United States Sentencing Commission

2024-2025 Amendment Cycle

Reply Public Comment on Proposed Amendments to Supervised Release and Drug Offenses

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UNITED STATES SENTENCING COMMISSION

2024-2025 REPLY 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?

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SMALL BUSINESS AND
ENTREPRENEURSHIP
MEMBER

March 18, 2025

The Honorable Carlton W. Reeves
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chair Reeves:

I write in reply to the comments received and the public hearing and to again applaud the Commission's proposal. It is clear that there is broad-based support for the Commission to take a monumental step towards restoring supervision to the system Congress originally intended, including by increasing discretion and individualization on the imposition of supervision (and its length and conditions), reinvigorating early termination to better allocate resources and provide positive incentives, and increasing discretion for how courts respond to technical violations or violations in which the person will be (or will likely be) punished for a new crime.[1]

I appreciate the hard work that remains for the Commission to finalize the proposal and account for the thoughtful feedback offered by the various working groups and commenters. I offer a few final thoughts for its consideration, mindful that anything the Commission does approximating the proposal would be a significant achievement.

- Insofar as some raised concerns about the administrability of the proposed language in §5D1.1(b) and (d), I would note that the *Safer Supervision Act*'s parallel "individualized assessment" requirement was not meant—and I do not read the proposal to mean—to impose a new freestanding process other than what is already the law under Sections 3553 and 3583 (and thus, Section 3771). Rather, both are a response to the practical reality that the vast majority of courts are imposing supervision "mechanically" without

[1] *See, e.g.*, DOJ Comment 2, 32 (stating DOJ is "generally supportive of the Commission's proposal to reaffirm judicial discretion in imposing supervised release terms and managing violations" and appreciates "desire to ensure that supervised release is not reflexively imposed or revoked"); Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release (May 2023) ("2023 DOJ Report"), 1 (noting "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"); Criminal Law Committee Comment (generally supporting most aspects of proposal); Probation Officers Advisory Group ("POAG") Comment (supporting introductory commentary, promotion of early termination, and other aspects).

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the consideration and explanation the law requires.[2] I am confident the Commission could address any concerns through minor tweaks and statutory citations.

- With regard to length, and in response to concerns about judicial and probation workloads (which are topics of deep importance to me), the Commission could consider noting, in an application note to §5D1.2 or to §5D1.4, that a court could consider setting a shorter term of supervision than it otherwise would have at the outset while establishing a record that it would extend the term under Section 3583(e)(2) should it prove necessary.[3] This would allow individuals who performed well in the initial period to leave supervision without the need for further proceedings, while still providing sufficient supervision for those who prove to need it.

- I support the Commission's encouraging courts to use early termination whenever in the interest of justice. I do have some concern, however, that absent further clarity on when termination is "in the interest of justice," the full value of the proposal will not be realized given prevailing caselaw and practices.[4] That is why my bipartisan colleagues and I urged the Commission to at a minimum add language that would make clear, consistent with persuasive reasoned appellate decisions,[5] that the interest of justice does not require any showing of new, extraordinary, unforeseen, exceptional, or changed circumstances to grant early termination. Rather, it should be sufficient that supervision no longer is necessary to serve the purposes for which it was (or could have been) imposed.[6]

- I appreciated Professor Guernsey's testimony that early termination is not a challenge to the original sentence but rather an integral part of the statutory scheme. This point has significant legal relevance because of a concerning line of cases that have found a motion for early termination—even filed many years after the sentencing—barred by a general waiver in a plea agreement not to challenge the original sentence.[7] I would urge the

---

[2] I also do not understand the "when, and only when" language of the proposal to be anything other than a faithful implementation of the "sufficient, but not greater than necessary" requirement under Section 3553(a). Relatedly, I support Judge Underhill's suggestion (at 2) that the latter language be used in application note 3 of §5D1.2.

[3] Separately, I support the suggestion of many commenters that the Commission encourage courts to consider imposition of a nominal term when necessary to preserve access to benefits under the *First Step Act*.

[4] *See* Jacob Schuman, "Terminating Supervision Early," Am. Crim. L. Rev. (forthcoming), 27-33.

[5] *See United States v. Hale*, 127 F.4th 638 (6th Cir. 2025); *United States v. Melvin*, 978 F.3d 49 (3d Cir. 2020); *United States v. Ponce*, 22 F.4th 1045 (9th Cir. 2022); *see also United States v. Trotter*, 321 F. Supp. 3d 337, 364-65 (E.D.N.Y. 2018) (quoting Administrative Office rejection of such requirement).

[6] Relatedly, while I strongly support reentry programs like those described in IFC 6, I would note that language along the lines proposed in IFC 6 was cut from an earlier draft of the *Safer Supervision Act* early termination section after both law enforcement and civil rights groups raised concern that the availability of such worthy programs remains very limited and district-dependent. *See, e.g.*, 2023 DOJ Report at 14. Care should be taken to ensure such language does not undermine early termination claims by those for whom such programs were not available or not necessary to meeting the relevant criteria. Separately, if the Commission includes the proposed §5D1.4(b) factors, I would note my specific support for Professor Guernsey's suggestions (at 16) on factors (3) and (5).

[7] *See, e.g. United States v. Damon*, 933 F.33 F.3d 269 (3d Cir. 2019); *United States v. Nykoriak*, 803 F. App'x 919 (6th Cir. 2020); Schuman, *supra*, at 33-39.

Commission to consider how it can address this. At a minimum, it could consider highlighting in the introductory commentary or elsewhere how early termination fits into the rehabilitative scheme and why a motion for early termination (or an appeal of a denial of such motion) is thus distinct from a challenge to the original sentence.[8]

- As the author of the strongly bipartisan *Driving for Opportunity Act* with Sen. Wicker, I have long been concerned with the criminalization of poverty and how our criminal justice system can make it impossible for the indigent to rehabilitate and reintegrate. I recognize that some commenters have suggested additions on this topic and would welcome the Commission's consideration of the matter.

- I support the options in the Chapter 7 proposal that provide courts greater discretion to address violations, and I encourage the Commission to consider whether additional tweaks are needed in light of comments received to effectuate this intent. With regard to the options proposed in §7C1.3 and in recognition of the Federal Defenders' comment (at 29) that many probation offices and courts treat a positive drug test as a Grade B violation, I would flag that a key part of the bipartisan consensus reflected in Section 3(4) of the *Safer Supervision Act* was to eliminate mandatory revocation for minor drug use and even multiple drug testing failures (let alone just one) so as to allow a court to determine if treatment or another approach is more appropriate.[9]

- Recognizing concerns raised by some about the workload to recalculate criminal history on revocation, the Commission may consider whether it should simply update new application note 3 of §7C1.5 to be more balanced and note that a downward departure may be warranted if the person had a favorable record since the original sentencing or had convictions that otherwise would have aged out.

- I do not think the Commission need await the Supreme Court's decision in *Esteras v. United States* (regarding whether a court may consider punishment in revoking supervised release) before finalizing this proposal. The proposal is carefully rooted in the statute, legislative history, and Supreme Court opinions not at issue in *Esteras*. Notably, the government's brief in that narrow case took pains to distinguish its argument regarding revocation from imposition, and even as to revocation it conceded that

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[8] For instance, it could add to the end of the introductory commentary language like the following: "Congress permits courts to modify, reduce, or enlarge conditions, extend the term, or terminate supervision early if one year has been served and if warranted by the conduct of the defendant and in the interest of justice. *See* 18 U.S.C. § 3583(e). A motion for early termination or modification of conditions is not a challenge to the original sentence but rather an integral part of this flexible and tailored scheme that is designed to ensure that resources are allocated to those who need them the most [and to provide supervisees with positive incentives to rehabilitate]."

[9] While I agree with POAG that certain technical violations can be more concerning than minor criminal behavior, that strikes me as something courts can consider carefully in an individualized analysis. More generally, I would note that the U.S. Department of Justice recently explained that curtailing carceral sentences for technical violations "would greatly reduce the number of individuals who are reincarcerated while under supervision, providing a potential pathway to promote more successful reentry." 2023 DOJ Report, *supra*, at 20. That report further spoke favorably about reducing carceral sentences for drug use in particular. *Id.*

> Congress intended the non-punishment factors to "be the primary considerations across the board." Oral Arg. Tr. 48:10-12. Nothing in the proposal goes further than that.

One never knows when an opportunity to act may slip away. Whether with the imposition of supervision, the tailoring and reassessment of conditions,[10] availability of early termination, or practices with revocation, a consistent theme of the public hearing was the discrepancy between what should happen in theory versus what is happening in practice, and between what is happening in some districts versus what is happening in others. The Commission's proposal would go a long way to addressing these issues. So while I recognize that the Commission will invariably have to decide how far it can go now, I repeat the call of my bipartisan colleagues and me to urge the Commission to do as much as it can in this cycle to finalize the proposal and implement the letter and spirit of our *Safer Supervision Act*.

Thank you again for your leadership on this critical but woefully understudied issue. Please let me know if I can be of further assistance.

Sincerely,

Christopher A. Coons
United States Senator

CC: Commissioners of the U.S. Sentencing Commission

[10] On this point, I particularly appreciate how the proposal's changes to §5D1.3 help make clear in the Guidelines what is already the law: all but the statutorily mandated conditions are discretionary conditions ultimately subject to the parsimony test in Section 3583(d)(1) and (2).

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Larry Burns, U.S. District Judge, (Ret.)

Topics:

Drug Offenses

Comments:

Please see the attached court order, which critiques the Commission's minor role factors insofar as they apply in drug importation cases. I am a recently retired federal district judge from San Diego, with over 27 years on the federal bench and 18 years before that as a practicing criminal lawyer in a busy border district. Having presided over dozens of drug importation trials and sentenced thousands of drug importers, I am very familiar with the case-specific aspects of border drug smuggling.

In my opinion and based on my experience, many of the Sentencing Guidelines' minor role factors are abstractions that do not accurately reflect the level of culpability of international drug traffickers who smuggle multi-kilogram quantities of dangerous drugs into the United States. My order in the Rodriguez cases provides a detailed analysis of why these minor role factors are inapt and inappropriate in the context of border drug smuggling. As it presently stands, under the Committee's guidance, almost all international drug smugglers qualify for a minor role reduction. This is borne out by recent Ninth Circuit precedent interpreting the minor role provision that has essentially reduced the crime of importing drugs into the United States to a lesser included offense of itself. Surely, with the fentanyl and methamphetamine epidemic in the United States reaching catastrophic levels, this cannot be what Congress intended. The Sentencing Committee should reevaluate its minor role guidance as it applies to drug importation cases.

Respectfully,

Hon. Larry A. Burns, (Ret.)
San Diego, California

Submitted on: March 13, 2025

er, as the Court previously determined, his claim for a violation of unfair practices failed as a matter of law. In addition, Kajberouni is unable to establish standing for injunctive relief as a former employee as the District. Because the defects identified in the SAC cannot be cured by amendment, the request for leave to amend is denied.

V. Conclusion and Order

For the reasons set forth above, the Court **ORDERS**:

1. The motion to dismiss (Doc. 54) is **GRANTED IN PART**.
2. Dismissal of the third claim for relief related to reimbursement is **DENIED**.
3. The fourth cause of action against the District is **DISMISSED without leave to amend**.
4. The prayer for injunctive relief is **DISMISSED without leave to amend**.
5. The motion to strike (Doc. 55) is **GRANTED**.
6. References to the BVPD as an entity separate from the District in paragraphs 6, 38, 39, 41, 42, and 43 of the Second Amended Complaint are **STRICKEN**.

IT IS SO ORDERED.

UNITED STATES of America, Plaintiff,

v.

Sandra RODRIGUEZ, Defendant.

United States of America, Plaintiff,

v.

Jesus Ezequiel Rodriguez, Defendant.

Case Nos. 19-CR-3339-LAB, 20-CR-2911-LAB

United States District Court, S.D. California.

Signed November 15, 2022

Background: First defendant entered a guilty plea in the United States District Court for the Southern District of California, Larry Alan Burns, J., to importing methamphetamine and heroin. Defendant appealed. The Court of Appeals, 2021 WL 6118165, vacated based on misapplication of factors for determining at sentencing whether defendant was minor participant, and remanded for resentencing. Second defendant entered a guilty plea in the District Court, Burns, J., to importing methamphetamine. Defendant appealed. The Court of Appeals, 44 F.4th 1229, vacated based on misapplication of factors for determining at sentencing whether defendant was minor participant, and remanded for resentencing.

Holdings: The District Court, Larry Alan Burns, J., held that recusal was required because district judge, on remand, would be unable to comply with law of the case doctrine and mandate rule.

Judge recused.

1. Sentencing and Punishment ⚿30, 67

In the federal system, when a defendant pleads guilty or is convicted after trial, a district judge is obligated to impose

a reasonable sentence, and central to this task is determining the defendant's level of culpability—what his or her role was in the crime.

2. Sentencing and Punishment ⚿67

At sentencing, district judges have special competence to assess the defendant's level of culpability, because district judges typically have thorough knowledge of the facts of the case at hand, are familiar with common offenses and the characteristic ways in which they are committed, and have everyday experience they have gained in handling trials, sentencings, and imposing sentences in similar cases.

3. Sentencing and Punishment ⚿764

The mitigating factors in the Sentencing Guidelines, for minor role reduction of offense level under Guidelines, are not exclusive, and a district judge may consider other factors weighing for or against granting or denying a role reduction, but all of the Guidelines factors should be considered in making the determination. U.S.S.G. § 3B1.2(b).

4. Sentencing and Punishment ⚿764

The ultimate question, when determining whether to grant or deny minor role reduction of offense level under Sentencing Guidelines, is whether in light of all the circumstances, the defendant has proved that it is more likely than not that he or she was substantially less culpable than other average participants in the criminal activity. U.S.S.G. § 3B1.2(b).

5. Criminal Law ⚿1192

Appellate court's mandates vacating defendants' sentences, and remanding for resentencing, were law of the case, and the district judge was required on remand to faithfully adhere to and implement the appellate court's holdings when resentencing each defendant.

6. Criminal Law ⚿1192

Under the mandate rule, which is similar to, but broader than, the law of the case doctrine, a district court, upon receiving the mandate of an appellate court, cannot vary it or examine it for any other purpose than execution.

7. Criminal Law ⚿1192

Under the mandate rule, lower courts may not deviate from the terms of the appellate court's mandate if the effect of doing so runs counter to the spirit of the appellate court's decision.

8. Sentencing and Punishment ⚿752

A defendant "organizes" other participants, as basis for aggravating role enhancement of offense level under Sentencing Guidelines, if he has the necessary influence and ability to coordinate their behavior so as to achieve the desired criminal results. U.S.S.G. § 3B1.1.

See publication Words and Phrases for other judicial constructions and definitions.

9. Sentencing and Punishment ⚿752

A defendant can "organize" a single codefendant, as basis for aggravating role enhancement of offense level under Sentencing Guidelines. U.S.S.G. § 3B1.1.

See publication Words and Phrases for other judicial constructions and definitions.

10. Criminal Law ⚿1158.1

A district court's findings are to be upheld as long as they are not illogical, implausible, or without support in inferences that may be drawn from the facts.

11. Criminal Law ⚿1134.75, 1158.34

In sentencing appeals, where the question embodies the kind of discretion traditionally exercised by a sentencing court, i.e., making findings concerning a defendant's role in an offense and level of culpability, the judgment is entitled to sub-

stantial deference. 18 U.S.C.A. § 3742(e); U.S.S.G. §§ 3B1.1, 3B1.2.

12. Criminal Law ⚿1134.75, 1158.34

Substantial deference is especially appropriate in sentencing appeals when factual nuances may closely guide the legal decision to be made, or where the legal result depends heavily on an understanding of the significance of case-specific details that have been gained through the district judge's experience with trials and sentencings.

13. Sentencing and Punishment ⚿995

It is a general principle of federal sentencing law that district courts have a duty to explain their sentencing decisions, and this requirement helps reinforce the public's trust in the judicial institution, and demonstrate that a reasoned decision has been made.

14. Criminal Law ⚿1192

Recusal of district judge was warranted, on remand for resentencing of one defendant for importing methamphetamine and heroin and another defendant for importing methamphetamine, where district judge, based on his comprehensive experience with border drug-importation offenses, was unable to comply with law of the case doctrine and mandate rule, with respect to mandate that usurped judge's trial-level sentencing discretion under binding precedents and replaced it, if not by letter then certainly in spirit, with a diktat that defendants were minor drug smugglers who were entitled to minor-role reduction of offense level under Sentencing Guidelines. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 1002, 21 U.S.C.A. § 952(b); U.S.S.G. § 3B1.2(b).

15. Criminal Law ⚿1192

If the original sentencing judge, on remand from the appellate court, would have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous, the judge should recuse.

Michael F. Kaplan, Assistant United States Attorney, U.S. Attorney's Office, Criminal Division, San Diego, CA, for Plaintiff United States of America.

Charlotte E. Kaiser, Assistant United States Attorney, U.S. Attorney's Office, San Diego, CA, for Plaintiff United States of America.

Devin Jai Burstein, Warren & Burstein, San Diego, CA, Scott Pactor, Law Offices of Scott Pactor, San Diego, CA, for Defendant Sandra Rodriguez.

ORDER OF RECUSAL IN CASE NOS. 19CR3339 AND 20CR2911

Larry Alan Burns, United States District Judge

These two cases—both coincidentally involving unrelated defendants with the surname Rodriguez—have been remanded to this Court by the court of appeals for resentencing. In both cases, the defendants pled guilty to importing very large amounts of dependency-causing drugs from Mexico into the United States. In Case No. 19CR3339, Sandra Rodriguez confessed and pled guilty to importing 21.06 kilograms (over 47 pounds) of pure methamphetamine and 2.24 kilograms (about 5 pounds) of pure heroin. In Case No. 20CR2911, Jesus Rodriguez admitted he imported 40.48 kilograms (89 pounds) of pure methamphetamine. Both defendants also acknowledged they had previously imported or trafficked drugs at least one other time.

At their sentencing hearings, I considered and rejected arguments that defen-

dants were "minor participants" in the importation crimes they committed. On appeal, the Ninth Circuit held this determination was error based on a misapplication of § 3B1.2(b) of the United States Sentencing Guidelines ("U.S.S.G.") (listing factors a court should consider in assessing whether a defendant was a minor participant in a crime), vacated the defendants' sentences, and remanded the cases for resentencing. In Sandra Rodriguez's case, the panel majority (with Judge Lee dissenting) concluded four of five nonexclusive factors under § 3B1.2(b) weighed in favor of finding she was a minor participant in her crimes. *United States v. Rodriguez* ("S. Rodriguez Mandate"), 2021 WL 6118165, at *5, 2021 U.S. App. LEXIS 38134, at *12–13 (9th Cir. Dec. 27, 2021). In Jesus Rodriguez's case, a different panel held I erred by misinterpreting and misapplying three of the five § 3B1.2(b) factors, which the panel said supported a minor role finding. *United States v. Rodriguez* ("J. Rodriguez Mandate"), 44 F.4th 1229,1234–37 (9th Cir. 2022).

[1, 2] In the federal system, when a defendant pleads guilty or is convicted after trial, a district judge is obligated to impose a reasonable sentence. Central to this task is determining the defendant's level of culpability—what his or her role was in the crime. The Supreme Court has declared that district judges have "special competence" to make this assessment because they typically have thorough knowledge of the facts of the case at hand, are familiar with common offenses and the characteristic ways in which they are committed, and have everyday experience they have gained in handling trials, sentencings, and imposing sentences in similar cases. *Buford v. United States*, 532 U.S. 59, 64–65, 121 S.Ct. 1276, 149 L.Ed.2d 197 (2001); *see also Koon v. United States*, 518 U.S. 81, 98–99, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (deference to the district court is warranted because factual nuances often closely guide the legal decision, with legal results depending heavily upon an understanding of the significance of case-specific details). The Sentencing Guidelines aid district judges in making the assessment by providing a list of nonexclusive aggravating and mitigating factors to be considered when deciding what role a defendant played in the criminal activity.

Section 3B1.1, for example, identifies factors that point to an "aggravating role," such as whether the defendant acted as a "leader," "organizer," "manager," or "supervisor" in the offense; exercised authority and control over others; or recruited accomplices. U.S.S.G. § 3B1.1, comment. (n.4). Defendants who play an aggravated role in criminal activity face an upward adjustment of their Guidelines of 2–4 levels.

