sanctions to probation. These changes to probation decreased the probability that an individual would face full revocation of their probation sentence, but increased the

probability they would face some time in jail or prison (Sakoda 2023).[4] The impact of these reforms to probation on charging and sentencing behavior is ambiguous. To the extent that prosecutors and judges viewed the reforms as creating a more effective probation system, they may have increased their propensity to pursue and impose probation sentences. On the other hand, if prosecutors and judges viewed the reforms as making probation supervision less severe, then there may have been some substitution into prison sentences. The second vertical line in Figures C.1 and C.2 marks the quarter HB 2170 was enacted. There is no discernible change in overall sentences, however, there appears to be an increasing trend in probation sentences for drug offenses and a small decrease in probation sentences for non-drug offenses. Table C.3 reports the results from applying the same propensity score reweighting procedure described above to the cases surrounding the enactment HB 2170. These results are consistent with the results for the unadjusted sample. In addition, Figure C.3 shows a decreasing trend in revocations starting with individuals sentenced just prior to the enactment of HB 2170. This change is associated with the probation sanctioning changes described above. As explained in the main text, I account for these changes by running the analysis on a sample restricted to those individuals sentenced after HB 2170 was enacted and find similar results to the full sample (see Table III).

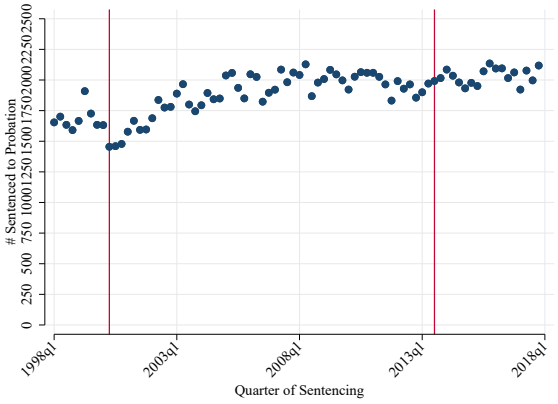
[4]I account for the changes in the probation revokee population after HB 2170 by estimating results, not only for the full sample, but for the subsample of individuals sentenced after the enactment date of HB 2170 (July 1, 2013) as well. The results remain the same for the full sample and this restricted sample.



All Sentences



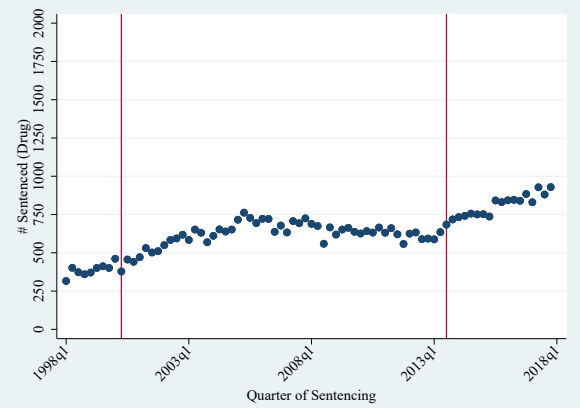
Prison Sentences



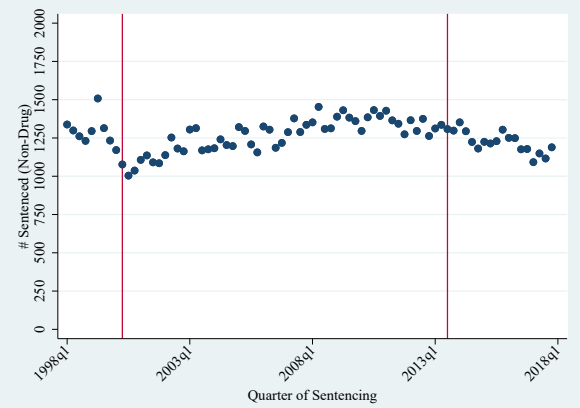
Probation Sentences

Figure C.1
Sentences by Type of Sentence

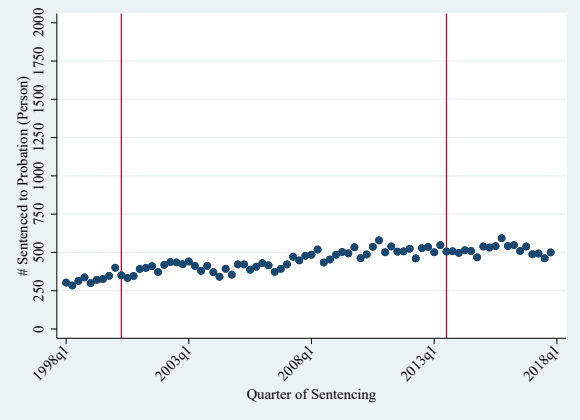
Notes: Observations are placed into quarter of sentencing bins. Each dot represents the number of felony sentences in the given quarter. The vertical lines indicate Q2 2000 when SB 323 was enacted and Q3 2013 when HB 2170 was enacted.



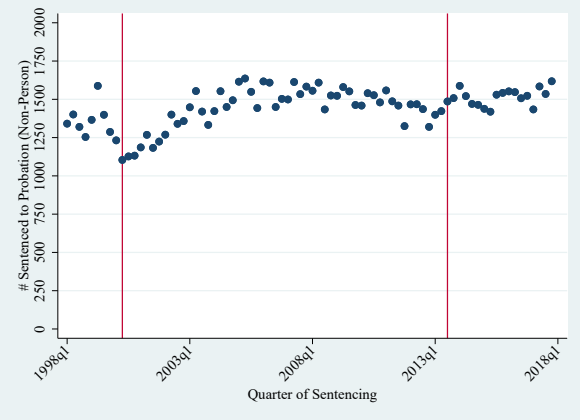
Drug Sentences



Non-Drug Sentences



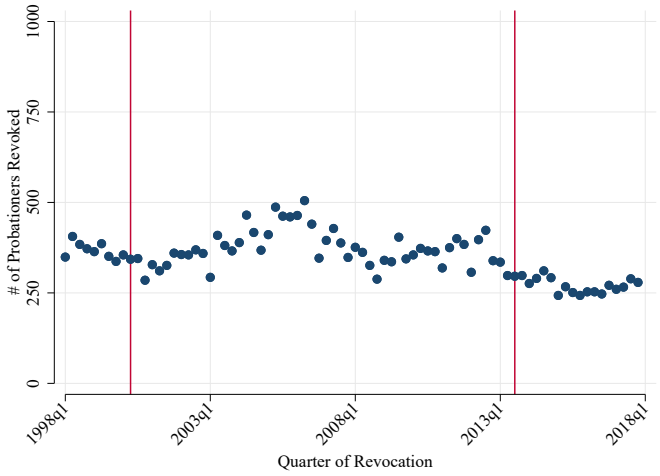
Person Sentences



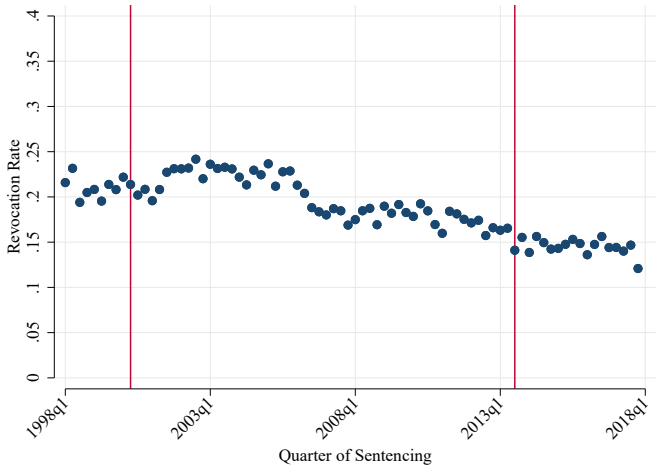
Non-Person Sentences

Figure C.2
Probation Sentences

Notes: Observations are placed into quarter of sentencing bins. Each dot represents the number of felony sentences in the given quarter for the indicated type of offense. The top two panels divide the full sample into drug and non-drug offenses. The bottom two panels divide the full sample into person and non-person offenses. The vertical lines indicate Q2 2000 when SB 323 was enacted and Q3 2013 when HB 2170 was enacted.



# of Probation Revocations by Quarter



Rate of Probation Revocations by Month

Figure C.3
Probation Revocations

Notes: In the upper panel, each dot represents the number of individuals whose probation was revoked for conditions violations in the given quarter. In the lower panel, each dot represents the proportion of all individuals sentenced in the given month who eventually had their probation revoked for conditions violations and served their underlying prison sentence. The vertical lines indicate Q2 2000 when SB 323 was enacted and Q3 2013 when HB 2170 was enacted.

Table C.1
Differences-in-Differences (Robustness Check) Reincarceration

	Dependent variable: Return to Prison					
	Sentenced before 1/1/2000			Probation Violation before 5/25/2000		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
After x Tr	-0.2812***	-0.2796***	-0.2382***	-0.2914***	-0.2723***	-0.2327***
	(0.0231)	(0.0237)	(0.0207)	(0.0280)	(0.0292)	(0.0289)
Pre-SB 323 Baseline	0.3506	0.4920	0.5292	0.3503	0.4917	0.5288
	Dependent variable: New Prison Sentence					
	Sentenced before 1/1/2000			Probation Violation before 5/25/2000		
	within 1 Year	within 3 Years	within 5 Years	within 1 Year	within 3 Years	within 5 Years
After x Tr	0.0013	0.0171	0.0093	-0.0062	0.0114	0.0055
	(0.0114)	(0.0153)	(0.0168)	(0.0154)	(0.0224)	(0.0254)
Pre-SB 323 Baseline	0.0542	0.1100	0.1574	0.0543	0.1099	0.1573
Year FE	X	X	X	X	X	X
Demog. Controls	X	X	X	X	X	X
Crime FE	X	X	X	X	X	X
Criminal History FE	X	X	X	X	X	X
Parole Office FE	X	X	X	X	X	X
Observations	9,599	9,599	9,599	8,600	8,600	8,600

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. The sample includes individuals who were released from prison between 1997:3 and 2003:2. Columns 1-3 report results for the subsample of individuals sentenced prior to January 1, 2000 and columns 4-6 report results for the subsample of individuals who violated probation before May 25, 2000. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table C.2
SB 323 (2000): Propensity Score Reweighting - Pre/Post

Dependent variable: New Prison Sentence					
	within 6 Months	within 1 Year	within 2 Years	within 3 Years	within 5 Years
After x Tr	-0.0033	0.0031	0.0042	0.0153	0.0144
	(0.0067)	(0.0101)	(0.0125)	(0.0137)	(0.0163)
Year FE	X	X	X	X	X
Demog. Controls	X	X	X	X	X
Crime FE	X	X	X	X	X
Criminal History FE	X	X	X	X	X
Parole Office FE	X	X	X	X	X
Observations	13,322	13,322	13,322	13,322	13,322

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The post-SB 323 observations of both the treatment and control groups are reweighted by propensity score to match the pre-SB 323 observations. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table C.3
HB 2170 (2013): Propensity Score Reweighting - Pre/Post

	Dependent variable: New Prison Sentence	
	within 6 Months	within 1 Year
After x Tr	0.0048	0.0068
	(0.0233)	(0.0271)
	Dependent variable: Any New Felony	
	within 6 Months	within 1 Year
After x Tr	-0.0009	0.0172
	(0.0266)	(0.0335)
Year FE	X	X
Demog. Controls	X	X
Crime FE	X	X
Criminal History FE	X	X
Parole Office FE	X	X
Observations	3,199	3,199

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). The outcome variable, any new felony, includes any new felony conviction regardless of the sentence imposed. The sample includes only those individuals sentenced after July 1, 2013. This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The post-HB 2170 observations of both the treatment and control groups are reweighted by propensity score to match the pre-HB 2170 observations. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

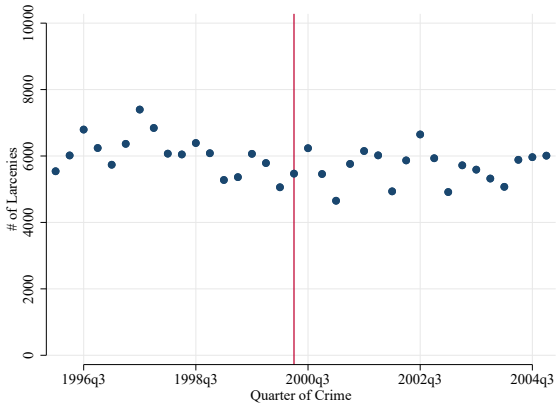
ii) Potential Changes to Arrest and Prosecution Rates After SB 323 and HB 2170

In addition to changes in the composition of the treatment and control groups described above, the arrest and prosecution rates for certain types of criminal behavior may have changed under SB 323 or HB 2170. Not only do prosecutors and judges hold a tremendous amount of discretion in deciding how they will respond to alleged criminal activity, but community corrections officers and law enforcement agents wield discretion as well. If individuals are more likely to be arrested and convicted of unlawful behavior because they are more closely monitored under post-release supervision, the rate of new offenses for the treatment group would be inflated upward in the pre-period relative to the post-period (and vice versa for HB 2170). If, on the other hand, community corrections officers (in conjunction with prosecutors) substitute technical violations for formal prosecution when a supervised individual is arrested, the rate of new offenses would be suppressed downward in the pre-SB 323 and post-HB 2170 periods (Petersilia and Turner 1993). My conversations with KDOC community corrections and parole officers indicate that no such coordination with prosecutors occurs. I am unable, however, to verify this in the data; and more generally, I am limited in my ability to disentangle these factors from the effect of SB 323 and HB 2170 on actual criminal behavior using the KDOC and KSC data sets.

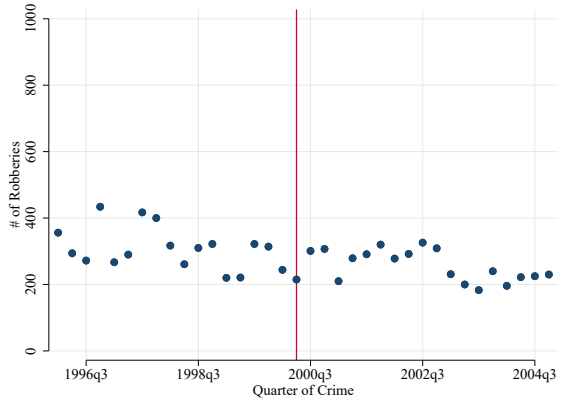
The Uniform Crime Reports (UCR), however, provide evidence on underlying criminal activity. Using the UCR data, I examine reported crime during the time period surrounding the enactment of SB 323 and HB 2170. If criminal activity increased when post-release supervision was eliminated, one would expect to see an increase in reported crime. I plot the number of reported larcenies, assaults, and robberies by quarter in Wichita and Topeka, two of the largest cities in Kansas (see Figure C.4).[5] There is no discernible increase in the number of reported crimes following the elimination of post-release supervision. The figures suggest that the limitations inherent in the use of convictions data is unlikely to have masked an increase in actual criminal behavior. The absence of a change in reported crimes across the SB 323 threshold, however, would be concerning if surrounding states showed a contemporaneous decrease in reported crime. Figures C.5 and C.6 plot reported crimes in the major cities of states surrounding Kansas and there is no noticeable drop in reported crime at the time SB 323 was enacted.

Figures C.7-C.9 show analogous UCR data for the period of time surrounding HB 2170.

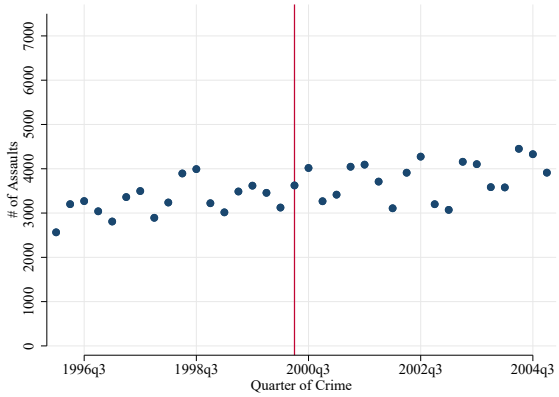
[5]UCR reported crime data is only available for Wichita and Topeka during the years prior to the enactment of SB 323. In 2000, Wichita was the largest city in Kansas by population and Topeka was the fourth largest city by population.



Larcenies



Robberies

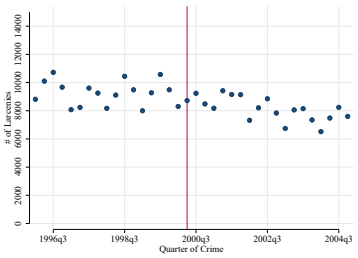


Assaults

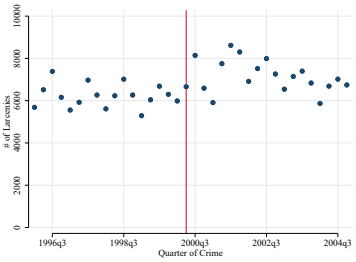
Figure C.4
Reported Crimes in Wichita and Topeka by Quarter

Notes: Each dot represents the number of reported crimes (not including unfounded offenses) in Wichita and Topeka for the given quarter. The vertical line indicates Q2 2000 when SB 323 was enacted. The top panel shows the number of reported larcenies and the bottom panels show the number of reported robberies and assaults. There is no apparent change in the reports of these crimes at the SB 323 threshold.

Larcenies

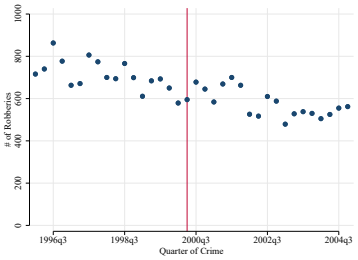


St. Louis & Kansas City

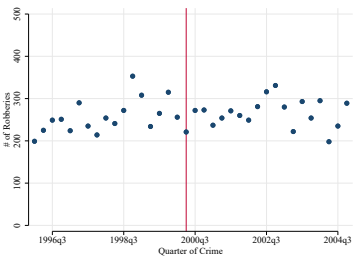


Lincoln & Omaha

Robberies

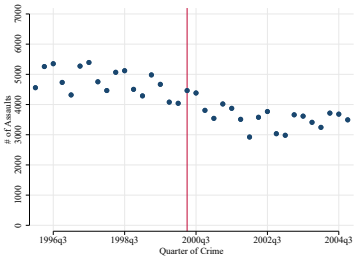


St. Louis & Kansas City

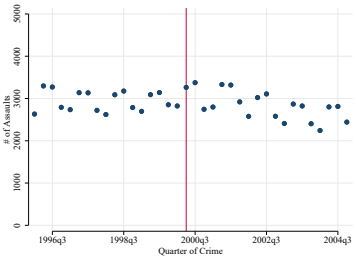


Lincoln & Omaha

Assaults



St. Louis & Kansas City

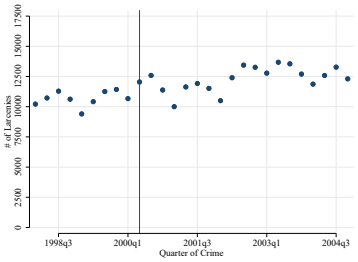


Lincoln & Omaha

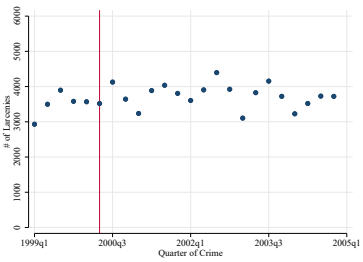
Figure C.5
Reported Crimes in Surrounding States - MO & NE

Notes: Each dot represents the number of reported crimes (not including unfounded offenses) in the indicated cities for the given quarter. The vertical line indicates Q2 2000 when SB 323 was enacted. The trends in larcenies, robberies, and assaults for these major cities in the states surrounding Kansas can be compared to the same trends in Wichita and Topeka. Similar to Wichita and Topeka, we generally see a smooth trend across the SB 323 threshold for most of these states. There is no indication that there was a drop in offending at the SB 323 threshold for any of the states.

Larcenies

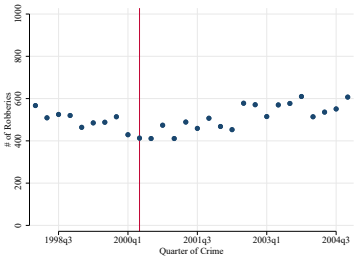


Oklahoma City & Tulsa

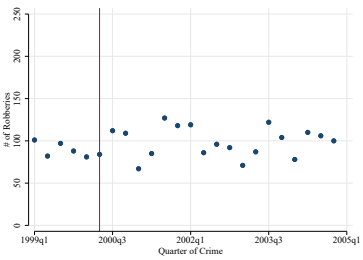


Des Moines & Cedar Rapids

Robberies

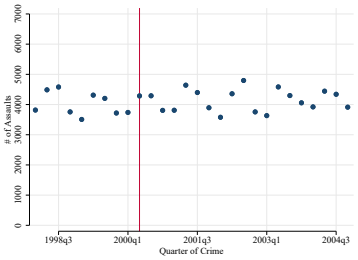


Oklahoma City & Tulsa

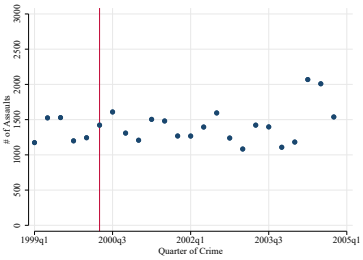


Des Moines & Cedar Rapids

Assaults



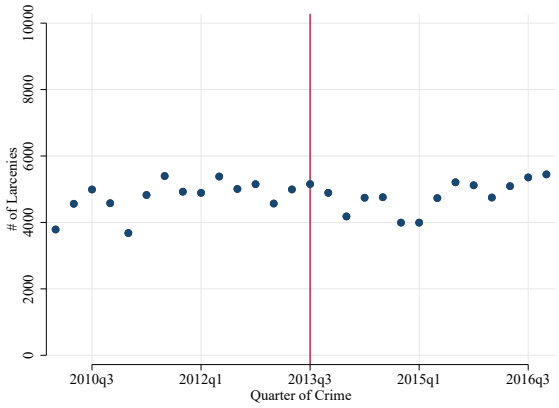
Oklahoma City & Tulsa



Des Moines & Cedar Rapids

Figure C.6
Reported Crimes in Surrounding States - OK & IA

Notes: Each dot represents the number of reported crimes (not including unfounded offenses) in the indicated cities for the given quarter. The vertical line indicates Q2 2000 when SB 323 was enacted. The trends in larcenies, robberies, and assaults for these major cities in the states surrounding Kansas can be compared to the same trends in Wichita and Topeka. Similar to Wichita and Topeka, we generally see a smooth trend across the SB 323 threshold for most of these states. There is no indication that there was a drop in offending at the SB 323 threshold for any of the states.



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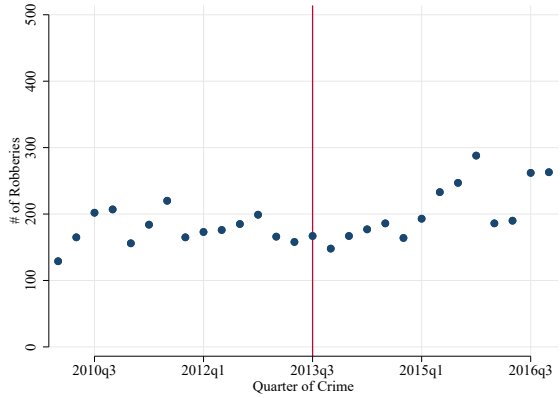
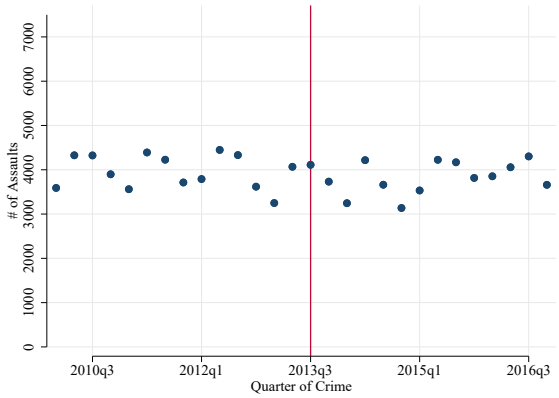


Robberies

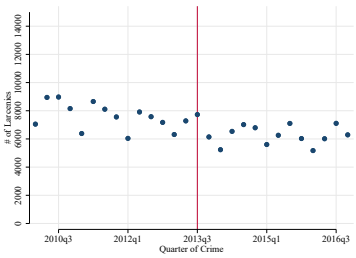


Assaults

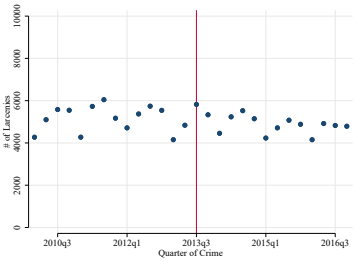
Figure C.7
Reported Crimes in Wichita and Topeka by Quarter

Notes: Each dot represents the number of reported crimes (not including unfounded offenses) in Wichita and Topeka for the given quarter. The vertical line indicates Q3 2013 when HB 2170 was enacted. The top panel shows the number of reported larcenies and the bottom panels show the number of reported robberies and assaults. There is no apparent decrease in the trend of reported crimes after HB 2170 was enacted.

Larcenies

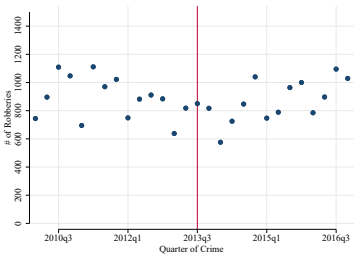


St. Louis & Kansas City

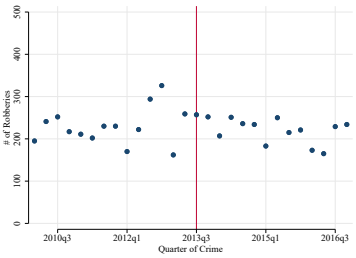


Lincoln & Omaha

Robberies

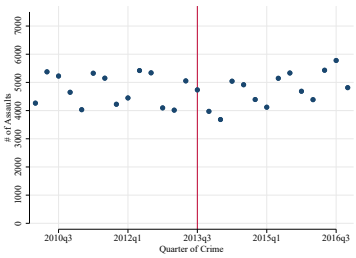


St. Louis & Kansas City

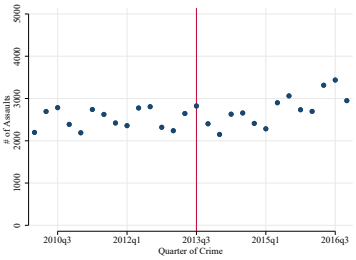


Lincoln & Omaha

Assaults



St. Louis & Kansas City

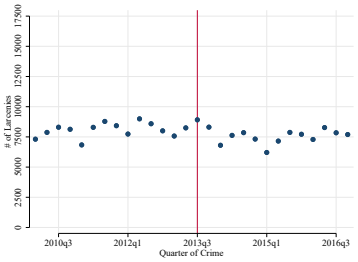


Lincoln & Omaha

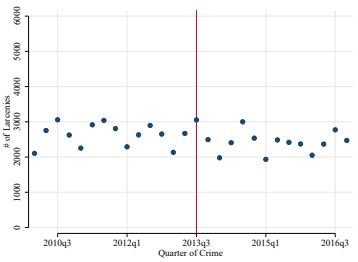
Figure C.8
Reported Crimes in Surrounding States - MO & NE

Notes: Each dot represents the number of reported crimes (not including unfounded offenses) in the indicated cities for the given quarter. The vertical line indicates Q3 2013 when HB 2170 was enacted. The trends in larcenies, robberies, and assaults for these major cities in the states surrounding Kansas can be compared to the same trends in Wichita and Topeka. Similar to Wichita and Topeka, we generally see a smooth trend across the HB 2170 threshold for most of these states. There is no indication that there was a major difference in the trend of reported crime after HB 2170 was enacted.

Larcenies

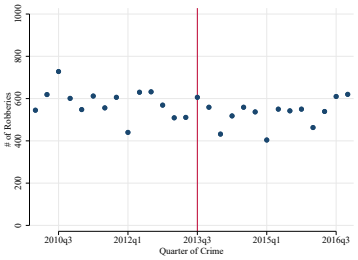


Oklahoma City & Tulsa

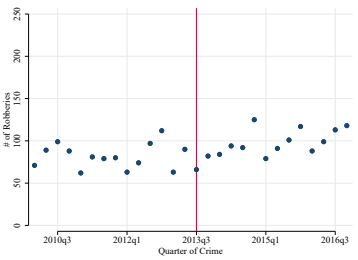


Des Moines & Cedar Rapids

Robberies

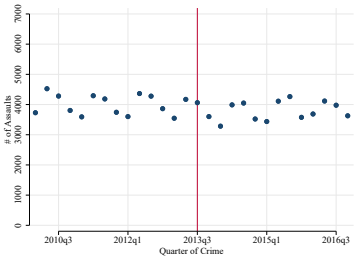


Oklahoma City & Tulsa

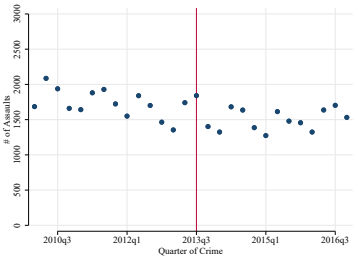


Des Moines & Cedar Rapids

Assaults



Oklahoma City & Tulsa



Des Moines & Cedar Rapids

Figure C.9
Reported Crimes in Surrounding States - OK & IA

Notes: Each dot represents the number of reported crimes (not including unfounded offenses) in the indicated cities for the given quarter. The vertical line indicates Q3 2013 when HB 2170 was enacted. The trends in larcenies, robberies, and assaults for these major cities in the states surrounding Kansas can be compared to the same trends in Wichita and Topeka. Similar to Wichita and Topeka, we generally see a smooth trend across the HB 2170 threshold for most of these states. There is no indication that there was a major difference in the trend of reported crime after HB 2170 was enacted.

iii) Sensitivity Analysis

I rerun the difference-in-differences analysis after reweighting the sample using propensity scores that were calculated as the conditional probability an observation would be found in the treatment group given the covariates. Estimates of the effect of SB 323 on reoffending for this reweighted sample are close to zero and statistically insignificant but somewhat larger in magnitude and less precisely estimated than the main results (see Table C.4). Estimates of the effect of HB 2170 on reoffending for this reweighted sample are similar to the main specification (see Table C.5).

As a further robustness check, I vary the parameters for including an individual in the control group sample and rerun the difference-in-differences model with control groups using a prison sentence cutoff of 12, 24, 48, or 60 months rather than the 36 months cutoff that I use in the main results of the previous section (see Tables C.6 and C.7). I also rerun the analysis if individuals convicted of certain categories of crimes are dropped from the data set (see Tables C.8 and C.9). In general, the results in these tables do not vary substantially from the main results.