[3, 4] Conversely, § 3B1.2(b) lists five factors that may demonstrate a defendant played only a "minor" role, such as whether the defendant understood the scope of the criminal activity, participated in the planning of the criminal activity, exercised decision-making authority, or stood to benefit from the crime. U.S.S.G. § 3B1.2, comment. (n.3(C)). Minor participants are eligible to receive a downward adjustment of their Guidelines of 2–8 levels, depending on the crime. These factors aren't exhaustive—a judge may consider other factors weighing for or against granting or denying a role reduction. But all of the § 3B1.2(b) factors should be considered in making the determination. *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016) (district court should consider all § 3B1.2(b) factors, but may grant or deny role reduction even if some factors weigh in favor and others weigh against a minor role finding). The ultimate question

whether to grant or deny minor role is: In light of all the circumstances, has the defendant proved more likely than not that he or she was substantially less culpable than other average participants in the criminal activity? U.S.S.G. § 3B1.2, comment. (n.3(A)); *see United States v. Davis*, 36 F.3d 1424, 1436 (9th Cir. 1994) (burden of proof is on defendant to show by a preponderance of the evidence that he or she played a minor role in the offense).

Both Mandates alluded to a possible 2-level reduction under § 3B1.2(b) if the defendants were found to be minor participants. *See S. Rodriguez Mandate*, 2021 WL 6118165, at *3, 2021 U.S. App. LEXIS 38134, at *8; *J. Rodriguez Mandate*, 44 F.4th at 1232. These references incompletely describe the extent of the reduction the Rodriguez defendants stood to receive. Drug smugglers who import more than 4.5 kilograms of methamphetamine, as both Rodriguez defendants did, and who are *not* minor participants in the offense, face a starting Guidelines offense level of 38. U.S.S.G. § 2D1.1. The Guidelines then direct the court to impose an additional 2-level increase because methamphetamine is especially harmful and addictive. U.S.S.G. § 2D1.1(b)(5). The starting Guidelines offense level of "average" methamphetamine importers is 40.

In contrast, when a drug smuggler is deemed a minor participant, the Guidelines instruct the court to reduce the starting offense level from 38 to 34, and to not apply the 2-level adjustment peculiar to methamphetamine. U.S.S.G. § 2D1.1(a)(5). After initially applying this **6-level** downward adjustment, the Guidelines direct the court to apply an additional **2-level** downward adjustment to account for minor role. U.S.S.G. § 3B1.2(b). Thus, defendants who smuggle 4.5 kilograms or more of methamphetamine but who are deemed minor participants face a starting offense level of 32 rather than 40. This amounts to an ***8-level*** decrease in their starting Guidelines offense level. Without regard to other downward adjustments sentencing courts commonly grant, an 8-level decrease results in a minimum 171-month reduction in sentencing exposure under 21 U.S.C. § 952(a) for defendants who import bulk amounts of drugs. U.S.S.G. Sent'g Tbl. (suggesting a Guidelines range of 292–365 months of imprisonment for an Offense Level 40 in Criminal History Category I and 121–151 months for Offense Level 32 in Criminal History Category I).

Despite finding that neither Sandra Rodriguez nor Jesus Rodriguez was a minor participant in their crimes, I sentenced both to prison terms well below the low end of their respective Guidelines ranges. Sandra Rodriguez, who had no prior criminal record, but who had successfully smuggled a bulk quantity of drugs a week before, was sentenced to 78 months in custody. Jesus Rodriguez, who had recently served a 7-year prison sentence for felony drug trafficking and was on supervised release for that offense when arrested in this case, was sentenced to 90 months in custody.

[5–7] The Ninth Circuit's Mandates in the *Rodriguez* cases are "law of the case," which requires me to faithfully adhere to and implement the holdings when resentencing each defendant. *Sibbald v. United States*, 37 U.S. 488, 12 Pet. 488, 492, 9 L.Ed. 1167 (1838) (inferior courts are bound by law of the case and must act according to the mandate; they cannot vary from the mandate or examine it for any other purpose than execution or intermeddle with it, "further than to settle so much as has been remanded"). I am also bound by "the rule of mandate," which is similar to, but broader than, the law of the case doctrine. Under this rule, "[a] district court, upon receiving the mandate

of an appellate court cannot vary it or examine it for any other purpose than execution." *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995). Emphasizing the breadth of this requirement, the Ninth Circuit has explained that lower courts may not deviate from the terms of the Mandate if the effect of doing so runs "counter to the *spirit* of the circuit court's decision." *Cassett v. Stewart*, 406 F.3d 614, 621 (9th Cir. 2005) (emphasis added).

Theoretically, adherence to the law of the case and the rule of mandate doctrines should not preordain the sentence the district court must impose on remand. *But see United States v. Paul*, 561 F.3d 970, 973 (9th Cir. 2009) (after circuit court vacated sentence and remanded, district court "flout[ed]" the "spirit of the mandate" by imposing a sentence only one month shorter than the original sentence). After all, the Supreme Court and the en banc Ninth Circuit have repeatedly emphasized that district courts—not appellate courts—have substantial discretion and possess primary authority to determine what is a reasonable sentence. *See Rita v. United States*, 551 U.S. 338, 357–58, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007) (sentencing judge has greater familiarity with the individual case and individual defendant than the appeals court and is therefore in a superior position to find facts and judge their import); *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1173 (9th Cir. 2017) (en banc) ("Each guideline-application decision is ultimately geared toward assessing whether the defendant should be viewed as more or less culpable than other offenders in a given class. In light of their experience sentencing defendants on a day-in-and-day-out basis, district courts possess an institutional advantage over appellate courts in making such culpability assessments."). And again, this makes practical sense because district judges are more familiar with the "nuts and bolts" that go into making sentencing determinations, which "depend heavily upon an understanding of the significance of case-specific details"—matters over which district courts have an institutional advantage. *Gasca-Ruiz*, 852 F.3d at 1172; *accord Koon*, 518 U.S. at 98, 116 S.Ct. 2035 ("District courts have an institutional advantage over appellate courts in making [sentencing] determinations, especially as they see so many more Guidelines [sentences] than appellate courts do.").

Yet after carefully and respectfully studying the Mandates in these *Rodriguez* cases, I find it impossible to reconcile the holdings with other binding precedents, such as *Buford*, *Koon*, and *Gasca-Ruiz*. These precedents encourage and direct me as a sentencing judge to draw on my knowledge of underlying facts, to apply my comprehensive experience with border drug importation offenses, and to rely on my familiarity with the characteristic ways in which this offense is committed. The conflict is that the Rodriguez Mandates, which I must dutifully follow, have interpreted and applied the § 3B1.2(b) factors in ways that largely disaffirm my "case specific" experience and foreclose me from relying on the "special competence" I have developed from presiding in dozens of drug importation trials and sentencing thousands of convicted drug importers. Likewise, paying heed to the "spirit of the mandate," as I must, unmistakably bolsters the perception that both panel majorities favor a finding that these defendants—and presumably every other cross-border drug smuggler—should be deemed "minor participants." *But see United States v. Hurtado*, 760 F.3d 1065, 1067 (9th Cir. 2014) ("[The] argument is essentially this: Just as all children in Lake Woebegone are above average, all drug couriers are, by definition, below average and entitled to the minor role reduction. Like the

district court, we reject that argument."). If not by their letter, then certainly in spirit, the Mandates have usurped my trial-level sentencing discretion and replaced it with a diktat that "Defendants are minor drug smugglers and the district court shall so find." I outline in greater detail below the incompatible interplay between complying with that injunction and applying my grounded experience and familiarity with border drug smuggling cases.

I. The Degree to Which the Defendant Understood the Scope and Structure of the Criminal Activity – U.S.S.G. § 3B1.2, comment. (n.3(C)(i))

The panel in Sandra Rodriguez's case determined that, because "Rodriguez only knew two participants by name and two others by description," this factor was indicative of minor role. *S. Rodriguez Mandate*, 2021 WL 6118165, at *5, 2021 U.S. App. LEXIS 38134, at *13. The panel relied on *United States v. Diaz*, 884 F.3d 911, 917 (9th Cir. 2018), for this proposition. In *Diaz*, the court observed that a minor participant "may be unable to identify other participants with specificity" and this "tends to show that [the defendant] had minimal knowledge regarding the scope and structure of the criminal operation." 884 F.3d at 917.

Context is important here. Section 3B1.2(b) is not peculiar to border drug smuggling cases, and the *Diaz* court's tentative language ("*may be unable to* identify" and "*tends to show* . . . minimal knowledge") suggests that this factor shouldn't be considered "one size fits all." It *nominally* applies to every criminal offense listed in the U.S. Code. Supposing that average participants in criminal activities can identify their co-participants may reasonably fit the characteristics or modus operandi of many federal offenses. But two decades of experience has convinced me that the generality of this proposition doesn't fit most border drug smuggling cases.

To those familiar and experienced with border drug smuggling, it is axiomatic that the hierarchy of all major cross-border drug organizations consciously and intentionally strives to keep drug smugglers in the dark. Unlike a conventional business where new employees begin their first day on the job meeting coworkers, being introduced to supervisors, and leafing through the company handbook to familiarize themselves with the corporate structure, border drug smuggling organizations operate in guarded anonymity. Awareness of the structure and inner-workings of the organization and knowledge of those who control it is strictly on a need-to-know-basis. The reason for this is obvious: higher-ups won't chance being "ratted out" by smugglers who run the greatest risk of being caught. In this Court's broad experience, it is unremarkable—in fact, *it is the norm*—that average border drug smugglers are unable to identify other participants in a smuggling venture, save perhaps their immediate recruiters.[1]

Predicating a minor role finding on a drug smuggler's ability to identify other members of a cartel or to describe the scope and structure of the larger drug

1. Judge Van Dyke acknowledged this point in his concurrence in the J. Rodriguez Mandate, calling it an "unrealistic assumption" to believe that average smugglers are likely to know the scope and structure of the drug organization that employs them or to be able to identify other members working for a criminal cartel. 44 F.4th at 1238. He explained: "[S]omeone running large quantities of drugs across the border understands 'the scope and structure of the criminal activity' well enough, regardless of whether he knows specifically the many other participating individuals." *Id.* at n.1.

organization ignores the realities of border drug importation cases for another reason. The Rodriguez Mandates broadly construe the phrase, "the criminal activity," used in the commentary to § 3B1.2(b), to conjure up the specter of an overarching, multinational drug organization of which the Rodriguez defendants were an insignificant part. No doubt such organizations exist, but to be clear, Sandra Rodriguez and Jesus Rodriguez pled guilty only to importing controlled substances in violation of 21 U.S.C. § 952(b). The essential elements of that offense are simple and straightforward: (1) bringing a prohibited drug into the United States (the *actus reas*); (2) with knowledge of or willful blindness to its presence (the *mens rea*). The simplicity of these elements distinguishes § 952(b) importation offenses from complex drug-related offenses such as RICO, 18 U.S.C. § 1961 *et eq.*, and Continuing Criminal Enterprise ("CCE"), 21 U.S.C. § 848, which require proof of "exotic" elements, involve highly structured and regimented hierarchies, and depend on a multitude of participants to succeed.

An example illustrates the distinction. Several years ago, I presided over the RICO prosecution of the infamous Arellano-Felix Organization ("AFO"). The AFO was one of seven major Mexican drug trafficking organizations and was considered the largest and most violent. Peter Chalk, *Profiles of Mexico's Seven Major Drug Trafficking Organizations*, CTC Sentinel, Jan. 2012, at 5, https://ctc.westpoint.edu/profiles-of-mexicos-seven-major-drug-trafficking-organizations/. I sentenced the three main defendants in the case—the Arellano-Felix brothers—as well as several lieutenants in the organization and many others with less significant roles. I learned from handling the Arellano-Felix cases and numerous other complex border drug cases that major drug cartels are intricately organized and closely controlled. Only those who are at or near the very top of these organizations are likely to know the scope and structure of the overall operation. And if you're not part of that hierarchy—drug importers never are—then asking questions about the scope and structure of the organization arouses suspicion and is dangerous. Drug smugglers well know that "inquiring minds" can lead to trouble.

The point here is that it is a mistake to conflate insular § 952(b) drug importation cases with other more complex drug offenses and to presume, as the Mandates do, that the case-specific aspects of these very different offenses are identical. They are not. Unlike the complicated and highly structured criminal operations carried out by an AFO-type organization, the average drug importation case typically involves a lone smuggler who crosses the border alone, neither knowing nor having the ability to specifically identify co-participants in the offense, and who has been deliberately shielded from awareness of the scope and structure of the organization that hired him. While it may be accurate to characterize drug smugglers as minor participants in RICO or CCE cases, it is misguided to superimpose that generality onto importation cases. In other words, not even adroit legal interpretation can transform the very basic elements of proof required under § 952(b) into a lesser-included offense of itself.

II. The Degree to Which the Defendant Participated in the Planning or Organizing of the Criminal Activity – U.S.S.G. § 3B1.2, comment. (n.3(C)(ii))

Both panels held this factor supported granting minor role because there was no evidence the defendants participated "in the planning of the plan," S. Rodriguez Mandate, 2021 WL 6118165 at *5, 2021

U.S. App. LEXIS 38134 at *14, or in "devising the plan" or "developing the plan," J. Rodriguez Mandate, 44 F.4th at 1236. Handling thousands of drug importation cases has taught me that average drug smugglers rarely—if ever—plan, devise, or develop the drug smuggling plan in which they knowingly participate. Instead, drug smugglers are invariably recruited to participate in a plan that was preconceived by organizers and other higher-ups—participants who likely qualify for an aggravated role adjustment under § 3B1.1. Overgeneralizing this factor and establishing it as a touchstone for whether a border drug smuggler is deemed "average" or "substantially less than average" ignores this reality.

[8, 9] By construing the phrase, "participated in the planning," to require that a defendant must "devise," "develop," or "plan" the criminal activity, the Rodriguez Mandates are in tension with other Circuit case law and with § 3B1.1, which declares that "organizers" of criminal activity should be considered for an *aggravated* role and an *upward* adjustment of their Guidelines. According to Circuit precedent, "[a] defendant 'organizes' other participants if he has 'the necessary influence and ability to coordinate the[ir] behavior . . . so as to achieve the desired criminal result[s].' " *United States v. Holden*, 908 F.3d 395, 402 (9th Cir. 2018) (quoting *United States v. Doe*, 778 F.3d 814, 826 (9th Cir. 2015)). And a defendant can "organize" a single codefendant. *Id.* One who devises, develops, or plans criminal activity is unquestionably "influencing" and "coordinating" the behavior of co-participants to achieve the desired results. But can it be correct that simply because a drug smuggler is not an "organizer"—because he "doesn't plan the planning"—he is instead a "minor participant?" If so, who qualifies as an average drug smuggler?

Interpreting words matters because whoever controls the meaning of words controls the conversation. Here, the Mandates have strictly cabined the words "participated in the planning," to mean those who "plan the plan" or who "devise" or "develop" it. The Oxford language dictionary (among several other definitional sources) takes a broader view of what it means to "participate." According to Oxford, to "participate" means to "take part in an action or endeavor." *Participate*, Oxford Languages (2022). Correspondingly, Oxford defines "endeavor" as "an attempt to achieve a goal." *Endeavor, id.*

Consider Tom Brady, widely believed to be the best quarterback ever to play professional football. Week in and week out during the NFL season, Brady studies his team's game plan for the upcoming game, runs familiar plays with teammates at daily team practices, and strategizes with coaches how to execute the game plan to score touchdowns. Although Brady has masterful knowledge of the team playbook, understands the game plan, and knows the specific role he and each of his teammates must play during the game, he neither devised the playbook or developed the game plan, nor (barring an occasional audible) does he decide which play to run during the game. That responsibility rests with the coaches who call in plays from the sideline or from a sky booth overlooking the field. When the plays are relayed to Brady and his on-field teammates, they know exactly how to execute them because the game plan was explained beforehand and the players understood it and practiced the plays. Acknowledging this division of responsibility, can it be said that Tom Brady doesn't participate in the game plan? Or, tracking the rationale of the Mandates, is it accurate to describe Brady as a "minor participant" in the game be-

cause he didn't "plan the plan," or "develop" or "devise" it?

Now contrast this football analogy with the respective roles played by the Rodriguez defendants in their drug smuggling ventures.

A. Sandra Rodriguez

A month before she was arrested, Sandra Rodriguez agreed to participate in a plot to smuggle drugs into the United States. Presentence Rep. at 3, *United States v. Rodriguez* (*Sandra Rodriguez*), No. 19-cr-3339-LAB-1 (S.D. Cal. filed Nov. 27, 2019), ECF. No. 25 (PSR 1). A friend of hers, Martha, who lived nearby her in Los Angeles, recruited her to participate and introduced her to a man named Alejandro Ibarra. *Id.* Ibarra bought Rodriguez a car to use to smuggle the drugs, and she permitted him to register it in her name. Sent'g Tr. at 7–8, *Sandra Rodriguez*, No. 19-cr-3339-LAB-1 (S.D. Cal. hearing held Jan. 6, 2020), ECF. No. 43 (ST 1). Three weeks later, Rodriguez drove her newly registered car from Los Angeles to the Plaza Sendero in Tijuana—a distance of 151 miles. At the plaza, she expected to meet a man whom she didn't know, understanding that she would turn the car over to him and he would take it to another location where drugs would be hidden in it. *Id.* at 8–9. After turning the car over to the man, she waited several hours for him to return to the Plaza, then reclaimed possession of the car, knowing it now contained hidden drugs. She then successfully crossed the drug load into the United States. *Id.* For this she was paid $4,000. *Id.* at 17. These events occurred a week *before* she was arrested for drug smuggling on August 3, 2019.

A week later Sandra Rodriguez tried it again. This time her attempt was foiled when a drug detection dog alerted to her car. PSR 1 at 3. Border guards searched the car and discovered 21.6 kilograms (over 47 pounds) of pure methamphetamine and 2.24 kilograms (almost 5 pounds) of heroin stashed in non-factory compartments welded into the frame of the vehicle. *Id.* Sandra Rodriguez admitted in a post-arrest statement that she expected to be paid an additional $4,000. She also revealed she had paid Martha a $500 "recruitment fee" after her first successful drug smuggling trip and she intended to pay her an additional $500 once she successfully crossed drugs this time. *Id.*

B. Jesus Rodriguez

About three years before his arrest on August 27, 2020, Jesus Rodriguez was stopped at a highway checkpoint where Border Patrol agents discovered more than 4 kilograms of a controlled substance hidden in his car. Presentence Rep. at 6, *United States v. Rodriguez* (*Jesus Rodriguez*), No. 20-cr-2911-LAB-1 (S.D. Cal. filed Jan. 1, 2021), ECF. No. 27 (PSR 2); Sent'g Tr. at 6, *Jesus Rodriguez*, No. 20-cr-2911-LAB-1 (S.D. Cal. hearing held May 3, 2021), ECF No. 43 (ST 2). He pled guilty to transporting a controlled substance and was sentenced to seven years in prison, although he served only three. PSR 2 at 12. He was on mandatory supervision for his previous drug trafficking offense when he was arrested in this case. *Id.*

Two weeks before he was arrested, Rodriguez met a man named "Gordo" at a party. *Id.* at 3–4. Gordo had overheard Rodriguez talking about finding a job and asked Rodriguez if he'd be willing to smuggle drugs from Mexico into the United States. *Id.* at 4. Rodriguez told Gordo he'd have to think about it and the two exchanged contact information. *Id.*

Two or three days later, Gordo and Rodriguez spoke again. This time, Rodriguez told Gordo he would accept the job. Gordo explained to Rodriguez that he would be given a load vehicle containing drugs to

drive from Mexico into the U.S. and that he would be paid $2,000 to $3,000 once he successfully crossed the drugs. *Id.* Approximately a week later, Gordo notified Rodriguez that the load car was ready. *Id.*

On the day of his arrest, Rodriguez had driven from Perris, California to a hotel in Tijuana where the drug-laden car was turned over to him. ST 2 at 7. According to Rodriguez, the plan was for Gordo to call him with specific instructions where to deliver the drugs once he crossed into the United States. *Id.* at 5. But the plan was upended when Rodriguez was detained at the port of entry by a border guard who found drug packages under a rug in the trunk of the car. In secondary inspection, border agents discovered 40.84 kilograms (almost 90 pounds) of pure methamphetamine stuffed into the car's quarter panels, doors, spare tire, gas tank, and rear seat. *Id.* at 3.

* * * * *

In both Rodriguez cases, the defendants knew the essential details of the drug smuggling plan *before* they agreed to participate. Sandra Rodriguez, for example, was told that the car she would be given had to be registered in her name. This is a common tactic in border drug smuggling, designed to allay suspicion by border guards. Presumably, she was aware of this purpose and willingly provided her personal information to Ibarra so he could list her as the registered owner.

At sentencing, her lawyer explained that when she was arrested, she was again working with Ibarra, following the same *modus operandi* as the week before when she successfully smuggled drugs, driving the same car she had permitted Ibarra to register in her name, and planning to deliver drugs to the same person to whom she had previously delivered drugs. ST 1 at 4. In other words, with a full understanding of the "game plan," which she had practiced, Rodriguez attempted to execute the plan a second time. I'm no linguist, but it's hard to decipher why such deliberate, informed conduct doesn't amount to "participation in the planning" of the smuggling venture.

As for Jesus Rodriguez, having previously been caught at a highway checkpoint transporting drugs, he had experienced first-hand the risk of attempting to drive a drug-laden car past a point where law enforcement checks are performed. At the border, the risks include running the gauntlet of border guards who patrol the pre-primary area aided by reliable drug-sniffing dogs. If a drug smuggler makes it to the primary inspection booth without detection, he'll confront, face-to-face, a suspicious border guard whose duty is to prevent drugs from entering the U.S. The guard has unlimited authority to inspect any car. These well-known risks probably explain why Rodriguez initially parried Gordo's offer, saying he needed to "think about it."

[10] A district court's findings are to be upheld as long as they aren't illogical, implausible, or without support in inferences that may be drawn from the facts. *United States. v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). When I sentenced Jesus Rodriguez, I reasonably deduced from the known facts of his initial encounter with Gordo that: (1) they discussed a plan to smuggle drugs across the border; (2) they very likely discussed and possibly negotiated the fee that would be paid (unless he was to be paid, why would Rodriguez even consider the plan or need to think about it?); and (3) Rodriguez had a clear understanding of what his anticipated role would be if he agreed to participate in the plan.

Rodriguez's delay in deciding whether to participate gave him time to contemplate

and reflect on the plan, and to consider the risks it posed. I found that his eventual decision to become involved in the drug smuggling plan was fully considered and premeditated—mental states that the criminal law has historically regarded as indicative not of minor participation but rather of a high level of criminal culpability. *See e.g., Enmund v. Florida*, 458 U.S. 782, 800, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) ("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 . . .' ") (cleaned up); *see also Deliberate*, Black's Law Dictionary (8th ed. 2004) (defining a deliberate action as one that is "[i]ntentional; premeditated; fully considered").

Pursuant to the plan, Rodriguez drove from Perris, California to a hotel in Tijuana to meet Gordo, a distance of approximately 98 miles. PSR 2 at 4; ST 2 at 8. There, as he anticipated, he took possession of the drug-laden car and drove to the border, expecting to receive a phone call providing additional direction once he crossed. PSR 2 at 4. None of the actions Rodriguez took were forced or coerced—he had volunteered. Well before he was caught smuggling drugs at the border, Jesus Rodriguez knew the plan, knew his role in the plan, and took action to execute the plan.

As was true of the Rodriguez defendants, my experience is that average border drug smugglers in every case are thoroughly briefed on the actions they must take for the smuggling plan to succeed. The plan often contemplates their participation in various preparatory acts, such as registering smuggling vehicles in their names (or allowing others to do so), driving long distances, making "dry runs" across the border to establish a crossing pattern in a particular vehicle and also to familiarize smugglers with the scrutiny they can anticipate from border guards, and memorizing detailed instructions such as where they must go and what they must do once they successfully cross the border. But because I must follow the letter and the spirit of the Mandates—which, to reiterate, require importers to "plan," "devise" or "develop" the drug smuggling plan"—I am foreclosed from relying on my own entrenched experience to decide whether the evidence proves the Rodriguez defendants "participated in the planning." According to the Mandates, they did not.

The Mandates emphasized another factor that the panel majorities considered consequential to a finding of minor role: both Rodriguez defendants claimed to be unaware of the type or quantity of drugs they were smuggling. S. Rodriguez Mandate, 2021 WL 6118165 at *5, 2021 U.S. App. LEXIS 38134 at *14–15; J. Rodriguez Mandate, 44 F.4th at 1236. My experience—again, in handling thousands of border importation cases—is that drug smugglers seldom know or care to know the type or quantity of drugs they are smuggling. To the contrary, they are either indifferent to knowing such information or they *deliberately don't want to know.* Having listened to sentencing allocutions from hundreds of border drug smugglers, I've learned that the most important consideration to a smuggler is money—how much he will be paid. Money is so paramount that a smuggling plan could call for bringing in nuclear waste and, for the right price, average drug smugglers would bite. Here, for example, although both Rodriguez defendants had discussed money with their recruiters and knew how much they would be paid, neither bothered to ask about the type or quantity of the drugs they would be smuggling. ST 1 at 11; PSR 2 at 4. Sandra Rodriguez's detachment went further—she *deliberately avoided knowing* the type and quantity of her drug

loads. ST 1 at 11 (counsel for Sandra Rodriguez describing her as "willfully ignorant" of the type and quantity of her drug loads); *cf. United States v. Heredia*, 483 F.3d 913, 924 (9th Cir. 2007) (en banc) (defendant's awareness of a high probability of criminality and deliberate avoidance of learning the truth is tantamount to actual knowledge).

Here again, notwithstanding my everyday observations and understanding of the case-specific details of border drug smuggling cases, *Gasca-Ruiz*, 852 F.3d at 1173, and the "special competence" I have developed in handling a myriad of these cases, *Buford*, 532 U.S. at 64, 121 S.Ct. 1276, I am stymied by the letter and spirit of the Mandates. Rather than relying on my validated experience, the rule of mandate forces me to ratify an irreconcilable assumption that average drug smugglers usually know—or should know—the type and quantity of the drugs they import.

III. The Degree to Which the Defendant Stood to Benefit from the Criminal Activity – U.S.S.G. § 3B1.2, comment. (n.3(C)(v))

The Rodriguez Mandates held this factor favored a finding of minor role because Sandra Rodriguez was to receive $4,000 [2] and Jesus Rodriguez was to receive between $2,000 and $3,000. The Mandates characterized these amounts as "modest and fixed," but offered no guidance as to what amount of compensation would disqualify a drug smuggler from being considered a minor participant. Again, I cannot reconcile my experience in sentencing thousands of border drug smugglers with this characterization and conclusion.

I learned long ago in my law school contracts class that the fair market value of something, whether goods or labor, was the price that was agreed to between a willing seller and a willing buyer. The usual or "going" rate per trip for smuggling large quantities of controlled substances across the border into the Southern District of California is between $1,000 at the low end and $8,000 to $10,000 at the very high end. These figures aren't speculative. They are empirical and verified by my extensive experience sentencing "willing smugglers." Judges, prosecutors, and criminal defense lawyers in this District who handle border drug smuggling cases on a daily basis will attest to their accuracy. The smuggling fees promised to both Rodriguez defendants fell within this well-established range.

The Mandates rebuffed my first-hand experience, minimizing the amount of the fees the Rodriguez defendants agreed to accept by characterizing them as "modest and fixed." But considering the substantial

2. In determining Sandra Rodriguez's sentence, I concluded her fee for smuggling drugs was $8,000 because she had received $4,000 for smuggling drugs the first time and expected to receive another $4,000 had she not been arrested the second time. According to the Mandate, the $8,000 figure was wrong because only $4,000 was promised for the drug load for which she was arrested and sentenced. S. Rodriguez Mandate, 2021 WL 6118165 at *5, n.5, 2021 U.S. App. LEXIS 38134 at *23, n.5. This holding is contrary to U.S.S.G. § 1B1.3(a)(1)(A)–(B) (Relevant Conduct), which directs district courts to consider ''all acts'' committed by the defendant that are ''within the scope of jointly undertaken criminal activity,'' which is further defined as ''a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others.'' It is undisputed that both times Sandra Rodriguez smuggled drugs, she was working with Ibarra, following the same *modus operandi*, driving the same car, intending to deliver the drugs to the same person, etc. ST 1 at 4. Here again, the rule of mandate poses a conflict with other controlling legal authority by requiring that I ignore § 1B1.3(a)(1)(A)–(B) and adopt the panel's conclusion that Sandra Rodriguez's drug smuggling fee was only $4,000.

deference the Supreme Court has said is owed to district courts, should my finding of the fair market value of a negotiated service between a willing buyer and seller—neither being under any compulsion to buy or sell and both having full knowledge of the relevant facts—have been so cavalierly disregarded? If so, what fee amount exceeding the limits of reason or necessity must be paid for a drug smuggler to be regarded as "average?" The Mandates don't say, although they're clear that fees between $2,000 and $4,000 are insufficient.

While rejecting case-specific experience relating to the common amount of fees paid to drug smugglers, the Rodriguez Mandates rely on a metric that compares the value of a smuggler's fee to the value of the drug load being smuggled. The mathematics of this metric are easy enough to understand, but drawing on my experience I am unaware of any meaningful rationale to explain how this method of comparison applies to border drug smuggling cases. Just the opposite: I know from hard-won experience that there is no relevant or comparable relationship between the high value of bulk narcotics and the much lower value fee that will induce someone to smuggle them. The lack of comparability is unremarkable and understandable to those familiar with the nuances of border drug smuggling because, as I have pointed out, border drug smugglers are invariably *indifferent* to the type and amount of drugs they smuggle.

Analogies to buttress this point abound. Armored truck guards transport millions of dollars of bonds, currency, and jewelry in heavily fortified trucks, but their pay isn't tied to the value of their cargo. Nor does the compensation of a jewelry salesperson bear any relationship to the value of the gold, silver, and diamond jewelry in the showcase he or she oversees. And stadium hot dog venders, as far as I know, aren't entitled to a percentage of the gate receipts from the World Series. In each of these examples, just as with drug value and drug smugglers' fees, there is no meaningful, experientially-based interrelationship that applies. Nevertheless, I am bound by the Mandates to apply this metric.

Finally, the Mandates also held that because the Rodriguez defendants didn't own the drugs they were smuggling, that too supported granting them minor roles. While I acknowledge that the commentary to § 3B1.2(b) mentions having a "proprietary interest in drugs" as a factor, I know from experience that it has absolutely no relevance or application to border drug smuggling cases. *See United States v. Gutierrez-Sanchez*, 587 F.3d 904, 908 (9th Cir. 2009) ("The weight to be given the various factors in a particular case is for the discretion of the district court."). Trying to apply it is akin to the proverbial effort to fit a square peg in a round hole. In disposing of thousands of "border bust" cases, I have *never* encountered a single instance in which a cross-border drug smuggler owned all, or any part of, a bulk drug load.

My experience mirrors that of experienced prosecutors and defense attorneys who practice in this District. In countless border drug smuggling cases when the issue of "proprietary interest in the drugs" has been raised, I have asked whether either counsel has ever handled a case where the smuggler owned the large load of drugs being smuggled. Without exception, the answer has been "no." It never happens. Why? Because drug traffickers with the wherewithal to own and control large quantities of drugs won't take the risk of crossing drugs themselves. Despite the certainty and uniformity of my experience that this factor has zero application in

border smuggling cases, I must construe it in favor of finding minor role.[3]

IV. Recusal is Warranted and Necessary in Cases of Conflict or When a Judge is Unable to Follow the Law

[11, 12] Over a hundred years ago, Oliver Wendell Holmes discerned that "[t]he life of the law has not been logic: it has been experience." Oliver Wendell Holmes, Jr., The Common Law 1 (1881). Holmes' wisdom is embodied in the relevant federal sentencing statute that requires a reviewing court not only to "accept" a district court's "findings of fact" (unless "clearly erroneous"), but also to "give due deference to the *district court's application of the guidelines to the facts.*" 18 U.S.C. § 3742(e) (emphasis added). The Supreme Court has also embraced this principle, pointing out that deference may depend on whether "one judicial actor is better positioned than another to decide the issue in question," *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985), and adding that the deference due depends on the nature of the question presented, *Koon*, 518 U.S. at 98, 116 S.Ct. 2035. Where the question embodies the kind of discretion traditionally exercised by a sentencing court—*i.e.*, making findings concerning a defendant's role in an offense and level of culpability—the judgment is entitled to *substantial* deference. *Id.* Substantial deference is especially appropriate when factual nuances may closely guide the legal decision to be made, or where the legal result depends heavily on an understanding of the significance of case-specific details that have been gained through experience with trials and sentencings. *Buford*, 532 U.S. at 64–65, 121 S.Ct. 1276. This is precisely the kind of determination that must be made in resentencing Sandra and Jesus Rodriguez.

The Mandates arrived at the judgment that two practiced drug traffickers, who consciously and intentionally joined plans to import bulk quantities of methamphetamine and heroin into the United States, and who were promised thousands of dollars in payment for their participation, qualify as "minor participants" in the offense of simple drug importation. My twenty-five years of grounded, trial-level experience handling border drug smuggling cases opposes the logic and impact of that conclusion.

[13–15] "It is a general principle of federal sentencing law that district courts have a duty to explain their sentencing decisions." *United States v. Emmett*, 749 F.3d 817, 820 (9th Cir. 2014) (citing *United States v. Carty*, 520 F.3d 984, 992–93 (9th Cir. 2008)) (en banc). This requirement helps reinforce "the public's trust in the judicial institution," *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), and demonstrate "that a reasoned decision has been made," *Carty*, 520 F.3d at 992. In this Order, I have attempted to explain why I continue to believe and would find that the Rodriguez defendants are "average" border drug smugglers—no better, no worse. But my

3. The Supreme Court's decision in *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), authorizes district judges "to impose sentences reflecting their policy disagreements with the Guidelines," in cases in which empirical evidence doesn't support the application of a particular provision of the Guidelines. *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 739 (9th Cir. 2009). However, *Kimbrough* doesn't permit me to flout the law of the case or the rule of mandate doctrines. Both doctrines here again require me to apply a factor in an abstract manner that is contrary to my knowledge and experience with "case specific details" in border drug smuggling cases. *Cf. Koon*, 518 U.S. at 99, 116 S.Ct. 2035.

explanation and probable findings—even if not expressly precluded by the law of the case and the rule of mandate—are most certainly inconsistent with the expansive "spirit" of the Mandates, which unsubtly bespeaks the desired conclusion of the court of appeals. The Ninth Circuit has said that in situations like this, where the original sentencing judge on remand would "have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous," the judge should recuse. *United States v. Arnett*, 628 F.2d 1162,1165 (9th Cir. 1979). Because I find myself unable to brush aside my insights, experience, and long-held conclusions about what "average" border drug smugglers know and how they operate, I respectfully recuse from further involvement in these cases.

IT IS SO ORDERED.

Ryan CHIEN, individually and on behalf of all others similarly situated, Plaintiffs,

v.

BUMBLE INC., Buzz Holdings L.P., and Bumble Trading LLC, Defendants.

Case No.: 3:22-cv-00020-GPC-NLS

United States District Court, S.D. California.

Signed November 17, 2022

Background: User brought putative class action in state court against operator of internet-based dating application and related entities, alleging violations of California's Unfair Competition Law, False Advertising Law, Consumer Privacy Act, and Comprehensive Data Access and Fraud Act and related claims arising from allegedly unauthorized collection, use, and disclosure of users' personally identifiable information (PII) and biometric information. Following removal, defendants moved to dismiss for lack of personal jurisdiction, or in the alternative, to compel arbitration.

Holdings: The District Court, Gonzalo P. Curiel, J., held that:

(1) specific personal jurisdiction did not exist over non-resident parent company of operator under alter ego test;

(2) operator purposefully directed its activities at California, supporting exercise of specific personal jurisdiction;

(3) parent company purposefully directed its activities at California, supporting exercise of specific personal jurisdiction;

(4) claims arose out of and related to defendants' forum-related activities, supporting exercise of specific personal jurisdiction;

(5) operator provided reasonably conspicuous notice of terms to which user would be bound, and thus arbitration agreement existed;

(6) arbitration agreement contained valid delegation clause; and

(7) issue of whether arbitration agreement applied retroactively was for arbitrator, rather than court, to decide.

Motion to dismiss granted in part; motion to compel arbitration granted.

1. Federal Courts ⚿2791

When the defendant challenges personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper. Fed. R. Civ. P. 12(b)(2).

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

801 I Street, 3rd Floor
Sacramento, California 95814

Chair: Heather Williams Phone: 916.498.5700

March 18, 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: Defender Reply Comment on Proposed 2024–2025 Amendments on Supervised Release and Drugs

Dear Judge Reeves:

Thank you for the opportunity to provide comments and witness testimony on this year's proposed amendments to the Sentencing Guidelines. Below, we briefly supplement our comments and testimony, to reply to issues discussed in other comments and raised at last week's hearing, as follows:

I. Proposal 1: Supervised Release

Last week's hearing and public comment make clear that there is broad support for the Commission's proposed reforms to the Supervised Release Guidelines and Policy Statements to ensure supervised release serves the utilitarian purposes for which it was designed: rehabilitation, deterrence, and public safety. Despite this near-consensus, several commentators suggested the Commission should either delay or not enact parts of its ameliorative proposal. Below, Defenders respond to these critiques, and urge the Commission to adopt this amendment now.

A. *Esteras* will have no impact on this amendment.

The CLC and POAG suggested in their written comments that the Commission should await the outcome of *Esteras v. United States* before adopting this amendment.[1] We disagree. The Commission's proposed updates to Chapters 5 and 7 merely conform the guidelines and policy statements to the supervised release statute, 18 U.S.C. § 3583. As CLC Chair Judge Edmond E-Min Chang acknowledged last week,[2] the narrow question addressed in *Esteras* involves the proper interpretation of § 3583(e),[3] specifically, whether that provision permits courts to consider the § 3553(a)(2)(A) retributive factors when revoking supervised release, even

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[1] 145 S. Ct. 413 (Oct. 21, 2024) (granting certiorari).

[2] Testimony of Honorable Edmond E-Min Chang on behalf of the CLC to USSC, at 5:13:25–5:13:54 (Mar. 12, 2025). At the hearing, Judge Chang appeared to concede that the Commission's carefully worded amendment would not run afoul of any holding in *Esteras*. He testified, "It does seem like the only question [in *Esteras*] is a very specific 3553(a)(2)(A)" question about whether the retributive factors can be considered in violation hearings, and if the Commission simply refers to the statute "which is already progress," then "whatever comes along with *Esteras* will just be imported into that very statutory cite." *Id.*

[3] Section 3583(e) addresses the modification, termination, extension, and revocation of supervised release. Imposition, length, and setting of the original conditions of supervised release are addressed at § 3583(c), which is not at issue in *Esteras*. In *Tapia v. United States*, the Supreme Court acknowledged that "a court may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release." 564 U.S. 319, 326 (2011).

though § 3583(e) omits the (a)(2)(A) factors from its list of what courts may consider.[4]

While the amendment references § 3583(e), building its guidance upon the framework of that provision, it does not prohibit courts from relying on retributive factors when addressing noncompliance or revoking supervised release. The amendment otherwise cites to legislative history and Supreme Court precedent not called into question or implicated by the pending *Esteras* decision. There is simply no need to wait for the outcome of *Esteras* to adopt this proposal. To the contrary, testimony and written comment illustrate that supervised release has veered far from what was undisputably Congress's original intent in devising the supervised release scheme, with lengthy terms of supervision often imposed mechanistically, and with wide disparities in rates of early termination and revocation—all pressing issues this amendment would (and should) address now.

B. §5D1.1: Earned time credit commentary.

With regard to First Step Act earned time credits, commentators, including the DOJ, support efforts to ensure earned time credit-eligible individuals can receive up to one year of credits toward early transfer to supervised release.[5] The earned time credit program not only encourages incarcerated individuals to take beneficial recidivism reduction programming in prison but, through early transfer to supervision, also ensures that halfway house beds are available for those who are not eligible for earned time credits but could receive discretionary halfway house placement under 18 U.S.C. § 3624(c)(1) (i.e. Second Chance Act).[6] Defenders write to clarify

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[4] Brief for Petitioners at i, *Esteras v. United States*, 145 S. Ct. 413 (2024) (No. 23-7483), 2024 WL 5119863, at *i.

[5] *See* DOJ Comment on the USSC's 2025 Proposed Amendments, at 35 (Mar. 3, 2025).

[6] As discussed by the DOJ, if an individual received earned time credits but was not sentenced to a term of supervised release, they could only use their credits for prerelease custody to a halfway house or home detention. *See* DOJ 2025 Comment, at 35. As a result, the individual would spend, in some cases, an extra year in the halfway house, limiting bed placement for others. *See id.* ("When RRC beds are occupied for an extensive time by a 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.").

two points. First, under a plain reading of 18 U.S.C. § 3624(g)(3), a court need only impose a one-day term of supervision for an individual to be transferred to supervised release at an earlier date, not to exceed 12 months.[7] And second, during that nominal or minimal term of supervision, the individual would not need to be supervised by a probation officer.[8]

C. §5D1.2: The Commission should not recommend lifetime supervision for people convicted of sex offenses.

The DOJ opposes, for "public safety" reasons, removing §5D1.2's policy statement recommending lifetime supervision for people convicted of a sex offense, which includes people convicted of noncontact child pornography receipt and possession.[9] There are at least three reasons to remove this recommendation.

First, it contributes to extreme unwarranted geographic disparity, as certain districts default to automatically imposing lifetime supervision in nearly all sex offense cases, including noncontact child pornography cases, while others properly conduct individualized assessments of risks and need.[10]

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[7] Defenders believe only a one-day term of supervised release is needed to trigger early transfer to supervised release up to 12 months under 18 U.S.C. § 3624(g)(3). However, as this area of law is developing, we suggest that the Commission use a modifier such as "some/nominal/minimal" in any commentary to signal the importance of requesting a limited term for individuals eligible for earned time credits. Defenders prefer the terms "nominal" (as set forth in our Comment) or "minimal" as it makes clear that the least amount of supervision should be requested. *See* Defenders' Comment on the USSC's 2025 Proposed Supervised Release Amendments, at 8–9 (March 3, 2025).