Table C.4
SB 323 (2000): Propensity Score Reweighting - Treatment/Control

Dependent variable: New Prison Sentence					
	within 6 Months	within 1 Year	within 2 Years	within 3 Years	within 5 Years
After x Tr	-0.0101	-0.0055	0.0221	0.0317	0.0285
	(0.0103)	(0.0129)	(0.0253)	(0.0257)	(0.0264)
Year FE	X	X	X	X	X
Demog. Controls	X	X	X	X	X
Crime FE	X	X	X	X	X
Criminal History FE	X	X	X	X	X
Parole Office FE	X	X	X	X	X
Observations	13,303	13,303	13,303	13,303	13,303

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group observations are reweighted by propensity score to match the control group observations. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table C.5
HB 2170 (2013): Propensity Score Reweighting - Treatment/Control

	Dependent variable: New Prison Sentence	
	within 6 Months	within 1 Year
After x Tr	0.0125	0.0001
	(0.0219)	(0.0296)
	Dependent variable: Any New Felony	
	within 6 Months	within 1 Year
After x Tr	0.0243	0.0401
	(0.0228)	(0.0352)
Year FE	X	X
Demog. Controls	X	X
Crime FE	X	X
Criminal History FE	X	X
Parole Office FE	X	X
Observations	3,207	3,207

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). This restricted sample excludes individuals who started probation prior to the reforms to probation enacted under HB 2170. The treatment group observations are reweighted by propensity score to match the control group observations. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table C.6
SB 323 (2000): Robustness Control Group - Months

	Dependent variable: New Prison Sentence				
	within 6 Months	within 1 Year	within 2 Years	within 3 Years	within 5 Years
12 Months	0.0006	-0.0035	-0.0049	0.0048	-0.0009
	(0.0076)	(0.0107)	(0.0144)	(0.0157)	(0.0193)
Obs.	9,187	9,187	9,187	9,187	9,187
24 Months	-0.0051	-0.0069	-0.0035	0.0068	0.0022
	(0.0062)	(0.0087)	(0.0115)	(0.0128)	(0.0147)
Obs.	11,840	11,840	11,840	11,840	11,840
48 Months	-0.0011	0.0014	0.0028	0.0125	0.0077
	(0.0058)	(0.0082)	(0.0103)	(0.0119)	(0.0140)
Obs.	13,930	13,930	13,930	13,930	13,930
60 Months	0.0002	0.0020	0.0028	0.0125	0.0063
	(0.0057)	(0.0082)	(0.0103)	(0.0123)	(0.0142)
Obs.	14,579	14,579	14,579	14,579	14,579

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control groups vary between rows with each control group consisting of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to prison terms of 12 months, 24 months, 48 months, or 60 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table C.7
HB 2170 (2013): Robustness Control Group - Months

	New Prison Sentence		Any New Felony	
	within 6 Months	within 1 Year	within 6 Months	within 1 Year
12 Months	0.0261	0.0482*	0.0199	0.0704
	(0.0183)	(0.0280)	(0.0299)	(0.0462)
Obs.	1,660	1,660	1,660	1,660
24 Months	0.0082	0.0060	0.0125	0.0356
	(0.0183)	(0.0255)	(0.0209)	(0.0337)
Obs.	2,679	2,679	2,679	2,679
48 Months	0.0162	0.0158	0.0162	0.0367
	(0.0192)	(0.0238)	(0.0204)	(0.0299)
Obs.	3,365	3,365	3,365	3,365
60 Months	0.0162	0.0159	0.0161	0.0369
	(0.0192)	(0.0237)	(0.0203)	(0.0298)
Obs.	3,395	3,395	3,395	3,395

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). The outcome variable, any new felony, includes any new felony conviction regardless of the sentence imposed. The sample includes individuals who were released from prison between 2006:1 and 2017:4. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control groups vary between rows with each control group consisting of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to prison terms of 12 months, 24 months, 48 months, or 60 months or less. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table C.8
SB 323 (2000): Robustness Control Group - Crimes

Dependent variable: New Prison Sentence					
	within 6 Months	within 1 Year	within 2 Years	within 3 Years	within 5 Years
No Drug	0.0005	0.0050	-0.0002	0.0126	0.0091
	(0.0072)	(0.0105)	(0.0135)	(0.0157)	(0.0170)
Obs.	9,811	9,811	9,811	9,811	9,811
No Sex Offenses	-0.0046	0.0009	0.0017	0.0133	0.0050
	(0.0061)	(0.0085)	(0.0112)	(0.0129)	(0.0148)
Obs.	12,799	12,799	12,799	12,799	12,799
No Drug or Sex Offenses	-0.0001	0.0066	-0.0008	0.0135	0.0067
	(0.0075)	(0.0108)	(0.0145)	(0.0167)	(0.0179)
Obs.	9,274	9,274	9,274	9,274	9,274

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. The sample includes individuals who were released from prison between 1997:3 and 2003:2. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control groups vary between rows with each control group consisting of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to prison terms of 36 months or less who were not convicted of a drug offense, a sex offense, or neither drug or sex offense respectively. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

Table C.9
HB 2710 (2013): Robustness Control Group - Crimes

	New Prison Sentence		Any New Felony	
	within 6 Months	w/in 1 Year	w/in 6 Months	w/in 1 Year
No Drug	0.0138	0.0193	0.0099	0.0353
	(0.0268)	(0.0324)	(0.0281)	(0.0407)
Obs.	2,434	2,434	2,434	2,434
No Sex Offenses	0.0137	0.0117	0.0148	0.0355
	(0.0192)	(0.0240)	(0.0195)	(0.0297)
Obs.	3,117	3,117	3,117	3,117
No Drug or Sex Offenses	0.0145	0.0207	0.0089	0.0371
	(0.0271)	(0.0323)	(0.0280)	(0.0405)
Obs.	2,346	2,346	2,346	2,346

Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed (same as in the SB 323 analysis). The outcome variable, any new felony, includes any new felony conviction regardless of the sentence imposed. The sample includes individuals who were released from prison between 2006:1 and 2017:4. The treatment group consists of probation violators who were not subject to post-release supervision after SB 323 but were once again subject to post-release supervision after HB 2170 was enacted. The control groups vary between rows with each control group consisting of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to prison terms of 36 months or less who were not convicted of a drug offense, a sex offense, or neither drug or sex offense respectively. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.

iv) The Effect of Variation in the Length of Post-release Supervision

SB 323 not only affected individuals released from prison after the law was enacted, but was retroactively applied to individuals already under post-release supervision who would not have been subject to supervision under the new regime. In order to bring their sentences in line with the new law, the KDOC was ordered to discharge all of these individuals within a three month period. The termination of post-release supervision for this group of individuals produced quasi-random variation in the length of time spent under supervision. I exploit this variation to estimate the relationship between the time spent under supervision and subsequent rates of reoffending (i.e. the intensive margin effect of post-release supervision). This identification strategy follows the strategies used in Maurin and Ouss (2009) and Kuziemko (2013) who exploit early releases from prisons in France and Georgia respectively to estimate the effect of the length of incaraceration on recidivism. I find no significant effects of an additional month of supervision on new prison sentences. This is consistent with the main results of the paper showing that eliminating post-release supervision had no effect on reoffending.

I define the length of post-release supervision as the number of days between the date when the individual completed his underlying prison term and the date when he was discharged from KDOC supervision due to the retroactive application of SB 323. Because violating a condition of post-release supervision is punished by imprisonment, the number of days under post-release supervision (as defined here) may include days that the individual was in prison due to a conditions violation.[6] Consequently, the estimates reported in this portion of the analysis will reflect the impact of some combination of non-prison supervision and incarceration.

After SB 323 was enacted on May 25, 2000, the KDOC was given until September 1, 2000 to discharge all individuals who were no longer required to serve post-release supervision under the new law. While there is no indication that the timing of the retroactive releases was anything but random, the fact that there was a three-month window to discharge these individuals creates the possibility for endogeneity. If manipulation of release dates did occur, one might expect that KDOC officials would attempt to keep those deemed higher-risk under supervision for longer periods of time and discharge them closer to the September 1 deadline. This would bias the results toward finding a positive relationship between the amount of time under supervision and reoffending. In order to eliminate this potential source of endogeneity,

[6]Technical violations are penalized with six months of incarceration which is reducable to three months by earning good time credits. The post-release supervision clock does not stop running during these prison penalty periods and, therefore, the individual will be released from prison if the penalty period goes up to the scheduled end of the post-release period. K.A.R. 44-6-115c.

I instrument for the number of months under post-release supervision (including prison penalty periods) with the individual's post-release supervision start date.

I estimate the following equation:

$$\text{New Prison Sentence}_{it} = \alpha + \beta_1 \widehat{Months}_i + \beta_2 X_i + \beta_3 Z_t + \varepsilon_{it}$$

where i indexes an individual, t indexes the time period; $\widehat{Months}$ is the predicted number of months under post-release supervision obtained from the first stage; X is a vector of individual-level characteristics including sex, race, age (two-year bins), parole office fixed effects, severity level of crime, criminal history, length of the probation sentence; and Z is a set of dummy variables indicating the month of release.

My data set does not include a variable indicating whether or not an individual was released early because of SB 323. I do know, however, that an individual would serve a minimum of 12 months under a post-release supervision sentence even if he had accumulated the maximum amount of good time.[7] Therefore, I limit my sample to those individuals who began their period of post-release supervision between September 1, 1999 (one year prior to the deadline for retroactive application of SB 323) and May 25, 2000 (the day SB 323 was enacted) which guarantees that their supervision period was cut short due to the retroactive application of SB 323. New offenses are measured from the date that the individual was discharged from post-release supervision.

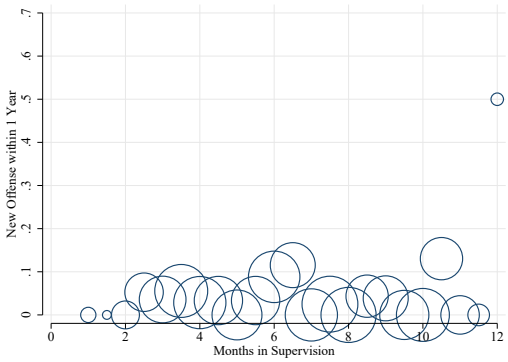
The relationship between the amount of time in supervision and the proportion of individuals with a new offense leading to a prison sentence of any length looks fairly flat at the one-year horizon and does not develop a clearly increasing or decreasing pattern as the horizon lengthens to nine years (see Appendix Figure C.10). The 2SLS estimates reported in Table C.10 are positive, but insignificant at traditional levels for the full sample. The coefficient at the nine-year horizon is positive and statistically significant for individuals convicted of drug offenses, but the sample size is 90 so caution should be exercised when interpreting this result. I repeat the analysis with reoffending measured from the date of prison release (as is done in the difference-in-differences analysis) and find similar results (see Appendix Table C.11).

[7] When this sample was sentenced, post-release supervision was either 24 or 36 months long and the maximum amount of good time would reduce post-release supervision by half (Kansas Sentencing Commission 1999, 2000).

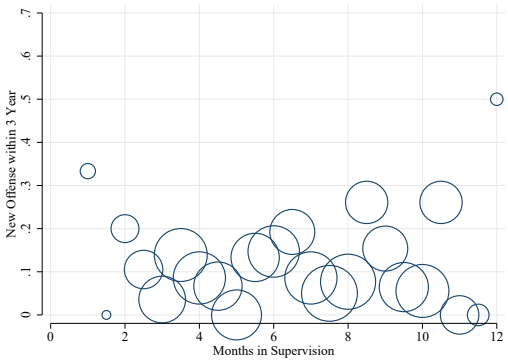
Table C.10
Retroactive Application of SB 323

Dependent Variable: New Prison Sentence within					
	All				
	1 Year	3 Years	5 Years	7 Years	9 Years
Months in Supervision	0.0004	0.0024	0.0041	0.0050	0.0054
	(0.0024)	(0.0045)	(0.0057)	(0.0049)	(0.0048)
Observations	564	564	564	564	564
	Non-Drug Offense				
	1 Year	3 Years	5 Years	7 Years	9 Years
Months in Supervision	0.0016	0.0034	0.0048	0.0057	0.0047
	(0.0032)	(0.0046)	(0.0064)	(0.0051)	(0.0053)
Observations	472	472	472	472	472
	Drug Offense				
	1 Year	3 Years	5 Years	7 Years	9 Years
Months in Supervision	0.0001	0.0003	0.0072	0.0072	0.0225*
	(0.0031)	(0.0089)	(0.0128)	(0.0128)	(0.0126)
Observations	92	92	92	92	92
Sentencing Controls	X	X	X	X	X
Demographic Controls	X	X	X	X	X
Month of Release FE	X	X	X	X	X
Age Cateogory FE	X	X	X	X	X
Parole Office FE	X	X	X	X	X

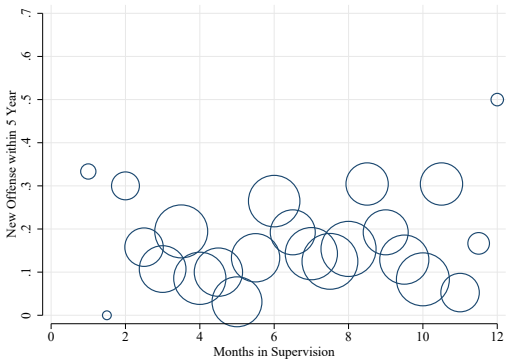
Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. This table estimates new prison sentences from the time that the individual was discharged from post-release supervision. Each column reports estimates obtained from a 2SLS regression where months in supervision is treated as an endogenous variable and instrumented for using the individual's post-release supervision start date. Standard errors in parentheses are robust and clustered at the parole office level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.



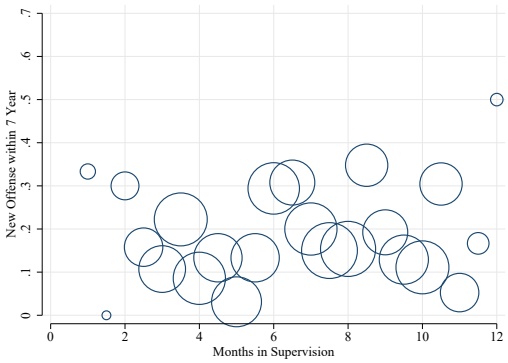
New Prison Sentence w/in 1 Year



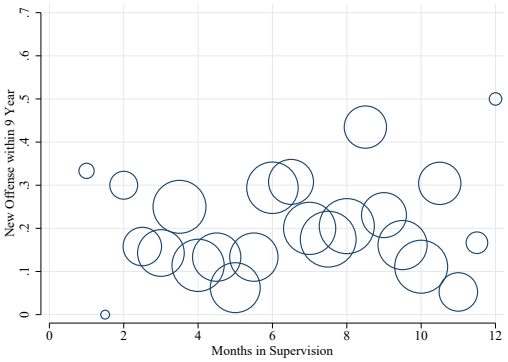
New Prison Sentence w/in 3 Years



New Prison Sentence w/in 5 Years



New Prison Sentence w/in 7 Years



New Prison Sentence w/in 9 Years

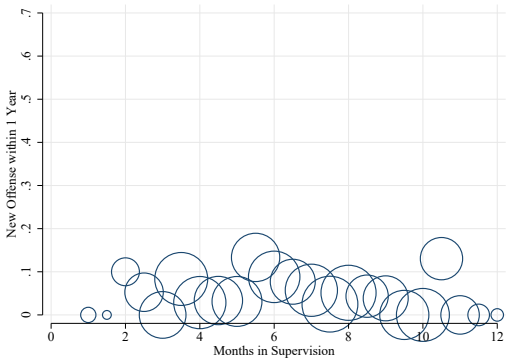
Figure C.10
New Prison Sentences by Months Under Supervision

Notes: This figure shows proportion of individuals with a new prison sentences (which includes only those new offenses leading to a conviction where a prison sentence of any length was imposed) by the number of months served in post-release supervision. Observations are placed in half-month bins and the size of each circle is scaled by the number of observations in the bin.

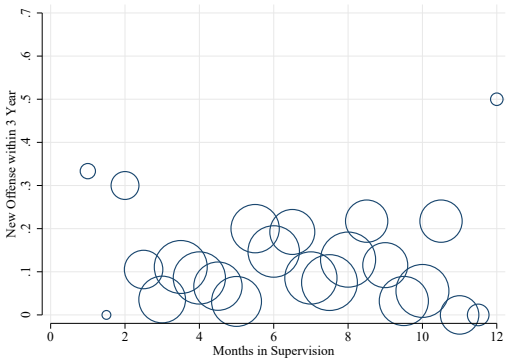
Table C.11
Retroactive Application of SB 323

Dependent Variable: New Prison Sentence from release to community					
			All		
	1 Year	3 Years	5 Years	7 Years	9 Years
Months in Supervision	-0.0023	-0.0008	0.0012	0.0036	0.0033
	(0.0031)	(0.0043)	(0.0058)	(0.0055)	(0.0045)
Observations	564	564	564	564	564
			Non-Drug Offense		
	1 Year	3 Years	5 Years	7 Years	9 Years
Months in Supervision	-0.0013	0.0004	0.0012	0.0041	0.0029
	(0.0040)	(0.0046)	(0.0072)	(0.0066)	(0.0054)
Observations	472	472	472	472	472
			Drug Offense		
	1 Year	3 Years	5 Years	7 Years	9 Years
Months in Supervision	0.0001	-0.0030	0.0072	0.0072	0.0176
	(0.0031)	(0.0088)	(0.0128)	(0.0128)	(0.0121)
Observations	92	92	92	92	92
Sentencing Controls	X	X	X	X	X
Demographic Controls	X	X	X	X	X
Month of Release FE	X	X	X	X	X
Age Cateogory FE	X	X	X	X	X
Parole Office FE	X	X	X	X	X

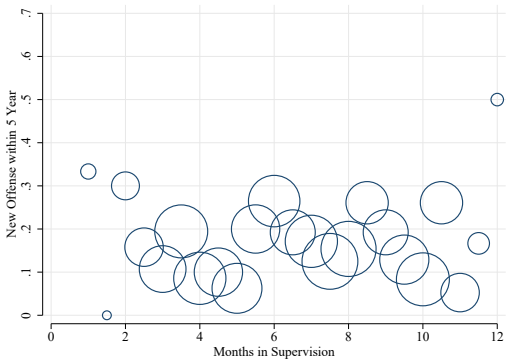
Notes: The outcome variable, new prison sentence, includes only those offenses leading to a conviction where a prison sentence of any length was imposed. This table estimates new prison sentences from the time that the individual was released from prison. Each column reports estimates obtained from a 2SLS regression where months in supervision is treated as an endogenous variable and instrumented for using the individual's post-release supervision start date. Standard errors in parentheses are robust and clustered at the parole office level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.



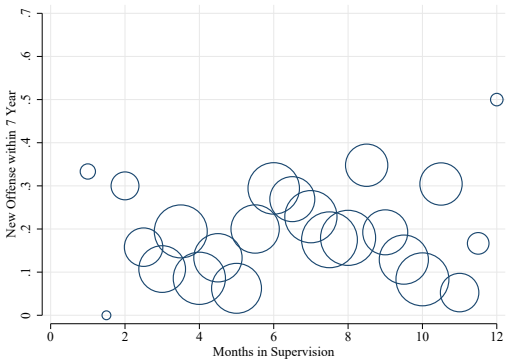
New Prison Sentence w/in 1 Year



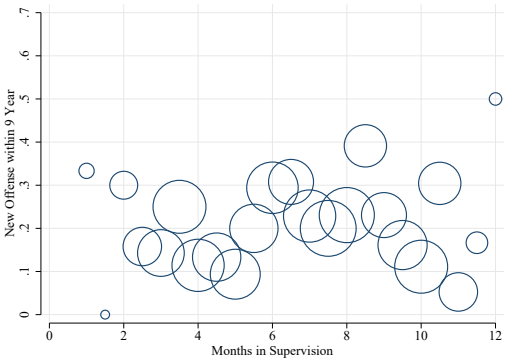
New Prison Sentence w/in 3 Years



New Prison Sentence w/in 5 Years



New Prison Sentence w/in 7 Years



New Prison Sentence w/in 9 Years

Figure C.11
New Prison Sentences by Months Under Supervision
(Measured from Prison Release Date)

Notes: This figure shows proportion of individuals receiving a new prison sentences (which includes only those new offenses leading to a conviction where a prison sentence of any length was imposed and measured from prison release date) by the number of months served in post-release supervision. Observations are placed in half-month bins and the size of each circle is scaled by the number of observations in the bin.

Appendix D: Employment Outcomes

This appendix reports estimates of the effect of SB 323 on long-run employment outcomes by using unemployment insurance (UI) records of quarterly earnings between Q1:2005 and Q2:2012. I employ a difference-in-differences strategy to estimate the effect of SB 323 on the following two outcomes: (1) average earnings over the six quarters between years 7.5 and 9 after release; and (2) the employment rate averaged over the six quarters between years 7.5 and 9 after release.

$$\text{Employment Outcome}_{it} = \alpha + \beta_1 X_i + \beta_2 Z_t + \beta_3 After_t + \beta_4 Tr_i + \beta_5 After_t \times Tr_i + \varepsilon_{it}$$

where i indexes an individual and t indexes the time period; X is a vector of individual-level characteristics including sex, race, age (two-year bins), parole office fixed effects, severity level of crime, criminal history and category of crime fixed effects; Z is a vector of year fixed effects; $After$ is a dummy variable taking on the value of one if the individual is released from prison on or after the second quarter of 2000; Tr is a dummy variable taking on the value of one if the individual is in the treatment group; and $After \times Tr$ is an interaction term between $After$ and Tr which will pick up the effect of SB 323 on the rate of reincarceration.

In addition, although I cannot report the immediate impact of SB 323 on the employment outcomes of affected individuals, I can look at later cohorts to observe the patterns of employment and earnings immediately before and after incarceration. Figure D.3 shows the employment patterns for these cohorts of the treatment and control groups during these later years. These figures report the simple averages for all individuals covered by the employment data for the given quarter. For example, the average earnings for five years after incarceration is an average of the earnings in the quarter five years after release for all cohorts released between Q1 2000 and Q2 2007, because the employment data is only available for Q1 2005 to Q2 2012. The employment data is only matched for those individuals who were incarcerated before Q3 2011, therefore, the average earnings for five years before incarceration is an average of the earnings in the quarter five years before incarceration for the cohorts entering prison between Q1 2010 and Q2 2011. I further break out these figures into cohorts that would have been in the treatment (probation revokees with no post-release supervision) and control groups (probation revokees and individuals with prison sentences less than three years who still had post-release supervision after SB 323).

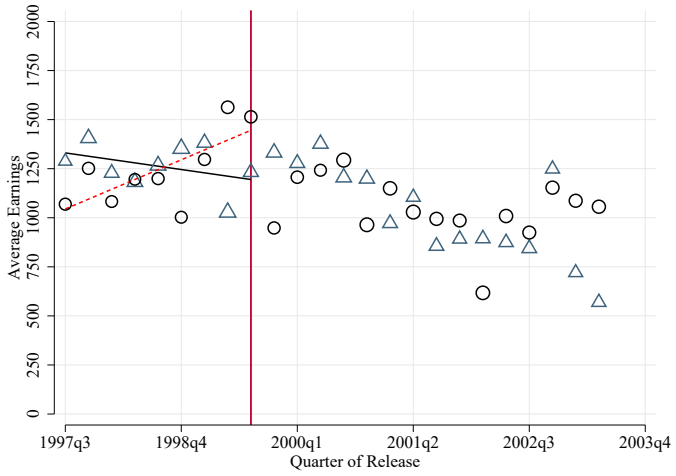
Overall, the average formal sector employment rate is extremely low both before and after incarceration at around only 30 percent. Figure D.3 reveals some distinct patterns in employment and earnings relative to admission and release from prison. The decline in employment begins earlier for the control group relative to admission to prison, which

reflects the pre-conviction process which will often involve some amount of pre-trial detention. The employment pattern is not replicated for the treatment group as their imprisonment is triggered by a probation revocation, and probation often has conditions to maintain or actively seek employment. The figures do show a sharp decline in earnings and employment in the quarter immediately prior to incarceration, however, which likely reflects the loss of employment during the process leading to the probation revocation. The figures show higher levels of employment and earnings immediately after release for the control group which likely reflect the assistance of reentry programs in gaining immediate employment. For the treatment group, the employment rate is about the same as pre-incarceration levels, but for both groups these higher employment rates are short-lived and decrease to levels around or below the pre-incarceration levels within one year. For the treatment group, the average earnings steadily increases over time after incarceration. This likely reflects the increase in earnings with age and experience for those individuals who are able to maintain employment. The trends in employment and earnings appear to stabilize by five years after release for the treatment and control groups.

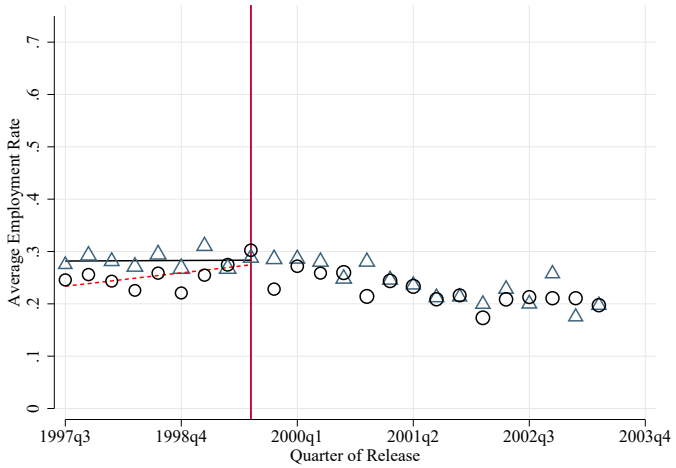
Table D.1
Difference-in-Differences - Long-Run Employment Outcomes

Dependent variable:		
	Avg. Earnings	Avg. Employ
After x Tr	-70.5207	-0.0132
	(92.7167)	(0.0124)
Year FE	X	X
Demog. Controls	X	X
Crime FE	X	X
Criminal History FE	X	X
Parole Office FE	X	X
Observations	13,336	13,336

Notes: Avg. Earnings is the average quarterly earnings over the six quarters between years 7.5 and 9 after release (including zeros). Avg. Employ is the rate of employment averaged over the six quarters between years 7.5 and 9 after release. The sample includes individuals who were released from prison between 1997:3 and 2003:2. Individuals who could not be matched to KDOL records were assumed to have no earnings. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.



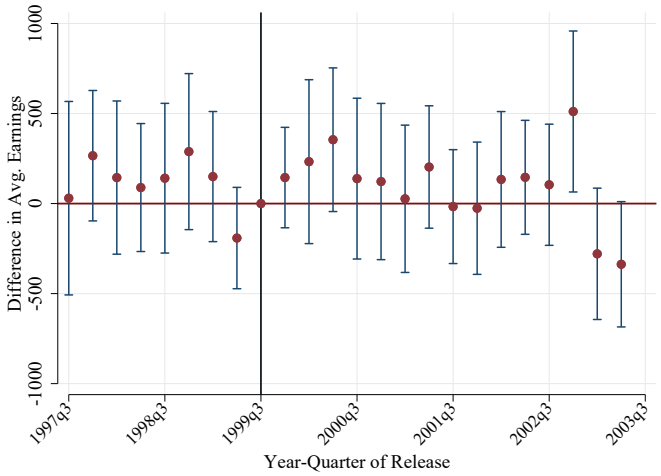
Earnings



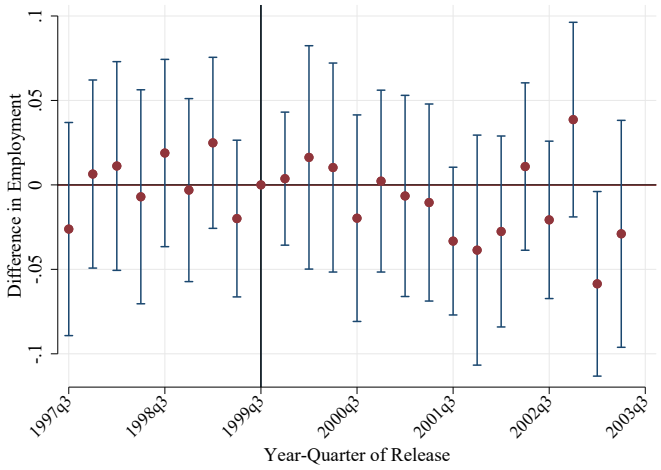
Employment

Figure D.1
Difference-in-Differences - Long-Run Employment Outcomes

Notes: The solid lines indicate the linear trends before and after SB 323 for the treatment group. The dashed lines indicate the linear trends for the control group. Avg. Earnings is the average quarterly earnings over the six quarters between years 7.5 and 9 after release (including zeros). Avg. Employ is the rate of employment averaged over the six quarters between years 7.5 and 9 after release. The vertical line is placed at Q3 1999, which is the quarter before SB 323 began to impact individuals released from prison. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less.



Earnings



Employment

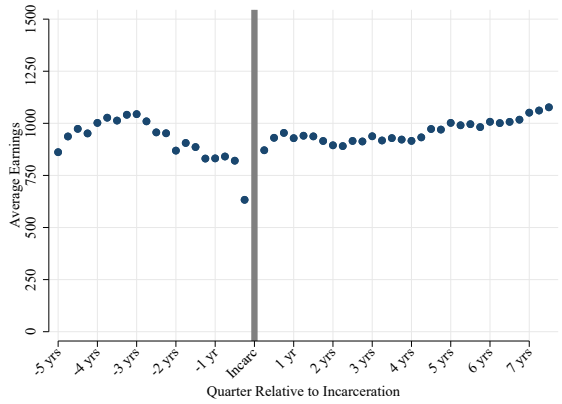
Figure D.2
Event Study - Long-Run Employment Outcomes

Notes: The figures show the differences in average earnings and average employment between the treatment and control groups for each quarter relative to the reference quarter. The reference quarter is the quarter before SB 323 began impacting probation violators (Q3 1999). Avg. Earnings is the average quarterly earnings over the six quarters between years 7.5 and 9 after release (including zeros). Avg. Employ is the rate of employment averaged over the six quarters between years 7.5 and 9 after release. The treatment group consists of probation violators whose post-release supervision was eliminated by SB 323. The control group consists of those probation violators whose post-release supervision was not eliminated by SB 323 and individuals sentenced to relatively short prison terms which I define as 36 months or less. The point estimates all come from one regression that includes a full set of demographic and case control variables. The vertical lines represent the 95 percent confidence interval for each estimate.

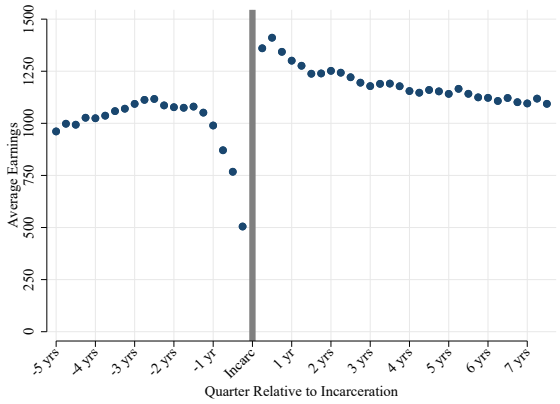
Table D.2
Heterogeneous Effects - Long-Run Employment Outcomes

	Demographic Category			
	Black		Non-Black	
	Avg. Earnings	Avg. Employ	Avg. Earnings	Avg. Employ
After x Tr	-15.6157	0.0023	-90.2924	-0.0198
	(127.2000)	(0.0196)	(110.8822)	(0.0139)
Pre-SB 323 Baseline	799	0.2235	1,503	0.3100
	Under 32 Years Old		32 Years or Older	
	Avg. Earnings	Avg. Employ	Avg. Earnings	Avg. Employ
After x Tr	-79.5614	0.0028	-43.3329	-0.0288*
	(115.7086)	(0.0166)	(127.1976)	(0.0153)
Pre-SB 323 Baseline	1,403	0.3073	1,122	0.2509
	Female		Male	
	Avg. Earnings	Avg. Employ	Avg. Earnings	Avg. Employ
After x Tr	-60.2950	-0.0406	-91.1390	-0.0126
	(169.8207)	(0.0320)	(106.1048)	(0.0130)
Pre-SB 323 Baseline	796	0.2461	1,386	0.2907

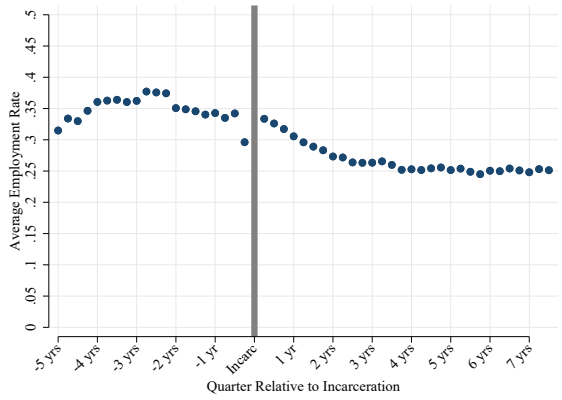
Notes: Avg. Earnings is the average quarterly earnings over the six quarters between years 7.5 and 9 after release (including zeros). Avg. Employ is the rate of employment averaged over the six quarters between years 7.5 and 9 after release. Each column reports difference-in-differences estimates for the subsample indicated. In addition to the treatment variables, the control variables are fully interacted with an indicator for the given subsample. The sample includes individuals who were released from prison between 1997:3 and 2003:2. Individuals who could not be matched to KDOL records were assumed to have no earnings. Standard errors in parentheses are robust and clustered at the parole office by year level. ***Significant at 1 percent level, **significant at 5 percent level, *significant at 10 percent level.



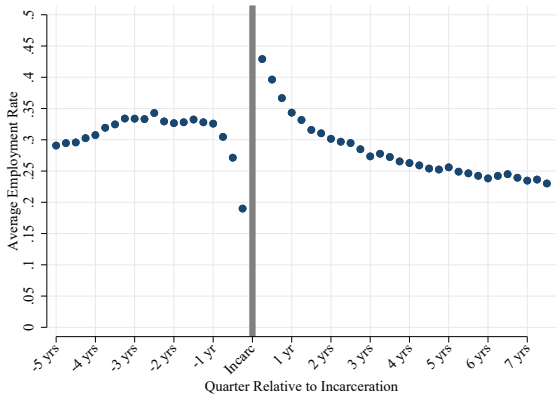
Earnings (Treatment Group)



Earnings (Control Group)



Employment (Treatment Group)



Employment (Control Group)

Figure D.3
Earnings and Employment Patterns Relative to Incarceration

Notes: These figures report the simple averages for all individuals covered by the employment data for the given quarter. For example, because the employment data is only available for Q1 2005 to Q2 2012, the average earnings for five years after incarceration is an average of the earnings in the quarter five years after release for all cohorts released between Q1 2000 and Q2 2007. The employment data is only matched for those individuals who were incarcerated before Q3 2011, therefore, the average earnings for five years before incarceration is an average of the earnings in the quarter five years before incarceration for the cohorts entering prison between Q1 2010 and Q2 2011. Individuals who could not be matched to KDOL records were assumed to have no earnings.

References

Bjerk, David. 2005. "Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing." *The Journal of Law and Economics*, 48(2): 591–625.

Glaeser, Edward L, Daniel P Kessler, and Anne Morrison Piehl. 2000. "What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes." *American Law and Economics Review*, 2(2): 259–290.

Kansas Sentencing Commission. 1999. *Desk Reference Manual.* Topeka, KS.

Kansas Sentencing Commission. 2000. *Desk Reference Manual.* Topeka, KS.

Kuziemko, Ilyana. 2013. "How Should Inmates Be Released from Prison? An Assessment of Parole Versus Fixed-Sentence Regimes." *The Quarterly Journal of Economics*, 128(1): 371–424.

Maurin, E, and A Ouss. 2009. "Sentence Reductions and Recidivism: Lessons from the Bastille Day Quasi Experiment." *IZA Discussion Paper 3990.*

Miller, Marc L. 2004. "Domination & Dissatisfaction: Prosecutors as Sentencers." *Stanford Law Review*, 56: 1211.

Petersilia, Joan, and Susan Turner. 1993. "Intensive Probation and Parole." *Crime and justice*, 17: 281–335.

Rehavi, Marit, and Sonja Starr. 2014. "Racial Disparity in Federal Criminal Sentences." *Journal of Political Economy*, 122(6): 1320–1354.

Sakoda, Ryan T. 2023. "The Architecture of Discretion: Implications of the Structure of Sanctions for Racial Disparities, Severity, and Net Widening." *Northwestern University Law Review*, 117: 1213–1276.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Jessica Sanchez, Centro Esperanza, LLC.

Topics:

Supervised Release

Drug Offenses

Comments:

As a researcher (PhD in Clinical Psychology) and Licensed Professional Counselor and Licensed Chemical Dependency Counselor, I feel that steep incarcerations don't fix the problem, treatment does. I agree to reduce prison sentences for Drug offenses and incorporate supervised release to substance abuse programs as well as employment/ trade training programs (TDCJ used to have project Rio however it was taken out the prison system). Rehabilitation and punishment do not go hand in hand. Punishment does not fix the problem, resources and alternative do.

Submitted on: February 25, 2025

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February 25, 2025

Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments to Supervised Release Guidelines

Dear Judge Reeves,

I write in response to the Sentencing Commission's request for comment on its proposed amendments to the *Guidelines Manual* provisions on supervised release. I am an Associate Professor at Temple University Beasley School of Law, where I study the law of community supervision, including probation, parole, and supervised release. My comment addresses one specific issue about which the Commission has requested feedback: how courts should sentence a new-crime violation when the defendant is already serving a sentence for the criminal conduct that was the basis for the violation.[1]

Currently, the *Manual* instructs courts that any term of imprisonment imposed upon revocation "shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release."[2] In other words, when a defendant violates their supervised release by committing a new crime, and then is prosecuted, convicted, and sentenced for that crime, the *Manual* recommends that courts revoke the defendant's supervised release and impose a sentence consecutive to the sentence for the criminal conviction. For example, if a defendant on supervised release gets caught selling drugs, is convicted of drug-dealing, and receives a 5-year prison sentence, then the *Manual* recommends that the court revoke the defendant's supervised release and impose a sentence consecutive to that 5-year prison term. Because at least half of all revocations are based on new-crime violations,[3] this situation is common.

[1] *See* Proposed U.S.S.G. § 7C1.4(a)(2), Options 1 and 2.
[2] U.S.S.G. § 7B1.3(f).
[3] Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1846 (2022).

The Commission's proposed amendments offer two options for addressing this scenario. Option 1 (Concurrent or Consecutive Sentences) would recommend that the court conduct an "individualized assessment" to determine whether the revocation sentence "should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release."[4] In other words, Option 1 would recommend that the court decide, based on the facts of each case, whether to run the sentence for a new-crime violation concurrently, partially concurrently, or consecutively to the sentence the defendant is already serving for that crime. Option 2 (Consecutive Sentences Only) would maintain the current provision recommending that the sentence run consecutively.[5]

In my view, Option 1 is the superior choice. Although committing a new crime while on supervised release is obviously a serious violation, imposing a consecutive sentence in such cases is both unnecessary and unfair. "When a defendant on supervised release is convicted of a new crime," the judge who sentences them for that conviction will already "consider *both* the criminal conduct *and* the fact that the defendant committed it while under supervised release," and "will likely view the criminal conduct as more aggravated because the defendant committed it while under supervision," which "very likely" will result in a "longer sentence."[6] Indeed, the *Manual* itself recommends that a judge sentencing a defendant for a criminal conviction incurred while under community supervision impose a longer sentence by "adding two points to the defendant's criminal history score.'"[7] Because the judge sentencing the defendant for the new conviction will already have determined an appropriate punishment for their criminal conduct, there is no benefit to having a different judge at the revocation hearing decide whether additional punishment is necessary for the violation of supervised release.[8] "The judge at the revocation hearing is no better suited to determine what punishment is necessary" for the defendant's new crime, and arguably is "in a worse position, as it is 'difficult in many instances for the court or the parties to obtain the information … and witnesses' regarding the underlying conduct."[9]

The current version of the *Manual* provides a weak justification for its recommendation of consecutive revocation sentences for new-crime violations. According to the *Manual*, consecutive revocation sentencing is necessary in these cases to punish the "breach of trust inherent in the conditions of supervision."[10] Yet the "breach of trust" theory of revocation has been thoroughly discredited by courts

[4] Proposed U.S.S.G. § 7C1.4(a)(2), Option 1.
[5] *Id.*, Option 2.
[6] Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 931 (2021).
[7] Schuman, *supra* note 3, at 1854 (quoting U.S.S.G. § 4A1.1(d)).
[8] *See* Schuman, *supra* note 6, at 931.
[9] *Id.* (quoting U.S.S.G. § 7A.3(b)).
[10] U.S.S.G. Pt. A.3(b).

and commentators. As Judge Underhill observed: "It is … unpersuasive to suggest that any new term of imprisonment imposed [upon revocation of supervised release] merely sanctions a breach of 'trust' rather than the underlying violation conduct," because imposing "a sentence of supervised release entails no leap of faith or 'trust' by a district court, nor does the evidence suggest that judges impose less severe prison terms by virtue of the discretion to include a term of supervised release."[11] Indeed, the Commission's Proposed Amendments themselves appear to back away from the "breach of trust" concept by creating a new Part C in Chapter 7 to distinguish between revocation of probation and supervised release.[12]

Of course, there may occasionally be situations in which a consecutive revocation sentence for a new-crime violation could be justified. For example, if the judge who sentenced the defendant for their new conviction was unaware that they were under supervision at the time of their criminal conduct, then the judge at the revocation hearing might wish to impose a consecutive sentence to reflect this additional aggravating factor. However, there is no justification for the current *Manual*'s recommendation of consecutive revocation sentence for *all* new-crime violations. In fact, the current *Manual* breaks from the practice of the old Parole Commission, which adopted a default rule favoring *concurrent* revocation sentences for new-crime violations.[13] It is also in tension with the legislative history of the Sentencing Reform Act, which shows that legislators intended that judges not revoke supervised release for new-crime violations, which can simply "be prosecuted."[14]

There are many examples of consecutive revocation sentences for new-crime violations that resulted in unnecessarily and unfairly long prison terms. In some cases, courts have imposed consecutive revocation sentences that equaled or even exceeded the sentence imposed for the crime itself, which effectively doubled the defendant's time in prison solely because they committed their crime while on supervised release.[15] In other cases, courts have appended consecutive revocation

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[11] *United States v. Peguero,* 34 F.4th 143, 175 (2d Cir. 2022) (Underhill, J., dissenting); *see also* Schuman, *supra* note 3, at 1888-1890 (criticizing the "breach of trust" doctrine); Fiona Doherty, *"Breach of Trust" and U.S. v. Haymond*, 34 FED. SENT. REP. 274, 277-279 (2022) (same); Schuman, *supra* note 6, at 907 (same).

[12] *Cf.* Schuman, *supra* note 6, at 905-906 (arguing that "supervised release is not probation" because probation arguably involves an act of "trust").

[13] *See* Schuman, *supra* note 3, at 1842-1843.

[14] S. Rep. No. 98-225, at 125 (1983).

[15] *See, e.g.*, *United States v. Duckett*, 935 F.3d 594, 596 (D.C. Cir. 2019) (offense sentence 13 months, revocation sentence 24 months); *United States v. Kenny*, 846 F.3d 373, 375 (D.C. Cir. 2017) (offense sentence 48 months, revocation sentence 30 months); *United States v. Valure*, 835 F.3d 789, 790 (8th Cir. 2016) (offense sentence 63 months, revocation sentence 60 months); *United States v. Reyes-Solosa*, 761 F.3d 972, 973–74 (9th Cir. 2014) (offense sentence 6 months, revocation sentence 12 months); *United States v. Ceballos-Santa Cruz*, 756 F.3d 635, 636–37 (8th Cir. 2014) (offense sentence 6 months, revocation sentence 18 months); *United States v. Banks*, 743 F.3d 56, 58 (3d Cir. 2014) (offense sentence 18 months, revocation sentence 33 months); *United States v. Carter*, 730 F.3d

sentences to already lengthy prison terms, increasing the defendant's total time in prison by a few extra years for little-to-no benefit.[16] Because the sentences imposed for criminal convictions are already sufficient to punish most defendants for their criminal conduct, adding a consecutive revocation sentence in these circumstances violates the "parsimony principle"[17] under federal law, which limits sentencing to what is "sufficient, but not greater than necessary," to comply with the purposes of punishment set forth in the Sentencing Reform Act.[18]

In sum, Option 1 of proposed U.S.S.G. § 7C1.4 takes the better approach to new-crime violations by advising the court to consider, based on an individualized assessment, whether the revocation sentence should run concurrently, partially concurrently, or consecutively to the sentence the defendant is already serving for the criminal conduct that is the basis of the violation. Thank you very much for considering my comment, and please do not hesitate to contact me if you have any questions or concerns.

Sincerely yours,

Jacob Schuman
Associate Professor of Law
Temple University Beasley School of Law

187, 189–90 (3d Cir. 2013) (offense sentence 9 to 23 months, revocation sentence 37 months); *United States v. Kreitinger*, 576 F.3d 500, 503 (8th Cir. 2009) (offense sentence 48 months, revocation sentence 58 months).

[16] *United States v. Roe*, 9 F.4th 754, 754 (8th Cir. 2021) (offense sentence 120 months, revocation sentence 36 months); *United States v. Ramos* 979 F.3d 994, 997, 1000 (2d Cir. 2020) (offense sentence 264 months, revocation sentence 24 months); *United States v. Napper*, 978 F.3d 118, 122 (5th Cir. 2020) (offense sentence 240 months, revocation sentence 37 months); *Andrews v. Warden*, 958 F.3d 1072, 1074 (11th Cir. 2020) (offense sentence 188 months, revocation sentence 24 months); *United States v. Cruz-Olavarria*, 919 F.3d 661, 661 (1st Cir. 2019) (offense sentence 120 months, revocation sentence 24 months); *United States v. Ferguson*, 876 F.3d 512, 513–14 (3d Cir. 2017) (offense sentence 120–240 months, revocation sentence 24 months); *United States v. Mulero-Algarin*, 866 F.3d 8, 9 (1st Cir. 2017) (offense sentence 120 months, revocation sentence 36 months); *United States v. Hernandez-Pineda*, 849 F.3d 769, 771 (8th Cir. 2017) (offense sentence 300 months, revocation sentence 24 months); *United States v. Adams*, 820 F.3d 317, 325 (8th Cir. 2016) (offense sentence 240 months, revocation sentence 18 months); *United States v. Johnson*, 786 F.3d 241, 242–43 (2d Cir. 2015) (offense sentence 216 months, revocation sentence 36 months); *United States v. Johnson*, 640 F.3d 195, 199 (6th Cir. 2011) (offense sentence 144 months, revocation sentence 36 months); *United States v. Moore*, 624 F.3d 875, 877 (8th Cir. 2010) (offense sentence 188 months, revocation sentence 24 months).

[17] Douglas Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 48-49 (2005).

[18] 18 U.S.C. § 3553(a).

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Sheila Sullivan, The Body of Christ

Topics:

Supervised Release

Drug Offenses

Comments:

Honorable Judge,
I am in full support of fair sentencing in drug cases and support any changes that will bring this result especially in methamphetamine cases. Thanks for listening. Respectfully submitted

Submitted on: February 21, 2025

March 3, 2025

Dear Members of the Sentencing Commission,

I am grateful for the opportunity to comment on the proposed revisions to the Sentencing Guidelines. I am a licensed psychologist and attorney in the state of Connecticut, and I have specialized training in the provision of evidence-based mental health and substance use treatment to people involved in the criminal legal system, including people on state and federal supervision. I currently serve as an Associate Research Scientist in the Department of Psychiatry at Yale School of Medicine, where I conduct research about the health-harming impacts of incarceration and factors that impact trajectories of psychological adjustment upon re-entry. The opinions expressed in this comment are my own and not the opinions of my employer.

I greatly appreciate that the proposed revisions emphasize the need for individualized assessment of each person's unique needs rather than using a one-size-fits-all approach to supervision conditions. Utilizing an individualized approach to the assessment and treatment of mental health and substance use disorders is consistent with the science on evidence-based treatment. Mental health and substance use disorders are highly heterogeneous, and individualized treatment is necessary to address the many factors that drive and maintain the symptoms of these disorders. Given the high rate of comorbidity between substance use disorders and other mental health conditions, effective treatment must address any underlying issues that may be driving the substance use, such as untreated posttraumatic stress or grief, which must be done in an individualized manner.

The current treatment landscape for people on community supervision often does not align with known best practices. In partnership with the Liman Center at Yale Law School, a team of legal scholars and researchers recently conducted systematic interviews of clinicians at agencies in Connecticut that contract with the United States Probation Office to provide mental health and substance use treatment to clients on federal supervised release. One striking theme that emerged across many interviews was the lack of individual therapy offered; many agencies exclusively provided psychoeducational group treatment, which does allow for treatment to be adapted to each individual client's needs. Even programs that offered dual diagnosis services tended to offer one dual diagnosis curriculum, which does not begin to address the many types of mental health conditions that can co-occur with

substance use disorders. Finally, results revealed that most agencies did not have policies or safeguards in place to ensure that information was communicated to probation officers in a consistent manner, resulting in wide discrepancies in practices across clinicians and agencies; given that confidentiality is essential to effective treatment, this raises serious concerns about the impact of these practices on the efficacy of the treatment provided.

To ensure that mental health and substance use treatment during supervision is helpful and not harmful, it is imperative that substance use disorders are conceptualized as a treatable illness, rather than a moral failing or act of defiance. Researchers have long held that addiction is a chronic, relapsing disease that should be conceptualized and treated as a chronic medical illness (Leshner, 1997; McLellan et al., 2000). In a seminal study, researchers compared the etiology and course of drug dependence to other chronic medical conditions such as type 2 diabetes, hypertension, and asthma; researchers concluded that the role of genetic heritability, personal choice, and environmental factors in drug dependence is no different than other chronic medical conditions, and thus addiction should be evaluated, insured, and treated just like other chronic diseases (McLellan et al., 2000).

Consistent with the conceptualization of addiction as a medical condition, a large body of research has established that addiction has a neurological basis, such that there are differences in the brain structure and functioning of people with substance use disorders compared to the general population (Heilig et al., 2021). Neuroimaging studies have revealed patterns of alterations in key areas of the brain responsible for reward processing, habit formation, and executive control (i.e., mental processes that allow for one to regulate their thoughts and actions and engage in goal-oriented behavior; Heilig et al., 2021). The human brain has remarkable plasticity, such that the brain's structure and function can change and adapt in response to experiences (Koob & Volkow, 2016). Although this neuroplasticity plays a key role in the development of substance use disorders, it also offers a pathway for effective treatment, as the brain can adapt in response to learning and positive behavioral changes (Heilig et al., 2021; Koob & Volkow, 2016).

Given that addiction is a chronic, relapsing disease, there has been increasing support for harm reduction approaches to substance use treatment, as opposed to abstinence-based models. Harm reduction is "a set of compassionate and pragmatic approaches for reducing harm associated with high-risk behaviors and improving quality of life" (Collins et al., 2012, p. 5). In harm reduction treatment, a successful outcome does not require abstinence; instead, success is any step that reduces the severity of harmful consequences (Peterson et al., 2021). Harm reduction treatment

acknowledges that incremental and demonstrable changes are treatment successes, and long-term, sustainable changes to substance use patterns take time and consistent effort in treatment (Vakharia & Little, 2017). From a harm-reduction perspective, relapses should not be treated in a punitive manner (e.g., incarcerating a client in response to a positive urine toxicology result), but rather should be viewed as an opportunity for learning. Clinicians practicing from a harm reduction framework view "relapse as part of recovery," as most people do not achieve recovery through a linear period of abstinence but rather go through periods of sobriety marked by relapses that occur less frequently over time. For clients on supervised release, harm reduction principles suggest that incarcerating clients for relapses in substance use only causes further harm by removing the client from effective treatment and disrupting the continuity of their care, which is one of the strongest predictors of successful outcomes in substance use treatment (Finney, Moos, & Wilbourne, 2009; McCarty et al., 2014).

When mental health or substance use treatment is imposed as a condition of supervised release, it is imperative that all efforts are made to center the therapeutic alliance and build intrinsic motivation, rather than mandating treatment in a rigid manner. Research has consistently shown that one of the strongest predictors of successful outcomes in mental health and substance use treatment is the relationship between the therapist and client, also known as the therapeutic alliance (Wampold, 2015; Meier, Barrowclough, & Donmall, 2004). In substance use treatment, early therapeutic alliance is a consistent predictor of engagement and retention in treatment, as well as post-treatment outcomes such as reducing substance use (Meier, Barrowclough, & Donmall, 2004; Gibbons et al., 2010). Clients who have a stronger alliance and working relationship with their clinician are less likely to keep secrets in treatment and are more likely to be honest about their substance use (Kelly & Yuan, 2009; Vakharia & Little, 2017).

When clients are mandated to treatment, evidence suggests that the perception of coercion can have a negative impact on the therapeutic process and therapeutic alliance, leading to worse outcomes (Hatchel, Voogel, & Huber, 2019). When a client is intrinsically motivated to engage in treatment, behavioral changes tend to last longer; when behavior changes occur as a result of extrinsic motivation, the changes tend to last only as long as the controls are in place (Hatchel, Voogel, & Huber, 2019). Researchers have identified three factors that tend to enhance intrinsic motivation: secure relationships, the feeling of volition or agency, and the feeling of being efficacious or competent (Ryan & Deci, 2000; Hatchel, Voogel, & Huber, 2019).

When a client is encouraged or required to complete mental health or substance use treatment during a period of supervised release, all efforts should be made to reduce perceptions of coercion and facilitate the client's agency in their treatment. For example, probation officers can ensure that clients have agency in selecting their clinician, and clinicians can work collaboratively with their client to establish therapeutic goals that the client is intrinsically motivated to work towards. At the core of the therapeutic alliance is confidentiality; if a client feels like their information is not private, the therapeutic alliance is eroded (Farhoudian et al., 2022). When clinicians provide updates to probation officers for the purposes of supervised release, all efforts should be made to only provide necessary information, such as the number of sessions attended by the client. The content shared by a client during treatment should remain confidential whenever possible.

Finally, it is important to note access to basic needs, such as housing, employment, and transportation, is essential to meaningfully engage in mental health or substance use treatment. Effective treatment for mental health and substance use disorders should not only address biological and behavioral needs, but also social and contextual needs that impact a client's mental health and well-being (Leshner, 1997). Research has revealed that one of the primary barriers to successful reentry is lack of access to basic needs such as housing, employment, and transportation (Luther et al., 2011). Reallocation of funds to address clients' basic needs can reduce barriers to treatment while simultaneously addressing clients' mental health needs directly. For example, research has shown that clients who are employed during treatment tend to successfully complete treatment at higher rates than their non-employment counterparts, and researchers and policymakers now characterize gainful employment as a critical health intervention in and of itself (Knapp & Wong, 2020; Drake & Wallach, 2020; Magura & Marshall, 2020).

Thank you for the opportunity to comment on the proposed revisions to the Sentencing Guidelines.

Sincerely,

Kathryn Thomas, PhD, JD

Licensed Psychologist and Attorney

Associate Research Scientist

Yale School of Medicine

References

Collins, S. E., Clifasefi, S. L., Logan, D. E., Samples, L. S., Somers, J. M., & Marlatt, G. A. (2012). Current Status, Historical Highlights, and Basic Principles of Harm Reduction. In *Harm Reduction: Pragmatic Strategies for Managing High-Risk Behaviors* (2nd ed., pp. 3–35). essay, Guilford Publications.

Drake, R. E., & Wallach, M. A. (2020). Employment is a critical mental health intervention. *Epidemiology and Psychiatric Sciences, 29*. https://doi.org/10.1017/s2045796020000906

Farhoudian, A., Razaghi, E., Hooshyari, Z., Noroozi, A., Pilevari, A., Mokri, A., Mohammadi, M. R., & Malekinejad, M. (2022b). Barriers and facilitators to substance use disorder treatment: An overview of systematic reviews. *Substance Abuse: Research and Treatment, 16*. https://doi.org/10.1177/11782218221118462

Finney, J. W., Moos, R. H., & Wilbourne, P. L. (2009). Effects of treatment setting, duration, and amount on patient outcomes. *Ries RK, Fiellin DA, Miller SC, et al. Philadelphia, Wolters Kluwer/Lippincott Williams & Wilkins*.

Gibbons, S. B. (2010). Understanding empathy as a complex construct: A review of the literature. *Clinical Social Work Journal, 39*(3), 243–252. https://doi.org/10.1007/s10615-010-0305-2

Hachtel, H., Vogel, T., & Huber, C. G. (2019). Mandated treatment and its impact on therapeutic process and outcome factors. *Frontiers in Psychiatry, 10*. https://doi.org/10.3389/fpsyt.2019.00219

Heilig, M., MacKillop, J., Martinez, D., Rehm, J., Leggio, L., & Vanderschuren, L. J. (2021). Addiction as a brain disease revised: Why it still matters, and the need for consilience. *Neuropsychopharmacology, 46*(10), 1715–1723. https://doi.org/10.1038/s41386-020-00950-y

Kelly, A. E., & Yuan, K.-H. (2009). Clients' secret keeping and the working alliance in adult outpatient therapy. *Psychotherapy: Theory, Research, Practice, Training, 46*(2), 193–202. https://doi.org/10.1037/a0016084

Knapp, M., & Wong, G. (2020). Economics and mental health: the current scenario. *World Psychiatry : Official Journal of the World Psychiatric Association (WPA), 19*(1), 3–14. https://doi.org/10.1002/wps.20692

Koob, G. F., & Volkow, N. D. (2016). Neurobiology of addiction: A neurocircuitry analysis. *The Lancet Psychiatry, 3*(8), 760–773. https://doi.org/10.1016/s2215-0366(16)00104-8

Leshner A. I. (1997). Addiction is a brain disease, and it matters. *Science, 278*(5335), 45–47. https://doi.org/10.1126/science.278.5335.45

Magura, S., & Marshall, T. (2020). The Effectiveness of Interventions Intended to Improve Employment Outcomes for Persons with Substance Use Disorder: An Updated Systematic Review. *Substance use & misuse*, *55*(13), 2230–2236. https://doi.org/10.1080/10826084.2020.1797810

McCarty, D., Braude, L., Lyman, D. R., Dougherty, R. H., Daniels, A. S., Ghose, S. S., & Delphin-Rittmon, M. E. (2014). Substance abuse intensive outpatient programs: assessing the evidence. *Psychiatric Services*, *65*(6), 718-726.

McLellan, A. T., Lewis, D. C., O'Brien, C. P., & Kleber, H. D. (2000). Drug dependence, a chronic medical illness. *JAMA, 284*(13), 1689. https://doi.org/10.1001/jama.284.13.1689

Meier, P. S., Barrowclough, C., & Donmall, M. C. (2005). The role of the therapeutic alliance in the treatment of substance misuse: a critical review of the literature. *Addiction*, *100*(3), 304–316. https://doi.org/10.1111/j.1360-0443.2004.00935.x

Peterson, R., Kramer, M. P., Pinto, D., De Leon, A. N., Leary, A. V., Marin, A. A., Cora J. L., & Dvorak, R. D. (2021). A comprehensive review of measures of protective behavioral strategies (PBS) across various risk factors and associated PBS-related interventions. *Experimental and Clinical Psychopharmacology*, *29*(3), 236–250. https://doi.org/10.1037/pha0000498.

Ryan, R. M., & Deci, E. L. (2000). Self-determination theory and the facilitation of intrinsic motivation, social development, and well-being. *American Psychologist, 55*(1), 68–78. https://doi.org/10.1037/0003-066X.55.1.68

Vakharia, S. P., & Little, J. (2017). Starting where the client is: Harm reduction guidelines for clinical social work practice. *Clinical Social Work Journal, 45*(1), 65–76. https://doi.org/10.1007/s10615-016-0584-3

Wampold B. E. (2015). How important are the common factors in psychotherapy? An update. *World psychiatry : official journal of the World Psychiatric Association (WPA)*, *14*(3), 270–277. https://doi.org/10.1002/wps.20238

Manoj V Waikar, MD
20 E Main St #78
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March 1, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

This is Dr Manoj Waikar, and I am a Psychiatrist in a large metropolitan area.. I am writing today in response to the United States Sentencing Commission's (USSC) request for comments on the proposed amendments to drug offense sentences published on January 24, 2025.

I would like to start by commending this Commission for being bold and brave, listening to stakeholders, and embracing an approach to policy making rooted in data, science, and sociological evidence. I applaud your willingness to do the important and long-overdue work of exploring revisions to the Drug Quantity Table (DQT).

Part A - Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table) Issues for Comment

1. **Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?**

Decades of research have shown that, across the board, incarceration causes more harm than good. Incarceration does not improve public safety and has no association with reductions in violent crime, rather, it may actually *increase* crime[1] and recidivism rates[2] in certain circumstances. In fact, this Commission itself has published reports indicating that, at the federal level, recidivism rates can be as high as 80%.[3]

[1] Stemen, Don. The Prison Paradox: More Incarceration Will Not Make Us Safer. For the Record Evidence Brief Series, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works
[2] *See,* e.g., José Cid, "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions," European Journal of Criminology 6, no. 6 (2009), 459-80 (finding suspended sentences created a lower risk of reconviction than custodial sentences)
[3] United States Sentencing Commission (2016). Recidivism Among Federal Offenders: A Comprehensive Overview. www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

Not only have prisons failed to improve public safety, they have also been found to have notably damaging psychological effects, both by causing new mental health issues and exacerbating existing ones, especially among those from and returning to highly oppressive social conditions.[4] This is, in part, due to what many researchers have determined to be high levels of violence and related traumatic events in carceral settings.[5] Unfortunately, 2018 data from the Bureau of Justice Statistics shows prisons are only becoming more dangerous[6]. At least 35% of incarcerated men and 24% of incarcerated women have experienced some form of physical victimization behind bars, while 10% of men and 25% of women have been sexually victimized.[7] According to a meta-analysis, traumatic events during incarceration, including victimization and abuse, solitary confinement, and coercion, were significantly positively correlated with post-traumatic stress disorder (PTSD) outcomes.[8]

Incarceration also has a residual, negative impact on the incarcerated person's family, especially their children[9], and community.[10] For instance, experiencing the incarceration of a parent is considered one of the ten Adverse Childhood Experiences on the ACEs questionnaire. Research demonstrates both a correlation and a causal pathway between high ACEs scores and mental illness, with ACEs being correlated with depression, substance use disorders, anxiety, psychosis, personality disorders, and suicide.[11]

Other countries that are economically similar to the United States have managed to incarcerate people for far shorter periods of time while realizing lower crime and recidivism rates (i.e., safer communities). In Norway and Finland, for example, imprisonment is only reserved for the most severe offenses with the maximum available sentence typically being no more than 21 years in Norway and 12 years plus probation in Finland. In both countries, the average prison sentence is

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[4] Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. Lancet, 389(10077), 1464-1474. https://doi.org/10.1016/S0140-6736(17)30259-3; Sugie, N., & Turney, K. (2017). Beyond Incarceration: Criminal Justice Contact and Mental Health. American Sociological Review, 82(4).; Schnittker, J., Massoglia, M., & Uggen, C. (2012). Out and Down: Incarceration and Psychiatric Disorders. Journal of Health and Social Behavior, 53(4); Haney, C. (2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.