[8] Testimony of Kelly Barrett on behalf of the Federal Defenders to the USSC, at 5:49:00–5:50:26 (Mar. 12, 2025) (confirming that, if a one-day term of supervised release is imposed, that term would be only a technical imposition needed to trigger the ability to apply the credits but would not require supervision by a probation officer).

[9] *See* DOJ 2025 Comment, at 34.

[10] District norms around supervised release term length for sexual offenses varies widely from districts that follow the recommendation to others that ignore it. For example, in the District of Arizona in fiscal year 2023, the average length of a term of supervised release for individuals sentenced under §2G2.2 was 470 months, reflecting a lifetime supervised release term. By contrast, in the Eastern District of

Removing this recommendation would help ameliorate this disparity, while leaving judges discretion to impose lengthy supervision, up to the statutory maximum of life, in some cases (and judges can always extend the term when appropriate).

Second, this policy statement was added to the Guidelines before the PROTECT Act of 2003 increased the statutory maximum term of supervised release to life in all child pornography cases.[11] The Commission has noted criticism of this blanket recommendation because it was promulgated when the maximum term of supervised release in most child pornography cases was just three years.[12] The Fifth Circuit has observed that the Commission's policy statement recommending lifetime supervision for all child pornography cases goes well beyond Congress's decision to require a mandatory minimum five-year term of supervision for sex offenses.[13]

Third, empirical findings support removing this recommendation.[14] Not all individuals convicted of sex offenses carry the same risk level when it

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Texas, the average length of supervised release for individuals sentenced under §2G2.2 was 92 months. *See* USSC, IDA (last accessed Feb. 22, 2025). Out of individuals sentenced in fiscal year 2023 for §2G2.2 offenses who received lifetime supervision terms, five districts alone comprised 37% of such cases: the Eastern District of Missouri, Northern District of Texas, District of Arizona, Southern District of Florida, and District of South Carolina. The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2023. *See also* Niquita Marie Loftis, *Supervised Release Sentences of Child Pornography Offenders in U.S. District Courts: An Examination of Disparity*, at 125 (Apr. 13, 2017) (discussing geographic disparities and lifetime SR terms).

[11] Pub. L. No. 108–21, § 101, 117 Stat. 650 (2003); *see also* USSG, App. C., Amend. 615 (2001).

[12] USSC, *2012 Report to the Congress: Federal Child Pornography Offenses*, at 272 (2012).

[13] *See United States v. Alvarado*, 691 F.3d 592, 598 (5th Cir. 2012) ("Congress clearly contemplated that there would be instances where less than the maximum [*i.e.*, a lifetime term] would be reasonable.").

[14] *See* David Thornton et. al., *Estimating Lifetime and Residual Risk for Individuals Who Remain Sexual Offense Free in the Community: Practical Applications*, 33 Sexual Abuse 1, 24 (2019) ("The current statistical model of long-term risk highlights the importance of considering the time free effect for individuals residing in the community. After 10 to 15 years, most individuals will have desisted from sex offending, and virtually all will have desisted by 20 years.");

comes to reoffending, and while "the moral consequences of sexual offending may last forever, [study] results suggest that [people convicted of a sex offense] who remain offense-free could eventually cross a 'redemption' threshold in terms of recidivism risk, such that their current risk for a sexual crime becomes indistinguishable from the risk presented by" other sentenced individuals.[15] The Commission has itself recognized critics' claims that categorically recommending lifetime supervision in these cases fails "to distinguish among [supervisees] with respect to their levels of risk and corresponding need for lifetime supervision."[16]

D. §5D1.3: Concerns with current standard conditions.

With respect to the conditions of supervised release, the Commission heard testimony about the significant burdens created by various standard conditions. And while POAG urged maintaining the long list of "standard conditions,"[17] studies show that unnecessary conditions lead to unnecessary

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see also Thomas Cohen, *Predicting Sex Offender Recidivism: Using the Federal Post Conviction Risk Assessment Instrument to Assess the Likelihood of Recidivism Among Federal Sex Offenders*, 15 J. of Empirical Legal Studies 456, 477 (Aug. 2018) (explaining findings that track previous studies, specifically that individuals "convicted of child pornography [offenses] evidence less serious risk characteristics and are rearrested at lower rates compared to other sex offender types" and that "the overall pattern of sex offenders being rearrested at higher rates for nonsex rather than sexual offenses is consistent with the studies cited above and with other metaanalyses of sex offender recidivism").

[15] R. Karl Hanson et. al., *High-risk sex offenders may not be high risk forever*, 29 J. Interpersonal Violence, at 15 (2014); *see also id.* at 16 ("This study found that sexual offenders' risk of serious and persistent sexual crime decreased the longer they had been sex offense–free in the community. This pattern was particularly evident for high-risk sexual offenders, whose yearly recidivism rates declined from approximately 7% during the first calendar year, to less than 1% per year when they have been offense-free for 10 years or more.").

[16] *2012 Report to the Congress,* at 272 (citing *United States v. Apodaca*, 641 F.3d 1077, 1085–87 (9th Cir. 2011) (Fletcher, J., concurring)).

[17] *See* POAG Comment on the USSC's 2025 Proposed Supervised Release Amendments, at 5 (Mar. 3, 2025) (POAG believes all standard conditions "should remain unchanged in most cases").

reincarceration.[18] The conditions imposed on a person should be sufficient, but not greater than necessary.[19] Courts should initially impose a narrowly-tailored set of conditions, which they can later modify or expand as needed.[20]

Although POAG claimed that probation officers simply work with supervisees to modify conditions, such as travel restrictions, the experiences of Defenders and impacted persons such as Rita Gray show that busy probation officers cannot undo the harms caused by these conditions. Travel restrictions cause people on supervision to lose job opportunities and precious moments with loved ones that they can never recover. Likewise, the problems with the felony association condition go far beyond social isolation from friend groups; people often live in multigenerational households with parents, children, or other loved ones who have felony convictions. In our experience, this condition has an outsized impact on overpoliced, low-income Black, Hispanic, and Native communities.

The successes seen in the District of Connecticut, where some judges tailor conditions to the individual's needs rather than impose a blanket set of standardized conditions, speaks volumes. And as Defender Witness Kelly Barrett testified, investing more time and effort on the front-end by assessing and tailoring supervised release to the risks and needs of the individual, yields enormous benefits on the back-end by preventing violation and revocation proceedings. In this way, the proposed amendment would save courts and stakeholders time by preventing needless revocation proceedings from clogging busy court dockets**.**

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[18] M. DeLisi et. al., *Who are the compliant correctional clients? New evidence on protective factors among federal supervised releases*, 65 Int'l J. Offender Therapy & Comp. Criminology 1536, 1544 (2021) ("Total conditions were inversely associated with compliant supervision status . . . with each additional condition associated with a 19% reduced likelihood of compliant supervision status.").

[19] *See* 18 U.S.C. § 3553(a).

[20] *See* Liman Center, *Collecting Conditions: A Release Snapshot of Conditions District Connecticut* 19 (2025) (recommending sentencing courts limit the conditions initially imposed to a "tailored, individualized set," including only the minimum conditions that fulfill the statutory obligation of completing the sentencing).

E. §5D1.4(a): The need for, and practicality of, a "second-look" at conditions of supervision post-release.

In Defenders' view, the proposed "second-look" at conditions of supervised release "as soon as practicable" after a person's release from prison is one of the most important provisions in the proposed amendment. The Commission heard repeatedly that it is impossible for courts to anticipate a person's risks and needs upon release, many years or decades earlier, at the time of sentencing, when conditions and terms of supervision are initially set. Yet, DOJ, CLC, and POAG suggested that formalizing and standardizing this right-sizing of conditions in the Guidelines Manual—through a process fully consistent with statute—is either unnecessary because probation officers are already doing this work, or ill-advised because it would burden already overly-busy district judges.

To start, not all supervisees are able, on their own, to seek modifications of conditions to better meet their needs. Take, for instance, witness Rita Gray. She testified she had to turn down multiple well-paying job opportunities because of inflexibility related to the nature of acceptable employment while at the halfway house.[21] More importantly, busy probation officers simply cannot replace judges in this role. Judge Erickson described the importance of explaining to those he sentences the reasons for the conditions of supervised released, noting, "If I was hands on early on, they did better . . . because they understood that somebody cared." [22] Likewise, some judges in Connecticut regularly revisit conditions of supervised release after a person gets out of prison. As Attorney Barrett testified, this often involves no more than a 15 or 20-minute telephone conference.[23] Not only are these conferences efficient, but they save time, expense, and burden down the road by reducing the number of revocations and reimprisonments due to noncompliance with unnecessary and onerous conditions.

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[21] Testimony of Rita Gray to the USSC, at 1:24:31–1:26:20 (Mar. 13, 2025).

[22] Testimony of Honorable Ralph Erickson on behalf of TIAG to the USSC, at 21:09–27:14 (Mar. 13, 2025).

[23] Barrett Testimony, at 5:40:00–5:41:15.

F. §5D1.4(b): The Commission should not wait to establish early termination criteria.

At the hearing and in their written comment, the CLC suggested it would be premature to establish early termination criteria because an Administrative Office Working Group is studying the early termination factors listed in the *Guide to Judiciary Policy*, Vol. 8E, Ch. 3, § 360.20, on which some of the factors in the proposed §5D1.4(b) are based, and "*could*" be suggesting improvements to those criteria.[24] This is not a reason to delay adopting this amendment, including the bracketed criteria for early termination in the proposed §5D1.4(b).

In Defenders' experience, and irrespective of the *Guide*, the factors listed in the proposed §5D1.4(b), with Defenders' minor suggested changes,[25] are the factors that matter most to judges when deciding whether to terminate supervision early. For instance, in Connecticut, where Attorney Barrett practices, judges regularly rely on these and similar criteria to terminate supervision early, without explicitly citing to or relying on the *Guide*. And these criteria are working there—Connecticut has one of the highest early termination and lowest revocation rates in the country.[26]

More, POAG sees no need to wait for the results of the Working Group's study. They asked the Commission to mirror aspects of the current *Guide* in the proposed §5D1.4(b), pointing out that the Commission's inclusion of this criteria would encourage more probation officers around the

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[24] CLC Comment on the USSC's 2025 Proposed Amendments, at 6 (Mar. 3, 2025); Hon. Chang Testimony, at 5:13:08–5:13:24.

[25] Defenders also agree with the language modifications and additions Professor Alison Guernsey offered at (2), (3), (4), (5), and (7). *See* Guernsey Comment on the USSC's 2025 Proposed Supervised Release Amendments, at 15–17 (Mar. 3, 2025) .

[26] *See* USSC, *Federal Probation and Supervised Release Violations*, at 18 (2020) (from fiscal years 2013–2017, only 4.5% of individuals on supervision committed a violation in the District of Connecticut); Barrett Testimony, at 5:27:35–5:27:40 (testifying to statistics kept by the Federal Defender Office that 91% of early termination motions in the District of Connecticut are granted).

country to regularly recommend and support early termination, which could lower rearrest rates and improve public safety.[27]

Finally, it would be helpful for people on supervision if the Guidelines Manual included these early termination criteria *now*. As emphasized at the hearing, these criteria would provide people on supervision transparency and clear markers to strive for in order to successfully terminate early.[28] CLC was not able to say when the Working Group might update the *Guide's* early termination criteria. Judge Chang testified that there would be a meeting in June, at which point CLC would "figure out from there" what the timeline for updates would be.[29] Of course, the Commission's amendments are due to Congress by May 1, 2025. Thus, any recommended updates to the criteria would come after this amendment cycle ends, and not in time to benefit people like Mr. Hicks. If there are evidence-based updates to the *Guide* down the line, the Commission is free to revisit its early termination criteria in a future amendment cycle.

G. §7C1.1: The seriousness of "technical" violations.

Many commentators support adding a Grade D category, with lower sentencing ranges, for non-criminal technical violations.[30] That said, the

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[27] POAG 2025 Comment, at 8 (Mar. 3, 2025) (citing Thomas H. Cohen, *Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety* (Jan. 15, 2025)).

[28] Testimony of Eric Hicks to the USSC, at 1:23:26–1:24:05 (Mar. 13, 2025); *see also* Guernsey 2025 Comment, at 11–12 (discussing how including enumerated early termination factors provides people on supervised release with greater transparency and metrics for measuring achievement towards the goal of early termination).

[29] Hon. Chang Testimony, at 5:13:14–5:13:17.

[30] *See, e.g.,* CLC 2025 Comment, at 7 ("[T]he Committee supports this separate Grade to distinguish new crimes from other violations of supervised release."); TIAG Comment on the USSC's 2025 Proposed Supervised Release Amendments, at 12 (Mar. 3, 2025) ("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."); Reform Alliance Comment on the USSC's 2025 Proposed Supervised Release Amendments, at 10 (Mar. 3, 2025) (appreciating the distinction of carving out a Grade D violation and "strongly encourag[ing] the Commission to provide for a presumption against revocation for technical violations . . unless public safety is implicated and/or alternative interventions fail."); Judge Katherine M. Menendez

majority of POAG was opposed to this change, claiming some technical violations are more serious than misdemeanor offenses.[31] They gave as an example a person convicted of a sex offense having unapproved contact with a minor. This type of violation, however, does not arise often and is not a reason to forego lowering guideline ranges for technical violations.

Because technical violations make up approximately two-thirds of all supervised release violations,[32] Defenders have extensive experience handling them. POAG's example represents the exception, not the rule. Most technical violations involve positive drugs tests, missed drug tests, missed appointments with probation officers or counselors, or traveling without permission.[33] These violations often arise from mental health issues, including substance use disorders, as well as poverty and limited work or educational history.[34] "In essence, [technical] violations reflect the many barriers to rehabilitation that are often beyond our clients' control,"[35] and

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Comment on the USSC's 2025 Proposed Supervised Release Amendments, at 4 (Mar. 3, 2025) ("[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."); NACDL Comment on the USSC's 2025 Proposed Supervised Release Amendments, at 4 (Mar. 3, 2025) ("NACDL commends the Commission's proposal to create a new Grade D . . ."); Brennan Center Comment on the USSC's 2025 Proposed Supervised Release Amendments, at 2 (Mar. 3, 2025) ("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.").

[31] Testimony of Josh Luria on behalf of POAG to the USSC, at 19:57–20:28 (Mar. 13, 2025); POAG 2025 Comment, at 12.

[32] *See* DOJ *Report on Resources and Demographic Data for Individuals on Federal Probation and Supervised Release*, at 20 (2023).

[33] Studies from other jurisdictions also confirm that most low-level violations are related to failed alcohol and drug tests or failure to comply with the reporting requirements of supervision. *See, e.g.*, Ryan Sakoda, *Abolish or Reform? An Analysis of Post-Release Supervision* (June 14, 2024) (reporting data from a study of individuals on supervision in Kansas between 1998 and 2019 showing that 81.5% of violations were for drug and alcohol violations, failing to report to the probation officer, or failing to attend treatment or counseling).

[34] *See* Stefan R. Underhill, J., *Supervised Release Needs Rehabilitation*, 10 Va. J. Crim. L. 1, 16–17, 22–23 (2024).

[35] Defenders' Comment on Supervised Release, at 26.

they are usually qualitatively less severe than new criminal conduct. In the rare case involving more aggravated conduct, courts can vary above the guidelines, all the way up to the statutory maximum, if appropriate.[36]

POAG also argues against the creation of the Grade D category because, according to POAG, petitions based on technical violations are often filed "due to the exhaustion of other options" and because efforts "likely" had already taken place to address noncompliance.[37] Given the wide variation across districts in how violations are addressed, probation officers do not appear to handle violations consistently across the country.[38] While probation officers in some districts may avoid filing revocation petitions on the first or even second or third instance of technical noncompliance, other do not. More, once revocation proceedings are initiated and a defense attorney assigned, the attorney and court can work with the individual on supervision to address areas of noncompliance in ways that will better promote rehabilitation and public safety than additional prison time.[39]

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[36] Additionally, the commentary to Proposed §7C1.5 provides for an upward departure for a Grade C or D violation "associated with a high risk of new felonious conduct."

[37] Luria Testimony, at 19:57–20:11; POAG 2025 Comment, at 12.

[38] USSC, *Federal Probation and Supervised Release Violations*, 18 (2020) (noting the considerable variation in violation and revocation rates across districts, with the highest violation rate at 42% and the lowest violation rate at 5%).

[39] *See* Underhill, *Supervised Release Needs Rehabilitation*, at 5; *see also* Defenders' Comment on Supervised Release, at 32 ("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, and . . . could lead to increased recidivism." (citations omitted)); Barrett Testimony, at 5:40–5:41:35 (describing a 15-minute teleconference modification hearing to avoid what would have inevitably been a violation down the line).

II. Proposal 2: Drug Offenses

Defenders supplement our comment and testimony on the proposed amendments to §2D1.1 with data supporting a base offense level ceiling well below 30; discussion of why §2D1.1's failure to appropriately distinguish between more and less culpable offenses cannot be fixed via amendment to the mitigating-role adjustment at §3B1.2; and responses to discrete new arguments raised regarding Parts B through E of the proposal.

A. Not only does the data support elimination of base offense levels above 30, data support further eliminating BOLs—down to at least 20.

At the hearing last week, Chair Reeves asked witnesses what data would support the Commission reducing the Drug Quantity Table's maximum base offense level (BOL) *below* 30.[40] Defenders' initial comment noted that data pointed to 20 as an appropriate highest BOL, such that the Commission should at least adopt its lowest proposed cap of 30. In light of Chair Reeves's questions, Defenders expand upon this discussion.

[40] Eliminating BOLs above 30 would not be a windfall for kingpins, contrary to suggestions by the DOJ and CLC. First, these arguments are flawed as a matter of principle: Nobody is claiming that kingpins are a substantial proportion of the drug-trafficking sentencing population, and DOJ has implicitly acknowledged otherwise. *See* DOJ 2025 Comment, at 7 ("Many of the individuals at the highest levels of culpability may be located outside the United States."). In fact, it is the low-level, fungible workers in the drug-trafficking system who are the heartland of §2D1.1 cases. Second, it is unrealistic to think that a true kingpin's sentencing would start and finish with their quantity-based BOL. Defenders would expect such individuals to be sentenced under the continuing-criminal-enterprise guideline, which has a BOL floor of 38, or other guidelines for murder, RICO, or the like. At the least, kingpins would get role enhancements and a myriad of SOCs under relevant-conduct principles. Third, windfall claims fail to appreciate just how long these sentences are. At a BOL 30, and without any additional SOCs, the sentencing matrix calls for sentences of between 97 and 210 months' imprisonment, depending on criminal history. Defenders hope that the heart-wrenching testimony of D'Marria Monday—who described irreparable harms occurring in the first days of her incarceration—and Dr. Shaneva McReynolds make clear that there is nothing light about years- or decades-long prison sentences.

The best available data relevant to Judge Reeves's questions relate to: 1) how frequently people receive sentences below the guideline range; 2) how far below guideline ranges average sentences fall; and 3) the average time served in prison for state drug-trafficking offenses. Each of these categories of data supports a base offense level no greater than 20.[41]

As to the first category, the data are clear: judges are not imposing guideline-range sentences in cases with BOLs far below 30, demonstrating that, beginning even lower on the Drug Quantity Table, §2D1.1's sentencing ranges do not further the purposes of sentencing. In FY2023, below-range sentences represented a plurality of sentences at *every base offense level above twelve*.[42] These below-guideline sentencing rates significantly outpace above-guideline sentencing rates at every base offense level, with no BOL above 12 having a double-digit above-range sentencing rate.

Nor was FY2023 an anomaly. Over the past five fiscal years, in cases with §2D1.1 as the primary guideline and a BOL set by §2D1.1(a)(5), starting at BOL 14, a plurality received below-guideline-range sentences.[43] At BOL 16 and higher, a *majority* received below-range sentences.[44] Even excluding sentences for people who received §5K1.1 departures—which unhelpfully excludes the many people who received both a §5K1.1 and other departures and/or variances—at least one-third of people received a below-range sentence at every BOL from 12 and up, with a plurality receiving below-range sentences without a §5K1.1 from offense level 18 and higher.[45]

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[41] Defenders' initial comment also explains how reduced sentences would reduce racial disparities in the prison population. *See* Defenders' Comment on Drug Offenses, at 15 (Mar. 3, 2025). Though a strong justification for the Commission going as low as possible with the base offense level cap, because racial disparity is present at every offense level, *see id.*, that data serves as a difficult tool by which to identify a bright-line number.

[42] *USSC, Public Data Briefing—Proposed Amendments on Drug Offenses*, at 6.

[43] USSC, FY2019 to FY2023 Individual Datafiles.