[5] Dholakia, N. (2023). Prisons and Jails are Violent; They Don't Have to Be. https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be; Hopwood, S. (2021). How Atrocious Prisons Conditions Make Us All Less Safe. Punitive Excess.

[6] Wang, L., & Sawyer, W. (2021). New data: State prisons are increasingly deadly places.

[7] Widra, E. (2020). No escape: The trauma of witnessing violence in prison. https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/

[8] Piper, A., & Berle, D. (2019). The association between trauma experienced during incarceration and PTSD outcomes: a systematic review and meta-analysis. The Journal of Forensic Psychiatry & Psychology, 30(5), 854-875.

[9] Haney, C. (2001). From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities.

[10] Beresford S, Loucks N, Raikes B. (2020). The health impact on children affected by parental imprisonment. BMJ Paediatr Open; 4(1):e000275. doi: 10.1136/bmjpo-2018-000275.

[11] Sheffler, J., Stanley, I., & Sachs-Ericsson. (2020). Chapter 4 - ACEs and mental health outcomes. In G. Asmundson & T. Afifi (Eds.), Adverse Childhood Experiences (pp. 47-69). Academic Press. https://doi.org/10.1016/B978-0-12-816065-7.00004-5

less than one year.[12] Despite such significantly shorter sentences compared to the US, both Norway and Finland have recidivism rates between 20% and 30%.[13]

Given how damaging prisons can be for individuals and their communities while failing to improve public safety, incarceration can and should be used sparingly. Doing so also allows for significant cost savings that can then be reinvested into services and programs, like substance use treatment, that studies have found actually reduce recidivism and harm.

In light of this, of the presented options, we recommend the Commission elect Option 3, setting the new highest base offense level at 30. That being said, if the Commission is willing and able to set the highest base offense level even lower, we urge it to do so. Afterall, the guidelines already provide for aggravating factors that can significantly increase an individual's sentence far beyond the base offense level depending on the circumstances of each case.

2. **The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?**

For the same reasons provided in response to Issue #1, the Commission should reduce all base offense levels in the DQT in proportion with the new, highest base offense level. This reduction should apply across all drug types. While different drugs have different physiological effects, there is limited to no evidence that longer sentences for seemingly more dangerous drugs deter their sale.

The Commission, however, should consider further reducing base offense levels for cannabis and psychedelics (e.g., psilocybin, LSD, MDMA, ketamine, DMT, and ibogaine). These substances have relatively strong safety profiles; low potential for addiction; a growing body of research supporting their therapeutic benefits; and have garnered increasing political support at local, state, and federal levels. To date, 39 states have legalized medicinal cannabis while 24 have done so for its recreational use. Meanwhile, two states have allowed for regulated access to psilocybin and a growing number of municipalities have decriminalized psilocybin and other psychedelics.

Research has influenced many of these legislative shifts. Despite cannabis and most psychedelics continuing to be classified as Schedule I controlled substances, a growing body of research has found them to have promising potential in reducing, if not treating, debilitating mental health issues from PTSD to depression, substance use disorders, anxiety, and eating disorders. For

[12] Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.
[13]Kristoffersen, R. (2024) Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022. University College of Norwegian Correctional Service.

example, Lykos Therapeutics has reported impressive safety and efficacy data in two Phase III clinical trials to support the approval of MDMA-assisted therapy for PTSD.[14] Johns Hopkins Medicine has also completed waitlist-controlled pilot studies demonstrating the initial efficacy of psilocybin in treating major depressive disorder.[15] Ultimately, as of March 2021, there were 70 registered studies investigating psychedelics for psychiatric disorders, though this number is sure to have since grown. Federal agencies are even beginning to take notice. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019[16], and the same status to an LSD formula for the treatment of generalized anxiety disorder in 2024.[17] There has also been growing bipartisan support to fund clinical trials exploring the use of psychedelics[18] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[19]

Finally, implementing additional base offense level reductions for cannabis and psychedelics will also allow sentences to better reflect reality with respect to how these substances are often packaged for end users. For instance, cannabis and psychedelics are regularly mixed with or otherwise combined with legal substances (e.g., chocolate, other food items, juice, blotter paper, etc.) that weigh significantly more than the controlled substance itself. Nonetheless, the carrier medium's weight is still often included when calculating the weight of the illegal substance for sentencing purposes. This has resulted in individuals receiving higher base offense levels than they would if only accounting for the weight of the controlled substance.

3. **Should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what**

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[14] Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD (2024). https://news.lykospbc.com/2024-08-09-Lykos-Therapeutics-Announces-Complete-Response-Letter-for-Midomafetamine-Capsules-for-PTSD

[15] Johns Hopkins Medicine, Psilocybin Treatment for Major Depression Effective for Up to a Year for Most Patients, Study Shows (2022). https://www.hopkinsmedicine.org/news/newsroom/news-releases/2022/02/psilocybin-treatment-for-major-depression-effective-for-up-to-a-year-for-most-patients-study-shows

[16] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[17] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[18] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[19] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?

The Commission should retain all of the mitigating role cap clauses. Moreover, the highest base offense level for drug offenses is currently 38 with the mitigating role cap being applicable at level 32 or higher (i.e., the highest, seven levels for drug offenses). The Commission should maintain this range in its amendment. Therefore, if the new highest base offense level is 30, the mitigating role cap should trigger at level 24.

4. **If the Commission were to promulgate Option 1, 2 or 3 from Subpart 1, should the Commission amend the chemical quantity tables at §2D1.11?**

Yes. The Commission should amend the chemical quantity tables to keep recommended sentences for Section 2D1.11 tied to but still less severe than the base offense levels in §2D1.1.

5. **Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?**

No. Again, the Commission should reduce the base offense levels for all substances on the Drug Quantity Table at the same rate while considering even further reductions for cannabis and psychedelics.

* * *

Part A - Subpart 2 (New Trafficking Functions Adjustment) Issues for Comment

1. **The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?**

The Commission should decrease the offense level by six levels (or more) given that those carrying out low-level trafficking functions are often engaged in the least amount of harmful and/or violent activity. These people also tend to profit the least from trafficking and, therefore, their incentive to continue doing so is lower. For example, of those in the trafficking chain, having increased access to more lucrative, legal employment opportunities may be a sufficient deterrent from illegal activities compared to incarceration.

2. **The Commission seeks comment on whether the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions.**

While the new specific offense characteristics sufficiently capture low-level trafficking functions, these should be offered as examples and not an exhaustive list to account for unique

circumstances. Moreover, given that an individual's role may occasionally change for a limited amount of time, the language for §2D1.1(b)(17)(C) should be the less restrictive option proposed. That is, this section should read: "the defendant's primary function in the offense was performing any of the following low-level trafficking functions." In addition, for §2D1.1(b)(17)(C)(iii), the language should read: "one or more of the following factors is present . . ."

3. **The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?**

The proposed mitigating factors with respect to distribution merit the same reduction as the other new specific offense characteristics. Allowing for this reduction will help stem the country's use of incarceration as our default approach to responding to mental illness and substance use disorders, both often factors contributing to an individual's involvement in user-level distribution[20]. According to the National Institute on Drug Abuse, 65% of the prison population has an active substance use disorder (SUD), while an additional 20% did not meet the criteria for SUDs but were under the influence at the time of their crime.[21] Meanwhile, about two in five incarcerated people have a history of mental illness, which is twice the prevalence of mental illness in the overall adult population.[22]

This reduction will also help address the nation's history of criminalizing survivors of sexualized and physical abuse and domestic violence. Arrest rates have been rising for women for the past 25 years, especially in drug charges where there has been a 216% increase in women while only having a 48% increase in men. About a quarter of women in jail are held on drug charges[23] while 75% of incarcerated women have been victims of domestic violence at some point in their life.[24] Researchers have pointed to the combination of financial instability and domestic violence as key factors contributing to this increase in women charged with drug offenses, the majority of whom are women of color and the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade.[25]

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[20] Semple, SJ. Strathdee, SA. Volkmann, T. Zians, J. Patterson, TL. High on my own supply: correlates of drug dealing among heterosexually identified methamphetamine users. Am J Addict. 2011;20:516–24.
[21] NIDA. (2020). Criminal Justice Drug Facts.
[22] National Alliance on Mental Illness. Mental Health Treatment While Incarcerated. https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/#:~:text=About%20two%20in%20five%20people,within%20the%20overall%20adult%20population.
[23] Herring, T. (2020). Since you asked: What role does drug enforcement play in the rising incarceration of women? https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/
[24] Alessi, G. Maskolunas, K. Braxton, J. Murden, T. & Rhodes, R. (2023) Implementing Domestic Violence Peer-Support Programs in Jail: A Starting Point. safetyandjusticechallenge.org/wp-content/uploads/2023/07/2023DomesticViolencePeerSupportReport.pdf
[25] Harrell, M (2019). Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color. www.law.georgetown.edu/mcrp-journal/wp-content/uploads/sites/22/2019/12/GT-GCRP190027.pdf

4. **Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at §3B1.2 (Mitigating Role). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

The Commission should provide that, in any given case, between the Mitigating Role reduction and the new low-level trafficking functions adjustment, the reduction that allows for the lowest base offense level should be the one applied.

5. **Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction ("minimal participant") at §3B1.2(a). How should the Commission amend §2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?**

If the new low-level trafficking functions adjustment allows for a lower base offense level than the minimal participation reduction, the new low-level trafficking functions adjustment should apply.

6. **Subpart 2 includes a special instruction providing that §3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under §2D1.1. The Commission seeks comment on whether this special instruction is appropriate.**

The Commission should provide guidance that allows for the lowest base offense level.

7. **Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline. This can result in a case in which the defendant is sentenced under a guideline other than §2D1.1 but the offense level is determined under §2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under §2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.**

The Commission should provide guidance that allows for the lowest base offense level.

* * *

Call for Retroactive Application

There are currently roughly 63,000 people serving federal sentences for drug-related offenses. Some of those sentences range from several decades to life.[26] These sentences were based on previous and current iterations of the sentencing guidelines' Drug Quantity and Conversion

[26] Federal Bureau of Prisons, (2025). *Offenses*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

Tables, which rely on outdated medical, scientific, and sociological information[27]. Given the magnitude of the proposed changes in the guideline range, and in the interest of justice, upon moving forward with amending sentencing guidelines for drug offenses, we strongly urge the Commission to also amend relevant policy statements to permit relief under 18 U.S.C. §3582(c)(2). Specifically, any drug-related sentencing guideline amendments should be included in the list of covered amendments in §1B1.10(d) to indicate all of these new amendments should be applied retroactively. The Commission has elected to do this in connection with previous, drug-related amendments, most notably the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, and 2014 Drugs Minus Two Amendment.[28] We see no reason why the USSC should not do so again with respect to these new proposed amendments, especially as the Commission considers revising or expanding its guidance on retroactivity more broadly.

In closing, I would like to add that I have first hand experience seeing the negative impact that these outdated sentencing rules have had when I worked in maximum security California state prisons. Young men, smart young men, whose lives were essentially wasted, were housed in the same space as murderers and rapists. How can we, as a civilized society, possibly equate drug use with violent felonies?

* * *

Sincerely,
Manoj V Waikar, MD
Psychiatrist

[27] Not only do the current guidelines recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. (Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021))

[28] *See* USSG, App. C, amend. 713 (Adding amend. 706 as amended by 711); USSG, App. C, amend. 759 (Adding amend. 750 in part); USSG, App. C, amend. 788 (Adding amend. 782).

Re: Response to Proposed Amendments to Chapter 7 of the United States Sentencing Guidelines

Dear Members of the Sentencing Commission,

I am writing to express my concerns regarding the proposed amendments to Chapter 7 of the United States Sentencing Guidelines. In the past I have been reluctant to respond to request for feedback from the Commission, as I felt the changes were already a foregone conclusion. However, currently, I feel that it is imperative that I provide feedback regarding these proposed amendments which appear to significantly reduce the consequences for violations of conditions of supervision. To the extent that this commission believes that hearing from a twenty-three-year veteran officer, who has significant experience in both the corrections and mental health fields, I would like to offer my thoughts on this matter.

As you all know, supervised release is a crucial mechanism in the criminal justice system, designed not only to reintegrate individuals into society but also to ensure compliance with the law post-incarceration. A well-functioning system requires a balance of support and accountability. If the consequences for violations are weakened, this balance is disturbed, sending the wrong message to individuals under supervision—that noncompliance is tolerable, and that the authority of the court is negligible.

Many individuals under our supervision have long histories of impulsivity, poor decision-making, and unstable lifestyles. Supervision conditions such as: drug tests, employment requirements, and treatment programs are designed to help them not only with specific issues in their lives but also to help them build a healthier law-abiding lifestyle. When violations go unaddressed, these individuals remain stuck in destructive habits and patterns of behavior that brought them before the Court in the first place. Appropriate judicial consequences reinforce the importance of accountability, sending the message that these conditions exist for a reason, and compliance is not optional. Additionally, as they pay attention to what happens to other individuals being supervised by the Court, it allows them to see that good behavior will be rewarded, while violations will lead to increased restrictions or incarceration.

Psychological research has repeatedly shown that when people believe punishment is certain and unavoidable, they are far less likely to engage in negative behaviors. This concept is simple to see, if any of you have been on a heavily patrolled piece of highway, where speeding is routinely met with a ticket, you'll notice that people get the message quickly and proceed through that area accordingly. People will change their behavior, even if for a short period of time, to avoid a negative consequence.

It is important to note, that true change in someone comes from "with-in" the person, not from "outside" the person. I have been able to show all my supervisees an "open door to some type of assistance with a problem" but ultimately only they can walk through the door. In fact, according to psychologists, there are "Four Stages of Readiness to Change," that determine the overall likeliness for an individual to truly make a positive change in their life (such as to stop using illegal drugs), and they are as follows (ranked lowest to highest): 1) Being compelled by authority to change (lowest level); 2) Attempting change to appease loved ones; 3) Understanding and knowing intellectually that changing the behavior is in their best interest; and 4) Being both intellectually aware of the benefits and also being fully and deeply committed to making a permanent behavioral change.

As you may guess, most of the individuals we deal with fall into the first and lowest level, "being compelled by authority." However, even though this is the lowest level, when combined with trying to avoid a consequence from the Court, I have been able to help a multitude of individuals make significant changes in their lives. Sometimes an individual returned to jail for violations, when they desired to "test" if the "compelling authority" was serious about requiring them to make these changes. However, every

single who eventually made these changes, thanked me and often the Court for "holding their feet to the fire" and keeping them on the right path. By doing so, these individuals developed new healthier lifestyles, often ones that were completely foreign to them, with new hobbies, new skills, and new friends. Despite initially making the changes because they were being told they had to do so, they began to see the benefits of these changes in their lives, and in the end were able to want that change permanently for themselves.

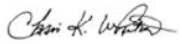
Therefore, the fear of consequence has often acted as a catalyst for transformation, forcing individuals to engage in rehabilitation, maintain employment, and comply with the terms of supervision when they otherwise would have continued a path of self-destruction. Without this clear structure of accountability, many of these individuals would have remained entrenched in negative behaviors, cycling in and out of the system. The impact of certain and proportional judicial responses cannot be overstated—when individuals understand that violations will lead to immediate and predictable sanctions, they are far more likely to take their supervision seriously and commit to real change.

Unfortunately, this rarely happens without a "compelling authority." I have witnessed the ineffectiveness of judicial authorities, who falsely believe that leniency and overindulgent compassion will result in an individual feeling "grateful" and "fortunate" to the point of being willing making the necessary changes to their negative behavior patterns merely out an altruistic desire to be a better person. I have <u>never</u> seen this to be true in my thirty years of working with individuals in the criminal justice system.

Cognitive Behavioral Therapy for Criminal Offenders (which is taught in the Bureau of Prisons and in therapy sessions upon their release) teaches these individuals to link their actions with consequences, and to therefore "think" about the consequences prior to choosing a behavior. This form of therapy has shown to reduce recidivism, as it causes individuals to act in a less compulsive manner to avoid negative consequences. However, if there are "no" consequences, then I do not ask myself why an individual is continuing the same destructive behaviors, I ask, "why wouldn't they continue?" It is working for them, as they are receiving no negative consequence for doing so There is no one enforcing the speed limit on the road!

While it is important to ensure fairness and proportionality in sentencing, significantly attenuating the penalties for violations risks undermining the entire system of supervised release and probation. The consequences of watering down Chapter 7 in the manner being proposed, is clearly to encourage judicial authorities to either simply ignore the violations all together, or issue mere warnings, rather than any meaningful consequences. This lack of enforcement will simply embolden individuals under supervision to disregard their conditions, knowing there are few real consequences. I fear the result will reduce federal probation to a meaningless bureaucratic process, rather than a tool for rehabilitation and accountability. Please do not let this happen and disregard the proposed changes to Chapter 7. Thank you for the opportunity to share my opinion.

Respectfully submitted,



Chris K. Whitver
Sr. United States Probation Officer
Southern District of Mississippi

FREYLEGAL GROUP

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Amy E. Frey
Jon P. Frey
Frey Legal Group
3049 Almond Street
Philadelphia, PA 19134

February 25, 2025

Comments on the Proposed Amendments to the Sentencing Guidelines

The following comments are in response to the U.S. Sentencing Commission's (USSC) proposed amendments to the sentencing guidelines, released for public comment on January 24, 2025. The comments below are directed towards the issues for comment on pages 22-24:

1a. Individualized assessments of individuals on supervised release is highly prized and will evaluate defendants on the unique factors of their conviction, conduct during incarceration and supervised release.

We encourage the USSC to modify the introductory commentary to Part D in Chapter 5 to include the court's supervised release determination under 18 U.S.C. $4042, in addition to the court recommending specific First Step Act programming as part of the sentence. The defendant's compliance to court recommended programming should be an additional variable used for future re-calculations for or against early termination of supervised release.

We further request the USSC to only use $3583(c) in revocation proceedings involving violations of a criminal statute. All technical violations of supervised release should be treated as contempt of court, providing the defendant an opportunity to remedy the violation. The courts may apply graduated sanctions from fines, additional conditions or extensions of time to achieve compliance with re-incarceration as a last resort.

Reincarceration inhibits rehabilitation and forces a defendant to start over, losing employment, housing, treatment and social supports, creating risks to future higher recidivism over violations of a non-criminal, technical nature.

1b. We support the addition of the new guideline §5D1.4. The proposed guidance using a non-exhaustive list of factors should be retained and used throughout Chapter 5, Part D.

The USSC should provide courts with specific direction to standardize application of these factors to all offenders and refer to them as the §5D1.4 factors.

For factor #6 of the proposed non-exhaustive list, language should be added for courts to reference the §3553(a) analysis used at sentencing for historical reference and single factor of the overall analysis verses a de novo 3553(a) analysis. In consideration of modifications to terms of supervised release, the courts should be directed to focus on compliance and achievements or violations throughout the term of supervised release.

Executive Order 14074 was issued by President Biden in 2023 for the purpose of focusing on resources to assist justice system involved individuals with re-entry. The report noted that 44% of defendants received insufficient support from U.S. Probation. In FY 2022, 28% of defendants had their supervision revoked. 68% of those revocations were of a technical, not criminal nature. 99% of all revocations resulted in an average sentence of 9.5 months. This means more than half of the quarter of all defendants on supervised release were returned to prison for almost a year for a minor infraction that was non-criminal in nature, which creates significant hardship on the individual, their families and community that rely on them.

E.O. 14074 required that the Department of Justice issue a strategic plan to advance DOJ goals related to the reduction of criminal justice interactions.

Providing statutory language and a measurement tool focused on the defendant's performance on supervised release using the §5D1.4 factors would fulfill the purpose of E.O. 14074 and The Report of the Department of Justice pursuant to §15(h) of E.O. 14074 in 2023, in addition to the statutory requirements of §3583(a)-(e). In 2013, the Judicial Conference Committee on Criminal Law endorsed reducing supervision terms, citing a cost to taxpayers with no risk to public safety. Filtering out compliant defendants permits districts to devote ever shrinking resources towards higher risk offenders on supervision. Such individualized assessment logically supports the removal of lifetime supervised release for sex offenders. Statistically speaking, this class of offenders have the lowest recidivism rate. Individualized assessments allow further breakdown of this class of offenders from highly serious contact crimes and repeat offenders to first-time, no-contact offenders.

3. The §5D1.4 factors are appropriate. We suggest amending factor six to cite the §3553(a) factors as a weight in the §5D1.4 analysis. We ask the U.S.S.C. to specifically direct courts to the §5D1.4 analysis and abstain from a new §3553(a) analysis.

6. The inclusion of re-entry program completion as a weighted metric in early-termination decisions should be included as tangible evidence justifying termination of supervision.

Respectfully submitted,

Amy E. Frey
Chief Executive Officer

Jon P. Frey
Paralegal and legal analyst

From: [redacted]
Subject: [External] ***Request to Staff*** AFOLABI, LASSISSI, [redacted]
Date: Sunday, March 2, 2025 10:52:53 PM

To: Comments on proposed amendments
Inmate Work Assignment: Library, E

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The following comments are in response to the U.S.S.C.'s request for public comment on amendments proposed to the Sentencing Guidelines on January 24, 2025.

1A. Individualized assessments of defendants on supervised release is a prudent exercise of due process that is lacking in the current system. I would like to see the U.S.S.C. modify the introductory commentary in Part D in Chapter 5 to include the court's supervised release determination under 18 U.S.C. Sec. 4042 in addition to the court recommending specific First Step Act programs as part of the sentence. The defendant's compliance with court recommended programming is a variable that can be factored into a re-evaluation for early termination decisions.

I request the U.S.S.C. to limit use of the 3583(c) in revocation proceedings involving violations of criminal statutes only.

Technical violations should be treated as contempt of court, giving the defendant an opportunity to cure the violation. Courts should rely on graduated sanctions with reincarceration used sparingly as a last resort.

Reincarceration inhibits rehabilitation and increases recidivism, forcing a defendant to lose employment, housing, and other stabilizing factors.

1B. I support the addition of Section 5D1.4 and retain the proposed guidance using non-exhaustive factors for use in Chapter 5, part D.

The U.S.S.C. should provide courts with specific direction to standardize application of these factors to all defendants.

Factor #6- I recommend limiting use of the 3553(a) factors to a historical reference and use the 5D1.4 factors for a current re-analysis. Courts need direction to focus on compliance with release terms and accomplishments.

Statutory language and a measurement tool focused on a supervisee's performance on supervised release using the 5D1.4 factors would provide a more accurate analysis of a supervisee over re-use of the 3553(a) factors. Discharging compliant ex-offenders will provide a cost savings to the government with no risk to public safety.

3. The Sec. 5D1.4 factors are appropriate. I request the U.S.S.C. amend factor 6 to cite the Sec. 3553(a) factors as a single weight in the Sec. 5D1.4 analysis.

6. The inclusion of re-entry program completion as a weighted metric in early-termination decisions should be

included as tangible evidence justifying termination of supervision.

Thank you for considering my public comments.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Dennis Alba

Topics:

Supervised Release

Comments:

My comments for reforming supervised release protocols merit consideration, as they align with evidence-based practices in criminal justice reform while balancing fiscal responsibility and public safety:

1. Prioritizing Rehabilitation Over Recidivism.

Shifting the focus of supervised release toward rehabilitation, rather than punitive oversight, is critical—particularly for individuals who have served extended periods of incarceration.

Successful reintegration into society requires robust support systems, including access to housing, employment, and mental health resources. While transitional programs such as halfway houses provide initial stability, their limited duration often undermines opportunities for sustained rehabilitation. Extending post-release support through community partnerships and case management would better address systemic barriers to reentry.

2. Streamlining Early Termination of Supervision

Current practices frequently delay early termination of supervised release, despite statutory provisions permitting it after one year of compliance. While courts and probation departments face significant caseload burdens, institutional inertia often results in individuals serving two-thirds or more of their supervision terms unnecessarily. Revising guidelines to incentivize timely reviews of eligibility for early discharge would reduce administrative strain and align supervision periods with demonstrated rehabilitation progress.

Expected Outcomes
These reforms would achieve dual objectives:

- Public Safety Preservation: Neither proposal compromises community safety, as eligibility for rehabilitation-focused programs or early termination would remain contingent on strict compliance and risk assessments.

- Fiscal Efficiency: Reducing prolonged supervision periods would yield cost savings, allowing reallocation of resources to high-priority law enforcement initiatives and preventive services.

By centering rehabilitation and rationalizing supervision timelines, these guidelines would foster more equitable, effective, and fiscally responsible outcomes within the criminal justice system.

Submitted on: February 18, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Dennis Alba, See comments

Topics:

Supervised Release

Comments:

My story reflects the need for a Guideline that makes is easier to end Supervised Release.

I was incarcerated in federal prison for manufacturing ecstasy and served a 20-year sentence.

During my incarceration, I underwent monthly urine analysis (UA) tests—typically once or twice per month.

In May 2020, I was granted Home Confinement due to COVID-19. Over the subsequent 56 months of Home Confinement, I was required to submit UA tests six or more times each month.

On December 12, 2024, I received clemency from President Biden. I am now on Supervised Release, during which I am required to complete four UA tests per month for the next five years.

This repetitive testing protocol brings to mind the adage that, doing the same thing repeatedly while expecting a different result is, indeed, counterintuitive, insanity and a waste of taxpayers' money.

I would also like to note that all of my test results have been negative, as I have never used drugs.

Additionally, my supervising officer is aware that I am employed as a case analyst for two former federal prosecutors who were part of the prosecutorial team that prosecuted my case.

Once the applicable amendment is passed, I plan to file for early termination of my Supervised Release.

BTW -UAs are not cheap at least $300 per test or more per test...

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Dave Allen, See comments

Topics:

Supervised Release

Comments:

The proposed Guidelines for Supervised Release present a compelling approach that could generate significant cost savings for the federal government. The provision allowing termination of supervision after one year, combined with shifting the focus from reincarceration to rehabilitation, creates a more effective path to reintegration. Research indicates that the first year after release is typically the critical period that determines an individual's likelihood of successful reentry into society.

Submitted on: February 27, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** ANDERSON, MICHAEL, [redacted]
Date: Wednesday, January 15, 2025 8:05:15 PM

To:
Inmate Work Assignment: retro

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Can the meth actual and mixtures be brought up again this year cause there's a lot of people in prison for a drug that's not near as bad as fentanyl and people have very long sentences that need some relief...The commissioner said there was a need to get this on the bill this year and that he would try too cause something needs to be done...Thanks

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Miranda Anderson

Topics:

Drug Offenses

Comments:

Good evening, I have reviewed the proposed amendments for the change in base levels of the drug quantity table. I am beyond supportive of these proposals. I feel that lowering the highest base level to level 30 or lower would make sentencing more appropriate for the offense.

Submitted on: February 5, 2025

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Nancy Anderson, Friend of inmate

Topics:

Retroactivity Criteria

Comments:

Proposed Amendments: Drug Offenses

Please adopt these changes to remove disparities in sentencing and make them retroactive.

Part A, Subpart 1
Select Option 3. This reduction would lower 2D1.1 with a starting point at 30. Would delete 2D1.1(a)(1) through (a)(4).

Part B, Subpart 1
Deletes all references to Ice, and provides a reduction for non-smokable forms of methamphetamine.

Part B, Subpart 2
Select Option 1. Would set the quantity thresholds for all methamphetamine types at current level for methamphetamine mixture.

Application Note 27(B) should be amended to raise the threshold from, "10 times the minimum quantity", to some significantly greater threshold. As proposed, the Application Note would encourage a upward departure for everyone currently assigned offense level 38. Which would be counter to what you are trying to accomplish with these proposed changes.

Submitted on: February 24, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Sarah Anderson

Topics:

Supervised Release

Drug Offenses

Comments:

The proposed 2025 amendments should absolutely be accepted. Courts should have greater discretion in determining supervised release. Methamphetamine purity guidelines are out of date, archaic actually, and completely unfair. Most importantly, all amendments should be retroactive. Everyone deserves the application of the guidelines in the new amendments in their cases and circumstances, no matter the time frame. Thank you.

Submitted on: February 1, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** ARBAUGH, JAMES, Reg# [redacted]
Date: Wednesday, February 26, 2025 9:23:26 AM

To:
Inmate Work Assignment: FPI ASMBL1

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sentencing Commission:

I want to express my appreciation for your consideration of Supervised Release, the lessened amount of time recommended and the easing the requirements for early termination of supervised release. I am aware that you are requesting comments on the subject of supervised release. The following are my comments:

1. Congress intends supervised release to improve the odds of a successful transition from the prison to liberty. This implies that it will be temporary. Congress provided for supervised release to facilitate a "transition to community life". United States v. Johnson, 524 U.S. 53, 59-60, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000); see also S. Rep. No. 98-225, p 124 (1983) (declaring that "the primary goal [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release"). If a defendant is sentenced to a life term of supervised release with no possibility of coming off of it, it is no longer being used as a tool for transition. As soon as a defendant has reintegrated, he should be allowed to come off of supervised release. This would be evident in having the basic necessities of liberty; a place to live, job, transportation, healthcare, etc.

2. Section 5D1.2(b) (Policy Statement) should be changed or removed. It says "(Policy Statement) if the instant offense of conviction is a sex offense, however, the statutory term of supervised release is recommended." According to 18 U.S.C. Section 3583(k) this is life. The Sentencing Commission does not provide any apparent reasoning for a recommendation of life. The recommended term of supervised release should be justified on what works; supervised release fulfilling rehabilitation. The Department of Justice Adult Sex Offender Management report states "Specialized supervision, in conjunction with rehabilitation, appears to be effective in reducing recidivism for sexual offenders. However, the use of specialized supervision in the absence of rehabilitation is not supported by research." Christopher Lobanov-Rostovsky, Adult Sex Offender Management, July 2015, p 4, [redacted]

3. Similarly, a recommendation of supervised release should not be in excess of the maximum punishment for the crime as specified by the statute. For example; 18 U.S.C. 2423(c) has a 30 year incarceration statutory maximum punishment. A sentence including lifetime supervised exceeds 30 years. Accordingly, the supervised release recommendation should never be greater than the maximum punishment less the term of incarceration.

4. There is evidence that reducing supervised release caseloads can reduce recidivism. Sarah Kuck Jalbert et al., "Testing Probation Out-comes in an Evidence-Based Practice Setting: Reduced Caseload Size and Intensive Supervision Effectiveness," 49 J. Offender Rehabilitation, 233 (2010). Focusing resources on those that need

supervision, can improve the outcomes and reduce recidivism. Accordingly, shorter terms of supervised release should be recommended and coming off of supervised release should be made easier.