[44] *Id.*

[45] *Id.*

As to the second category, that is, data regarding the delta between guideline ranges and sentences, in FY2023, average imposed sentences fell substantially below the guideline minimum at every BOL above 16.[46] And as we discussed in our initial comment, it is beginning at BOL 20 that average sentences imposed are at least 20 percent lower than the guideline-range minimum.[47] Thus, while data regarding the frequency of departures would support a much lower cut-off, data regarding the extent of departures supports a cut-off more particularly at BOL 20. Given the degree of drop from the present drug quantity table, Defenders erred on the side of this higher BOL cap of 20.

Finally, state sentencing practice accords with capping base offense levels at no higher than 20. According to a 2021 Department of Justice study (cited in Defenders' initial comment), the average prison time served by a person convicted of drug trafficking in the state courts was 26 months[48]—roughly the time served on a 30-month federal prison sentence for a person receiving good time credit.[49] Significantly, this state average necessarily includes the full panoply of state drug offenses. In other words, the 26-month average includes sentences served by people who would fall into federal CHC VI, who possessed weapons or used violence, who were kingpins, and/or who did not plead guilty.[50] At BOL 20, even a person falling into CHC I and with

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[46] *See* *Public Data Briefing—Drug Offenses*, at 7. The average rates below the guideline minimum from BOL 18 and on have a general increasing trend, where average sentences for BOL 18 were 14% below guideline minimum and average sentences for BOL 38 were 39% below guideline minimum.

[47] Defenders' Comment on Drug Offenses, at 15 (citing *Public Data Briefing—Drug Offenses*, at 7).

[48] DOJ Office of Justice Programs, Bureau of Justice Statistics, *Time Served in State Prison, 2018*, at 2 (Mar. 2021); *see also* Defenders' Comment on Drug Offenses, at 24–25 (discussing BJS study).

[49] *See* 18 U.S.C. § 3624(b) (providing maximum of 54 days' good-time credit for each year of imprisonment court imposes).

[50] While these numbers would also include the opposite—e.g. first-time convictions and non-violent offenses—those individuals are more consistent with the starting point for much of this discussion (a base offense level prior to any SOCs and viewed in light of a CHC I range).

no specific offense characteristics elevating his offense level whatsoever, would get a sentence somewhat higher than this average state sentence.

B. The fundamental mismatch between §2D1.1 and the need for courts to assess culpability under § 3553(a) cannot be corrected via chapter 3.

There was significant discussion at the hearing last week about the interplay between the proposed low-level-trafficking-function SOC and the mitigating role reduction at §3B1.2. We discuss three aspects of this interplay here.

First, Vice Chair Mate asked several witnesses whether the new SOC might lead to the same miserly application rates seen with §3B1.2 if the new SOC lists examples of qualifying conduct, rather than conduct that necessarily qualifies. Defenders share that concern but also see a need to ensure that Option 1's list of qualifying conduct is not treated as exhaustive, which would also lead to potential overly narrow interpretations. Hoping to address both concerns, Defenders' initial comment suggested a hybrid of Options 1 and 2, which clarifies that the listed functions do in fact qualify for the reduction, but that the list is non-exhaustive, using the phrase "including any of the below."[51] Additionally, our experience with the limited application of §3B1.2 is also part of what motivates our request for an application note directing courts to liberally construe the new SOC.[52]

Second, Vice Chair Mate asked several witnesses whether the new SOC should supplant or supplement §3B1.2. As Defenders discussed in our initial comment, it would be reasonable for the Commission to preclude receipt of both the new SOC and §3B1.2 for the same count, given significant overlap. However, the two provisions are far from identical, and it is imperative that the new SOC is not promulgated in a way that precludes people from receiving at least the same benefit that they would have obtained from §3B1.2 prior to the new SOC's creation. Our earlier comment identified

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[51] *See* Defenders' Comment on Drug Offenses, at 16–17, 21–22. This is exceptionally important as demonstrated at the hearing and in public comment where stakeholders identified low-level activity potentially not expressly covered by the list which should nonetheless be included.

[52] *See also id.* at 28 (describing reasoning for proposed construction statement).

several circumstances in which people might presently obtain a role reduction yet would be very unlikely to get the new SOC because their §2D1.1 calculation is not based on ordinary trafficking (as with money laundering or reverse stash house robberies).[53] Other commenters noted that, if the Commission ultimately decides that the new SOC comes with only a two-point reduction, which is one of the options, people who would otherwise have received a four-point role reduction will receive a significantly reduced benefit if unable to obtain §3B1.2's benefit.[54]

Both concerns are resolved by: 1) not making §3B1.2 inapplicable to drug cases but instead providing as a special instruction that "[i]f 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;" and 2) establishing that the SOC entails a six-point reduction.

Third, Commissioner Wong probed whether, as an alternative to the new SOC, the Commission should instead amend §3B1.2 to increase its application rate. Similarly, the DOJ and CLC averred that amending §3B1.2 might be a better option. But the generally applicable §3B1.2—no matter how modified—is incapable of correcting for flaws specific to §2D1.1, related to how judges assess culpability in drug-trafficking cases. And any effort to modify §3B1.2 to fix §2D1.1's problems would likely create new problems with §3B1.2's application to other kinds of cases.

At bottom, drug-trafficking offenses are different. As has been emphasized many times, including by Professor Caulkins at the §2D1.1 hearing, drug trafficking is a crime committed within a massive, complex, global economic system that is responsive to a seemingly insatiable demand for controlled substances. In contrast, most any other federal offense exists within its own, isolated ecosystem.[55] For example, a fraud offense involves

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[53] *Id.* at 25–26.

[54] *See, e.g.,* Professor Alison Siegler, The University of Chicago Law School, *Proposed Amendments to the Drug Sentencing Guidelines*, at 12 (Mar. 3, 2025) (explaining flaws in opting for two- or four-level SOC options).

[55] The closest comparator might be firearms trafficking; there is a global firearms market. However, the firearms market is substantively different as there are simultaneously legal and illegal markets and different people may legally and

only those who participated in a particular scheme or series of schemes. A robbery consists only of the participants in the specific robbery or discrete organization.

The mitigating role adjustment works well for these latter crimes, where judges assess culpability in part by determining the role that each person played in the scheme. But there is a mismatch with drug trafficking, where sources of supply at every step are fungible and all are located within a broader interconnected, international market. With drug-trafficking, function within the interconnected market is *nearly always* relevant to the purposes of sentencing—whether the person is acting alone or in concert with others, and regardless of the scope of the individual offense or other details.[56] And, significantly given the constant evolution of the drug trade, role is an evergreen gauge of culpability. Indeed, judges and others have complained about §2D1.1's failure to account for function almost since its inception, which in part explains why imposed sentences deviate so far from guideline ranges.[57] And what's more, in order to get judges to appropriately assess function within the interconnected drug market, the Commission needs to use drug-market-specific language, which has no application to other kinds of cases. Thus, it does not make sense to attempt to correct §2D1.1's fundamental flaws through amendments to a role adjustment that serves a different, important purpose.

Moreover, any effort to correct §2D1.1's flaws through §3B1.2 will run up against something identified by the CLC *in favor* of relying on §3B1.2: its well-established body of caselaw. Over the decades, courts have narrowed the reach of §3B1.2 and sentencing judges have grown accustomed to §3B1.2's limited reach. To succeed in expanding §3B1.2's application in the drug-trafficking context where earlier attempts have failed, the Commission would

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illegally possess firearms. Thus, it is not inevitable that a person convicted of firearms trafficking—often, for example, a straw purchaser—will operate within the same sort of single overarching illegal marketplace.

[56] This is highly relevant to culpability, general and specific deterrence, and protection of the public. *See* § 3553(a)(2).

[57] *See* Defenders' Comment on Drug Offenses, at 3 nn.5–7 (collecting sample of Defenders', judges', and stakeholders' criticisms of §2D1.1).

first have to unsettle decades of decisions, a move certain to generate litigation and which seems unlikely to occur with any mild tinkering.

In contrast, Defenders do not expect the creation of the proposed low-level-trafficking SOC to dramatically increase litigation. To be sure, parties will debate whether the SOC applies in particular cases, and these disputes will occasionally generate appeals, as occurs with every SOC. But sentencing ranges for low-level trafficking functionaries will be lower, more consistent with their culpability, which should reduce litigation. And the SOC's qualifiers turn on factual issues that are already at issue in sentencings. Defenders regularly present facts and arguments about our clients' role in an offense including their motivations, actual conduct, and place in the overall and specific hierarchies. At present, those arguments relate mostly to variances and prosecutors have essentially the same incentive to dispute and counter our arguments as they would with the SOC. The new SOC does not create new factual issues and arguments, it merely places them where they belong in the process: before the guideline anchor is set, not after.

Nor are present §2D1.1 sentencings otherwise devoid of complicated litigation. Presently, the near-sole salience of drug quantity and type means that Defenders are highly incentivized, and regularly required, to litigate quantity calculations, which can include live witness testimony, briefing, and appellate litigation. Such litigation often relies on guesswork/theories as to how much quantity existed in past, un-intercepted shipments or sales. Particularly if the Commission adopts Defenders' proposal to cap low-level trafficking participants' BOLs at 17,[58] it seems likely that there will be a net reduction in litigation over drug quantity given the reduced salience of drug quantity and type.

Most importantly, any lingering concerns about a possible increase in litigation are far outweighed by the SOC's potential to improve §2D1.1. The Commission is considering how to rectify one of the greatest failings in the Guidelines Manual: a four-decade-old, misplaced, non-empirical, near-total reliance on drug quantity and type that conflates low-level cogs in a vast machine with the people operating that machine. The benefits here are

[58] *See* Defenders' Comment on Drug Offenses, at 24–25 (explaining reason for BOL 17 cap).

potentially enormous and should outweigh any potential concerns about litigation. In our adversarial system of criminal justice, litigation occurs now and will occur in the future. The Commission's focus should remain on aligning §2D1.1 more closely with the purposes of sentencing.

C. Comments and testimony do not alter the fact that the Commission should adopt Part B, Option 1, and Part E, and should reject Parts C and D.

Part B. While stakeholders largely agree that the time has come for the Commission to eliminate purity distinctions in methamphetamine cases, we disagree about where to set the quantity thresholds.[59] The Commission should focus its attention on sentencing data, which confirms that imposed sentences on average fall below applicable guideline ranges across all methamphetamine types—even in meth-mixture cases—revealing that current guidelines trigger excessive sentences at all quantity levels.[60] This pattern supports Option 1, which would reduce disparities between guideline ranges and the sentences that judges actually impose.[61]

As for concerns that Option 1 would create disparities between cases where a meth-actual mandatory minimum applies,[62] where the minimum

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[59] *Compare e.g.,* Defenders' Comment on Drug Offenses, at 31 (March 3, 2025) (supporting Option 1's approach to set base offense levels at current meth-mixture quantity thresholds); PAG's Comment on the USSC's 2025 Proposed Drug Amendments, at 23 (March 3, 2025) (same); *with,* DOJ 2025 Comment, at 18–19 (advocating for Option 2's meth-actual quantity threshold); CLC 2025 Comment, at 11 (recommending further study to assess appropriate quantity thresholds); POAG 2025 Comment, at 20 (suggesting that appropriate threshold quantity levels may lie somewhere in between the current meth-mixture and meth-actual levels).

[60] *See Public Data Briefing—Drug Offenses*, at 22.

[61] *See id.*

[62] *See* DOJ 2025 Comment, at 19–20 (arguing that Option 1 would create an "inappropriate discrepancy" between mandatory minimums and guidelines, citing the example of a defendant distributing 60 grams of 95% pure methamphetamine who would face a 10-year mandatory minimum but a base offense level of 24, resulting in a guideline range of only 51–63 months for a Criminal History Category I defendant). Commissioner Meisler asked a related question at last week's hearing about whether the Commission should be concerned about disparities and increased

would be the guideline sentence,[63] "[d]e-linking the Guidelines from the mandatory minimums need not result in sentencing cliffs of any kind."[64] Mandatory minimums were designed for the most culpable traffickers and kingpins, with prosecutors maintaining discretion over when to apply them. So, if prosecutors apply mandatory minimums as Congress intended—focusing on the most culpable individuals—§5G1.1(b) will ensure appropriate sentences in those cases while allowing the guidelines to better reflect typical sentences for typical individuals.[65] The Commission should not set guideline ranges based on concerns that prosecutors will apply mandatory minimums in cases where such sentences do not make sense. Instead, it should adhere to its obligation to set guideline ranges that best reflect the purposes of sentencing.

The DOJ has also suggested that the Commission should delay implementing Option 1 until Congress acts. But as Defenders have explained, the Commission has complementary statutory duties under §§ 991(b) and 994 to review and revise guidelines in light of sentencing data and evolving circumstances, which are more than apparent regarding the meth market. Moreover, nothing about Option 1, which would still trigger the harshest sentencing ranges for any drug type other than fentanyl and cocaine base, contravenes prior congressional directives.[66]

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pressure on mechanisms like safety valve and substantial-assistance motions if guideline ranges deviate from mandatory minimums.

[63] USSG §5G1.1.

[64] *United States v. Diaz*, No. 11-CR-00821-2 (JG), 2013 WL 322243, at *15 (E.D.N.Y. Jan. 28, 2013).

[65] *See id.*

[66] In its comment, the government raises the specter of multiple directives. Defenders hesitate to respond because, as Defenders have explained, directives do not forever lock in place the impacted provisions. Purely in the interest of a full response, however, Defenders note that there is no directive problem here. Regarding Part B, the government cites to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237 § 301 (directing the Commission to "provide for increased penalties" for offenses involving "methamphetamine") and the Crime Control Act of 1990, Pub. L. No. 101-647, § 2701 (directing the Commission to amend the guidelines so that offenses involving "smokable crystal methamphetamine" are

Indeed, as Professor Caulkins's testimony shows, even Option 1 treats meth far more harshly than is appropriate based on its pharmacological properties.[67] Given these considerations, the Commission can and should eliminate meth purity distinctions, with Option 1 of Subpart 2 representing the best path forward.

Part C. At last week's hearing, Commissioner Wong asked what practical problems exist with §2D1.1(b)(13)'s "represented or marketed" language, questioning whether the enhancement was being applied

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assigned an offense level two levels higher than other forms of methamphetamine). To the extent there is some cause for concern regarding the 1996 law, that would come from the "drugs minus two" amendment, not this one, as DOJ implicitly acknowledges. DOJ 2025 Comment, at 16 n.47. But in any event, penalties for methamphetamine are far higher in relation to other drugs on the DQT than they were in 1996. *See* USSG §2D1.1(c) (1995). Back then, penalties for methamphetamine were equal to those of heroin and PCP and five times harsher than cocaine. *Id.* Now they are twice that of heroin and PCP and 10 times harsher than cocaine. And the Commission has specifically structured the Part B proposal so that §2D1.1 assigns smokable crystal meth an offense level that is two levels higher than other meth. Separately, the government suggests that the proposed low-level trafficking SOC "may be inconsistent with" the Fair Sentencing Act, Pub. L. 111-220, § 7, which directed the Commission to ensure that individuals who receive a minimal role adjustment are not assigned a drug-quantity-based BOL exceeding 32 and providing for the SOC that is presently at §2D1.1(b)(17). Defenders do not see how the proposal could conceivably be inconsistent with this directive, the text of which did not freeze into place the specific "mitigating role adjustment" as it existed in 2010. And this directive was meant to be ameliorative, so the present amendments are entirely consistent not only with its text but also its purpose. These proposals also comply with §§ 994(b)(1) (requiring that sentencing ranges be consistent with statutes) and (i)(5) (requiring guidelines to "specify a sentence to a substantial term of imprisonment" for drug-trafficking offenses involving a "substantial quantity"). First, to the extent that §2D1.1 might call for a sentence below an applicable mandatory minimum in a particular case, it is §5G1.1(b) that will set the range, ensuring consistency. This is no different than the situation that applies where §2D1.1 sentencing ranges exceed the statutory maximum, which is not uncommon. And there is no doubt that every sentencing range for substantial quantities of drugs under this amendment calls for a "substantial term of imprisonment."

[67] *See* Statement of Prof. Jonathan Caulkins on Drug Offenses, at 3–4 (March 12, 2025) (arguing that "a case could be made for equalizing the treatment of methamphetamine mixture and methamphetamine (actual) at the same level as cocaine").

inconsistently or was too stringent. DOJ suggested the enhancement goes unused because it is often too difficult for prosecutors to prove active marketing or misrepresentation of fake pills. The Commission's March 2025 report, however, reveals a simpler explanation: the enhancement isn't being applied because the conduct it targets rarely occurs.

The Commission found that "[m]ost people selling drugs in this study and most of those who overdosed on these drugs did not know the exact drugs involved in the transaction."[68] The Commission's own data show that fewer than five percent of sentenced individuals in overdose cases knowingly misrepresented the drugs they trafficked.[69] The enhancement's low application rate makes sense given these findings, particularly since over 55 percent of individuals in overdose cases function as street-level dealers who themselves lack knowledge about what they distribute.[70]

Given the limited time the enhancement has been in effect, the Commission's own caution about drawing conclusions from the small number of cases receiving the enhancement, and the Commission's recent findings about defendants' knowledge of whether the drugs they sold contained fentanyl, Defenders' call for further study before making changes to crucial mens rea protections in §2D1.1(b)(13) represents the most prudent path forward.[71]

Part D. The Department has requested that the proposed amendment to §2D1.1(b)(1) go beyond Part D and include a 4-level enhancement for not only machineguns but also for *all* NFA firearms (as described in 26 U.S.C. § 5845), semiautomatic firearms capable of accepting a large capacity magazine, and three or more firearms.[72] The CLC has also recommended

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[68] USSC, *Overdoses in Federal Drug Trafficking Crimes*, at 2 (March 2025).

[69] *Id.*

[70] *Id.* at 16.

[71] Defenders' Comment on Drug Offenses, at 35. Also, at last week's hearing, Judge Restrepo highlighted additional concerns over the DOJ's burden-shifting proposal, noting it would force individuals to testify to disprove knowledge and risk obstruction charges if disbelieved. These types of unintended consequences reinforce the need to take pause before altering mens rea protections in §2D1.1(b)(13).

[72] *See* DOJ 2025 Comment, at 29.

going beyond Part D to include "ghost guns" in the enhancement.[73] There were not significant questions about these proposed expansions of the Commission's proposal at the hearing, so we address them here.

Both proposed expansions fail to address—or perhaps even recognize—that they would fundamentally alter the existing guidelines framework, where distinctions between firearm types are limited to firearm-specific guidelines (as we discussed in our earlier comment). And these recommendations show that once that structure is broken, the floodgates open: countless firearm-type distinctions emerge (and potentially spill into other guidelines), undermining simplicity and distracting from the offenses that are actually being punished.

As we've already noted, Part D's original proposal creates absurdities and overbreadth.[74] The DOJ's proposed new enhancement for NFA firearms and semiautomatic firearms capable of accepting a large capacity magazine would only worsen these problems.[75] And the CLC's request to increase

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[73] *See* CLC 2025 Comment, at 12.

[74] *See* Defenders' Comment on Drug Offenses, at 36–43.

[75] The definition of NFA firearms includes flare launcher inserts, unassembled silencer kits, tear gas pen guns, and outdated single-shot weapons like the H&R Handy Gun. *See generally*, ATF, *Firearms Guide—Identification of Firearms Within the Purview of the National Firearms Act* (last rev. Oct. 4, 2016). Applying a four-level enhancement for such items makes no sense when more dangerous firearms receive a two-level increase. To make matters worse, the DOJ's desire to include "a semiautomatic firearm capable of accepting a large capacity magazine" would effectively make §2D1.1(b)(1) a de facto 4-level enhancement anytime a semiautomatic weapon is involved. As the government has conceded elsewhere: "Today, the terms 'semiautomatic firearm' and 'able to accept a large-capacity magazine' are essentially synonymous. The exception has swallowed the rule." *United States v. Fuller*, No. 7:20-cr-0035, ECF No. 69, at 4 (W.D. Va. Jan. 24, 2022). Semiautomatic firearms are highly prevalent in the United States—primarily among law-abiding citizens—and many of the most popular models come standard with magazines capable of holding more than 15 rounds. *See Duncan v. Bonta*, 695 F. Supp. 3d 1206 (S.D. Cal. 2023) ("Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds." (quoting *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc))). For example, "[o]ne of the most popular handguns in America today is the Glock 17, which comes standard with a magazine able to hold 17 bullets." *Duncan v. Becerra*, 970 F.3d 1133, 1148 (9th Cir. 2020).

penalties for privately manufactured firearms ("PMFs" or "ghost guns") is equally flawed.[76]

As we explained in our earlier comment, if the goal is to draw meaningful distinctions, the focus needs to be on fixing the standard, making it defendant-specific, and eliminating the "clearly improbable" language from the guideline commentary.[77] Firearm distinctions like the one that the Commission has proposed or the ones that others have proposed don't make sense in the drug-trafficking guideline. They simply add yet another layer of complexity.

Part E. Some stakeholders have suggested that the proposed amendment in Part E would mean "the end of the in-person proffer" (as Vice Chair Murray put it when summarizing concerns). We disagree. This amendment simply clarifies the law—it doesn't weaken the requirements of truthfulness or completeness.

Written proffer letters are already widely used in some districts, and without the sorts of problems predicted by stakeholders who seem not to have experience with written proffers. The TIAG witness testified that in Arizona, where caseloads are high, written proffers are the norm. Defenders in other districts also use written proffers (with the blessing of local prosecutors). Many clients just don't have much information about their offenses (including relevant conduct): they can summarize it in just a few sentences. This is hardly surprising—after all, the safety-valve provision was designed to

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[76] PMFs are not inherently more dangerous than commercially manufactured firearms and are legal under federal law. *See* Defenders' Comment on the USSC's 2023 Proposed Firearm Offenses Amendment, at 28–30 (Mar. 14, 2023). Their primary difference—lacking a serial number—concerns traceability, not increased dangerousness. *See United States v. Price*, 635 F. Supp. 3d 455, 464 (S.D. W.Va. 2022) ("In fact, as the Government points out, the commercial requirement that a serial number be placed on a firearm 'does not impair the use or functioning of a weapon in any way.'"). Given that §2D1.1(b)(1) is focused on dangerousness and applies almost any time a firearm is present during a drug trafficking offense—regardless of traceability—this proposed four-level increase is unjustified because it is based on a meaningless distinction.

[77] Given §2D1.1(b)(1)'s uniquely expansive standard, if the Commission were to adopt the commenters' suggestions, an individual could receive a 4-level enhancement without even knowing that a co-conspirator possessed an NFA firearm, a PMF, or a large capacity magazine.

protect low-level participants who typically lack the kind of valuable information needed for a §5K1.1 sentence reduction.

To be sure, for those with more substantial information, an in-person proffer is likely the better option. And in such cases, defense attorneys have every incentive to pursue that option: we bear the burden of demonstrating that our client has met § 3553(f)'s requirements. Also, where a client has a lot of information, a sit-down meeting may be less burdensome than drafting a lengthy written proffer. Defense attorneys are best positioned to determine the right approach for each client. An insufficient proffer—whether written or oral—carries devastating consequences. But at the same time, we are acutely aware of the real-world risks our clients face.

By explaining in a new application note that the safety-valve provision does not specify how a defendant must provide information and evidence to the government—and therefore does not always require an in-person proffer—the Commission will do nothing more than clarify the law, reflect the current practices in some districts, and reduce disparities. As Professor Seigler's comment highlights, some U.S. Attorney's offices do not allow proffer letters even in circuits that have expressly authorized them.[78] The proposed amendment does not place a thumb on the scale for written proffers or eliminate the in-person option—it simply notes that the law already provides these options.

* * *

The Federal Public and Community Defenders appreciate the Commission's consideration of our views and experiences and we look forward to continuing to work together to improve federal sentencing policies.

[78] *See* Siegler Comment on Drug Offenses, at 30–31, n.165.

Very truly yours,

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

Sentencing Resource Counsel
Federal Public and Community Defenders

cc: 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

March 18, 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: Reply Comment for the 2025 Amendment Cycle

Dear Judge Reeves,

On Wednesday, March 12, FAMM President Dr. Shaneva D. McReynolds testified before the Commission. She shared her perspective on the drug guideline amendments as the President of FAMM, as the wife of someone who was over-sentenced for a crack cocaine offense, and as the victim of a senseless crime that took the life of her late husband.

FAMM amplifies voices like Dr. McReynolds'; voices of family members who have been harmed by the criminal justice system, often in more ways than one. We also represent people like Shaneva's husband, Jeffery, who testified before the Commission in 2023 to share how retroactivity of drug amendments helped him come home earlier. It is with their voices in mind that we submitted our comments on March 3, supporting the Commission's endeavor to re-imagine the calculation of drug offenses under USSG §2D1.1.

In the morning session on March 12, Assistant United States Attorney Kimberly Sanchez testified that holding street level dealers accountable for quantities of a larger organization makes sense. She insinuated that people could choose among various drug trafficking organizations, and so, people who, in her view, "chose" to become involved with larger organizations should be held accountable for the larger quantities they handled. But this statement defies logic. Street level dealers like Jeffery McReynolds get involved with drug handlers who control particular corners. Getting involved with the drug dealers on a neighborhood corner is not like applying for a job – you don't get to choose between Target, Walmart, or Walgreens; you work for whomever controls the territory in your neighborhood. Moreover, street level dealers are often intentionally excluded from knowing the inner workings of the larger organization, much less profiting significantly from it.

Dr. McReynolds eloquently made this point in her testimony – holding street level dealers responsible for drug quantities controlled by a larger organization results in inflated sentences that do not fit the purposes of punishment, and do not address culpability.

Additionally, the government witnesses expressed concern that were base offense levels reduced, individuals, especially those sentenced for methamphetamine offenses, may end up with guideline ranges that, would – contrary to law – fall below the statutory mandatory minimum. This concern is a red herring. As we wrote in our comment,[1] under USSG §5G1.1(b), "[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." In addition, capping the guideline range would not prevent the court from imposing enhancements or exercising its discretion under 18 U.S.C. § 3553(a) to increase sentence lengths when called for.

Finally, during Dr. McReynolds' testimony, Vice Chair Mate asked for the reason behind FAMM's recommendation that the Base Offense Level ("BOL") under a reimagined §2D1.1 be capped at 30. The Commission's data support FAMM's recommendation to cap the BOL at 30.[2]

In proposing revisions to §2D1.1, the Commission observed 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."[3] The Commission's data briefing for this amendment cycle underscores this point. Currently, 64.5% of people receive a calculated BOL between 30-38.[4] Only a small percentage of the imposed sentences fell within the calculated guideline range. At a BOL of 30, 28.8% of defendants were sentenced within the calculated a guideline range; 44.3% were sentenced below the range. As the base offense levels go up, they become less relevant. At a base offense level of 34, only 20.5% of people received guideline sentences, with 47% being sentenced below the guidelines; and of those with a BOL of 38, a mere 13.1% received a guideline sentence.

Why does the data showing that defendants with higher BOLs rarely receive guideline sentences matter? For two reasons. First, it demonstrates most people sentenced under §2D1.1 are assigned guideline ranges that are too high. Second, the data underscores that these inflated guideline ranges render the guidelines irrelevant in most drug cases, thus challenging the relevance of the guidelines. The Commission should amend the drug table, capping BOLs at 30, to reflect the data the Commission collected in preparation for this proposed amendment.

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[1] FAMM Comment on 2025 Proposed Amendments at 9 (March 3, 2025).
[2] *Id.* at 5.
[3] USSC, Proposed Amendments 2025, (Jan. 24, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendlyamendments/20250130_rf-proposed.pdf.
[4] 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.

We are grateful to the Commission for considering the voices of our members and striving to make the guidelines more fair.

Sincerely,

Dr. Shaneva D. McReynolds, PhD	Mary Price	Shanna Rifkin
President	General Counsel	Deputy General Counsel

FIRST-NETWORK

Federal Inmates Requesting Sanctioned Treatment Network

#BeTheirVoice

Date: March 13, 2025

To: USSC Sentencing Commission
One Columbus Circle, NE Suite 2-500
Washington, DC 20002-8002

Subject: Support for Supervised Release Reform & Request for Nonprofit Engagement

Dear U.S. Sentencing Commission,

FIRST-Network is a national nonprofit committed to improving federal prison policies and we strongly support the proposed changes to supervised release. These reforms recognize what we've seen firsthand—supervision should be a tool for reentry, not just an extension of punishment. Giving courts more discretion in both imposing supervision and responding to violations is a crucial step toward ensuring that supervised release serves its intended purpose: rehabilitation and successful reintegration.

As an organization that works directly with families and individuals impacted by the justice system, we see the consequences of outdated policies. Our mission is to capture issues in real-time, identify systemic concerns and advocate for meaningful reforms that promote rehabilitation, accountability, and fairness.

We would appreciate the opportunity to contribute to future discussions on policy reform. Can FIRST-Network be included in the Commission's list of nonprofit organizations for stakeholder meetings and public input? Our firsthand data and direct engagement with impacted families provide valuable insights into how these policies play out in practice.

Please let us know how we can participate in upcoming discussions. We'd love to bring insight from the thousands of families we work with to help shape effective policies.

Thank you for your time and consideration. I look forward to the opportunity to collaborate.

Kind Regards,

Heather Pirtle

Heather Pirtle
President, FIRST-Network

NATIONAL
FRATERNAL ORDER OF POLICE ®

328 MASSACHUSETTS AVE., N.E.
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PATRICK YOES
NATIONAL PRESIDENT

JIM PASCO
EXECUTIVE DIRECTOR

18 March 2025

The Honorable Carlton W. Reeves
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

I am writing on behalf of the members of the National Fraternal Order of Police (FOP), our nation's oldest and largest law enforcement labor organization which represents more than 377,000 members from every region of our country, to share our perspective on the amendments proposed by the United States Sentencing Commission (USSC) to the Federal sentencing guidelines relating to drug offenses and supervised release.

I want to start by thanking the Commission for their work and for inviting the FOP to comment on the proposed amendments. As law enforcement officers, my members are on the front lines, and they know first-hand just how devastating this drug epidemic is in our communities. Our officers are not only working to keep drugs out of our neighborhoods, but they are also actively pursuing the dealers of these drugs both on our streets and online by ensuring their swift arrest and prosecution. As such, the FOP has a vested interest in making sure that sentencing guidelines for fentanyl related crimes are fairly and justly applied.

Fentanyl is one of the most dangerous drugs available on the black market today. In 2021, more than 100,000 Americans died from a drug overdose—65% of which are attributable to fentanyl. The National Institute on Drug Abuse recently found that fentanyl and fentanyl analogs are "the main driver of drug overdose deaths." Overdose deaths have increased by 7.5 times from 2015 to 2021. The U.S. drug overdose death toll for 2022 is nearly 110,000, primarily from synthetic opioids like fentanyl, making them the leading cause of death for Americans ages 18-49.

The FOP has concerns about the proposed amendments offered by the USSC, specifically regarding the amendments that would lower trafficking offenses. In the midst of the current opioid epidemic, the FOP feels that reducing the base offense levels for "low level trafficking" sends the wrong message to our officers and the public. They work hard every day to find and arrest traffickers of fentanyl and trust that the courts will decide on appropriate sentences that keep drug dealers off the streets.

The FOP believes that the proposed sentencing guidelines are inconsistent with Congressional intent, specifically regarding how they interact with the Controlled Substances Act. The changes, if needed, need to be enacted by Congress, not the USSC.

Secondly, the FOP feels that eliminating the higher offense levels for those found with high quantities of drugs, such as major traffickers or cartel leaders, runs the risk of lessening sentences for those most responsible for the current drug epidemic. The drug quantities that are required to be sentenced at the current level are already quite high, requiring more than 36 kilograms, which could contain over 18 million potentially lethal doses. As such, it is highly unlikely that a person who was not a high-level trafficker would be found with this amount of fentanyl, thereby reducing the need for lowering potential guidelines.

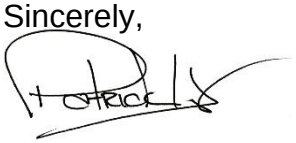
Thirdly, for lower-level defendants caught with higher quantities, the existing statute already provides relief and reduced sentencing in appropriate cases. Notably, the statutory safety valve does not take quantity into account. In designing the safety valve, Congress recognized—and addressed—concerns 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. Congress again addressed additional concerns by expanding this eligibility under the historic First Step Act, which the FOP played a key role in getting through Congress, well beyond those with little or no criminal history.

With respect to the proposed amendment focused on enhancing sentencing for “fake pills,” or pills that include fentanyl that are knowingly misrepresented by a defendant, the FOP agrees that there must be additional considerations when sentencing based on this fact. The FOP agrees with the proposed amendment offered by the U.S. Department of Justice, which would increase the sentencing level by four levels should it be determined that a defendant knowingly sold a drug laced with fentanyl or fentanyl analogues. Doing so would properly apply justice in these cases and hopefully help curb the fake pill markets that have led to the deaths of so many Americans.

Let us be clear—fentanyl is a deadly drug and is the cause of death for hundreds of thousands of Americans. The idea of basing sentencing on the amount of drug that is possessed or sold is at variance with common sense in that the drug is fatal even in very small doses. Whether the offender sold one gram or 40 grams doesn’t matter to the victims that die of a fentanyl overdose. They provided these victims a lethal drug, and whether they knew they were dealing in fentanyl or not is also immaterial, only intent should be a factor. These are the factors that Congress considered when amending the Controlled Substances Act and Congress is where these sentencing changes should be debated, not the USSC.

On behalf of the 377,000 members of the FOP, we urge the USSC to reject the potential amendments related to the sentencing guidelines as described above. If I can be of any help or provide additional information on the FOP's views on this matter, please do not hesitate to contact me or Executive Director Jim Pasco in our Washington, D.C. office.

Sincerely,



Patrick Yoes
National President

March 18, 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: Reply Comment on Amendments to Supervised Release Guidelines

Dear Judge Reeves and Fellow Commissioners:

On behalf of REFORM Alliance, I'd like to again extend my gratitude to the U.S. Sentencing Commission for the opportunity to provide testimony at the recent public hearing. In our previous comment, we outlined the research that supports much of the evidence backing the Commission's suggested amendments. We stand by our original comment and respectfully submit this reply comment to address concerns raised throughout the public comment period and testimony. In doing so, we aim to clarify any misconceptions and provide further evidence in support of the Commission's amendments.

Early Termination

A number of comments noted the existing statutory authorizing judicial discretion to terminate an individual's supervised release. While existing law provides general discretionary power to judges, the proposed addition of §5D1.4 represents a significant step forward by clarifying the considerations and expectations, thereby strengthening the existing opportunity and further incentivizing prosocial behavior. The proposed amendment provides a more structured pathway for early termination after the expiration of one year of an individual's supervised release term.

The proposed amendments can also mitigate unintended disparate impact from different districts utilizing varying criteria and standards to determine early termination *while* still maintaining full judicial discretion. The Commission's proposed inclusion of §5D1.4 not only sets forth a clear timeframe, but also includes a non-exhaustive list of criteria that courts could use when evaluating an individual's suitability for early termination. By providing clear criteria, the Commission makes it easier for the court to conduct an evaluation *and* encourages those on supervision to prioritize the behaviors correlated with successful reentry and lasting rehabilitation. When policies are recommended by authoritative entities, such as the USSC or the Judicial Conference, courts are more likely to implement the suggested practices. This is evidenced by a 2013 report that notes that after the Judicial Conference issued policies favorable to the early termination of supervision, the number of early terminations issued by the courts increased by 50% in the year following the Conference's endorsement of the practice.[1]

Another ongoing concern raised in relation to the early termination of supervised release is the potential risk to public safety. As mentioned by the Probation Officers Advisory Group in their initial comment, a recent study published by Thomas H. Cohn of the Probation and Pretrial Services Office, Administrative Office of the U.S. Courts showed that the usage of early termination in federal supervision did not negatively impact public safety.[2] In his cross-analysis of similar cases where individuals either received early termination or completed their full term of supervised release, Cohn's study revealed that those who were granted early termination actually

[1] Laura M. Baber and James L. Johnson, "Early Termination of Supervision: No Compromise to Community Safety," Federal Probation (September 2013): 17, http://www.uscourts.gov/file/fedprob3rdproofssept13082213epdf.

[2] Cohen, Thomas H., Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety (January 15, 2025). Available at SSRN: https://ssrn.com/abstract=5098803 or http://dx.doi.org/10.2139/ssrn.5098803

exhibited *lower* post-supervision arrest rates. The pattern of lower re-arrest rates is also seen in state and local level data. In 2010, for example, the New York City Department of Probation began recommending early termination for eligible individuals, leading to an increase in early discharges from 3% in 2007 to 17% in 2012. A study found that individuals released early under this program had a lower felony re-arrest rate compared to those who served their full terms.[3]

As shared with the Commission in our initial comment, REFORM Alliance has actively pursued policies that streamline early termination practices, making them accessible for individuals on supervision and have seen consistently positive results across the nation. We remain supportive of the proposed addition to the guidelines under § 5d1.4.

Individualized Assessments

The Commission seeks to implement individualized assessments in three critical areas of supervised release: the imposition of supervised release, the duration of the term, and the conditions attached. This individualized approach reflects the understanding that people who come into contact with the criminal justice system aren't a monolith: they each require an individualized approach to promote their rehabilitation and reduce their chances of recidivism.

Imposition and Duration of Term of Supervised Release

Arguments have been raised against altering the language in subsection (b) of §5D1.1, contending that it would place undue restrictions on the court's discretion by inserting language that limits the application of supervised release to "when, and only when, warranted by an individualized assessment." Other arguments insist that 18 U.S.C. § 3583 competes with the Commission's suggested amendments by creating confusion that could result in litigation.

The suggested amendments would neither erode the court's ability to impose a term of supervised release nor place undue restrictions on the judiciary. Rather, the suggested amendments emphasize the need to look at an individual's unique circumstances when deciding the imposition of a term of supervised release – a statutory practice already required by code.[4] In 2021, supervised release was ordered in the vast majority of cases, with 79.8% of individuals sentenced by federal courts receiving a period of supervised release.[5] Such a high rate of imposition tracks with the exponential increase in the use of supervised release over the last several decades and underscores the apparent reality that actors within the current system are inclined to impose it automatically as a complementary sentence rather than as a rehabilitative tool and deterrence measure based on an individual's actual needs and circumstances. The Sentencing Commission's suggested amendment promotes the purposeful use of supervised release by ensuring that its imposition is for the betterment of the individual and not merely a checked box.

Moreover, the amendments to the guidelines do not compete with the statutory provisions present in §3583, but instead work in tandem with those provisions and underscore the existing requirement in law.[6] Section 3583(a) provides a *permissive* avenue for judges to order a term of supervised release. The proposed amendment to §

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[3] Harvard Kennedy School, "Less Is More: How Reducing Probation Sentences Can Improve Outcomes. Program in Criminal Justice", August 2017, https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf.

[4] 18 U.S. Code § 3583(d); 18 U.S. Code § 3553.

[5] United States Sentencing Commission, "Fiscal Year 2021: Overview of Federal Criminal Cases," April 2022, p. 10. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf.

[6] Indeed, the comments that suggest this deviates from current law reveal how frequently the existing parameters in the code are disregarded or ignored - that comments both oppose the amendment because these requirements already exist in the code *and* simultaneously because the amendment would conflict with current code and require an entirely new practice - underscores the need for clarity and guidance.

5D1.1 would similarly establish a permissive avenue for imposing a term of supervised release, with an emphasis that supervised release should be needs-based. In both the suggested amendments and statutory code, judicial officials retain the discretion to impose a term of supervised release *if* warranted. Section 3583(c) outlines the factors that should be considered when determining whether to include a term of supervised release and the duration therein – *the same factors considered when imposing a sentence*. One of the factors that statute requires to be considered is the history and characteristics of the individual before the court – also known as an individualized assessment.[7]

Another argument that has been raised is that imposing procedural steps at every juncture of the supervised release process may place form over substance. Yet, absent these procedural safeguards, we've advanced a system that has grown exponentially without any commensurate achievement in its aims of successful reentry and reduced recidivism. Allowing such a system to continue unchecked runs the risk of trapping more individuals in a system that serves them no benefit, jeopardizes their rehabilitation, stunts their professional growth, and costs taxpayers half a billion dollars annually.

Individualized Conditions

In our previous comment, we spoke to the need for individualized conditions that speak to the unique state of each individual and the specific rehabilitative goals of supervised release. Arguments have been presented to the Commission centered on the untenable workload that would be created for the judiciary because of the proposed changes to §5D1.3. Those opposed have raised concerns that individualized assessments will create a strain on the judiciary's resources, as well as increase the likelihood of litigation if an individual's legal representative does not believe the conditions imposed by the court aid in rehabilitation.

This proposed amendment is in line with current statutory practice that requires judicial officials to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" amongst other factors when considering which, if any, non-mandatory conditions to impose.[8] Section 5D1.3 serves to reinforce this existing statutory framework by emphasizing to judges the critical importance of adopting an individualized approach to the cases that come before them. By building on existing statutory practices and emphasizing the need for individualized assessments, §5D1.3 serves as a complementary reminder of supervised release's intended purpose.

Reassessment of Conditions

§5D1.4(a) encourages the re-assessment of an individual's supervised release conditions as soon as practicable after an individual's release from federal prison. During initial comments, a repeated concern from those apprehensive to reassessment is that there would not be enough information available for courts to properly reassess an individual's conditions post release. However, we believe that the Commission's language of "as soon as practicable" adequately addresses this concern by allowing courts to be able to reassess imposed conditions once enough information is available to make an informed decision. Moreover, we submit that a reevaluation of conditions is justifiable following a period of incarceration due to the dynamic nature of individuals. For example, individuals with drug offenses may end up with conditions that necessitate frequent drug tests or mandatory treatment programs at the initial sentencing. However, if during this individual's time of incarceration they completed the Residential Drug Abuse Program (RDAP), have been sober for years, and are in a recovery house, those same conditions may not be necessary for the totality of supervised release.