5. When considering coming off of supervised release, you could consider the defendant's 2 latest PATTERN Risk Assessments before release from incarceration, and any post-release conduct. Those with minimum risk of recidivism and no incidents while on supervised release should be considered good can candidates for early termination of supervised release.

Thank you for your consideration.

James Arbaugh

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Tiffanie Artigas

Topics:

Supervised Release

Comments:

Dear United States Sentencing Commission,

I am writing to express my strong support for the proposed 2025 amendments to the Federal Sentencing Guidelines, as published in January 2025. These amendments represent a significant step forward in ensuring that our federal sentencing system remains fair, effective, and responsive to contemporary challenges.

One of the most commendable aspects of the proposed amendments is the emphasis on addressing the opioid crisis, particularly the inclusion of guidelines related to fentanyl and its analogues. By updating sentencing policies to reflect the severity and unique dangers associated with these substances, the Commission demonstrates a commitment to public health and safety. This approach not only holds offenders accountable but also acknowledges the broader societal impacts of opioid distribution and abuse.

Furthermore, the proposed amendments exhibit a thoughtful consideration of criminal history and recidivism. By refining the criteria for assessing prior offenses and adjusting sentencing enhancements accordingly, the guidelines promote a more individualized and just sentencing process. This ensures that penalties are proportionate to the offender's history and the nature of the offense, thereby enhancing the credibility and fairness of the justice system.

The Commission's dedication to incorporating public feedback into these proposals is also noteworthy. The solicitation of comments and the transparent amendment process reflect a commitment to democratic principles and the continuous improvement of the sentencing framework. This inclusivity fosters public trust and ensures that the guidelines evolve in line with societal values and empirical evidence.

In conclusion, the proposed 2025 amendments to the Federal Sentencing Guidelines are a

prudent and necessary advancement. They address pressing issues such as the opioid epidemic, promote fairness in sentencing, and exemplify a responsive and transparent policymaking process. I urge the Commission to adopt these amendments and continue its vital work in enhancing the federal sentencing system.

Submitted on: February 3, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** ASHCRAFT, GEORGE, [redacted]
Date: Saturday, February 8, 2025 7:38:16 PM

To:
Inmate Work Assignment: Food Service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

This is a response to the sentencing commissions latest amendment proposals. I fully support the amendment that would remove the highest levels of the drug sentencing table. But one other thing I would like to add is that I think if the commission does remove those highest levels that they need to do some reduction for ALL the remaining levels as well. If you made level 34 the highest offense level, the only people affected would be those with an offense level of 36 or 38. I think the fairest thing the commission could do would be to lower all the drug offenses by 2 levels so that those responsible for lower amounts of weight are given relief just like those responsible for larger amounts of weight. Thank you.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Lilianasia Bailey

Topics:

Drug Offenses

Comments:

Public Comment to the United States Sentencing Commission Regarding the 2025 Proposed Amendment on Methamphetamine Purity Disparities

Dear United States Sentencing Commission,

I am writing to express my support for the 2025 proposed amendment addressing sentencing disparities related to methamphetamine purity in federal drug cases. This amendment represents a significant step toward achieving fairness and proportionality in sentencing, particularly for those whose involvement in drug offenses does not align with the severe penalties associated with high-purity methamphetamine.

The current guidelines disproportionately punish defendants based on the purity of methamphetamine, often without regard to their actual role in the offense. This practice fails to differentiate between individuals who are involved at different levels of the drug trade. For example, low-level offenders, such as couriers or addicts, are often subjected to the same harsh sentences as high-level traffickers or manufacturers, simply because they were in possession of higher-purity drugs—something over which they typically have no control.

This disparity not only undermines the principle of individualized sentencing but also exacerbates systemic inequalities in the criminal justice system. Research has consistently shown that the purity of methamphetamine is not necessarily indicative of a defendant's culpability or role in the offense. By continuing to anchor sentencing levels to purity, the guidelines perpetuate sentences that are overly punitive and fail to reflect the realities of drug distribution networks.

The proposed amendment is a necessary correction. By reducing the emphasis on purity as a determinant of culpability and revising the guidelines to better align with evidence-based principles, the Commission will ensure that sentences are fairer and more proportional. This

change will allow courts to focus on factors such as the defendant's role, intent, and actual conduct, rather than imposing sentences based on arbitrary and often misleading metrics.

Furthermore, this amendment will address the growing recognition that drug addiction is a public health issue, not merely a criminal matter. By reducing sentences for low-level offenders, the proposed amendment will free up resources that can be better used for treatment, rehabilitation, and community support, ultimately reducing recidivism and promoting public safety.

I urge the Commission to adopt this amendment and to continue working toward sentencing policies that are fair, evidence-based, and reflective of the complexities of drug offenses. Thank you for your commitment to improving the federal sentencing system and for considering this critical reform.

Sincerely,
Lilianasia Bailey

Submitted on: January 27, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Terry Baker

Topics:

Drug Offenses

Comments:

I completely agree that the sentencing for methamphetamine-related offenses is too harsh and should be reduced. The current guidelines place too much emphasis on drug quantity without fully considering the individual's role in the offense, leading to excessive and disproportionate sentences for lower-level offenders. Reducing these sentences would align punishments more fairly with the severity of the crime, especially for non-violent offenders, while still maintaining accountability for those at higher levels of trafficking. Sentencing reforms should focus more on treatment and rehabilitation rather than just long-term incarceration, which has not been effective in addressing addiction or reducing recidivism. Additionally, these changes should be applied retroactively to ensure that individuals already serving excessive sentences under outdated guidelines have the opportunity for a fair review and potential sentence reduction.

Submitted on: February 6, 2025

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Gabriel Barber

Topics:

Retroactivity Criteria

Comments:

In 1987 the Sentencing Guidelines, pertaining to methamphetamine adopted the "Ice" purity distinction from "Meth-Mixture". This was supposed to be done off of empirical data, showing that if distributors can purchase 90% + pure methamphetamine then you had access to the Mexican cartels. Basically a role enhancement was included based off the purity levels of meth which increased sentences drastically. This is the only drug that has this kind of distinction even though other drugs can be diluted, cut and redistributed.

Around 2017 or possibly sooner, empirical data has shown that end users who possess user quantities of meth possess 90% pure or better meth around an 80% percentile. These end users have no access to the Mexican cartels, are punished for a role that they don't have and therefore the Guidelines don't reflect the empirical data at this time. Also, studies have shown that when users of meth go to rehabilitation they receive the same treatment whether it's "Ice" or "Meth-Mixture". Some lawyers and researches actually argue that "Ice" is actually more organic and not as harsh on the body compared to the shake and bake made meth or "Meth-Mixture".

The Guidelines should reflect empirical data at that current time. Studies have shown, lawyers have argued and some judges recognize that "Ice" is being sentenced too harshly. Defendants have received sentences that reflect the "Meth-Mixture" Guideline calculation. I urge the Sentencing Commission to take the "Ice" distinction out of the Guidelines and charge all meth as "Meth-Mixture". This will also fix the fact that meth carries the worst punishment even compared to fentanyl which accounts for a staggering amount of deaths across this nation.

I also urge the Commission to make this change retroactively due to years of empirical data reflecting the Guidelines being inaccurate, which resulted in improper role enhancements and sentences. Also a retroactive change would negate sentencing disparities among comparable defendants across this nation.

Sincerely,

Gabriel Barber

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Gabriel Barber Feb. 10, 2025

Topics:

Supervised Release

Drug Offenses

Comments:

The Guidelines should reflect empirical data at that current time. Studies have shown, lawyers have argued and some judges recognize that "Ice" is being sentenced too harshly. Defendants have received sentences that reflect the "Meth-Mixture" Guideline calculation. I urge the Sentencing Commission to take the "Ice" distinction out of the Guidelines and charge all meth as "Meth-Mixture". This will also fix the fact that meth carries the worst punishment even compared to fentanyl which accounts for a staggering amount of deaths across this nation.

I also urge the Commission to make this change retroactively due to years of empirical data reflecting the Guidelines being inaccurate, which resulted in improper role enhancements and sentences. Also a retroactive change would negate sentencing disparities amongst comparable defendants across this nation.

Sincerely,
Gabriel Barber

Submitted on: February 10, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** BATTON, WILLIAM, [redacted]
Date: Friday, February 28, 2025 8:38:33 AM

To: Comments on Supr. Real. Part A
Inmate Work Assignment: Edu Law Library

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Inmate Message Below

Comments on Jan 24th Proposal for changing Supervised Release.

PART A COMMENTS

In General I am favor of the new direction, with the following emphasizes:

Please maintain the new introductory commentary since it focuses on the reintegrative needs which was the original goal of supervised release (SR) when it was conceived in 1984.

The emphasis on not imposing SR for those who do not need it is a positive step forward, but should be tempered with an understanding of how no SR might affect qualifications for other sentencing incentives such as First Step Act Time Credits, and their co-effects on deportable individuals who are here in this country legally.

Removal of mandatory minimums for supervised release, the sex offense policy statement for lifetime, and the individualized assessment is the right step to move away from the rote categorization SR has leaned on for decades. While SR is part of the criminal sentence, at its core, it was meant for curative means of reintegration and that determination should be based on the judge's assessment of the individual before them, not some table of offenses.

Specific Questions for Part A

1. (a) Individualized assessment scheme for Chapter Five, Part D is enough to provide discretion and guidance. The language should focus on how far back the criminal history is, and based on scientific data should ignore, or greatly discount, anything 7 to 12 years old. It should also have a way to account for lengthy stretches' of law-abiding behavior in some way.

1. (b) 5D1.4(b)(6) on of the Early Termination factors dealing with public safety should not focus on the NATURE OF OFFENSE, but on the individuals post conviction, and especially post carceral behavior, length of law abiding behavior and cost verses benefit of keeping the person on SR.

2. I am against 5 D1.1(c) and do not support strengthen it. The commission should either remove it or leave it the as is. "Likely deporation," does not equate to actual deportation, and with FSA time credits being tied to have some form of SR, this will prevent those who are legally in the country from being returned to their home country at the earliest possible opportunity, and will encourage them to ignore potentially beneficial programing while in prison.

3. See my comment to 1(b)

4. For any carceral sentence where the defendant will receive FSA time credits (most likely the same cohort as those being considered for zero SR) they should receive some small amount 3 or 6 months of SR to be able to benefit from time credit incentives.

5. I would change the language and title of the condition list to indicate a more discretionary or suggested nature of the conditions listed.

6. No knowledge on this, no comment

7. I believe the commission should not involve itself in the nature of the proceedings in such a way a it indicates here.

From: [redacted]
Subject: [External] ***Request to Staff*** BELANGER, CALEB, [redacted]
Date: Monday, March 3, 2025 10:23:00 AM

To: U.S. Sentencing Commission
Inmate Work Assignment: landscaping

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I believe 1 year supervised release is appropriate for most inmates coming out of federal prison. It makes sure they will stay in check after being released. If a person doesn't slip up after that year, it should be a pretty good sign that they're going to stay clean. Keeping people on super long supervised release almost guarantees a slip up and a one way ticket back to prison. So many people I met in county jail were locked up for violating probation. It's not like they actually committed another crime or re-offended, they just couldn't follow the strict guidelines that normal people don't have to abide by; Things that are completely legal in the U.S.. I received 10 years prison and lifetime supervised release. That's a lifetime sentence. So if I accidentally violate some terms of probation without knowing, I could potentially go back to prison for the rest of my life. This isn't a joke. This can seriously screw up someone's life even though they committed no crime. Just see if they can handle 1 year of supervised release and if they can, terminate it and let them try to live a somewhat normal rest of their life. They already served their prison sentence. That's rough enough. If you're worried about sex offenders, they have to register for life in Florida and for long periods of time in other states so they're going to be kept in check from that registry without having to worry about a bunch of extra regulations from supervised release. I implore you to take this seriously.

From: [redacted]
Subject: [External] ***Request to Staff*** BENTLEY, MICHAEL, [redacted]
Date: Friday, February 7, 2025 8:09:11 PM

To:
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I would like to respond to the commissions latest amendment proposals. I agree with the amendment that would make the highest level on the drug sentencing table level 34, 32, or 30, rather than 38. However, this needs to be done in tandem with the commission providing a reduction to the lower levels as well. If the commission makes the highest level 34 for example, the only offenders receiving relief would be those whose base offense level is 36 or 38. It is not right that the offenders responsible for the largest amount of drug weight would receive a reduction while those responsible for smaller amounts of weight get no reduction. For example, if the commission made the highest base offense level 32 someone responsible for 3,000kg of marijuana would be sentenced at the same guidelines as someone responsible for 50,000kg of marijuana. I think the commission needs to do something like a 2 level reduction for all non violent adrug offenders.

From: [redacted]
Subject: [External] ***Request to Staff*** BOUCK, KYLER, [redacted]
Date: Sunday, February 23, 2025 1:09:30 AM

To: Sentencing Commission
Inmate Work Assignment: Compound Scrub

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing to submit a comment regarding the proposed guideline changes. I am in support of changing the drug offense base levels to a lower level on all drugs as the current guidelines are too harsh. I am currently in prison and see the number of people in here with extremely long sentences due solely or mostly to the amount of drugs in their cases. I am one of those with an extremely long sentence of 123 months for methamphetamine weight contributed to me.

I also support the proposed changes to the methamphetamine disparity between actual, ICE, and mixture containing meth. The current conversions are much too harsh and should be 500g or 1kg marijuana conversion for all meth conversions. Thank you.

From: [redacted]
Subject: [External] ***Request to Staff*** BRADLEY, JAMAR, [redacted]
Date: Tuesday, February 4, 2025 9:14:33 AM

To: Chief Judge
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

ABSOLUTELY unacceptable for you all to consider a proposal for meth guidlines...
When WE have been waiting in line for 40 years for the disparity between crack and cocaine and you all just skip our misjustice!!
You all can not propose a change in guideline for meth with out including 1 to 1 or even 2.5 for CRACK COCAINE!!
YOU ALL MUST SHOW JUSTICE AND THAT THIS SYSTEM IS COLOR BLIND!!
IT IS UNFAIR YOU ALL TO DO THAT!!

From: [redacted]
Subject: [External] ***Request to Staff*** BRIDGES, MATTHEW, [redacted]
Date: Tuesday, January 14, 2025 10:05:22 PM

To: chairman
Inmate Work Assignment: na

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Things that need to be looked at in drug guideline range!
can you guys please look at historic dope / ghost dope! it's unreliable and the informants giving this information have every reason to lie and make a person seem like they are way more then they are, so they can get a better deal.
1. purity on meth if you go to the cases in the eighth cir from northern iowa (U.S vs. nawanna) and (U.S. vs. havel) they detail just how unjust the guidlines are on meth. there are disparities on actual pure ice meth! its supposed to mean your at the top of the food chain if your meth is pure but now almost all meth test pure! even at the lowest levels of drug users. also more people are getting caught with more and more and its way cheaper then it was years ago. purity needs to be switched to mixture of a substance.

2. the leadership role! you can be charged with leadership role if you have a buyer seller relationship with five or more people and your not part of any orginized crime. you dont even got to be able to tell the those five what to do!you can have no control over them other then you sell to them or they might owe you money and now your leadership!

3. informants are unreliable they are often times used by the police as a tool and coerce into saying things that are worse off then what they really are to get a better deal. they are also asked leading loaded questions were its hinted on what the police want the informant to say

4. conspiricys to deliver need to be looked into to it allows way to much into the courts that are turning the court rooms into a joke and take away the peoples right to have a fair trial (how can you defend against dope that you cant prove you never had and the goverment cant prove you did have other then by hearsay!) how can they charge you with purity of this ghost dope and you cant even test it to see if it was even really dope at all. what if what was sold was salt. how does a person prove that??
hearsay is allowed too. that turns the court room into a joke cause now people (jail house snitches) who have never even ment a person can look up a person in their jail and study their case on the jail law libaray and find a couple details and now they are being used on a case were they have never even been in the same area as that person other then in that jail. how does a person defend against that!!! please let me know you recieved this by a responce

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Paige Britz

Topics:

Drug Offenses

Comments:

I am writing this in response to the Sentencing Commission's most recent drug offenses, I am in favor of the amendment that would remove the highest levels of the Drug Sentencing Table. I would like to see Option 3 passed which would make level 30 the highest base offense level. However, I find it deeply troubling that the Commission may stop there and not amend the lower levels as well. How does it make sense that those responsible for the largest amounts of drug weight would receive a reduction while those responsible for smaller amounts would receive no relief? For example, if you topped out the Drug Sentencing Table at 34, the only offenders affected would be currently at level 36 or level 38. My nephew is a first time offender currently serving a 192 month sentence for a non violent marijuana offense in which his base offense level was 32. It is my sincere belief that the Commission should remove the highest levels of the Drug Sentencing Table while also doing something like a 2 level reduction to remaining base offense levels as well. If the drug offenders responsible for the largest amounts of weight deserve shorter sentences, then it is only logical that the offenders responsible for a smaller amounts of weight deserve shorter sentences as well. The length of sentences for non violent drug offenders for federal crimes in our country is appalling. Please lower the guidelines for all non violent drug offenders

Submitted on: March 3, 2025

March 3, 2025

The Honorable Carlton W. Reeves
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

RE: **Opinion: Enhancing Judicial Discretion in Early Termination of Supervised Release**

Dear Judge Reeves,

The proposed 2025 amendments to the U.S. Sentencing Guidelines address significant reforms regarding supervised release, particularly in granting courts greater discretion to determine its imposition, duration, and conditions. While these amendments make strides toward a more individualized approach, I believe further steps should be taken to ensure a fairer, more efficient system. Specifically, judges should be given broader discretion in terminating supervised release early, and a mandatory one-year review of supervised release terms should be implemented.

Supervised release serves as a crucial tool for reintegrating individuals into society while maintaining public safety. However, it should not be applied uniformly or unnecessarily prolonged when an individual has demonstrated rehabilitation and poses little risk. Currently, courts have the ability to terminate supervised release early under 18 U.S.C. § 3583(e)(1), but the process lacks a standardized mechanism for review. Instead, the burden often falls on the defendant or probation officer to petition for termination, leading to inconsistencies in application across jurisdictions.

A key aspect of the proposed amendments emphasizes an "individualized assessment" in determining supervised release conditions, including early termination. This is a positive step, but without a structured review process, many eligible individuals may remain under supervision longer than necessary. To address this, I propose that courts be required to conduct a mandatory review of an individual’s supervised release status after one year. This review would ensure that those who have shown compliance, stability, and low recidivism risk have a fair opportunity for early termination.

My personal experience highlights the unnecessary burdens that prolonged supervised release can create. I served 15 years in federal prison and was released early due to law changes from the First Step Act. Upon my release, I was saddled with 10 years of supervised release, despite the fact that I do not require any assistance with programs, classes, or structure to remain a law-abiding citizen. The barriers imposed by my supervised release have had a tangible and heartbreaking impact on my life. And despite these barriers my application for early termination was denied.

One of the most devastating consequences has been the termination of my foster care license. A hearing officer determined that because I remain on supervised release, I could be

"stripped of my freedom at any time." As a result, the placement of three foster children—ages 2, 3, and 4—was terminated, and they were rehomed. This decision was not based on my behavior, stability, or ability to provide a loving home, but rather on the mere technicality of my supervised release status.

Additionally, my supervised release has created significant barriers to my professional career. As the Director of Operations for a glazing company, I am often required to visit various jobsites, many of which involve government contracts or school projects. However, I have been unable to obtain the necessary background clearance due to my supervised release status. The background screening company "One Source" has explicitly stated that I will not be eligible for clearance until at least five years after my supervised release is terminated. This restriction persists despite the fact that my crime was committed 20 years ago, and I have since demonstrated complete rehabilitation, serving as a model inmate, mentor, tutor, and now a successful professional for five years post-release. These barriers not only hinder my career growth but also limit my ability to fully reintegrate into society and contribute meaningfully to my industry.

In addition, my ability to travel is restricted. My wife recently planned a family Christmas vacation to Cancun, for which I submitted the requisite travel permit application to my Supervising Release Officer. He stated, "I cannot authorize this." As a result, I had to hire a lawyer to file a court motion and obtain permission from a federal judge. This added unnecessary stress and financial burden to my life. Furthermore, upon reentering the country, I was pulled aside along with my family and required to provide proof that my Supervising Officer had approved my travel permit. These restrictions make everyday life more stressful and difficult.

Beyond vacations, these limitations prevent me from engaging in meaningful family experiences. I have a two-year-old son and a two-year-old and six-month-old grandson. I would love to take them on trips outside the country and teach them skills such as hunting and preparing their own food. However, I am unable to begin this process of reintegration and family bonding until my supervision is terminated.

I am passionate about criminal justice reform, and change is necessary. I applaud Congress for the progress made in the past five years. I want to share my story and highlight a crucial reality—incarcerated individuals will be released. They will be your neighbors, the people standing next to you in the grocery store. Why would we not spend our limited resources to ensure their success and, in turn, our own? Ensuring successful reintegration which benefits not only the individual but society as a whole.

The changes put forth in these amendments are necessary to provide an individualized approach and establish a structured timeline for review. A one-year review would work both ways—it would identify individuals who require more supervision while also allowing those who no longer need oversight to regain their full freedom. This would free up resources and allow probation officers to focus on individuals who truly need guidance and support. Ultimately, this reform would better serve the goal of successful reentry into society and promote long-term rehabilitation, ensuring that those who have demonstrated their commitment to lawful living remain "Free 4 Life."

A structured, mandatory review after one year would provide judges with clearer guidance while preserving their discretion to weigh individual circumstances. This approach balances accountability with fairness and ensures that supervised release fulfills its intended rehabilitative purpose without becoming an unnecessary extension of punishment.

Such a policy would have several benefits. First, it would reduce unnecessary supervisory burdens on probation officers, allowing them to focus resources on individuals who require closer monitoring. Second, it would support rehabilitation by incentivizing good behavior and goal achievement, such as employment, education, or substance abuse treatment completion. Finally, it would align with the broader criminal justice reform movement that aims to make sentencing and post-incarceration supervision more equitable and evidence-based.

The U.S. Sentencing Commission has sought public input on whether additional factors should be considered for early termination decisions. A structured, mandatory review after one year would provide judges with clearer guidance while preserving their discretion to weigh individual circumstances.

In conclusion, while the proposed amendments reflect a more flexible approach to supervised release, further refinements are needed. By granting judges greater discretion in early termination and implementing a mandatory one-year review, we can create a system that is both just and effective, prioritizing successful reintegration over excessive supervision.

Sincerely,

Signed by:
Daniel Brown
49C9E595A77547F...

Daniel Brown

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Aaron Camacho

Topics:

Supervised Release

Drug Offenses

Comments:

Greetings,

I am a first-time non-violent offender who pled guilty to a conspiracy to possess and distribute LSD in 1999 (published law) and received a 10 year mandatory minimum sentence and 5 years supervised release.

Although I used my time in prison wisely 10 years was excessive and negatively impacted my entire family in ways that none of us were able to truly recover from.

During my 8.5 years of incarceration I developed several non-profits and a few for-profit business ideas that were all oriented towards benefiting my community and country and I was filled with enthusiasm about my freedom and a chance to implement them.

To my dismay and detriment I was not allowed to pursue these by my probation officer. I was also repeatedly promised that I would be dismissed from supervised release early if I served "just one more year"... instead I served all 5 years!

By the time I was done serving my 5 years of supervised release in 2012 I had lost my enthusiasm and motivation and have not been able to truly recover to this day.

This leads to my comments here:

1. Long sentences without the opportunity for parole often go from helping to hurting a person's ability to re-enter society in a healthy way.

I witnessed many other inmates go from anger about being sentenced to being grateful for the

chance to get their lives together and being ready to live a better life to be bitter and depressed about still being in prison past the point of benefitting from it.

2. Long periods of supervised release, especially with prohibitions against being self-employed, also go from benefitting the probationer to hindering them.

If I had been allowed to pursue my very detailed and carefully planned ideas who knows how much I could have helped my community and how much better my life would have gone and where I would be today.

Therefore, I STRONGLY RECOMMEND that You approve and implement all amendments to the sentencing guidelines that will result in shorter sentences and shorter periods of supervised release with the maximum amount of flexibility for judges and probation officers so that they are not forced to punish their fellow citizens beyond the point of diminishing returns.

Thank You for Your Compassion,

Aaron Sun Camacho

Submitted on: February 26, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** CANDILLO, PHILLIP, [redacted]
Date: Friday, February 7, 2025 7:23:13 PM

To:
Inmate Work Assignment: Unit Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

This is a response to the commissions proposed amendments from January 25th. I vote yes to the amendment that would top out the drug quantity table at level 34, 32, or 30. But I would like to add that I believe all offenders with a base offense level below 34, 32, and 30 should receive something like a 2 level reduction as well.

My celly is a first time offender serving a 192 month sentence for a non violent marijuana offense. His base offense level was 32. In my opinion it does not make sense that if you topped out the drug sentencing table at level 34 or 32 that someone like him would receive no relief. I believe it is imperative that the commission remember that many non violent offenders are given enhancements after their base offense level that lead to them falling at the top of the sentencing table and land them decades behind bars for a non violent offense. A 2 level reduction for all non violent drug offenders seems like the most sensible approach to mitigating our countrys tens of thousands of overly lengthy sentences of non violent drug offenders.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Whitney Carter

Topics:

Supervised Release

Drug Offenses

Comments:

Inmates serving federal time for drug offenses should not be released early on supervised release or home confinement! Most federal inmates are in federal prisons selling drugs inside the prisons to make an untaxable profit! They have not learned their lesson. They should required to serve maximum sentences to prevent repeated drug selling behaviors once released back into society. If they are selling drugs inside federal prisons surely they will be released & sell drugs again in society killing innocent people in the community! Federal inmates need to be held accountable! Most of them are repeated drug offenders! Let's put a stop to illegal drugs in our communities & make the world safe again!!

Submitted on: February 12, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** CHAMPION, RICHARD, [redacted]
Date: Friday, February 7, 2025 1:38:31 PM

To: US Sentencing Commission
Inmate Work Assignment: CU ORD

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

RE: Methamphetamine Guidelines

The methamphetamines guidelines (actual) need to be completely done away with. ALL Meth in the US is pure. Rarely will you find any meth that is below 80%. Knowing that, how is it fair to punish offenders more harshly for the purity of the meth that they are caught with knowing that its all of a higher purity. The actual meth guidelines create unfair sentencing disparities and unjustly punish offenders where they were subject to unscrupulous prosecutors and the testing was purely of an arbitrary nature.

The way that the First Step Act of 2018 made section 404 retroactive, The Commission needs to allow the revised meth guidelines to apply retroactively. I was a level 34 due to 1.1 kilograms of actual methamphetamine. I was sentenced to 262 months. The national average for murder is 261 months. I got more time for a non-violent drug crime than people are getting for taking a human life. Were the Commission to allow this to apply retroactively, this would reduce my base offense level to a level 30. Making my sentence more in line with the sentencing norms today, eliminating the disparity in the guidelines sentence and also reducing the disparity between my codefendants and I.

This is long overdue. There are a lot of harshly sentenced individuals based off this disparity and I sincerely hope and pray that The Commission will do the right thing and allow this to have a retroactive effect in order to correct this injustice.

Thank you for your time.

Best Regards,
R. Champion

Comment on Proposed Amendments

United States Sentencing Commission

One Columbus Circle, NE

Suite 2-500, South Lobby

Washington, DC 20002-8002

Subject: Comment on Proposed Amendments to the Sentencing Guidelines – Drug Table, Methamphetamine, and Supervised Release

Dear Commissioners,

I am writing in support of the proposed amendments regarding the Drug Table and methamphetamine sentencing guidelines. As a concerned citizen personally impacted by the existing policies, I strongly encourage the Commission to move forward with these much-needed reforms.

A close relative of mine was sentenced under outdated guidelines that imposed a severe penalty based on the purity of methamphetamine. At the time, the 10:1 sentencing disparity disproportionately punished individuals found in possession of high-purity meth, under the mistaken assumption that purity equated to a higher level of criminal responsibility. Today, it is well understood that most methamphetamine found in circulation is of comparable purity, making the previous justification for the disparity no longer relevant. Unfortunately, despite evolving knowledge and reform efforts, individuals like my relative continue to serve draconian sentences based on obsolete policies.

Sentencing should reflect both fairness and justice, ensuring that penalties align with actual culpability rather than outdated and disproven assumptions. Reforming these guidelines is a step toward correcting past injustices and ensuring that future sentencing decisions are based on rational, evidence-based policy.

I appreciate the Commission's efforts to address these disparities, and I urge the adoption of these amendments to create a more just and equitable sentencing framework.

Sincerely,

Steve Chapman

From: [redacted]
Subject: [External] ***Request to Staff*** COBB, CHRISTOPHER, [redacted]
Date: Tuesday, February 4, 2025 10:30:40 AM

To: Supervised Release Guideline
Inmate Work Assignment: LBR Pool

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

US Sentencing Commission,

I am a prisoner who has been incarcerated now for nearly 15 years on a non-contact computer facilitated simple receipt and possession case which is labeled as a sex offense.

My case was run-of-the-mill, involved the inattention to what was being included with the downloads in a file sharing program, and received the same four enhancements that are common to such cases.

I was given a 210 month sentence, with lifetime supervised release to follow.

During the first few years of my sentence, I was an angry individual as I believed my sentence to be grossly disproportionate to the offense committed. This is especially true of the supervised release portion - which includes mandates to attend substance abuse treatment, anger management, and sex offender treatment ... for life.

These conditions, however, do not reflect the reality of my person any longer. I have taken substance abuse and anger management while incarcerated. I have also graduated from the Blackstone Institute's Paralegal Certificate course with an Advanced Certification in Criminal Law. I have aged out of the anger I felt at the time of my sentencing, and yet currently am still required to attend the same courses upon release that I attended and graduated while in prison.

I bring this up to point out that the redundant programs waste resources. My time, the government's money, my money, etc.

In light of this, I would request that a provision be added to the proposed supervised release guideline change that requires a district court to place great weight on completed rehabilitative programs while incarcerated in a motion filed under 18 USC Section 3583. And for a "second look" provision to be added that allows for a district court to review a prison record and update the supervised release requirements before a prisoner leaves prison. Perhaps that can be added to the language stating that lifetime supervised release is to be discouraged.

I also ask that the provisions use language that is strongly worded, as many judges feel that supervised release should be continued punishment. One such is my judge, L. Scott Coogler. He routinely sentences at the top of a defendant's guidelines, and always imposes lifetime terms of supervised release in non-contact, low recidivism risk cases. Softly worded provisions will only allow these types of abuses to continue, which will then only drive sentencing disparities which do not comport with the Sentencing Factors of 18 USC Section 3553(a).

Respectfully Submitted,

Christopher D Cobb

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Jonathan Crowder, [redacted]

Topics:

Retroactivity Criteria

Comments:

The Sentencing Guidelines for methamphetamine, adopted in 1987, distinguish between "Ice" and "Meth-Mixture" based on purity levels. Initially, this was to reflect cartel involvement, but recent data shows most end users possess highly pure meth without connections, leading to unfairly harsh sentences. I urge the Sentencing Commission to update the guidelines to reflect current data and make these changes retroactive to address sentencing disparities.