[7] 18 U.S. Code § 3583

[8] 18 U.S. Code § 3583(d); 18 U.S. Code § 3553.

In *United States v. Johnson*, the Supreme Court described conditions of supervised release as "transition assistance,"[9] assistance which is meant to "assist individuals in their transition to community life." This intentional framing highlights the need for supervision conditions to benefit an individual's re-entry into society. However, when we consider the static nature of conditions ordered at the time of conviction, one can better understand the need for reassessment. Conditions that may have been appropriate for an individual at an earlier point in time, such as during a struggle with addiction or other life issues, may no longer be effective or needed. For conditions of supervised release to truly aid an individual's transition, they must be dynamic and responsive to the individual's changing circumstances. Therefore, we retain our support of §5D1.4(a).

Supervision Violations

In response to the proposed construction of §7c1.3 and § 7C1.4, arguments have been made that weakening consequences for violations sends the wrong message and undermines the court's authority. Further, comments have expressed concern that less punitive measures could reduce the perceived deterrence against violations. We would respectfully disagree and encourage the Commission to implement Option 1 on both fronts.

First and foremost, this reasoning perpetuates the incorrect usage of supervised release as punishment, instead of as a tool with the end goal of rehabilitation. Secondly, these arguments overlook the fact that judicial discretion still exists within the confines of an individualized assessment. Specifically, Option 1 of §7C1.3 allows the court to "(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." In all these instances, the court's authority is not diminished, but preserved and refined. Individualized assessments allow for a balance to be struck that considers the unique factors of each case, the underlying violation, and the need for deterrence. Moreover, Option 1 under § 7C1.4, 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. Comments in favor of imposing a revocation sentence consecutive to any other term of imprisonment argue that this option clearly underscores the seriousness of supervision violations.

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

[9] United States v. Johnson, 529 U.S. 53 (2000)

Vilomah
FOUNDATION

March 16, 2025

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

Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses to the United States Sentencing Commission

Dear United States Sentencing Commission,

After viewing the testimonies provided in this matter, I respectfully follow up on my previous comment on **Proposed 2025 Amendments on Supervised Release and Drug Offenses**. While I deeply empathize with the victims and families advocating for harsher penalties, it is essential to recognize that newly grieving families may not fully grasp the long-term consequences of punitive measures. Research indicates that individuals who are incarcerated face a significantly higher risk of fatal overdose upon release.[1] In the intensity of their grief, families often seek retribution, believing it will bring closure, without fully understanding the lasting impact of these emotionally driven decisions. It is often only years later that they come to realize their true goal is to prevent further loss of life, not perpetuate the cycle of harm.

The pursuit of vengeance, particularly through the criminal prosecution of individuals involved in a loved one's death, often results in compounded trauma. Studies reveal that while families may initially feel a sense of justice through punishment, many later express regret as they come to understand the negative long-term consequences of their actions.[2] At the Vilomah Foundation, we have supported numerous parents who, in the early stages of their grief, encouraged the prosecution of their child's supplier, only to later realize that this decision may have inadvertently prolonged their own suffering and failed to bring closure.

It can take years for families to process their loss, move beyond the initial shock, and make sense of where to direct their grief. Without access to compassionate guidance and support, many are left feeling justified in calling for harsher penalties, not fully appreciating the long-term

[1]Binswanger, I. A., et al. (2007). "Release from prison—a high risk of death for former inmates." *New England Journal of Medicine*, 356(2), 157-165.
[2] Psychology Today (2012). *The Dark Side of Revenge: How Pursuing Retribution Impedes Healing*. Retrieved from https://www.psychologytoday.com/articles/2012.

ramifications. Research supports this, with studies indicating that families are often unaware of the detrimental effects their pursuit of punitive measures can have on their emotional and psychological well-being.[3] Bereavement support services and trauma-informed education are essential to help families make informed decisions that contribute to healing, rather than continuing the cycle of harm.

We strongly urge the Commission to consider our initial recommendations to address this critical issue, and to provide a path forward that breaks the cycle of retribution and fosters long-term healing for all those affected.

Thank you for your attention to this important matter.

Sincerely,

Susan Ousterman
Executive Director, Vilomah Foundation

[3]National Institute of Justice (2014). The relationship between trauma, grief, and substance use. *NIJ Journal*, 272, 14-20. https://nij.ojp.gov/library/publications/relationship-between-trauma-grief-and-substance-use.

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March 18, 2025

The Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
Via Public Submission Portal

Re: Reply Comment on Proposed Amendments to the Drug Sentencing Guidelines

Dear Judge Reeves, Vice Chairs, and Commissioners,

In our original Comment, we urged the Commission to adopt (with modifications) Parts A, B, and E of the Proposed Drug Amendments[1] and to reject Part C, which would undermine the critical role that *mens rea* plays in sentencing. We respectfully submit this Reply Comment to respond to issues raised by other stakeholders during the comment period, as well as to emphasize the need for action and to address concerns raised by other commentors.

I. Part A, Subpart 1's Modification of the Drug Sentencing Guidelines Does Not Create Unwarranted Similarities Between Defendants

In their Comments, some stakeholders raised concerns regarding Part A, Subpart 1's proposed amendment to reduce the highest base offense level in the Drug Quantity Table.[2] In particular, the Department of Justice (DOJ) stated that the amendments "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."[3] This suggests that the DOJ is concerned that the post-amendment Guidelines will produce ranges that create unwarranted similarities between defendants of disparate culpability.[4]

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[1] *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].
[2] *See, e.g.*, Scott Meisler, U.S. Dep't of Just., Comment Letter on Proposed Amendments to the Sentencing Guidelines Published January 24, 2025, at 7 (Mar. 3, 2025) [hereinafter DOJ Comment], https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/2025031213/DOJ.pdf; Edmond E. Chang, Comm. on Crim. L. of the Jud. Conf. of the U.S., Comment Letter on Proposed Amendments to the Sentencing Guidelines Published January 24, 2025, at 8–9 (Mar. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/2025031213/CLC.pdf.
[3] DOJ Comment, *supra* note 2, at 7.
[4] Ironically, the fact that the current Guideline ranges produce unwarranted similarity—between low-level couriers and high-level kingpins—is one the main points of criticism of the Guidelines. *See, e.g.*, Alison Siegler et al., Fed. Crim. Just. Clinic, Comment Letter on Proposed Amendments to the Drug Guidelines,

As addressed below, we believe that this concern is overstated given other aspects of the Guidelines. But, if the Commission is moved by this critique, we also propose an alternative amendment that would keep the current Guideline's four Drug Quantity Table categories above a Base Offense Level (BOL) of 30 while still addressing the overwhelming, nationwide judicial consensus that the current BOLs are "greater than necessary" to advance the § 3553(a) purposes of criminal punishment.[5]

A. The Proposed Amendments to the Drug Guidelines Will Not Produce Unwarranted Similarities

The concerns raised by the DOJ about unwarranted similarities in sentencing are overstated and ignore countervailing Commission guidance and actual on-the-ground sentencing statistics. First and foremost, concerns that "cartel leaders" responsible for "massive quantities of deadly drugs" will receive substantially lower sentences as a result of a lower top BOL category are already addressed by § 2D1.1's Application Note 27(B). As that Application Note clarifies, in certain "extraordinary case[s]"—such as the prosecution of a cartel leader—an upward departure above the top BOL "may be warranted."[6] Similarly, concerns about lowering the BOLs are mitigated by judges' ability to apply the Aggravating Role adjustment to high-level defendants. In fact, as the Commissions' Data Briefing highlights, a whopping 83.3% of defendants identified by the Commission as Organizers / Leaders in methamphetamine cases and 75% of Organizers / Leaders in fentanyl cases were subject to this enhancement.[7]

Additionally, as the DOJ notes when arguing against the proposed amendments, judicial discretion under 18 U.S.C. § 3553(a) ensures that the most culpable defendants will receive the highest sentences.[8] Unlike the mine run of drug cases, where over 70% of defendants received below-Guideline sentences,[9] a larger percentage of Organizers / Leaders received within-Guideline sentences—a remarkable finding considering many of these defendants already face higher ranges due to the application of the Aggravating Role adjustment.[10] This clearly demonstrates that judges are using their discretion to give higher sentences to more culpable defendants.

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at 2–3 (Mar. 3, 2025) [hereinafter FCJC Comment], https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202503/90FR8968_public-comment_R.pdf#page=770.

[5] As noted in our original Comment, 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).

[6] U.S. SENT'G GUIDELINES MANUAL § 2D1.1 cmt. n.27(B) (U.S. SENT'G COMM'N 2024).

[7] *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS ON DRUG OFFENSES: PUBLIC DATA BRIEFING 13, 16 (2025) [hereinafter U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING].

[8] *See* DOJ Comment, *supra* note 2, at 6 ("But for lower-level defendants caught with higher quantities, the existing statutory and guideline mechanisms—. . . [including] judicial discretion under 18 U.S.C. § 3553(a)—provide relief and reduce sentences in appropriate cases.").

[9] *See* FCJC Comment, *supra* note 4, at 6 & n.30.

[10] *See* U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 7, at 17 (noting that nearly 40% of fentanyl Organizers / Leaders were given a within-range sentence in 2019).

B. Alternatively, the Commission Could Address Concerns About Unwarranted Similarities by Keeping Multiple Drug Quantity Table Categories Above 30 While Still Lowering Base Offense Levels

Nevertheless, if the Commission were to find the DOJ's unwarranted similarity criticism persuasive, we propose an alternative amendment in this Reply Comment that would continue to provide graduated punishments above BOL 30. Our alternative proposal would respond to the DOJ's concern by keeping the same number of Drug Quantity Table categories assigned a BOLs above 30—thus ensuring that there is a "substantial term of imprisonment" for defendants who traffic a "substantial quantity of a controlled substance"[11]—while still addressing the very real problems of the overly harsh current regime.

Before elaborating on our alternative proposal, it's important to remember that the real outcome of the Sentencing Guidelines is a term of imprisonment, not merely an offense level. With that in mind, it becomes clear not all changes to BOLs are made equal. For example, the 2-level increase in offense level from 14 to 16 corresponds to an increased term of imprisonment of 6 months in prison for offenders with a Criminal History Category (CHC) of III. But for a CHC III offender, the same 2-level increase from 36 to 38 corresponds to an increased term of imprisonment of between 57 and 72 months in prison—a ten-times-larger increase in sentence length.

Accordingly, our alternative proposal would be to keep the four current categories associated with BOLs 32, 34, 36, and 38, but to decrease the BOL increase between those categories from 2 levels to 1 level. That is, we propose keeping the current top categories in the Drug Quantity Table associated with BOLs above 30, but respectively replacing their associated BOLs with 31 (for the current category assigned a BOL of 32), 32 (for the current category assigned a BOL of 34), 33 (for the current category assigned a BOL of 36), and 34 (for the current category assigned a BOL of 38).[12]

This alternative proposal would ensure that there is still a meaningful increase in the Guideline ranges and imprisonment terms for defendants involved with larger drug quantities, while lowering those Guideline ranges so that they are more in line with actual sentencing practices. For example, under the proposed alternative, moving from an offense level of 33 to 34 corresponds to an increase of 16 to 34 months behind bars[13]—a serious punishment differential eliminating any perceived unwarranted similarity in the Guidelines.

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[11] 28 U.S.C. § 994(b)(1), (i)(5).

[12] This proposal could also incorporate a reduction in the number of BOLs higher than 30. For example, if the Commission were to determine (consistent with Part A, Subpart 1, Option 1) that there should only be two categories assigned a BOL greater than 30, we would propose that those categories carry a BOL of 31 and 32.

[13] An offender in CHC I sentenced on the low end of the Guideline range would receive a term of imprisonment that is 16 months longer. On the other extreme, for a defendant with a CHC of VI sentenced at the high end of the Guideline range, this same 1-level increase would result in a term of imprisonment that is 34 months longer.

II. The DOJ's Concerns About Part A, Subpart 2's Low-Level Tracking Functions Adjustment Are Unfounded

The DOJ raises three main points in opposition to Part A, Subpart 2's addition of a low-level tracking functions adjustment. They contend that (1) the new adjustment will unnecessarily complicate the Guidelines; (2) the current Guidelines "appropriately account for defendants with lesser culpability;"[14] and (3) the proposed categorizations are overly simplistic.

None of these critiques are persuasive. The DOJ's first two critiques fail in light of the persistently and significantly below-Guideline real-world sentencing data.[15] As detailed in our initial Comment, a staggeringly low percentages of offenders performing low-level functions are sentenced to within-Guideline ranges.[16] This means that judges across the country have determined that the Guideline ranges are not "effective in meeting the purpose of sentencing" set forth in § 3553(a)(2)—the first obligation imposed on the Commission by Congress.[17] Simplicity, while an admirable goal, cannot overcome the Commission's statutory mandate.

The DOJ's third concern, regarding the classification of certain functions as low-level, is also unfounded. First, the generic claim that "each offense is unique,"[18] while true in the abstract, does not undercut the Commission's duty to provide guidance to judges addressing the case before them—after all, the Commission has a mandate to "reduc[e] unwarranted sentence disparities."[19] Second, as always, if a specific defendant is more culpable than their low-level function would indicate, the government can make that argument under § 3553 and the judge can increase the person's sentence accordingly.

Nevertheless, we do agree with the DOJ that Option 1's rule-like structure is preferable to Option 2's standard-like structure.[20] As we emphasized in our initial Comment, Option 2's use of the phrase "may qualify" injects significant uncertainty into the function analysis,[21] undermining the Commission's goal of mitigating sentencing disparities. As such, providing a list of qualifying low-level functions is the best way to proceed.[22]

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[14] DOJ Comment, *supra* note 2, at 9.
[15] *See* U.S. SENT'G COMM'N, PUBLIC DATA BRIEFING, *supra* note 7, at 7–8.
[16] *See* FCJC Comment, *supra* note 4, at 10–11 (detailing that, amongst other shocking statistics, that only 10% of methamphetamine couriers sentenced in 2022 were given a within-Guideline sentence).
[17] 28 U.S.C. § 991(b)(1)(A).
[18] DOJ Comment, *supra* note 2, at 10.
[19] 28 U.S.C. § 994(f).
[20] DOJ Comment, *supra* note 2, at 13.
[21] FCJC Comment, *supra* note 4, at 12.
[22] *Id.* at 15. Additionally, we agree with the DOJ that defendants who qualify for the Aggravating Role enhancement should be ineligible for the low-level tracking functions adjustment.

III. Part B's Proposed Amendments to the Methamphetamine Guidelines Should Be Adopted

A. The Commission Should Eliminate the "Ice" Guideline

We agree with the DOJ that Congress should be encouraged to repeal its directive in the 1990 Crime Control Act concerning smokeable crystal methamphetamine. Given the high purity level of nearly all methamphetamine, there are no longer "compelling reasons to retain a separate guideline specifically targeting 'ice.'"[23]

However, the DOJ is misguided in asserting that the Commission's proposed specific offense characteristic would be unworkable in practice.[24] The DOJ argues that a specific offense characteristic which permits a 2-level reduction for offenses involving methamphetamine in a non-smokable, non-crystalline form would "result in confusion and protracted litigation."[25] The DOJ contends that is because "methamphetamine is sometimes smuggled in a liquid form," which can be converted to crystalline form, or methamphetamine "can also be in tablet form . . . [which] can be consumed by smoking."[26]

First, whether methamphetamine in a particular form may be converted to another form is irrelevant to the Commission's duties pursuant to the 1990 Congressional Directive. The 1990 Congressional Directive solely instructed the Commission to ensure that "convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level . . . which is two levels above that which would have been assigned" for other forms of methamphetamine.[27] The Commission's proposed specific offense characteristic clearly satisfies this command.

Second, the DOJ's concern about the practical application of the proposed specific offense characteristic is misplaced. Methamphetamine in liquid or tablet form is clearly not smokable *and* crystalline. Regardless of what such forms of methamphetamine may be converted to, the specific offense characteristic clearly applies only to methamphetamine in liquid or tablet form. Hence, the DOJ's concern that "[s]entencing hearings could become debates about whether a particular form of methamphetamine is smokeable or is in crystal form" is meritless.[28]

Third, the DOJ also complains that "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."[29] But given the clear applicability of the specific offense characteristic to liquid/tablet forms of methamphetamine, the only other form of methamphetamine which will be treated differently is smokable, crystalline form. That is in keeping with the 1990 Congressional Directive, and to the extent that there is little reason to treat such forms of

[23] DOJ Comment, *supra* note 2, at 15.
[24] *See id.* at 16–18.
[25] *Id.* at 16
[26] *Id*.
[27] Crime Control Act of 1990, Pub. L. No. 101-647, § 2701, 104 Stat. 4789, 4912.
[28] DOJ Comment, *supra* note 2, at 16.
[29] *Id.*

methamphetamine more harshly, we agree with the DOJ that Congress should be urged to repeal the directive.

B. Base Offense Levels for Methamphetamine Should Be Determined Using the Current Levels for Methamphetamine (Mixture)

We also share the DOJ's sentiment that the Commission should urge Congress to act regarding the current mandatory minimum structure for methamphetamine offenses.[30] However, the Commission need not wait for such congressional action. Assuming the Commission takes action, the DOJ unjustifiably recommends implementing Option 2, which would set the quantity thresholds for all methamphetamine at the current levels for methamphetamine (actual).

The DOJ disfavors Option 1, contending that it would create "an inappropriate discrepancy between the mandatory minimums created by Congress and the Guidelines."[31] But the DOJ rightly acknowledges that "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 an individual who is at the top of the chain."[32] Given this admission, the Guidelines must account for the fact that it "is no longer true in all cases" that "trafficking in higher-purity methamphetamine reasonably could be associated with high-level drug suppliers."[33]

Considering the changes in "[t]he market for methamphetamine,"[34] we strongly urge the Commission to adopt Option 1.[35] Where mandatory minimums must apply, judges will follow the law and apply them. Where they do not apply, the Commission must ensure that the Guidelines recommend sentences that are "sufficient, but not greater than necessary."[36] To do so, the Commission must adopt Option 1.

C. The Crack/Powder Disparity Should Be Reconsidered

The DOJ's position "is that the Guidelines should be consistent with the statutory scheme," and therefore "[t]he Commission should refrain from taking further action on the crack/powder ratio issue until Congress acts to address the matter."[37] However, the Commission has not waited for congressional approval to rectify the clear injustices with the crack/powder disparity in the past, and should not do so now.[38] The Commission is wise to recognize that the crack/powder disparity continues to be deeply unfair and unjust, and should at the very least address these problems during a future amendment cycle.

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[30] *Id.* at 18–19.
[31] *Id.* at 19–20.
[32] *Id.* at 18–19 (citing United States v. Bean, 371 F. Supp. 3d 46, 52–53 (D.N.H. 2019)).
[33] DOJ Comment, *supra* note 2, at 18.
[34] *Id.*
[35] *See* FCJC Comment, *supra* note 4, at 20.
[36] 18 USC § 3553(a).
[37] DOJ Comment, *supra* note 2, at 21.
[38] Kimbrough v. United States, 552 U.S. 85, 99 (2007) (noting the Commission adopted "an ameliorating change in the Guidelines" and "did not simply await congressional action").

IV. We Oppose the DOJ's Proposed Version of § 2D1.1(b)(13)

The Commission should not adopt the DOJ's proposed revision to § 2D1.1(b)(13) for three reasons. First, the DOJ's proposal fails to address the commenters' concerns that led the Commission to consider revising § 2D1.1(b)(13) in the first place. Second, the DOJ's proposal does not remedy the concerns listed by the DOJ in their Comment. Third, the rebuttable presumption in the DOJ's proposal is impractical and comes with unintended consequences. Finally, instead of adopting the DOJ's proposal, or any of the Commission's options, the Commission should further study § 2D1.1(b)(13).[39]

The DOJ proposed revising § 2D1.1(b)(13) to state the following:

> (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 (Nphenyl-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.[40]

First, the DOJ's proposal will heighten commenters' concerns. Commenters told the Commission that "the enhancement is vague and has led to disagreement on when it should be applied."[41] But the DOJ's proposal is vaguer and more prone to application disagreements than the current § 2D1.1(b)(13). For example, who is the "reasonable person"? Is it the reasonable buyer of illicit drugs? Or is it the reasonable person in society as a whole? Such questions abound and render the DOJ's proposal unworkable. In addition, it is unclear what it means for a substance to be "legitimately manufactured." The current § 2D1.1(b)(13)'s reference to a "legitimately manufactured drug" makes sense because it is in reference to a misrepresentation of the substance as something that it is not.[42] However, the DOJ's proposal applies even absent a misrepresentation. Does "legitimately manufactured" mean that the pill itself looks legitimate? Does "legitimately manufactured" mean that the pill's packaging looks legitimate? Does legitimate mean professional? The contested answers to these questions matter because if the answers are yes, then a person who sells real fentanyl pills without misrepresentation would qualify for the enhancement. That is an absurd result and not the intent of § 2D1.1(b)(13). Nonetheless, that is what the DOJ's proposal appears to suggest.