Sincerely,
(Jonathan Crowder)

Submitted on: February 16, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Isaac Culver

Topics:

Supervised Release

Comments:

Some judges are basing their decisions to deny early termination of probation solely on the grounds that probationers have outstanding restitution. This approach echoes the historical Debtor's Prison Law, where individuals were effectively punished not for criminal acts, but for their financial inability to pay debts. Such a practice raises serious concerns about fairness and justice, as it prioritizes monetary obligations over rehabilitation and compliance with probationary conditions. Continuing probation solely due to unpaid restitution—without considering the probationer's circumstances or ability to pay—can be seen as a modern form of debtor's prison, conflicting with principles of equity and constitutional protections against undue punishment for financial hardship.

Submitted on: February 5, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** DARRAGH, SEAN, [redacted]
Date: Wednesday, February 26, 2025 8:53:12 AM

To: 2025 PROPOSED AMENDMENTS
Inmate Work Assignment: UNICOR-P

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

PART B. SUPPORT FOR SUBPART 1 AND SUBPART 2, OPTION #1 - USING METHAMPHETAMINE MIXTURE QUANTITY THRESHOLDS: The Commission should delete all references to methamphetamine ("ICE") and methamphetamine (Actual) from the Guidelines, and set all methamphetamine offense levels at the methamphetamine mixture level, thus eliminating the current and obsolete 10:1 ratio in use. Such a change would reflect understanding that methamphetamine quality is generally uniform, and that methamphetamine quality is not necessarily indicative of offense culpability. In other words, a methamphetamine addict on the streets generally possesses the same quality methamphetamine as a high-level trafficker. Because this is the case, purity should not be a Guidelines factor, and the Commission should set the quantity thresholds for all methamphetamine offenses at the current level for methamphetamine mixture, and eliminate the current and obsolete 10:1 ration in use. As the Commission's data makes clear, methamphetamine is methamphetamine. For this reason, all methamphetamine offenses should be equally treated. The Commission should make such changes retroactive to at least fiscal year 2020.

PART B. SUBPART 1. GENERAL COMMENT ON NON-SMOKABLE NON-CRYSTALINE METHAMPHETAMINE: Because the quality of methamphetamine is highly and uniformly pure, the methods by which a user can ingest methamphetamine are universal and/or interchangeable. In other words, if the Commission understands that methamphetamine is highly and uniformly pure, it should also understand that there is no such distinction as "smokable" and "non-smokable" methamphetamine. Any proposed 2-point reduction would benefit almost no one (except perhaps back in 1990), and would therefore be pointless. How would such a reduction even be decided? Just because a certain methoamphetamine possessed lloks like powder to the naked eye, that does not mean it is not crystaline under magnification (and what would be the standardized power of magnification required?). And even if by some chance a user did posses methamphetamine in a genuine powedered form, if it's methamphetamine, it's somkable. There should exist no 2-point separation between "smokable" and "non-smokable" meth. Those labels are the term of a subjective quality determination. The Commission's data makes clear that meth is meth. It should therefore all be equally treated.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Gwendolyn Davies

Topics:

Supervised Release

Drug Offenses

Comments:

Proposed Amendment: Reforming Sentencing for Fentanyl-Related Offenses

Section 1: Purpose and Intent

The purpose of this amendment is to reform sentencing practices for individuals convicted of fentanyl-related offenses by focusing on rehabilitation, treatment, and community reintegration rather than prolonged incarceration. This amendment recognizes that responsibility for the opioid crisis is not solely on those who sell the drugs but also involves those who purchase and use them. Addressing both sides of the equation—supply and demand—is critical to effectively combating the fentanyl epidemic and promoting long-term recovery.

Section 2: The Need for Reform

Addiction as a Medical Condition: Fentanyl addiction is a chronic medical condition that requires comprehensive treatment. Treating individuals solely through punitive measures, such as long prison sentences, has proven ineffective in addressing the root causes of their behavior. Whether an individual is selling fentanyl or purchasing it, both are often caught in the cycle of addiction. The focus should be on rehabilitation and treatment, not punishment, to break the cycle.
The Shared Responsibility: While the seller of fentanyl is certainly responsible for the distribution of a dangerous substance, the individual purchasing and using fentanyl also shares responsibility in the broader context of the crisis. The demand for fentanyl and other illicit substances is a driving factor in its proliferation. Both the buyer and the seller must be held accountable within a system that promotes rehabilitation and recovery. This requires recognizing that addiction is a disease that affects individuals at all levels of drug use, from the consumer to

the distributor.
Impact of Incarceration: Long prison sentences, especially for non-violent drug offenders, create an environment that exacerbates addiction and does little to address the underlying health issues. Incarceration often fails to provide adequate treatment for addiction and mental health, leaving individuals with little to no opportunity for recovery or personal growth. The focus should shift from isolation to rehabilitation, with an emphasis on both those who sell drugs and those who use them, to reduce the ongoing demand and supply of fentanyl in communities.
Section 3: The Case for Supervised Release and Treatment-Based Sentencing

Supervised Release as a Solution: The 2025 proposed amendments on supervised release provide an opportunity for individuals convicted of fentanyl-related offenses, whether as a distributor or user, to remain in their communities while receiving the necessary treatment and support. Supervised release allows for intensive rehabilitation programs, community involvement, and access to drug treatment programs, which are crucial for breaking the cycle of addiction. A rehabilitative approach that includes both the person purchasing the drugs and the person selling them is far more effective in addressing the issue holistically.
Rehabilitation for All Parties: Both those selling and buying fentanyl should be required to participate in structured rehabilitation programs. Treatment should be integrated into sentencing as a necessary condition, not a secondary option. Programs should include drug treatment, mental health services, vocational training, and educational resources that can help both individuals who are selling and purchasing drugs overcome addiction and reenter society successfully.
Preventing Future Drug Use and Crime: By addressing the demand side of the equation (those purchasing drugs) through rehabilitation, education, and support programs, we can reduce the number of people dependent on fentanyl and other illicit substances. This reduces the demand for fentanyl, which in turn lowers the incentive for individuals to engage in the distribution of these drugs. The more that society can reduce both demand and supply, the more effective the long-term solution will be to combat the opioid crisis.
Section 4: The Benefits of Reform

Breaking the Cycle of Addiction: Individuals on both sides of the fentanyl trade are often entrapped in addiction. Supervised release, along with rehabilitation, offers these individuals an opportunity to receive care and support to overcome their addiction, rather than merely serving time in prison, which exacerbates the problem. A comprehensive approach—addressing both the user and the distributor—ensures a more effective strategy for combating the opioid epidemic.
Reduction in Overcrowding: Prisons are already overcrowded, and incarcerating individuals for drug-related offenses, especially non-violent ones, contributes to a system that is inefficient and ineffective in promoting rehabilitation. This amendment would reduce overcrowding by providing non-incarceration alternatives such as supervised release and treatment, ultimately benefiting both the justice system and the individuals affected by addiction.
Strengthening Families and Communities: Rehabilitative programs and supervised release help individuals stay connected to their families, providing the emotional and financial support necessary for successful recovery. Children and families are often impacted when a parent is

incarcerated. Allowing individuals to remain in their communities while receiving treatment reduces this disruption and promotes healing both for the individual and their family.
Section 5: Conclusion

This proposed amendment seeks to fundamentally shift the approach to fentanyl-related offenses by prioritizing rehabilitation, treatment, and supervised release over prolonged incarceration. It acknowledges that both the demand (the buyer) and the supply (the seller) play critical roles in the opioid crisis, and both should be addressed in a fair and rehabilitative manner. By adopting treatment-focused policies, we can help individuals overcome addiction, break the cycle of recidivism, and reintegrate into society as productive members.

The proposed amendments to supervised release and drug offenses, set for 2025, align with these principles and provide an opportunity to focus on rehabilitation over punishment. With this approach, we can better combat the fentanyl epidemic, promote long-term recovery, and improve outcomes for individuals, their families, and communities.

Submitted on: February 19, 2025

February 19, 2025

Timothy R. Defoggi [redacted]
FCI Ft Dix
PO Box 2000
Joint Base MDL, NJ 08640

U.S. Sentencing Commission
1 Columbus Cir, NE Room 2-500
Washington DC 20002

RE: Petition for Modification of USSG

Dear Members of the U.S. Sentencing Commission,

Please accept the enclosed comments as a petition for modification of the sentencing guidelines as allowed for under 28 U.S.C. § 994(s).

Respectfully submitted,

Timothy R. Defoggi

Enclosure: Request for comment dated 02/18/25

[redacted] - DEFOGGI, TIMOTHY RAY - Unit: FTD-N-A

[redacted]

SUBJECT: For submission to the US Sentencing Commission
DATE: 02/18/2025 10:10:22 AM

Request for Comment - 2025 Amendment Cycle

Dear esteemed members of the U.S. Sentencing Commission,

While I am not aware of the specific issue under consideration by the Commission, I would like to offer my thoughts on potential changes in the U.S. Sentencing Guidelines as they relate to supervised release. As the Commission is aware, 18 U.S.C. Section 3583(e)(1) allows a sentencing court to terminate a term of supervised release at any time after the expiration of one year of supervised release. As such, I would like to recommend the removal of App Note 5 from USSG 5D1.2 "Early Termination and Extension" and instead create a new, more authoritative section as USSG 5D1.2(c). APP Note 5 would be replaced with a definition for "PATTERN Predictive Assessment Tool". The proposed language is provided below followed by justification for the proposed changes.

Proposed Change:

5D1.2(c) [New] The court has authority to terminate or extend a term of supervised release. See 18 U.S.C. Section 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor that the court may consider based upon post release conduct or upon petition of the defendant after the expiration of one year of supervised release. The court should give particular consideration to:

(1) Criminal History - In general, the more serious the defendant's criminal history, the greater the need for supervised release. [Taken from USSG 5D1.1, App Note 3(B)]

(2) PATTERN Predictive Assessment Tool - Upon presentation of defendant's two most recent PATTERN assessment scoresheets, consecutive scores of "Minimum" typically demonstrate a very low risk of recidivism, lessening the need for continued supervision. Higher risk ratings may be less persuasive.

5D1.2, App Note 5 [Replacement language] PATTERN Predictive Assessment Tool (See 18 U.S.C. Sections 3631-3635) - In accordance with the First Step Act of 2018, all Bureau of Prisons inmates receive a semi-annual assessment utilizing the United States Department of Justice risk and needs assessment tool know as PATTERN (Prison Assessment Tool Targeting Estimated Risk and Needs). This tool is designed to classify each inmate within one of four distinct categories relative to their risk of recidivism once released back into the community; Minimum, Low, Medium or High.

Justification:

It is asserted that specific terms of supervised release were designed to ensure that a defendant does not reoffend post-release while successfully reintegrating back into the community; all while carefully weighing a defendant's loss of liberties with the legitimate interests of public safety.

As cited above, the PATTERN predictive tool is designed to assess a defendant's risk of reoffending through a comprehensive scoring system that rates each inmate in one of four distinct categories relative to their risk of recidivism with scores ranging from -22 at the least risk of reoffending to the highest risk of recidivism at 109 points. The tool is designed to assess, determine and predict the likelihood of an inmate committing a new or subsequent crime once released back into the community.

The strength of the predictive validity is of key importance. PATTERN achieves a higher level of predictability and surpasses common risk assessment tools for the correction population in the United States. It was designed and developed under the guidance of the U.S. Attorney General, the Department of Justice and an independent review committee, whose members include experts in criminology and prison systems as well as former senior justice sector policy makers.

The success of this predictive tool was recently validated by the U.S. Department of Justice, National Institute of Justice in a report titled, "2023 Review and Revalidation of the First Step Act Risk Assessment Tool", dated August 2024. This report may be accessed at https://www.ojp.gov/pdffiles1/nij/309264.pdf

Respectfully submitted,

[redacted] - DEFOGGI, TIMOTHY RAY - Unit: FTD-N-A

/s/
Timothy Defogg[redacted]
FCI Ft Dix
P.O. Box 2000
Joint Base MDL, NJ 08640

From: [redacted]
Subject: [External] ***Request to Staff*** DICKINSON, JEFFERY, [redacted]
Date: Saturday, February 8, 2025 10:23:12 PM

To:
Inmate Work Assignment: Food Service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hi I recently read about the sentencing commissions latest amendment proposals so this is a comment about them. I approve of the amendment that would remove the highest offense levels from the drug sentencing table. I think the option that would make the highest offense level 30 would be the best because even level 30 criminal history category 1 still carries a sentence of roughly 10 years. I would like to mention that I think changing the entire drug sentencing table makes even more sense though. Rather than making a change that only affects the people that were responsible for the largest amount of drugs, I think it would be much more fair to do something like lowering all the drug base offense levels by 2 levels.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Erik Diehl, Family member

Topics:

Supervised Release

Comments:

Dear United States Sentencing Commission,

I support the proposed amendment to the federal sentencing guidelines for changes to Supervised Release. It seems everyone with a non-contact sexual offense, such as possession of illegal images, receives lifetime supervision at sentencing. It is one example of a one-size-fits-all punishment everyone receives, ignoring the crime's specifics. Fair and individualized assessments are needed for each person. The number of years under supervised release for all sex offenses is out of proportion compared to other class A and B felonies.

I have a son who is affected by Lifetime Supervised Release since he has been released from incarceration for possession of illegal images. My son has been diagnosed with Autism (formally known as Asperger's) and experienced social anxiety and depression throughout his adolescent years. His offense occurred when he was 22 years of age, in college, and working. He graduated getting his Bachelor's degree with Summa cum Laude honors. Since pre-trial supervision started, he has received support from family and professionals to help him with his neurodiversity and what caused the event. He had no prior criminal history and had no issues during pre-trial. My son's lawyer said the Eastern District of Missouri keeps those affected by the supervised release on it longer than other districts, even though it was a non-contact offense. He was told at his first meeting with the probation office that they would not consider early termination until 10 years at least and would need to pay for and take a polygraph twice a year along with therapy. My son is determined to be a law-abiding and productive member of society.

I understand federal courts use supervised release to protect public safety, reduce recidivism, and facilitate rehabilitation. However, what is performed today needs to change. If someone has proved to be low risk with therapy, has been remorseful, and has taken responsibility for the bad decision that led them to the conviction, they need to be given an opportunity for early

termination sooner, especially for those who had an offense that did not involve any contact with a minor, with no distribution or production.

Thank you,
Erik Diehl

Submitted on: January 29, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** DYKES, ROY, [redacted]
Date: Tuesday, February 4, 2025 9:00:29 AM

To: Honorable Carlton Reeves
Inmate Work Assignment: Capt. Yd./Mail

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I believe the laws should change pertaining to the reduction in sentences for the ones of us who were sentenced with a 10 to 1 ratio for methamphetamine mixtures' convictions. The reduction should not pertain to a mandatory minimum but rather the offense itself. For instance: "in my case I was sentenced for the meth that was ordered by the ATF agents and their CI's only. Nobody else purchased the drug from me. My total drug amount for meth was 527 grams. The last 308 grams were ordered by the agents on the same day after the arrest warrant was issued hours prior. That led to me being over 500 grams or more and led to a mandatory minimum sentence of ten years to life. My sentence was manipulated by the agents additional purchase of methamphetamine after they already had probable cause to arrest me. However, the drug purities were in the 60's, 70's, and 80's percent pure ranges. There were 5 that were 90% pure. I was sentenced under the 10 to 1 actual meth table instead of the meth mixture table."
I believe the reduction should involve the total sentence being reduced by 4 to 10 levels not up to 4 levels. A minor reduction will not solve the disparity caused by the harsh sentencing scheme most especially when we were given those enhancements although the government knew we did not have involvements with organized crime or cartels. Remember we were under surveillence by the Agents so they knew the truth but still sought harsh excessive sentences just because they could. Please pass the laws. Roy Dykes

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Diane Erdmann

Topics:

Supervised Release

Comments:

I am in favor of shortening supervised release times and making the decision retroactive. I freely admit I will benefit by this action. But I am not the only one. By shortening supervised release, you will save lives. I will share with you the story of one such life.

I am currently facing three years of supervised release, on top of 27 months of imprisonment and one year in an RRC (all for a government-manufactured crime). Our nation has a conviction rate any third-world country would be proud of; our courts have become a weapon.

Instead of continuing to demoralize good people by further dragging out this lengthy Tholian Web of a "Justice System," by placing us under the thumb of a "keeper" who can (often gleefully) have us returned to prison for minor infractions (once again losing everything we've worked hard to rebuild), you have the opportunity to make reintegration easier. You can let us move on with life.

I was imprisoned at FPC Pekin. We had a beautiful young mother there named Nya Mach, whose son had just celebrated his first birthday; a milestone she missed.

Nya had asthma, which the BOP refused to treat properly. On the evening of April 18, 2024, after being in distress all day and being sent away untreated by Medical, she stopped breathing. Out of the three officers who "responded" to her emergency, NOT ONE of them rendered first aid. NOT ONE. They watched her die in front of them.

The reason Nya was even there? She had been on supervised release and had a UA come back positive for alcohol. Not even an illegal substance. Alcohol.

For that minor slip-up, her PO sent her to her death at the hands of the BOP. Her son will now spend all of his birthdays without his mother.

Lives will be improved, and even saved, by the important act of lowering supervised release times and allowing retroactivity.

Respectfully submitted,

Diane Erdmann

Submitted on: February 8, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** FAJARDO-ALBARRAN, URIEL, [redacted]
Date: Tuesday, February 4, 2025 10:40:04 AM

To:
Inmate Work Assignment: UNICOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Commissioner:

I am one of many that was sentenced based on the "purity" of the methamphetamine I was caught with. As with many in my situation, the proposed 2025 amendment that would otherwise modify the language within 2D1 regarding methamphetamine and its "actual" and "mixture" designations would allow me a more realistic sentence. This is due to the overwhelming evidence and data that has been compiled by multiple agencies in the past 8 years regarding the purity of methamphetamine and the fact that it is not a reasonable proximity to determine one's culpability. I am commenting on this amendment and recommending that it be made retroactive to allow those that were sentenced based on the faulty logic of the "actual" and "mixture" purity element apply for relief. Thank you.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Rolanda Fowler-Jackson

Topics:

Drug Offenses

Comments:

I am writing to express my strong support for the proposed amendment to the Drug Quantity Table. Current sentencing guidelines place disproportionate weight on drug type and quantity rather than a defendant's individual culpability, leading to unjust and excessive sentences—particularly for first-time, non-violent offenders who played minor roles in drug-related offenses.

My loved one is currently serving a 120-month sentence for a non-violent drug offense. This was his first offense, and while he fully accepts responsibility for his actions, his sentence was determined primarily by the quantity and type of drug rather than his actual level of involvement. Unlike others in the case who had prior criminal histories and played significantly larger roles, he was given an extreme sentence despite his minor participation. Additionally, he cooperated with authorities and had strong character references from family and friends, yet none of this mitigated the weight of the sentencing guidelines.

This system unfairly punishes individuals based on the offense itself rather than assessing the person behind it. Sentences should reflect an individual's role, history, and culpability—not just drug weight. A more individualized approach to sentencing would create a fairer and more just system, ensuring that minor participants do not receive the same severe penalties as those who orchestrate or profit the most from drug-related activities.

Reforming the Drug Quantity Table is a necessary step toward a more just sentencing structure. The current system has devastated families like mine by imposing extreme sentences that serve little rehabilitative purpose. Reducing reliance on drug type and weight, and instead considering the defendant's role and history, would help correct these injustices and promote a fairer, more equitable justice system.

I urge the Commission to adopt this amendment to ensure that sentencing reflects the individual, not just the offense. Thank you for your time and consideration.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Casandrs Francisco

Topics:

Drug Offenses

Comments:

Pass the law on the purity of meth
If the meth is pure they should get more time
If the quality is half pure they should get minimum tome

Submitted on: February 15, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Jolynn Fussell

Topics:

Supervised Release

Drug Offenses

Comments:

There is a critical need to amend the guidelines concerning supervised release and drug offenses. Supervised release can assist offenders in reintegrating into society while still under the supervision of the justice system. The federal system needs more tailored conditions for supervised release, ensuring that individuals receive the necessary support to avoid recidivism. The current sentencing guidelines often impose harsh penalties for offenses involving these substances, but there is a growing consensus that a more nuanced approach is necessary.
A more consistent and humane approach to sentencing for fentanyl, fentanyl analogues, and other opioids should include:
- Differentiating between levels of involvement, such as distinguishing between low-level offenders and major traffickers.
- Considering the role of addiction and providing avenues for treatment and rehabilitation instead of solely punitive measures.
- Recognizing the public health aspect of the opioid crisis and integrating this perspective into sentencing decisions.
Such changes would not only align sentencing practices with contemporary understandings of addiction but also promote fairer outcomes for those involved in the criminal justice system. Incarceration should not solely be about punishment; it should also focus on rehabilitation and preparing inmates for successful reentry into society. The proposed amendments rightly emphasize the need for robust counseling and rehabilitation services for federal inmates. Providing these services has several benefits:
- Reducing recidivism rates by addressing the underlying issues that contribute to criminal behavior, such as substance abuse, mental health disorders, and lack of education or job skills.
- Enhancing the overall safety of communities as rehabilitated individuals are less likely to reoffend.
- Promoting human dignity by offering inmates the tools they need to transform their lives positively.

Effective rehabilitation programs can include substance abuse treatment, mental health counseling, educational opportunities, and vocational training, all tailored to the needs of the inmate population.

One of the most impactful aspects of sentencing reform is the potential for retroactive application of changes. Allowing currently incarcerated individuals to benefit from new, more lenient sentencing guidelines can have profound effects on the justice system.

The benefits of retroactivity include:

- Correcting past injustices where individuals were given unduly harsh sentences under older guidelines.
- Reducing the federal prison population, which can alleviate overcrowding and reduce costs associated with incarceration.
- Offering a second chance to individuals who have demonstrated good behavior and a commitment to rehabilitation during their time in prison.

Retroactivity also conveys a powerful message about the justice system's commitment to fairness and the potential for growth and change.

The proposed 2025 amendments to the federal sentencing guidelines represent a significant step towards a more equitable and humane justice system. By refining the guidelines for supervised release and drug offenses, particularly concerning fentanyl and its analogues, emphasizing the need for counseling and rehabilitation services, and allowing for the retroactive application of sentencing changes, these amendments can provide long-term benefits for individuals and society as a whole.

Submitted on: March 3, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** GARCIA, CHARLIE, [redacted]
Date: Monday, March 3, 2025 11:08:59 AM

To:
Inmate Work Assignment: EDUC_TUTOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To Whom It May Concern:

Supervised Release/Probation is part of the sentence, but at times to excessive for certain instances especially after the prison sentence has been completed. I am in favor of making the process of being on Supervised Release easier to being able to terminate it after a year of completing all requirements up to that time with clear conduct and no violations. If someone has been no issue to the probation officer or to the courts, there should be no reason why someone should stay on supervised release longer than needed. It would also free up the case loads for probation officers to concentrate on actual individuals that might need more through supervision or need assistance of a probation officer such as locating housing,mental health assistance, or work placement. Supervision should not be another sentence for the person coming out of prison or just on supervised release as some states, crimes have (for example: someone does 25 years of prison then are followed by lifetime probation) that person served their time for the crime, lifetime is too much for supervision. I am myself am an incarcerated person and will have 10 years of supervised release recommended by the judge. I hope my comment makes a difference at some point.

Thankyou for your time,
Respectfully,
Charlie Garcia

From: [redacted]
Subject: [External] ***Request to Staff*** GLAZE, DONALD, [redacted]
Date: Wednesday, January 15, 2025 5:18:43 PM

To: sentencing commission
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

i was hoping that the methamphetamines will go 1for1 with the actual cause the 10 to 1 is making sentences to long an not serving the right time for the actions of low level offenders who just happoen to come across high purity met an dont know it but end up with time like a king pin its unfair unwarranted sentences

From: [redacted]
Subject: [External] ***Request to Staff*** GONZALEZ-DE LA MORA, JUAN, [redacted]
Date: Thursday, January 16, 2025 9:05:20 AM

To: Law makers
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

greetings,
To whom it may concern, will the Commission be taking action on the "Four level guideline increase" that is added to a sentence due to the meth purity lab results, mostly added after plea agreement and arraignment ? the 10 to 1 disparity that is violating 3553(a) factors (sentence disparities between defendants.....) that is causing unwarranted and excessive sentences to a large amount of people like my self. your action on this matter will aide thousands of people with a release date that is fair and just. Thank You, God bless

From: [redacted]
Subject: [External] ***Request to Staff*** GUERRERO, ELIZABETH, [redacted]
Date: Friday, February 28, 2025 9:09:16 PM

To: any available
Inmate Work Assignment: unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

In regards to the drugs offense guidelines I feel it would benefit not only drug offenders but the overpopulated prison communities to lower the sentencing minimums and re-address the offenders role in the distribution of drugs. This could potentialy lower the time offenders serve , which, in turn effects their recidivism rate. The longer an inmate spends in the system, the harder it is for them to re-integrate back into society. If we charge them with less severity, the community as well does not judge them as harshly , which leads the community to provide greater job opportunities to drug offenders whose probable cause for selling drugs in the first place was likely a lack of these opportunities. Please consider the lowering of sentencing guidelines for drug offenders and help break the cycle that keeps them returning to the prison system

From: [redacted]
Subject: [External] ***Request to Staff*** GULLEDGE, BRADLEY, [redacted]
Date: Tuesday, February 4, 2025 11:15:39 AM

To: USSC
Inmate Work Assignment: G-orderly/Psy companion

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

For years there has been empirical data showing that the way meth is made it is all at a "pure" level making the 2 tier standard a huge sentencing disparity. That is in direct violation of the 3355 directives. I believe that the law should be changed and that it should be retroactive all the way back to the first piece of data showing the median levels of meth being above the 85% level. Thank you for your time with this matter.

From: [redacted]
Subject: [External] ***Request to Staff*** GUZMAN, ENUDIO, [redacted]
Date: Saturday, March 1, 2025 2:05:33 AM

To: Sentencing Commission
Inmate Work Assignment: Educ-Tudor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To Whom It May Concern,

As a Federal Inmate and also first time offender. I would like to offer my opinion on the Supervise Release. I think that one year of supervise release is fair, anything above that would be absurd. We serve our sentence and take programing to better ourselves so when we get out not to fall back to old habits. From my part i can say that I've learned a great lesson that will keep me form returning to prison and not falling back to a criminal mindset. All I want is to work, be with family, enjoy a healthy lifestyle. Having a supervise release over one year is an absurd law, that will hinder inmates lifestyle and peace of mind. Please take my opinion in consideration. I thank you in advance for even thinking to help inmates that do want a change of lifestyle and not be in the same old behavior's.

Thank You,

Enudio Fanian Guzman Jr.
[redacted]
Unit- Coral

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Joanne Haglof

Topics:

Supervised Release

Comments:

I support the proposed reforms to the federal supervision release system. The system is overburdened and inefficient with over 110,000 persons under supervision at any time.

Low risk individuals should be released from supervision once they have secured a job, housing, and have completed any mandated therapy program. Lengthy or lifetime supervision is a waste of taxpayer money, waste of time of the probation officers, and a continuous barrier to successful reintegration and rehabilitation.

Please do not carve out relief from supervision for those convicted of sex offenses. All sex offenses are not the same, nor do they all pose the same potential risk to society. Low level offenses such as accessing illegal pornography should not be subject to lifetime or long term supervision. These individuals are required to complete a specific therapy program. They have served their time, worked hard to understand the source of their misconduct (often early exposure to pornography or their own childhood abuse) and should be released from supervision upon completion of the therapy program and obtaining employment and housing. Supervising them for many years beyond that is wasteful and counterproductive to successful reintegration.

Dr. Karl Hanson has consolidated over 20 years of studies, and the recidivism rate for low risk sexual offenders is miniscule after 5 years in the community of commiting no further sexual offenses. Supervision should cease at that point.

Lastly, these rules track the bipartisan Safer Supervision Act, proposed in 2023 by Senators Coon and Cornyn and co-sponsored by many additional Senators and Members of Congress. HR 5005, 2023. These rules are not politically controversial and should be implemented immediately.

Thank you for the opportunity to comment.

From: [redacted]
Subject: [External] ***Request to Staff*** HAMILTON, SEZAR, [redacted]
Date: Thursday, January 16, 2025 7:04:15 AM

To:
Inmate Work Assignment: trust fund

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

i got sentence under 841 for a small amount of prescriptions sell buys,they gave me 174 months which i believe is compeletly harsh server sentence.I truly believe that the penality thats been giving out to me and others are way to over justice.Ive witness people with harsh sentense get way less time.However,they record probaby wasnt as bad as mine,but the fact is they crimes are worst than mine.I pray that in the near future that this will change...

From: [redacted]
Subject: [External] ***Request to Staff*** HANSEN, SAM, [redacted]
Date: Wednesday, February 5, 2025 8:23:23 PM

To:
Inmate Work Assignment: Compound Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hi I am writing this in response to the Sentencing Commissions proposed amendments from January 25, 2025 with the comment period ending March 3, 2025.

I am in favor of option 1, 2, or 3 which would top out the drug quanity table at Level 34, 32, or 30, preferably 30. However, I would like to be very adament about one thing. I believe there still needs to be some sort of sliding scale that would provide relief to those at lower levels. Topping the table out at level 34 for example, would only provide relief to those above level 34. And similarly, topping the level out at level 32 would only provide relief to those above 32. At level 32 for example, an offender would still be looking at between 121 and 260 months depending on their criminal history. And when you add the fact that many offenders get one or more enhancements, they would still be getting sentence in the mid to upper 30's on the sentencing table which results in many sentences of 20 years plus.

For example, my base offense level is 32(and my total offense level was 38 after 6 points in enhancements) for a non violent marijuana crime in which my converted drug weight was 5,500kg. If you topped the drug quantity table at either level 34 or 32 I would recieve no relief. Furthermore, people with a significantly larger quantity of drugs would be sentenced at the same level as me. So what I am saying is that I think would only be fair if those at lower levels recieve something like a 2 point reduction.

Thank you for letting me share my opinion.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Angelina Italia

Topics:

Drug Offenses

Comments:

Support for the Proposed Amendments on Drug Offenses and Incarcerated Persons' Sentencing

I am writing to express my strong support for the proposed amendments to the sentencing guidelines for drug offenses, particularly the provision aimed at addressing the sentencing of incarcerated individuals. I believe these amendments represent a meaningful step toward a more fair and rehabilitative criminal justice system.

The changes recognize the need for a more balanced approach, one that considers the individual circumstances of each case, the potential for rehabilitation, and the long-term impact of harsh sentencing practices. By ensuring that incarcerated individuals are given fairer sentencing opportunities and the chance to reintegrate into society, these amendments align with the principles of justice and human dignity.

I am particularly encouraged by the focus on reducing overly punitive sentences for non-violent drug offenses. This amendment offers an opportunity to create a more equitable system that provides individuals with a second chance to contribute positively to society. The emphasis on rehabilitation, rather than simply punishment, is a crucial step in fostering better outcomes for both incarcerated persons and our communities at large.

I commend the U.S. Sentencing Commission for its thoughtful and forward-looking approach to these proposed amendments and strongly urge their adoption.

Thank you for considering my comment.

Sincerely,
Angelina Italia

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Sara Jones

Topics:

Drug Offenses

Comments:

Hi my name is Sara Jones
and my cousin is a first time offender currently serving a 192 month sentence for a non violent marijuana offense. I would like to comment on the Sentencing Commission's recently proposed amendment: Drug Offenses. Part A Supart 1 gives 3 options for setting the highest base offense level in the Drug Quantity Table at a lower base offense level. I am in favor of Option 3, which would set the highest base offense level at 30, if the 3 options previously mentioned are the only options put to a vote.
However, I believe the Commission should also consider reducing all base offense levels in the Drug Quantity Table. Many offenders with a base offense level of 30 or lower also face excessive sentences, especially those responsible for non violent offenses. I believe it is only logical that if those responsible for the largest amounts of drugs deserve a reduction than those responsible for smaller amounts of drugs deserve a reduction as well. In my opinion the amount of time non violent drug offenders in our country are given for federal offenses in general is ridiculous. Please make a reduction to all base offense levels in the Drug Quantity Table

Submitted on: February 19, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Eastin Kendall

Topics:

Supervised Release

Drug Offenses

Comments:

1. All meth needs to be counted as a mixture at 1:1 ratio . NOT 10:1 ratio.
2. The drug quantity table needs to end at level 30.
3. We need to do away with mandatory minimums on drug charges. We have too many people in prison for small drug charges getting double digits and mandatory minimums of over 15 years.
4. We need to use the current Meth mixture calculations or lower them. If we used the Meth (actual) calculations it would be too severe of a punishment.

Submitted on: February 24, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** KING, WAYNE, [redacted]
Date: Thursday, February 27, 2025 3:09:15 PM

To: Commission Head
Inmate Work Assignment: Laundry

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I wanted to inform you that the "First Step Act" is not being implemented correctly by the Bureau of Prisons. The time credits are only being counted up until 60% of your sentence. Congress said that it needed to be counted to 85% of your full sentence. It can also be counted when you move into Supervised Release. Inmates that are programing are not being given any incentives as the law was written. Programing is a joke when all you have to do is sign a roster that you attended the class. Also FSA Time Credits are supposed to start at the beginning of your sentence, not when you actually get to a BOP location. It's supposed to be counted as long as you are in US Marshalls Custody, which could be a county jail or a contract prison. Several inmates are winning in court because the Supreme Court ruled in the Chevron case that a government agency can't make up their own interpretation of a law and must defer to what Congress intended.

Also, the BOP is not looking at any Administrative Remedy Forms. I sent one in 3 months ago and have not gotten a response. This is our only recourse before taking it to a Fereral Court. This is done on purpose where it will slow the whole court system down and then be thrown out because we didn't follow thru with BP-8 thru BP-11 Forms.

No one that I know, including myself, is getting any days knocked off their sentence with the Second Chance Act. It might as well not be a law, as they are thumbing their nose at Congress. People are staying in prison that should have been released a long time ago.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Jason Ledger

Topics:

Drug Offenses

Comments:

I think it makes sense on the methamphetamine purity section to go with option 1 for rectifying the 10:1 disparity. The overall goal is to decrease unnecessary incarceration not increase it so option 2 therefore is working against that point. I would also like to suggest (for the section involving the recalibration of the drug quantity chart) option 3 setting the highest base offense level at 30 for similar reasons. Again the goal is to reduce the cost of unnecessary incarceration especially in the case of nonviolent drug offenders. Thank you

Submitted on: January 25, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Lindsey London, Ant Juan Doss

Topics:

Supervised Release

Drug Offenses

Comments:

People facing fentanyl charges should be treated with a balanced approach that considers both the severity of the issue and the potential for rehabilitation. Here are some positive reasons why harsh punishments may not be the best solution:

Addiction as a Health Issue: Many individuals charged with fentanyl-related offenses may be struggling with addiction, which is a medical condition rather than a criminal behavior. Focusing on treatment and rehabilitation, rather than severe punishment, can help address the root causes of addiction and provide individuals with the support they need to recover.
Opportunity for Redemption: People who are involved in fentanyl-related activities may be in a cycle of desperation or bad circumstances. Providing opportunities for education, job training, and therapy allows individuals to reintegrate into society in a meaningful way, reducing recidivism and offering hope for change.
Overburdened Justice System: The criminal justice system can be overwhelmed by the sheer volume of drug-related offenses, and prioritizing harsh punishments for every case can divert resources away from more serious and violent crimes. Focusing on rehabilitation allows for more appropriate use of law enforcement resources.
Prevention and Education: Punishing individuals harshly may not deter others from engaging in similar behaviors. Instead, investing in prevention programs, education, and public health initiatives can more effectively curb the spread of fentanyl abuse.
Disproportionate Impact on Marginalized Communities: Harsh sentences for fentanyl offenses can disproportionately affect marginalized communities who may be more vulnerable to addiction and trafficking. Fair and balanced approaches can help break cycles of inequality and offer a more just response.
Restorative Justice: Focusing on restorative justice practices that encourage offenders to take responsibility for their actions while helping to repair harm within the community can be a more effective and compassionate approach. It encourages accountability without resorting to punitive

measures that may do more harm than good.
Humanizing the Issue: Fentanyl abuse is often tied to broader societal issues, including poverty, mental health struggles, and trauma. A more humane approach, with an emphasis on understanding these underlying factors, may lead to better outcomes for both individuals and society at large.
These arguments support a more compassionate and rehabilitative approach to fentanyl-related offenses, with the goal of reducing recidivism and improving public health outcomes.

Submitted on: February 17, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Stephanie London, Ant-Juan Doss

Topics:

Drug Offenses

Comments:

I fully support the proposed 2025 amendments on supervised release and drug offenses, as they reflect a much-needed shift toward fairness and rehabilitation in our justice system. People with drug cases, especially those involving fentanyl, should not receive harsh sentences that fail to address the root causes of substance use. Excessive punishment does not solve the crisis—it only perpetuates cycles of incarceration. This amendment takes a smarter approach by prioritizing treatment, rehabilitation, and successful reintegration. By focusing on support rather than excessive supervision and punishment, we can reduce recidivism and create a justice system that truly helps individuals rebuild their lives.

Submitted on: February 17, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** LORENZO, JOSE, [redacted]
Date: Friday, February 28, 2025 10:53:04 AM

To: U.S. Sentencing Commission
Inmate Work Assignment: EDUC-ORD

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To whom it may concern,

I am writing with regards to the open commentary, that concludes on March 3rd, about post-incarceration probation periods. I am currently at F.C.I. Miami serving a 7-year sentence with a 20-year probation period. Although I recognize the need for a probation period to ensure the safety of the public and to "prove" that I do not intend to come back to prison, I believe that the amount of time I, and many others, received to prove this is excessive. The purpose of incarceration is to rehabilitate people that have made poor choices in life in order to steer them in the right direction. I am currently learning a world of lessons through my being incarcerated and I will continue to do so. However, I believe that such a long time on the tail end of my probation period would be counterproductive towards that end. It feels more like perpetual punishment and a means to ensure recidivism of many individuals over technical violations that in some cases are out of our control (i.e. arriving late to a location due to traffic, etc.) With all due respect, I humbly ask that the amount of probation time given to present and future incarcerated individuals be reduced to reflect a fairer and more realistic period of time. Most first time offenders do not want to waste their precious time coming back to prison. We only have one life to live, and a hard lesson learned once should suffice. Thank you for your time and consideration.

Cordially,
Jose Lorenzo

Public Comment - Issue for Comment on Fentanyl, Fentanyl Analogues, and Other Opioids

Submitter:

Laura Lynch

Topics:

Fentanyl, Fentanyl Analogues, and Other Opioids

Comments:

I have a loved one that back in 2007 was sentenced to a very long sentence due to being charged with actual ice which at that time was 57% pure. For the past five years studies show now the purity of meth on the street is over 90%. There needs to be a change. Too many men /women are serving extremely long sentences due to the disparity. Why are some serving over 15 years for 57% when now that percentage is way higher. This is turning into a situation like the crack and cocaine disparity. The actual needs to be done away with. It is only putting more people in prison in already full prisons. There is no end in sight. People are being charged with crimes that drug cartel leaders should be charged with. Not low level street dealers.

Submitted on: February 1, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Laura Lynch

Topics:

Drug Offenses

Comments:

The drug table is outdated and unfair. To many people are getting extremely long sentences that should be more for drug lords than just someone who fell into the wrong lifestyle. These long sentences created by the drug table just put more and more people in already packed prisons. Long sentences are not the answer to deter crime.

Submitted on: February 1, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Mariah Martinez

Topics:

Drug Offenses

Comments:

To Whom It May Concern,
I am writing to strongly support the proposed amendment to address the methamphetamine purity disparity in sentencing, and I urge that this amendment be made retroactive to ensure fairness for individuals who have already been sentenced under the current, unjust guidelines. As it stands, the current sentencing system disproportionately penalizes individuals based on the purity of
methamphetamine involved in their cases, often resulting in excessively harsh sentences for lower-level offenders. This approach does not reflect the true severity of the offense, nor does it take into account the underlying issues of addiction and the need for rehabilitation.

This proposed amendment is similar to the critical reform made with the Fair Sentencing Act, which addressed the disparity between sentences for crack and powder cocaine. The reform for cocaine was a necessary step to eliminate racial and socio-economic inequities in the criminal justice system.

Similarly, the methamphetamine purity disparity needs to be corrected to ensure that sentences are based on behavior, not an arbitrary purity threshold.
However, it is equally important that this amendment applies retroactively to individuals who have already been sentenced under the current rules.
Many of those currently serving long sentences for lower-purity methamphetamine offenses have already served a disproportionate amount of time based on the purity disparity, and they deserve an opportunity for a fairer review of their cases. Making this change retroactive would bring justice not only for future offenders but also for those who have already paid the price under an unfair system.

Furthermore, addressing the purity disparity in a retroactive manner would demonstrate a commitment to restoring fairness and equity within the criminal justice system, particularly for

individuals who have struggled with

addiction. Instead of continuing to penalize people for the purity of the substance they possess, we should focus on rehabilitation and public health solutions. This amendment, if made retroactive, would reflect a compassionate, just approach to drug-related offenses.
I respectfully urge you to pass this amendment, and to make it retroactive, to ensure that all individuals who have been sentenced unfairly are given the opportunity to have their cases revisited and treated equitably, just as was done with the cocaine disparity reform. Thank you for your attention to this important issue.
Sincerely,
Mariah Martinez
Amarillo, Texas

Submitted on: February 6, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** MCCRONE, DAVID, [redacted]
Date: Tuesday, January 14, 2025 12:05:02 PM

To:
Inmate Work Assignment: adminord

[redacted]

[redacted]

Inmate Message Below

the sentencing does not fit crimes espeacially in drug cases the guide lines are to harsh

From: [redacted]
Subject: [External] ***Request to Staff*** MCDONALD, RONNIE, [redacted]
Date: Tuesday, January 14, 2025 12:49:05 PM

To: Whom it may concern
Inmate Work Assignment: CMS

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I want to make two statements about the proposed amendments for the sentencing guidelines. The first one is, I did not see anything on gun enhancements. In my situation, I was never even charged with a gun, but I have a two-point gun enhancement. I am however, in here on a conspiracy. Both of my co-defendants were charged with the gun, but it got dismissed. They were in Texas at the time of the incident. I was in New Mexico, and did not know anything about a gun involved. I fought this when I got my PSI, and during sentencing. I got shut down immediately. In turn, I have 58 months due to something I didn't have nothing to do with. Not fair at all. This should be against the law to overly charge someone to lengthen their sentence. The second one is the "Actual" methamphetamine. Last year June 13th, 2024, the U.S.S.C. put out a 64 page report going into deep details on how this issue needs to be changed. There is a huge disparity in sentence across the nation concerning this situation. The purity is pretty equal across the board, yet people are being hit with "Actual" just to receive a longer sentence. Which is not only longer, but 10 times longer than someone just charged with "methamphetamine". These two issues should be addressed sooner than later, because I am a victim of these two disparities mentioned. I , however take full responsibilities of my actions, but I do want to be sentenced correctly. Thank you for your time and consideration.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Jakeema Mcknight

Topics:

Supervised Release

Drug Offenses

Comments:

The federal prison system is costing tax payers large sums of money and resources. Inmates with low to minimum risk for reoffending and whom have non-violent offenses can be used to lighten this burden by being released to home confinement (supervised release). Non-violent drug offenders are being unfairly sentenced with the use of mandatory minimum and other statues such as the purity of methamphetamine which was designed to target cartels not street level dealers. This has proven to be ineffective because almost all meth for the past 20 years has been pure. Sex offenders and murders are receiving less time than non-violent drug offenders. Make it make sense.

Submitted on: February 21, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Brandon Menifee

Topics:

Drug Offenses

Comments:

I'm sending my comment regarding the sentencing guidelines and disparities on the methamphetamine. I have a brother who was given way too much time all because of the purity of the methamphetamine. He was no leader, nor manufacturer of the methamphetamine. But due to the purity he was enhanced and given more time, only because of the 5th district he was sentenced in. Hand he gotten sentenced in another district he would have received a lesser sentence. I think making all methamphetamine equal as in mixture is the right way to go, as well as making it retro active, so the people who got over sentenced all because of purity and not quantity will have an equal opportunity as the defendants who where charged with the mixture verses the purity...

Submitted on: February 24, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Maria Mercado

Topics:

Supervised Release

Comments:

Commentary on Proposed Amendments to Supervised Release Guidelines

To: The United States Sentencing Commission (USSC)

I am writing as a parent of an individual who has been convicted of a sex offense, and I respectfully urge the United States Sentencing Commission to carefully consider the proposed amendments to the supervised release guidelines. These amendments present a crucial opportunity to address longstanding inequities in how sex offenders are treated in comparison to other offenders. Specifically, I want to draw attention to the mandatory five-year minimum term of supervised release for sex offenders, a provision that is more punitive and restrictive than for all other federal crimes, and the ways in which the proposed changes could right these wrongs. This proposed amendment can correct the broad application of this mandatory minimum.

Disparity in Supervised Release for Sex Offenders
The current framework of a mandatory minimum of five years of supervised release for sex offenders starkly contrasts with the maximum of five years for other federal crimes, such as drug offenses, white-collar crimes, and even violent offenses—except in cases of terrorism. This disproportionate punishment is not only harmful but also unjust, particularly when considering that evidence overwhelmingly suggests that the vast majority of sex offenders will not recidivate.

As noted by experts, recidivism rates for sex offenders are lower than commonly believed, and when it does occur, it is more often due to factors such as lack of access to rehabilitation, or inadequate support systems post-release, not because sex offenders are inherently more dangerous than other criminals. This view is supported by numerous studies, including one by the Center for Effective Public Policy (CEPP), which debunks common myths about sex offenders and emphasizes the potential for rehabilitation when proper treatment is provided. Contrary to popular misconception, the vast majority of sex offenders are not repeat offenders,

and many have shown significant progress when allowed the opportunity for proper therapy and support (CEPP, 2021).

Addressing the Need for Reform

As a parent, it is painful to watch my child face the consequences of a mistake that happened years ago, knowing they are now subjected to harsher and longer terms of supervised release than those convicted of far more violent crimes. The proposed changes to the supervised release guidelines can correct this error, providing greater flexibility in determining the length and conditions of supervised release. This would allow judges to better tailor the terms of release to the specific needs of the offender, as well as their progress in rehabilitation.

Moreover, the proposed amendments could allow for early termination of supervised release based on an individual's demonstrated success and rehabilitation. If an offender has shown that they pose no risk to the community, it is unjust to force them to endure the maximum term simply because they are labeled as a sex offender. Instead of a one-size-fits-all approach, a more individualized assessment should guide decisions about supervised release, considering factors like the offender's behavior, treatment progress, and risk of recidivism.

This change would also bring the system in line with the recommendations of respected figures in the legal community. In the case of United States v. Kebodeaux, Justice Scalia's dissent argued against mandatory minimum sentences for sex offenders, noting that such inflexible policies fail to account for the individual circumstances and rehabilitation potential of each offender. By adopting the proposed amendments, the USSC would be taking a step toward a more just and rehabilitative system, one that acknowledges the humanity of offenders and their potential for reintegration into society.

The Negative Impact of Unjust Supervision

The current, rigid system of mandatory supervised release for sex offenders often results in excessive punitive measures that harm the offender's ability to reintegrate into society. According to Prison Policy Initiative, the collateral consequences of a sex offense conviction are severe and long-lasting, including societal stigma, housing and employment barriers, and reduced access to rehabilitative resources. These factors often create an environment in which offenders are set up to fail, exacerbating the difficulties they face in rejoining society and raising the likelihood of reoffending.

In fact, the system often operates counterproductively: rather than helping sex offenders reintegrate successfully, it increases their risk of failure by subjecting them to long, rigid terms of supervision without taking into account individual progress or the unique circumstances of each case.

Conclusion: A Call for Fairness and Flexibility

I urge the USSC to consider the human cost of continuing this outdated, overly punitive approach to sex offender sentencing and supervised release. The mandatory five-year minimum

term is arbitrary and excessive, particularly when compared to sentences for other crimes. The proposed amendments present a meaningful opportunity to correct these errors, allowing for more individualized assessments, tailored terms of supervision, and the potential for early termination for those who have shown genuine rehabilitation.

These changes would not only better serve the interests of justice but would also provide a fair shot at reintegration for individuals, like my child, who are committed to turning their lives around. We must trust in the ability of our judicial system to make decisions that are rooted in fairness, rehabilitation, and the hope of second chances.

Thank you for your consideration.

Sincerely,
Maria Elena Mercado

Submitted on: March 2, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Kerri Mizell

Topics:

Supervised Release

Drug Offenses

Comments:

In reference to the changes proposed for supervised release, creating a system to include individual needs assessments should have been the norm for years. The blanket system of one size fits all has never worked and has needed to be revamped since the beginning. Individuals should be treated as just that, individuals. The inclusion of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance. There is enough guidance included on the individualized assessment guidelines to determine need of supervision and length of supervision. It also leaves judges the opportunity to terminate supervision within a year, if an individual follows protocol or extend it if an individual breaks protocol. Requiring an individual to get their GED as part of supervision is a good example of holding them accountable. The current guidance is sufficient to retain. Individuals who are to be deported shouldn't be required to have supervised release in the US. They will no longer be a part of this country, so that seems an unnecessary expense and waste of time. The changes to supervised release should have no consequences in relation to The First Step Act. Supervision would begin on release, therefore, FSA credits should not be effected. Before revoking supervised release, individuals should be allowed to complete programming (once) to remain on supervised release. The purpose of supervised release is rehabilitation, not punishment. Violations of supervised release should receive an informal hearing first, unless a new and major crime was committed. Consider treating it like a parole hearing and no court appointed counsel. There should be enough guidance offered for Supervised release and/or the termination of it to ensure each court doesn't have room to create an imbalance of power. Individualized assessments should be used in all areas having to do with Supervised Release. The revocation tables at 7B1.4 and 7C1.4 should allow a defendant to benefit retroactively since supervised release is supposed to be rehabilitative and not for punishment. They should not all for a defendant to benefit retroactively as pertaining to probation, as probation is supposed to be used as punishment. In reference to the drug offenses, the Commission's setting of 34 as the highest base offense level is sufficient. The upward departure covers whether or not anything needs to surpass that. If the Commission were

to promulgate Option 1, 2, or 3 from subpart 1, they should amend the chemical quantity tables at 2D1.11 to reflect those changes as well. If the Commission amends the Drug Quantity Table relating to methamphetamines, that should not affect the Commission's consideration of reducing the highest base offense level. These are two separate issues. Not all "general drug" charges have to do with meth, and the Drug Quantity Table's are still in place to determine the base offense level for the amount of meth being reported. In reference to the proposed amendment to "Ice," all reference to "Ice" should be deleted. Adding the terminology in 2D1.1 [19] to say, "If the offense involved methamphetamine in a non-smokable, non-crystalline form, decrease by [2] levels" makes it unnecessary to have any other references to "Ice" specifically. This remains consistent with the 1990 congressional directive. In regards to the other changes to methamphetamines, the Commission should adopt Option 2 of the proposed changes and focus on methamphetamine (Actual). There is no point in having both the mixture and actual terminologies. There should be no difference between the amount of methamphetamine in a mixture as opposed to actual. It is not an appropriate outcome to be charged with less of the drug in a mixture and more as actual. The Commission should revise 2D1.1 to equal the amount of Actual to be the amount included in mixtures. For example, 5 grams of actual will be reduced by 1 gram to accommodate for any mixture of substances or miscalculations. Option 2 is the option the Commission should put in place. The amount of Actual methamphetamine is what an individual should be charged with, not the weight of a mixture made up of other substances. Another thing the Commission should consider is making any changes to these drug amendments retroactive. There are far too many people wasting their lives and not having the opportunity to rehabilitate due to outdated drug laws and unnecessarily long prison sentences.
Thank you for your time, your efforts, and your consideration.

Submitted on: March 2, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Katrina Molden

Topics:

Drug Offenses

Comments:

I feel the need to change methamphetamine purity passes based on the chances in drug purity over the past 10-15 yrs. Even street level offenders now tend to be in possession of more purified product and the law was implemented to distinguish your low level dealer from upper level kingpins and that isn't an accurate differentiation at the present time. Lie level drug offenders are spending more time in prison than murderers and sex offenders and while I understand those with intent to distribute must be punished we as a society must also recognize buyers have a choice victims of abuse and murder don't yet the punishment is often more harsh. Punishment should fit the crime and drug nonviolent drug offenders often receive more time than any other offender.

Submitted on: February 8, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Todd Moore

Topics:

Drug Offenses

Comments:

To Whom It May Concern,

I am writing to strongly support the proposed amendment to address the methamphetamine purity disparity in sentencing, and I urge that this amendment be made retroactive to ensure fairness for individuals who have already been sentenced under the current, unjust guidelines. As it stands, the current sentencing system disproportionately penalizes individuals based on the purity of methamphetamine involved in their cases, often resulting in excessively harsh sentences for lower-level offenders. This approach does not reflect the true severity of the offense, nor does it take into account the underlying issues of addiction and the need for rehabilitation.

This proposed amendment is similar to the critical reform made with the Fair Sentencing Act, which addressed the disparity between sentences for crack and powder cocaine. The reform for cocaine was a necessary step to eliminate racial and socio-economic inequities in the criminal justice system. Similarly, the methamphetamine purity disparity needs to be corrected to ensure that sentences are based on behavior, not an arbitrary purity threshold.

However, it is equally important that this amendment applies retroactively to individuals who have already been sentenced under the current rules. Many of those currently serving long sentences for lower-purity methamphetamine offenses have already served a disproportionate amount of time based on the purity disparity, and they deserve an opportunity for a fairer review of their cases. Making this change retroactive would bring justice not only for future offenders but also for those who have already paid the price under an unfair system.

Furthermore, addressing the purity disparity in a retroactive manner would demonstrate a commitment to restoring fairness and equity within the criminal justice system, particularly for individuals who have struggled with addiction. Instead of continuing to penalize people for the

purity of the substance they possess, we should focus on rehabilitation and public health solutions. This amendment, if made retroactive, would reflect a compassionate, just approach to drug-related offenses.

I respectfully urge you to pass this amendment, and to make it retroactive, to ensure that all individuals who have been sentenced unfairly are given the opportunity to have their cases revisited and treated equitably, just as was done with the cocaine disparity reform. Thank you for your attention to this important issue.

Sincerely,
Todd moore
[amarillo tx

Submitted on: February 5, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Lekeisha Morale Feb. 06, 2025

Topics:

Drug Offenses

Comments:

I am writing to respectfully urge you to consider introducing and supporting changes for amendment to §2D1.1 to set a new point levels and add a new trafficking functions reduction; "Ice" and the purity distinction between methamphetamine "actual" and methamphetamine mixture; I believe so many inmates are sentenced to prison terms for entirely too long for nonviolent offenses. I'm asking that you please take my comment into consideration. And pass the proposal for methamphetamine purity levels "retroactively"
I strongly believe that by passing this amendment, we can ensure that positive outcome you desire and uphold the core values of our Country. Please consider taking action to introduce this amendment and actively advocate for its passage in Congress.

Submitted on: February 6, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Lakey Moses

Topics:

Drug Offenses

Comments:

Methephimine has been the #1 on drug chart,and when meth was moved up to the top of the drug chart it was because of the flooding of it at our boarders into our country..Now it's a new day and a new drug is flooding our boarders and killing our citizens and this drug is not number 1 on our drug chart or even number 2 and we both know I'm talking bout the enemy of the states (fentanyl)! Methephimine was looking at as if the purity was high the higher your position in the organization you were ..it has been proven by the DEA that 96% of all meth bust after lab test results shows that the old way of using purity to pin point the position played is out of date as is methephimine being (#1) on the drug chart when fentanyl is the biggest enemy of the states!!!!!! Make it #1

Submitted on: February 7, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** NEAL, MERRELL, [redacted]
Date: Monday, February 10, 2025 8:09:02 AM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: U.S Sentencing Commission
Inmate Work Assignment: UNICOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The plan to make away for inmates to get off supervised release is a very good idea . Thank you !

From: [redacted]
Subject: [External] ***Request to Staff*** NICKENS, BRANDI, [redacted]
Date: Thursday, February 6, 2025 5:08:56 PM

To:
Inmate Work Assignment: fs-am

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The drug crimes should be "capped off" at 30 because the drug crimes are severely punished. The severe punishment on drug crimes was designed to punish the "big fish" in drug crimes but unfortunately the "small fish" are the ones suffering with the penalties not the "big fish" per say.
Most people with drug crimes need rehabilitation/counseling of some sort not to spend 5+ years in a federl prison that is sinking, has no programming, no rehabilitating, no counseling, wasting funds in the tune of $40,000+ a year to house in prison . There should be better options and incarceration alternatives for people. There should also be help for people who commit drug crimes to save their lives or the lives of their loved ones from abusers and such. There is no protection or support for us out there.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

James Norris Feb. 04, 2025

Topics:

Supervised Release

Comments:

Sadly supervised release has become a standardized extension of sentencing. Deliberately prolonging sentences and punitiveness. Supervised release is being used to hold people back from achieving their optimum potential and that is counter productive to society and certainly not rehabilitative. Sex offenses are being sentenced for periods that exceed the legal required period of registration for the offense which makes absolutely no sense i.e. a Tier 1 required to register for 15 years is sentenced to 20 years supervised release and refused early termination. Many are sentenced to life time supervision with no mitigating circumstances, prior criminal history, or medical diagnosis to support such excessive sentencing. It is purely political. Decades of empirical evidence criticize existing policy towards sex offender sentencing and the compounding excessive additional restrictions included with supervised release but it is dismissed, disregarded,, or outright denied in place of personal beliefs of bureaucrats and politicians. Technical violations are being conflated with recidivism to justify revocations and restarting of peoples time which is punitive and adds to mass incarceration needlessly unless in the private prison for profit industry. This cottage industry seems to parasitically feed off society through overcriminalization and false claims of providing public safety to justify existence. Electronic monitoring, polygraph testing, alleged treatment services (private pseudo-probation services) supporting the USPO have transformed society into a dystopia.

Submitted on: February 4, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

James Norris Feb. 06, 2025

Topics:

Supervised Release

Comments:

Supervised Release has become a tool of repressive, suppressive, and oppressive means by elites to enslave and dehumanize. It is being weaponized to hold those condemned in a lower caste status in conjunction with other punitive administrative tools such as sex offender registration. Sentencing persons to a longer period of supervised release than required to register is deliberate and malicious. It is being done with the intent to prohibit petition for removal by those who would be deemed eligible under the law with the exception that they are on supervised release.

Submitted on: February 6, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Trevin Nunnally

Topics:

Supervised Release

Drug Offenses

Comments:

Greetings. My name is Trevin Nunnally,Sr. & I am submitting my comments on the behalf of myself, FAMM & for all federal inmates that are suffering from being over sentenced & facing the burdens of being held over the time period on supervised release. I got released from federal prison for a drug offense on March 2, 2022, in which I joined FAMM as an advocate to help all federal inmates that is facing the burden of doing excessive time in prison for drug offenses & doing excessive time while on supervised release. I would like for the U.S. Sentencing Commission to change the way that inmates are sentenced for drug offenses, such as marijuana, cocaine & crack cocaine because it is unjust & inhumane prohibited by the U.S. Constitution's 4th & 5th Amendments, to allow inmates to do excessive time in federal prison for drug quantities that are relatively equal to each other (such as cocaine & crack cocaine) & a drug that is legalized in 80% of the U.S. & that was decriminalized & changed to a Schedule I'll drug (such as marijuana). Also, I would like for the Sentencing Commission to change the way that getting off supervised release in a year of good conduct is governed by changing the statute to mandate it by law rather than just merely stating it in the U.S. Sentencing Guidelines. I pray □□ that this is done to promote justice for all similarly situated inmates & to uphold justice mandated by law & the Constitution!

Submitted on: January 28, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Audrey Ortiz

Topics:

Supervised Release

Comments:

I agree with proposed amendment and request it be adopted. The Courts should have more direction in imposing supervision as well as the length and terms. Also, if the Court is given more discretion with the termination of supervised release within a year that would save funds from providing supervision. There likely would be many that could be removed at an earlier date.
Thank you.

Submitted on: February 27, 2025

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Connie Pitts

Topics:

Drug Offenses

Comments:

My name is Connie Pitts. My son, Sam, is a first-time offender, currently serving a 16-year sentence for a nonviolent marijuana crime. I would like to comment on the Sentencing Commission's most recent proposed amendment: Drug Offenses. I want to specifically comment on Part A Subpart 1, in which 3 options are set forth for amending Subsection 2D1.1, to set the highest base offense level in the Drug Quantity Table at a lower base offense level.

I am in favor of Option 3, which would set the highest base offense level at 30; if the 3 options stated are the only options put to a vote. I strongly feel, the highest base offense levels are severely harsh and carry sentencing guideline ranges that are significantly greater than necessary to provide just punishment. I also believe, it to be just as important, for the Commission to consider reducing all base offense levels in the Drug Quantity Table. The reduction should apply to all drug types and at all offense levels, especially for nonviolent offenders.

My grandson was in first grade when my son was sentenced to 192 months/16 years, for a nonviolent marijuana crime. Should my son be held accountable and punished for breaking the law? Absolutely. My son will be in prison and miss his son's entire childhood. My grandson will live out his childhood and graduate from High School without his father being a part of any of it. Is that just punishment? Absolutely Not. How will society benefit from my son's 16 years of incarceration? There was no violence and no named victims for his crime to warrant such a harsh sentence. His son, his parents, and other family members' lives have also been affected.

I understand and agree that those who have committed a crime, including my son, must be held accountable and pay a debt to society. However, the amount of time nonviolent drug offenders in our country are given for federal offenses is severely harsh. Our prisons are full and overcrowded. Our tax dollars are wasted by imprisoning these men for such excessive amounts of time. There are other options for punishment that would be more beneficial to all.

I am asking the sentencing committee to please give serious consideration to reducing all base levels by 2 to 4 levels. Marijuana should definitely be considered to be reduced, as in the United States, Cannabis is legal in 39 of 50 states for medical use, and 24 states for recreational use.

Sincerely,
Connie Pitts

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Tori Poe

Topics:

Drug Offenses

Comments:

Change the law of the purity level for methamphetamine from ice to mixture. It's the only drug the purity level determines your sentence. Fentanyl is the leading drug that is killing hundreds of people everyday but methamphetamine sentence are more harsh.

Submitted on: February 4, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** PURDY, JEFFREY, [redacted]
Date: Tuesday, February 4, 2025 12:53:15 PM

To: Whome it may concern
Inmate Work Assignment: Unassigned

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The United States Sentencing Comission may want to consider the following things for supervised release violation guidelines:

1) Adding in a section for recalculating the Criminal History of an individual if they were impacted by a retroctive sentencing guideline change, and the court had yet to correct it prior to a supervised release violation. While it is obvious a retroactive guideline corrects the original Criminal History, giving further instruction to attorney's and a court may prevent unneeded appeals. In my Appeal, Appeal 24-2620 in the 8th Cir. one of my issues is that the District Court did not use the correct guidelines because they did not use the correct criminal history by failing to correct it for the retroactive change of Amendment 821. Originally, my Criminal History was enhanced from a CH II from a CH I, through a Rule 32 violation on disputed information in my PSR that never had a finding of fact. That Rule 32 violation for CH is no longer relevant to the computing of criminal history as AMendment 821 fixed that issue irregardless. Though the Court is trying to keep me at a higher criminal history in the courts.

2) Adding in a section that gives guidelines on when to revoke, and when to continue on supervised release. For Example, USPO and the District Court instituted a supervised release violation against me, in a retaliatory manner because I didn't want to waive my rights to hearing (despite not having counsel) to have halfway house added to a term of supervised release, because I wanted to indicate at the hearing why it was needed (misconduct from USPO and the BOP (see D. Minn. 22-CV-2821(ECW/JRT) and D. Minn 22-CV-3148, I received a retaliatory false disciplinary in the halfway house to have me removed 2 days before objections were due in D. Minn. 22-CV-2821(ECW/JT) and the USPO assised the BOP in performing that misconduct ([redacted]). The District Court was covering up misconduct of the US Attorney's throughout my case, as well as the BOP's. As they are all trying to prevent me from raising the misconduct. My USPO refused to provide me transportation despite holding me in a halfway house 3-4 hours from the court. My USPO ([redacted] at the time) also did not inform me of any violations, rather told me that it was only a hearing to have halfway house time added to the terms of supervised release. In emails USPO [redacted] was actively trying to prevent me from attending a 8 Feb 2024 hearing in the District of Minnesota. I made it to the 8 Feb 2024 hearing and only then learned that USPO [redacted] was trying to retaliate by violating me indicating: (1) I was using an unauthorized cellphone, despite the fact I was going through weekly checks at the Halfway House on behalf of USPO and USPO visits and have used that cellphone the entire time (the cellphone only became an issue when in an email to Honorable Susan Richard Nelson's Chambers, USPO [redacted], and other judges in the district of Minnesota I indicated I wanted to continue my 2241 (D. Minn. 22-CV-2821(ECW/JRT)), and they wanted to prevent my obecjtions from being filed; (2) I was refusing a mental health evaluation, because I was asking why one was needed when I received a "no need" evaluation, and the issue is sensitive because Honorable Susan Richard Nelson, the US Attorney's and Defense Counsel attempted a fraudulent evaluation in the past (They just didn't realize I am a trained clinical auditor) and I signed the paperwork to release my information as soon as it was indicated it would be an issue otherwise. When

[redacted] contacted me, he indicated that the US Attorney's was attempting to advance fraudulent/false information, and I reported them to 911 and AUSA Emily Polachek has never been present since. The US Attorney [redacted] with USPO [redacted] omitted records from the Supervised Release violation proceeding, and My attorney [redacted] did nothing to even try and prepare or contradict. USPO [redacted] indicated Susan Richard Nelson (the Court) was the one who requested the violations be added. I was determined by Honorable Susan Richard Nelson to have violated, she took actions to prevent the misconduct of the BOP and others from being raised on the record, and never indicated how I violated. I appeal on 8th Cir. Appeal 24-1660, in which [redacted] delayed it for over 7 months by doing nothing, and the Court of Appeals allowed it. Additionally, Once [redacted] was removed, Attorney [redacted] indicated that the Court of Appeals does not care about violations that have no imprisonment, yet they use those violations against you in the future. I signed the motion to dismiss only on the grounds that the Court of Appeals does not care about supervised release violations that have no imprisonment time. With that said, the Sentencing Commission should not allow supervised release violations that have no imprisonment to be used to enhance later violations AS the District Courts and USPO's engage in misconduct and the Court of Appeals has no want or intention to review. If they are insignificant to the Court of Appeals, then no harm or sanctions should be allowed to be imposed, otherwise they should be subject to timely reveiw by the Court of Appeals.

3) In Appeal 24-2620 in the 8th Cir.. [redacted] and [redacted] have been delaying the appeal now, ~5 months where I was sentenced to an aggravated sentence of imprisonment of 14 months and the district court modified supervised release to include a term of home confinement after for 22months in violation of 18 USC 3583(e) and 3563(b). Additionally, the District Court performed clear error in even finding me guilty, as I did not violate any term of condition, and it was a retaliatory supervised release violation to try and quash a subpoena that would have additional evidence release showing the FBI/US Attorney's and others fabricated evidence to Indict me, on top of using false evidence. Actions they attempted to cover up with Earl Grey and Honorable Susan Richard Nelson. I have previously submitted information on this violation to the court. However, as the attorney's are delaying, and the Court of Appeals are allowing them, and the ~8-9 months I was on Supervised Release prior no longer count due to the supervised release violation (meaning they are trying to give me 8-9 months of Supervised release longer than authorized by law, due to the retaliation), there is plenty of prejudice. Yet, the Court of Appeals enabling counsel to perform misconduct and delay means I will spend more time imprisoned than authorized under law, due to the inefficiency and ineffectiveness of the 8th Circuit and the attorney's they bar. The Sentencing Commission should remove any time for Grade C violations, as if the Court of Appeals and their barred attorney's cannot move fast enough to correct misconduct, due process or other constitutional violations when people are imprisoned, etc..., then there should be no time of imprisonment and no sanctions able to be imposed.

Supervised Release Proposed Changes

1. **Modify Standard Discretionary Travel Restrictions to Notification Requirement**

A more balanced and practical approach to addressing travel restrictions for individuals on supervised release is to modify the condition from requiring prior authorization to a notification requirement. Instead of seeking explicit approval from a probation officer or the court for every instance of travel, defendants could be required to notify their probation officer of any planned travel outside the judicial district. For example, a defendant who must travel to a neighboring district for medical treatment or to visit family could provide advance notice without being subjected to delays caused by seeking formal approval. Advance notification can be provided when practicable. This adjustment maintains the probation officer's ability to monitor and respond to travel that could jeopardize public safety or compliance while reducing unnecessary burdens on the defendant.

This modification aligns with the statutory mandate under 18 U.S.C. § 3583(d), which requires that conditions of supervised release involve "no greater deprivation of liberty than is reasonably necessary" to serve the purposes of sentencing. A blanket requirement for prior authorization imposes an unnecessary administrative burden, particularly on defendants with legitimate travel needs, such as employment, medical care, or family emergencies, which may not pose any threat to public safety or rehabilitation efforts. In contrast, a notification requirement achieves the same supervisory goals without unduly restricting liberty.

Courts have emphasized the need for individualized conditions of supervised release. In *United States v. Betts*, 511 F.3d 872, 878 (9th Cir. 2007), the court noted that conditions must not impose excessive liberty restrictions when less intrusive alternatives can achieve the same objectives. A notification requirement satisfies this principle by allowing probation officers to monitor travel while respecting defendants' autonomy and ability to lead productive lives.

Furthermore, the Second Circuit has recognized that overbroad conditions must be closely tied to the specific circumstances of the defendant. In *United States v. Myers*, 426 F.3d 117, 123 (2d Cir. 2005), the court struck down a restrictive travel condition because the record did not demonstrate how it served

the goals of deterrence, public safety, or rehabilitation. Similarly, the *Reeves* court reiterated that courts must demonstrate why a condition is necessary and ensure it is the least restrictive means of achieving its purpose. *United States v. Reeves*, 591 F.3d 77, 81 (2d Cir. 2010).

Courts can fulfill their supervisory responsibilities by implementing a notification requirement rather than an authorization process while ensuring compliance with the statutory requirements of reasonableness and individualization under § 3583(d). This adjustment also reduces the risk of arbitrary enforcement by probation officers, ensuring that conditions are applied consistently and fairly.

In conclusion, transitioning from an authorization-based condition to a notification-based condition preserves the core objectives of supervised release while protecting defendants' constitutional and statutory rights to liberty and due process.

2. Individualized Assessments

1. Proposed Application Note

The proposed Application Note regarding the requirement for an individualized assessment of supervised release conditions should be moved directly into the text of the guidelines to ensure clarity and mandatory application. Specifically, this note emphasizes that courts must consider the factors listed in 18 U.S.C. § 3583(c) when imposing conditions of supervised release and may impose discretionary conditions only if they meet the requirements outlined in § 3583(d).

By placing this language directly in the guidelines text rather than relegating it to the commentary, the Sentencing Commission would eliminate ambiguity and prevent courts from treating the individualized assessment as a discretionary or advisory consideration. Historically, courts have occasionally misinterpreted application notes as non-binding or merely suggestive, leading to inconsistent applications of the guidelines. For example, the Supreme Court in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019), limited deference to agency interpretations of ambiguous regulations, emphasizing that commentary or notes cannot override the regulation’s plain text. Similarly, in *United States v. Nasir*, 982 F.3d 144, 159-60 (3d Cir. 2020), the Third Circuit declined to defer to the Sentencing Commission’s commentary where it conflicted with the guideline text.

To ensure compliance, the individualized assessment language should be integrated into the guidelines as follows:

Text to be Added to § 5D1.3 (Conditions of Supervised Release):

> "When imposing discretionary conditions of supervised release not required by statute, the court must conduct an individualized assessment of the defendant's circumstances. This assessment must consider the factors listed in 18 U.S.C. § 3583(c) and ensure that such conditions meet the requirements of § 3583(d). Specifically, conditions must be reasonably related to the nature and circumstances of the offense, the defendant's history and characteristics, and the purposes of deterrence, public safety, and rehabilitation. Discretionary conditions must also avoid imposing a greater deprivation of liberty than is reasonably necessary to achieve these purposes."

2. Benefits of Moving the Note into the Guidelines Text

Incorporating the language directly into the guidelines text ensures that courts treat the individualized assessment as a binding requirement rather than a discretionary or advisory recommendation. This eliminates the risk of misapplication or inconsistent rulings by making it clear that such assessments are mandatory. Codifying the requirement compels courts nationwide to apply a consistent standard, reducing disparities in the imposition of discretionary supervised release conditions.

This change also reinforces compliance with the statutory mandates of 18 U.S.C. § 3583(d), which explicitly requires that discretionary conditions of supervised release be narrowly tailored and impose no greater deprivation of liberty than is reasonably necessary to achieve the goals of deterrence, public safety, and rehabilitation. Codifying the requirement in the text enhances judicial accountability by ensuring that courts fully consider these statutory criteria in each case.

Additionally, requiring an explicit individualized assessment strengthens defendants' constitutional protections, safeguarding against overbroad or unnecessary restrictions on liberty. By ensuring that conditions are narrowly tailored to the defendant's circumstances, this change promotes fairness and consistency while respecting the principles of due process.

Finally, codifying this requirement simplifies appellate review. Appellate courts would have a clear framework to evaluate whether supervised release conditions were properly imposed. This would reduce

ambiguity in appellate decisions and help ensure that errors in the imposition of conditions are identified and corrected promptly.

By integrating this language into the guidelines text, the Sentencing Commission would unequivocally establish that individualized assessments are not optional. This adjustment would safeguard defendants' rights, promote uniform application of the law, and ensure that supervised release conditions align with the statutory and rehabilitative goals set forth by Congress.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Regan Rose, na

Topics:

Supervised Release

Drug Offenses

Comments:

Regan Rose's Public Comment on the 2025 Proposed Amendments on Drug Offenses

To the United States Sentencing Commission,

My name is Regan Rose, and I am writing to you not as a legal expert or activist, but as someone personally affected by the consequences of excessive sentencing policies. My fiancé, Christopher, has spent nearly 13 years in federal prison for a non-violent drug offense. In 2012, at the age of 34, he was arrested for possession with intent to distribute 600 grams of methamphetamine. He was sentenced to 210 months (17 years) in federal prison—a sentence that today would likely be significantly reduced under current guidelines.

While accountability is necessary, justice must also be fair and proportional. Research consistently shows that excessively long prison sentences do not deter crime more effectively than shorter, more proportionate sentences. According to studies from the National Institute of Justice, long-term incarceration increases the likelihood of recidivism, as extended isolation from society makes reintegration exceedingly difficult. Christopher's case is a prime example of this concern.

By the time he is released at 49 years old, he will face overwhelming challenges in rebuilding his life. He has missed critical years of workforce development, leaving him with no job experience, no retirement savings, no social security contributions, and no familiarity with modern technology. Studies indicate that long-term incarceration weakens social and economic ties, making employment and stability nearly impossible for returning citizens. This raises a fundamental question: if the goal of our justice system is rehabilitation, how does prolonged incarceration serve that purpose?

Additionally, the financial burden of mass incarceration is significant. The Federal Bureau of Prisons operates at overcapacity, costing taxpayers billions annually. Reducing unnecessarily lengthy sentences for non-violent drug offenders would not only alleviate overcrowding but also allow resources to be reallocated toward rehabilitation programs, vocational training, and reentry support—initiatives proven to reduce recidivism rates and promote successful reintegration.

Furthermore, lengthy sentences create a counterproductive prison environment. Instead of fostering rehabilitation, extended incarceration often results in individuals forming criminal networks within prison, as they are exposed to a system that prioritizes survival over reform. The U.S. Sentencing Commission's own reports acknowledge that punitive measures without proper rehabilitative efforts do not achieve long-term public safety goals.

The consequences of outdated sentencing laws extend far beyond the incarcerated individuals themselves. Families suffer immensely, with children growing up without parents, spouses left to navigate life alone, and communities bearing the social and economic costs of mass incarceration. If Christopher had been sentenced under today's evolving standards, he would likely already be home, contributing to society, and working toward a stable future.

I urge the Sentencing Commission to take a comprehensive approach in reforming federal sentencing guidelines. This includes not only adjusting future sentencing but also addressing those currently serving outdated, excessive sentences. True justice is not measured solely by punishment—it is defined by fairness, rehabilitation, and the opportunity for individuals to rebuild their lives after serving their time.

Christopher is more than an inmate.. He is a human being who deserves the opportunity to prove that he can be a productive member of society. Our justice system should reflect the principles of fairness and second chances, ensuring that sentences fit the crime rather than destroy lives.

Thank you for your time and consideration.

Sincerely,
Regan Rose

Submitted on: March 2, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** ROY, ROLAND, [redacted]
Date: Tuesday, January 14, 2025 2:34:07 PM

To:
Inmate Work Assignment: suicide companion

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I would like to comment on the Math laws.. specifically the purity law.. i was convicted for a 1/2 pound of meth. the prosicutor charged me with the purity of the dope because it triggered a 10yr minium. i should be in a 5-40 yr catigory. my counsel did not argue this at my sentancing and i got 130 months. if i had the 'mixture' charge instead of the other i would be home by now.. this needs to be changed. i have kids back on my reservation that need me i am the only parent they have left.. thank you and please change this old out dated law..

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Edward Saldana

Topics:

Supervised Release

Drug Offenses

Comments:

My name is Edward Robert Saldana. In 2016, I was indicted on a gun and drug charge. During my 106-month sentence, I had the opportunity to meet many good people and reflect on my circumstances. Though I was only a low-level drug addict, the high purity of the drugs involved significantly enhanced my sentence.

Today, I am writing to the U.S. Sentencing Commission to highlight an issue I believe needs attention. The majority of drug-related cases in the federal system involve addicts, not dealers—just people struggling with a drug problem who need help. While the federal system provides programs and classes to help inmates rehabilitate and better themselves, there is little to no incentive to participate in these programs because they offer no reduction in sentence.

Despite working for years in UNICOR for minimal wages, taking every class available, and dedicating myself to self-improvement, I still had to serve my full sentence. Now, I have been on supervised probation for two years, with no infractions. I have maintained steady employment, and I am living a prosocial lifestyle. I'm also a father to a beautiful one-year-old daughter and a devoted husband. Despite all of this progress, I still have an additional year of probation to complete.

I feel like I am just clogging up the system at this point. People like me, who have demonstrated change, responsibility, and the willingness to improve, should have opportunities for early termination of probation or more reasonable sentencing adjustments. The current system treats addicts as though they are high-level dealers, which disproportionately punishes those who need treatment and rehabilitation rather than lengthy sentences and excessive supervision.

I hope my story can shed light on the need for sentencing reform and a more compassionate,

effective approach to addressing addiction within the federal system.

Please take this into consideration

Submitted on: January 27, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** SARGENT, JOHNATHAN, [redacted]
Date: Tuesday, February 4, 2025 10:53:02 AM

To: commission members
Inmate Work Assignment: compound

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

im serving 11 years for meth. meth is meth, regardless of purity. (the enhancement for the purity would be like someone getting caught selling hydroplonic weed verse ditch weed). im serving time for an enhancement that should be lower. you have people that have done alot of time from draconion laws. it could be anyones family that can be effected by this law. thankyou for your time for reading this, this will save the tax payers alot of dollars.(2D1.1 is the statue)

From: [redacted]
Subject: [External] ***Request to Staff*** SCHWARTZBERG, SAGI, [redacted]
Date: Thursday, February 6, 2025 2:09:06 PM

To: Whom It May Concern
Inmate Work Assignment: Saefty

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To Whom It May Concern:

It is highly disappointing that even when the Sentencing Commission itself conducts empirical studies on sexual crimes, and particularly child pornography, there is nothing in the last several proposed amendments relating to the unjust and high sentencing guidelines for 2G2.1 and 2G2.2. In fact, even in the 5D section of supervised release which recommends the maximum amount of supervised release (which was adpoted when the maximum for ALL crimes was 5 years) has not been amended since the maximum supervised release for these crimes became LIFETIME! How is it that the commission releases studies that show the lowest recidivism rate for Child Pornography but yet fails time after time to take action to right this wrong?

The Commission is supposed to be a bipartisan body, which relies on empirical evidence to propose and adopt guidelines. Not ONCE has the Commission followed its own directive with regards to child pornography. Therefore, I implore the commission to adopt the following changes:

1. Exclude child pornography from the definition of sex offenses in 4C1.1 and 5D (the supervised release section). This is the only way the Commission can address the over punishment of these crimes without amending 2G2.1 and/or 2G2.2.

I doubt the Comission will read this, but I hope that the Commission takes its directive seriously for ALL offenders.

From: [redacted]
Subject: [External] ***Request to Staff*** SILVA, JOHN, [redacted]
Date: Saturday, February 8, 2025 8:23:13 PM

To:
Inmate Work Assignment: None

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

This is a comment about the most recent proposed sentencing amendments. I support the amendment that would remove the highest levels of the drug sentencing table and prefer the option that would make the highest base offense level 30. However, I don't understand why the commission is thinking of only removing those highest levels and not making adjustments to the remaining lower levels as well? Wouldn't it make more sense to adjust the entire drug sentencing table by a uniform amount so that all base offense levels were lowered? I'm not suggesting the commission should adjust the drug sentencing by an extreme amount but I think something like a 2 level reduction to all base offense levels makes the most sense. I would support an amendment like that even more than the current prosposed amendment that only removes the highest levels.

From: [redacted]
Subject: [External] ***Request to Staff*** SIMMONS, TYSHAWN, [redacted]
Date: Tuesday, February 4, 2025 8:57:25 AM

To: sentencing commission
Inmate Work Assignment: ed clk

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am sending this message about what I think the commission should look into. I see that the commission have a proposed amendment for meth which I think will help a lot of people who have been wronged by the system nonetheless why is the racial disparity between the sentences for crack and powder cocaine not being addressed .. It has been long recognized that its not difference between the powder form of the drug and crack form of the drug. Furthermore unlike meth which can be made from a mixture of different chemicals crack can only derive from cocaine so the ratio for them should be 1:1. I sincerely hope that this message get read and not ignored because its a lot of individuals still serving high sentences because of the blatant racial disparity between two form of drugs that is the exact same.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Tiana Smith

Topics:

Drug Offenses

Comments:

In response to the US Sentencing Commission's proposed amendments, this comment emphasizes two key areas of concern. First, I support Option 3 of the proposed strategies for recalibrating the drug quantity chart, specifically advocating for setting the highest base offense level at Level 30. This approach strikes a fair balance, ensuring that penalties remain proportionate to the offense without overly harsh sentencing for lower-level drug offenses.

Second, I am in favor of Option 1 regarding the methamphetamine purity section, recommending the elimination of separate thresholds for meth actual and meth ice, and instead classifying all methamphetamine as a meth mixture. This change would simplify sentencing, decrease unnecessary incarceration and help prevent disproportionate penalties based solely on the purity of methamphetamine. As chairman Reeves has stated in the past the purity of meth in today's trade is uniformly high purity. My comment also observes that methamphetamine's classification, based on meth(actual) weight thresholds alone (before even considering purity), unfairly leads to higher offense levels compared to most other drugs like heroin and even fentanyl, which have both proven to be far more lethal. By classifying all meth as a mixture, this amendment would create a more consistent and balanced approach to sentencing for all substances, particularly in light of the extreme dangers posed by fentanyl.

Thanks for allowing me a voice chairman Reeves

Submitted on: January 30, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** STAMPS, ALESSANDRA, [redacted]
Date: Tuesday, February 4, 2025 9:17:53 AM

To:
Inmate Work Assignment: Receration

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I feel that the meth guidelines are very high. I feel that it would be great to lower the level so that 38 is not the top number and also for the guidelines to not be so high. I have been down 4 years already and I can personally say that I have truly learned my lesson and I deserve a 2nd chance to come home to my loved ones. I am a model inmate and have very little past but because the guidelines are so extreme I am still incrassated. I also agree that meth should not be charged at pure or mixture because it is possible to receive both anywhere. I am sorry for my actions and I have shown through out my incrassation that I am striving to be a better individual. Thank you for you time. I feel everything should also be allowed to go retro active.

From: [redacted]
Subject: [External] ***Request to Staff*** STANTON, TERRANCE, [redacted]
Date: Friday, February 28, 2025 7:37:53 AM

To: United States Sentencing Commission
Inmate Work Assignment: Education

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

RE: SUPERVISED RELEASE

In 2013 I was sentenced to a life sentence and ten years supervised release . My life sentence was reduced to 365 months Oct. 2015 due to the 782 amendment. In 2024, my 365 month sentence was reduced to 327 months due to the 821 amendment. Jan 17 2025 my 327 month sentence was reduced to 220 month by an executive order from Former President Biden. Although my actual prison sentence length was reduced, my supervised release was not.

I'm scheduled to be released from prison Sept 2025 and will begin my supervised release . I have been incarcerated for 12. 4 years and have proved that I am not incorrigible. I've been assessed through the MALE PATTERN SCORE as a "low" regarding my chances to recidivate with general and violent crimes. 10 years supervised release is excessive after a prison sentence if the inmate can show in his /her first year that he/she can comply with all the rules.

I'm in complete agreement with the sentencing commission's potential amendment because just as it doesn't take 10 plus years for someone to rehabilitate, it doesn't take ten years for a P.O to assess someone and realize that he/she deserves full and complete freedom. The right to go to and from gives a former prisoner the chance to pursuit happiness , exploit all opportunites, and be a productive citizen without being impeded by a Probation Officer's discretion on what he/she thinks is the best decision for the former prisoner.

I'm entreating that the USSC does all it can to help release the unnecessary shackles from those who have successfully completed their prison sentence and lighten the burden by giving the opportunity to terminate probation if its well deserved!

Friday, February 28, 2025

United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500
Washington, DC 20002-8002

Attn: Public Affairs – Priorities Comment

Subject: Response to Proposed Amendment Regarding Supervised Release

Dear Members of the United States Sentencing Commission,

I am writing to express my deep frustration and disappointment over the continued exclusion of sex offenses from meaningful sentencing reform. Despite clear empirical data, judicial recommendations, and overwhelming public input, the Commission has once again failed to address the disproportionate sentencing and supervision conditions imposed on individuals convicted of first-time, non-violent sex offenses.

Year after year you ignore sex offenses and even after a plea for commentary on how to make a this 40th anniversary impactful, you again favor the drug offenses. One of the highest in recidivism. One of the most problematic offenses happening right now in our country and even within the BOP. The amendment demonstrates a clear focus on drug-related sentencing relief while continuing to exclude non-violent sex offenses from any meaningful reform.

The Commission's Own Data Contradicts Its Policies

The Commission continues to ignore its own research, which proves that individuals convicted of sex offenses have one of the lowest recidivism rates among all federal offenses. The same-crime recidivism rate for sex offenses is between 3.2% and 4.3%, yet the Commission has chosen to extend leniency to offenders with significantly higher recidivism rates while categorically excluding any relief for sex offenses.

According to the United States Sentencing Commission's (USSC) 2019 report on "Recidivism Among Child Pornography Offenders":

- For non-production child pornography offenders (possession, receipt, or distribution) with zero criminal history, the five-year recidivism rate for the same crime was 3.6%.
- The overall recidivism rate for this group was 14.1%.

If sentencing reform is truly about public safety and rehabilitation, why are sex offenses still being treated with blanket policies that defy logic and statistical reality? Why is this Commission unwilling to recognize that a first-time, non-violent offense does not carry the same risk profile as a repeat, violent crime?

The Failure to Differentiate Non-Violent from Violent Offenses

The Commission continues to categorize all sex offenses as violent, despite clear distinctions in offense conduct and recidivism data. It is time to stop operating on fear-based policies and instead implement fact-based sentencing that accounts for individual circumstances. If gun and drug crimes—both of which contribute significantly to violence and social harm—can receive sentencing reforms and reduced supervision requirements, why is the same not applied to non-violent sex offenses?

Individuals should be assessed for their risk to public safety, not subjected to arbitrary and excessive penalties based on outdated stigmas. The Commission must stop treating all sex offenses the same and instead apply individualized assessments that allow for proper sentencing and supervision conditions based on actual risk.

Judges Have Called for Reform—Why Is the Commission Ignoring Them?

In the August 24 public comment period, numerous judges advocated for lowering sentencing guidelines for certain sex offenses and granting judicial discretion in determining proper sentences. Yet, every proposed reform still categorically excludes these offenses. If the Commission claims to be listening, why are the voices of experienced judges being disregarded in favor of maintaining draconian policies?

The Need for True Reform

The Commission must take immediate action to ensure that first-time, non-violent offenders are included in any positive changes made in the supervised release amendment. Excluding them from these reforms ignores the fundamental principles of fairness and rehabilitation. If the goal is to promote reintegration and public safety, individuals who pose the least risk should not be left behind while those with higher recidivism rates benefit from policy changes.

Additionally, the Commission must acknowledge the flawed assumption that all sex offenses are violent. The legal definition of violent crime, as outlined in 18 U.S.C. § 16, requires the use, attempted use, or threatened use of physical force against another person. Many sex offenses, particularly non-contact ones, do not meet this threshold. If gun and drug offenses—both of which contribute significantly to violence and social harm—can receive sentencing reforms and reduced supervision requirements, why is the same not applied to non-violent sex offenses?

Individuals should be assessed for their actual risk to public safety, not arbitrarily classified under a one-size-fits-all system. The Commission must stop categorizing all sex offenses as violent and instead allow individualized assessments that take into account the nature of the offense, recidivism data, and rehabilitation potential.

The failure to address this issue perpetuates injustice and undermines the credibility of the Commission's broader sentencing reform efforts. If fairness, proportionality, and data-driven policymaking are truly guiding principles, the exclusion of sex offenses from reform must be rectified.

I urge the Commission to:

1. Acknowledge the Data – Recognize that individuals convicted of sex offenses have among the lowest recidivism rates and should be considered for sentencing reform.
2. Differentiate Between Violent and Non-Violent Offenses – Stop applying a blanket classification to all sex offenses and implement individualized risk assessments.
3. Incorporate Judicial Recommendations – Allow judges the discretion to impose proper sentences based on case specifics rather than rigid, outdated guidelines.
4. Make Sentencing Reforms Inclusive – Extend the same opportunities for sentence reductions and supervised release modifications to non-violent sex offenses as are given to other offenses.

Conclusion:

The exclusion of sex offenses from reform is unjust, unsupported by evidence, and counterproductive to rehabilitation and public safety. The Commission had an opportunity to make meaningful changes, yet it continues to rely on outdated, fear-driven policies rather than embracing common sense and fairness. If reform is truly the goal, it must include all offenses based on rational, evidence-based criteria—not political convenience.

I implore the Commission to address these glaring disparities in this amendment cycle and take real action toward a justice system that upholds fairness, integrity, and reason.

Sincerely,

Amy Starke
[redacted]

From: [redacted]
Subject: [External] ***Request to Staff*** TAKATA, ANDY, [redacted]
Date: Wednesday, January 15, 2025 1:04:19 AM

To: Commissioner
Inmate Work Assignment: na

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Please remove the enhancement for Meth Purity.
It makes no sense.
And with crystal meth costing about $1 per gram, it is almost cruel and unusual punishment to give a mandatory 10 years for 50 grams costing about $50.
Thank you for your consideration.

Public Comment - Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Linda Vaughn Feb. 21, 2025

Topics:

Drug Offenses

Comments:

I want to thank you for the proposed changes you suggesting and I want to ask you to move forward. There seems to be a lot of resistance to change when change is needed. You have did research. Sadly many comments seem to come from a fear of overburdening the probation or courts, when you are dealing with peoples lives. Too many inmates are serving years and decades for being a nonviolent drug offenders. Locking them up in prisons that do not have or provide the resources, to give them the help they need is not the answer. Being incarcerated is a very traumatic and the people who are already struggling with mental health and drug addiction problems are often coming out worse off than before. Raising recidivism.. the highest base levels should be lowered. the lower level trafficker reduction should be implemented at a six point reduction or more.. A person who is selling to similar situated users to probably just pay for their own drug habit should not be treated the same as those who are in the drug game for monetary profits. I ask you to make all these changes retroactive. new research shows the punishments are too severe and judges are deviating from guidelines . all those who have charged with these drug charges should be treated the same. Inmates who are already serving their sentences should be treated the same as new offenders when policies change.

Thank you

Submitted on: February 21, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** WATSON, ROBERT, [redacted]
Date: Friday, February 7, 2025 8:09:14 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: unit worker

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am responding to The Commission purposal to amending drug sentencing table, I agree with amendment that would make the highest level of drug sentencing table 34,32, or 30, rather then 38. But i believe the those with lower base offense levels should also have serious consideration for the same level reduction.

Respectfully Submitted.

From: [redacted]
Subject: [External] ***Request to Staff*** WIGFALL, KEITH, [redacted]
Date: Tuesday, February 4, 2025 12:09:18 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: Food Service A.M.

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing to make a comment on the Sentencing amendment proposal regarding the methamphetamine purity disparity which equates to a 10 to 1 disparity based upon purity. The step the Sentencing Commission is taking is in the right direction. However, the issue of retroactivity of the amendment has not been decided. When the Sentencing Commission addressed the disparity between Crack and Powder Cocaine it deemed that the amendment should be made retroactive. The methamphetamine purity disparity parallels the harsher sentences that were given based upon the crack/powder disparity. It would only be prudent for the harsher disparity based upon methamphetamine purity be given equal treatment and have the amendment applied retroactively. Thank you for allowing me to make a comment.

UNITED STATES SENTENCING COMMISSION
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