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[39] *See* FCJC Comment, *supra* note 4, at 27. ("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.").
[40] DOJ Comment, *supra* note 2, at 25. The underlined text is the change proposed by the DOJ.
[41] U.S. SENT'G COMM'N, PROPOSED DRUG AMENDMENTS, *supra* note 1, at 104.
[42] *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(13).

Second, the DOJ's proposal fails to address their own concerns. In its Comment, the DOJ writes that "drug traffickers frequently communicate in coded or vague terms that are not sufficiently specific to satisfy the misrepresentation/marketing requirement."[43] Yet, the DOJ urges the Commission to apply § 2D1.1(b)(13) if "the defendant represented or marketed [the substance] as legitimately manufactured."[44] If individuals really speak in code, the DOJ's proposal will face the same problem as the current § 2D1.1(b)(13).

Third, while it is an improvement over the Commission's options that both subparagraph (A) and (B) of the DOJ's proposal contain a *mens rea* requirement, we oppose the creation of a rebuttable presumption in subparagraph (B). Notably, when the DOJ previously proposed a rebuttable presumption in § 2D1.1(b)(13),[45] the Commission rejected the idea. Then-Commissioner Judge John Gleeson put it best during the Commission's hearing:

> I don't know how you prove the negative, except make a statement, you know, the defendant, you know, articulates why he or she had no reason to believe, or tries to rebut a rebuttable presumption. And I don't know how you do that except make a statement.
>
> The fact findings associated with that are kind of notoriously difficult to make. I mean, it's not a science, determining whether those are truthful.
>
> And here's my concern. And adverse credibility determination then I think has the capacity to result in an instruction enhancement, a deprivation of a few levels of acceptance.[46]

Put simply, a rebuttable presumption would be hard to implement in this context and would put defendants in a difficult position where they could lose acceptance points or gain obstruction points by contesting the presumption.[47] In the words of Marlo Cadeddu, the Fifth Circuit's representative to the Practitioners Advisory Group, a rebuttable presumption "is contrary to the way the guidelines operate. It's contrary to our system of justice. The [DOJ] has the burden of proof at all times at sentencing."[48] Therefore, the Commission should once again decline to adopt a rebuttable presumption.

Finally, although the DOJ's proposal misses the mark, we urge the Commission to pay close attention to the DOJ's description of the problem. The DOJ reported that "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."[49] The Commission should study why the cases of actual misrepresentation have

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[43] DOJ Comment, *supra* note 2, at 23.
[44] *Id.* at 25.
[45] *See* U.S. SENT'G COMM'N, PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES: TUESDAY, MARCH 7, 2023, at 14 (2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/Transcript_Day1.pdf.
[46] *Id*. at 101–02.
[47] *See id*. at 134.
[48] *Id*. at 81–82.
[49] DOJ Comment, *supra* note 2, at 23.

decreased per the DOJ, while the Commission's data demonstrates that the application of § 2D1.1(b)(13) has increased.[50]

Perhaps, contrary to the DOJ and commenters' concerns, § 2D1.1(b)(13) is being applied *too frequently*. Given the DOJ's statement, maybe the time has come to eliminate § 2D1.1(b)(13)? However, we cannot answer these questions—and the Commission should not amend § 2D1.1(b)(13)—until the Commission engages in the analysis we suggested in our original Comment. "[I]nstead of relying on anecdotes, the Commission should conduct a thorough study that examines every fentanyl presentence investigation and determines whether the commenters' concerns . . . 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?"[51] Absent this evidence, the Commission should not act.

In sum, we ask that the Commission not adopt the DOJ's proposal, or any of the Commission's proposed options, until it thoroughly studies § 2D1.1(b)(13).

V. The Commission Should Adopt Part E to Codify Congress's Intent with the Safety Valve and Ensure the Safety of Defendants

The DOJ's Comment to Part E recommends practices that override congressional intent in creating the safety valve, put defendants in unnecessary danger, and are unnecessary for obtaining the full truth from defendants.

Congress intended that the safety valve reduction would operate differently from substantial assistance departures, but the DOJ's Comment conflates them. On the face of the statute and Guideline, in-person debriefing is not required for safety valve eligibility.[52] Rather, safety valve eligibility merely requires complete honesty, which can be achieved through a variety of means. As we explained in our original Comment, Congress intentionally made the safety valve distinct from substantial assistance departures in response to disparate sentencing outcomes.[53] Notably, Congress did *not* require in-person debriefings for safety valve eligibility, even though they are required for substantial assistance departures.[54] Substantial assistance departures require in-person debriefing to help prosecutors investigate and prosecute others.[55] Interrogations operate better in-person, so the debriefing structure appropriately serves substantial assistance departures. The safety valve, on the other hand, was created to help low-

[50] FCJC Comment, *supra* note 4, at 27.
[51] *Id*. at 28.
[52] *See* 18 U.S.C. § 3553(f); 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 . . . ."); United States v. Acosta-Olivas, 71 F.3d 375 (10th Cir. 1995) ("Section 5K1.1 concerning substantial assistance operates very differently from § 5C1.2.").
[53] *See* FCJC Comment, *supra* note 4, at 29.
[54] *Id.* at 30 (quoting United States v. Montanez, 82 F.3d 520, 522 (1st Cir. 1996) ("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.").
[55] U.S. SENT'G GUIDELINES MANUAL § 5K1.1(a)(1).

level, nonviolent drug offenders with minimal criminal histories avoid harsh mandatory minimums.[56]

Part E clarifies and appropriately disentangles the safety valve from substantial assistance departures, while following the DOJ's recommendation would nullify Congressional intent with respect to the safety valve, turning it into another substantial assistance departure. The DOJ asks the Commission to reject Part E because it will prevent prosecutors from being able to mandate in-person debriefings. In its Comment, the DOJ explains that it prefers in-person debriefings so that it can get information that will lead to the prosecution of others, noting that it uses in-person debriefings to get defendants to "'name names' and specifically identify other wrongdoers and their contact information."[57] However, this is definitively not the point or intent of the safety valve statute. Naming suppliers can put a person at great personal risk and falls within the scope of § 5K1.1 cooperation, not safety valve reductions.

Improperly conflating § 5C1.2 and § 5K1.1, as the DOJ's Comment does, puts defendants in danger and scares individuals out of proffering any information, reducing the efficacy of the safety valve. As we explained in our original Comment, laypeople often cannot distinguish between cooperation proffers and safety valve proffers.[58] This puts defendants at risk and dissuades them from engaging in safety valve proffers. Anti-snitching culture is pervasive, and many defendants fear even the appearance of cooperation with the government, even if they are willing to share the information that they have. The proposed amendment will give even more defendants the opportunity to come clean while protecting them from retaliation for snitching, and it will lead to prosecutor's offices receiving more information. The DOJ's recommendation, in contrast, will result in reduced participation in safety valve proffers and will provide *less* information to investigators and prosecutors.

Part E still ensures that safety valve departures require that defendants fully and truthfully provide information regarding their crimes to the government.[59] This can be achieved, and in many jurisdictions is currently achieved, through a written proffer from the defendant.[60] Safety valve departures do not require permitting the DOJ to go on a fishing expedition and risk exposing individuals to retribution or death for their perceived snitching. Moreover, the DOJ's concerns with incomplete truthfulness are unfounded. As the DOJ itself acknowledged, 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."[61] The safety valve *already* requires that

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[56] *Id.* § 5C1.2(a)(5); *see also Montanez*, 82 F.3d at 522 (noting that § 3553(f) and § 5C1.2 were enacted to "reward[] low level offenders who meet the other conditions specified (*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").
[57] DOJ Comment, *supra* note 2, at 31.
[58] *See* FCJC Comment, *supra* note 4, at 32–33.
[59] *Id.* at 33–34 ("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 and will more clearly carry out the intent of Congress and the Commission.").
[60] *Id.* at 30–31 ("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.").
[61] DOJ Comment, *supra* note 2, at 30 (quoting *Montanez*, 82 F.3d at 522).

defendants provide complete and truthful information. Part E does not lower that bar; it merely clarifies the ways in which individuals can proffer this information.

We strongly urge the Commission to enact Part E to adhere to congressional intent and protect defendants from retaliation, while still giving them the opportunity to fully and truthfully share the information at their disposal.

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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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March 12, 2025

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Submitted Via Email

Re: Response to Public Comments regarding proposed amendments to Proposed Amendments to Sentencing Guidelines Regarding Supervised Release

Dear Judge Reeves and fellow Honorable Members of the Sentencing Commission:

Having read the large volume of public comments regarding proposed changes in supervised release, I write to share my response and provide data that may not have been provided previously on this subject. I have a unique prospective, having served the Court in the federal probation department for 23 years, nearly 18 of those years as Chief U.S. Probation Officer in the Eastern District of Missouri ("E/MO"). During my career with the Court, I was cited for bringing forth numerous recidivism reduction strategies and received multiple national awards. In fact, I was a recipient of the Director's Award for Outstanding Leadership and later the Director's Award for Extraordinary Actions, becoming the first person in the history of federal probation to receive two Director's Awards. A total of eight probation employees from E/MO who I mentored went on to become Chiefs. Additionally, E/MO was given an additive position by the Office of Probation and Pretrial Services (OPPS) so that we could assist other Districts throughout the nation in adding innovative practices. I respectfully ask that you consider my thoughts on the following subjects.

Individualized Assessments

The idea of an individualized assessment at sentencing is an excellent one. Also, in my reading of the proposed change, I see nothing requiring a formal assessment tool. If the presentence is done correctly, as is typically the case, there is a wealth of information in the report that a sentencing Judge could utilize in making such an assessment.

If a formal assessment is needed in the presentence, it will not be the first time this has been done. In Eastern Missouri we implemented a recognized tool at the presentence stage to determine the vocational needs of those being sentenced. Numerous Bureau of Prisons ("BOP") officials shared with me that they consider the presentence report to be "the bible" of

determining a defendant's journey through their custody stay. BOP has available hundreds of formal vocational and apprenticeship programs available that are recognized by the Department of Labor. Because of this recognition, time spent on these programs counted towards licensure and certificates in the community. For example, if a plumbing program takes three years and someone completed it in that timeframe while in BOP, they could obtain a position with nationally recognized licensure when they return to the community. If they completed only two years and were released, they could complete the final year in the community. The vocational assessment we implemented proved helpful in more cases than I can count. What limited time it added to the presentence report was well worth the impact it had on setting defendants up for success.

Should it be determined that a formal assessment for Judges at sentencing is best, OPPS and federal probation will be able to meet the need. As noted by others in previously submitted comments, federal probation already has an individualized assessment tool. This instrument, The Post Conviction Risk Assessment ("PCRA") is a statistically valid tool which was developed and implemented by OPPS. The purpose of using the PCRA was to make probation more effective and efficient. It was also designed to be easy to use, taking only minutes to obtain the required information. When the PCRA was brought forth to the entire federal probation system, no one questioned the validity or usefulness of the instrument. There was, however, a small group in our system who complained about how this would burden the workload of federal probation officers. Resisting change can be a common occurrence in many organizations, even when that change is to the betterment of those organizations. Probation is no different. The PCRA turned out to be an overwhelming success and achieved the goals of OPPS when designing it, plus federal probation lived through any impacts to the workload and became a better system in the process. I'm confident that the exact same would happen if a formal tool is found to be needed at the presentence stage.

When to Impose Supervision

The idea of imposing supervision "when and only when" assessing the need to do it is appropriate and an excellent strategy. I remember cases of elderly women being placed on supervision after a conviction related to continuing to cash their dead husband's social security checks. What serves as an even better example is the caseload I inherited when becoming the Chief USPO in E/MO, which includes St. Louis. The largest arena here seats over 60,000 people and hosts various sporting and other large events. The largest parking lot nearest to the area is on the grounds of the St. Louis Arch, which is also a federal park. It was not uncommon for people who left this parking lot after events to be pulled over and arrested for driving while under the influence. Because of it being on federal grounds, these cases were prosecuted by way of U.S. District Courts and the defendants were typically placed on federal supervision. Had they been prosecuted through local jurisdictions, they would have likely been fined and placed on unsupervised probation. Thankfully we teamed with the Court and the US Attorney to end the practice here, but this use of the federal system on minor crimes continues throughout the country, most notably with national parks and military bases. However, there continues to be lower risk level defendants placed on supervision as funding for resources are predicted to become scarcer in the immediate future.

Conditions of Supervision

I am supportive of the proposed change regarding conditions of supervision. The sentencing Judge has the needed information to determine what conditions are warranted, and a one size fits all method is not a best practice. Some current standard conditions are clearly not warranted or appropriate for certain defendants and do not think it would be too burdensome on probation officers to administer conditions that are better tailored to each individual.

The thought of examining conditions of supervision at release also makes sense. I've seen cases where people receive ten or more years in prison who didn't just serve time, they let time serve them. This includes getting involved in various programing that the BOP offers, such as the Residential Drug Abuse Program, education opportunities, vocational training and religious training. The more programming someone took advantage of, the different the person became and the lower their risk of recidivism became. I've also observed people whose risk levels increased significantly while in BOP, documented by prison records for such things as violent assaults, joining a gang, possession of dangerous contraband, sexual attacks and so on. It is my opinion that these two individuals should not have the same supervision conditions and the Judge should be made aware of their record while in BOP to utilize conditions of supervision that address the potential harm with the more dangerous defendant. Judges also typically see the failures of supervision through revocation and often do not see the successes. It would be a motivator to a supervisee for a Judge to eliminate conditions of supervision at release for an individual who became a substantially lower risk to the community because of hard work and programming. On the other hand, the person who became a higher risk should likely be targeted for additional conditions of supervision.

Another example of problems with mandatory imposition of conditions is the travel restriction. The Eastern District of Missouri is separated from the Southern District of Illinois (S/IL) by a river, and travel between the two is easily accessible by multiple bridges. The two Districts are so close that you can be at either Courthouse and easily see the other Courthouse. It is likely that tens of thousands of people who reside in S/IL travel to Missouri for employment every workday, while a large number of people who live in Missouri travel to Illinois for the same reason. The BOP has no halfway house in East St. Louis, Illinois, and many people who were sentenced there ended up at the halfway house in St. Louis, Missouri. Those from S/IL who find meaningful employment in Missouri while at the halfway house are in a quandary once released, as they are technically not able travel to their job once they return to their home community from the BOP facility. With the standard condition in St. Louis, supervisees can travel 200 miles north or south but cannot travel five miles east where more employment opportunities are. We've had people obtain employment in the transportation and sales industries who had route assignments in both states, as well. Additionally, defendants who are released to rural areas where services are not available face issues of possibly being unable to comply with supervision conditions. Having conditions reevaluated at release allows for the conditions to be tailored for these defendants.

Thankfully people who receive lengthy sentences in BOP often age out of their risk level. Most people are not the same person at 35 as they were at 20, at 50 years old as they were at 35. The prison population is becoming significantly older. A March 11, 2024 report from National

Public Radio stated that of those in U.S. Prisons the population is rapidly graying. By one measure, about a third of them will be considered geriatric by 2030, just five years from now. It is important to remember that an estimated 97 percent will return to their home communities. Supervision for these people could shift from risk reduction to finding proper care. This would best be done at release, as opposed to years or even decades before when they were initially sentenced.

Early Termination of Supervision

The proposed changes regarding early termination are exciting and needed. While some are against the proposal and cite that it is already occurring, this is true only if a defendant is lucky enough to reside in the right location. The bordering states of Florida and Alabama serve as an example. Examining cases closed shows that Norther Florida had an early termination rate of between 41 and 50 percent. However, a bordering District in Alabama over the same time period had an early discharge rate of less than ten percent. The two other Districts in Alabama had early term rates of 31 to 40 percent and 11 to 20 percent.

Perhaps the greatest reason to support the proposed changes in early discharges is the impact on public safety. As other commenters pointed out, overuse of supervision can cause harm. The truth is it can even increase crime in our communities. When tracking nearly 300,000 federal supervision cases discharged and rearrest rates two years after these individuals left supervision, OPPS found this to be the case. With all federal cases closed early, 2.7 percent of those who received an early discharge were rearrested within two years. However, over that same period those who full termed their supervision were arrested at 3.3 percent, 22 percent statistically higher than those early termed. There was a higher rearrest rate across the board for all individuals who served their full term of supervision, including those who the PCRA determined were at a low, low/moderate, moderate and high risk of reoffending.

A concern that was brought up in previous comments as to reviewing early termination was it being at the one-year period. One person commented on how some specialized judicial ran programs, such as those built on the drug court model, typically take more than a year. I am a fan of these programs and have witnessed the good that they accomplish. However, many of these programs target those most at risk. It is appropriate for those at a higher risk level and who are having trouble adapting to the community to serve longer terms of supervision and receive more services. The District I oversaw had Judicial-led reentry programs and that usually lasted more than a year, and the people served in these programs can continue with programming and supervision past the one-year point should this change in policy take place. My previous District where I served had more firearms supervision cases than the Districts that compose Los Angeles and Chicago. Often these local convictions involved dangerous gang activity and the defendants had lengthy and violent criminal histories. I can't see many of these individuals being released from supervision at a one-year point. Even in these cases, the carrot remains important and a motivator to do good for a possible early discharge. It is important to remember, the proposed change only calls for a review at the one-year time frame and allows for judicial discretion to determine if a termination of supervision is appropriate.

While some complained that assessments at presentence and at the one-year period of supervision will increase the workload of probation staff, one person voiced concern that the changes would allow more people to be early terminated from supervision and shrink the probation workforce. The review of these changes should result only when in the best interest of justice, regardless of possible budget reductions. I can't imagine a hospital not wanting to use a new medicine because it will reduce admissions and budgets, nor should we keep a system in place because of budget concerns when one that is more just is available. We must be good stewards of the taxpayers' money, and it was suggested that if all Districts had early discharge rates similar to those who process the most early discharges, annually savings would exceed between $50,000,000 and $100,000,000. Again, this would only positively impact crime rates in the future. The probation leaders at the Administrative Office have a track record of adapting to what determines workload and the statistical credit that Districts receive. Case in point, when the system experienced the crack cocaine retroactive resentences, probation began receiving a workload credit for the work involved with this. Additionally, doing the resentencings was in the best interest of justice, and all probation offices survived the increased workload.

Others point to how when people are doing well on supervision, instead of being discharged early they can be moved to what is called an "administrative caseload" or a caseload with a similar name. These caseloads often number in the hundreds and can consist of a clerical position filing the client's monthly reports. While the face-to-face supervision often ends, the ongoing restrictions of supervision continue. For example, there still are travel restrictions and in many states such as the one I reside in people cannot vote while on supervision. I also know of employers who will not hire people on supervision because of possible missed work for reporting purposes, counseling, drug testing, and other reasons.

Violations of Supervision and Mandatory Revocations

Revocations for technical violations are not treated equally from District to District. I know of one District where after a certain number of positive urine tests will result in revocation, while other Districts this is not the case. Revocations for technical violations can do more harm than good, such as losing a job. Technical violations also are a burden to the entire federal system. If you trust in science and medicine, punishing drug users for having an illness is clearly not a best practice. As was reported in one of the comments, at the period ending March 31, 2022, two-thirds of revocations were due to a technical violation. Changing policy to mandate revocation only when statutorily required is logical.

I hope the above information is helpful. You are in a unique time in history to evolve the federal criminal justice system. I appreciate your hard work, time and consideration.

Sincerely,

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March 18, 2025

The Honorable Carlton W. Reeves
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Re: Reply Comment to Proposed Amendments to the U.S. Sentencing Guidelines, Supervised Release (Jan. 24, 2025)

Dear Judge Reeves,

I appreciate having been invited to testify before the U.S. Sentencing Commission on March 13, 2025. I write to reply briefly to several points that were raised during the hearing and in the written commentary about the Proposed Amendments to the Supervised Release Guidelines.[1]

A. The Commission should not wait to promulgate § 5D1.4 and its suggested criteria for early termination.

The Committee on Criminal Law of the Judicial Conference of the United States suggested that it may be appropriate to delay including a list of non-exhaustive factors for early termination in § 5D1.4. It cited to the Federal Judicial Center's ("FJC") and the Administrative Office of the Courts' ("AO") on-going research with respect to early termination.[2] The Committee noted that AO "research [ ] 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."[3] And because of this variety, it "recently requested" the FJC "conduct a qualitative study on the differences in the use of early termination across the country."[4] It also noted that "evidence-based improvements" to the

[1] U.S. Sent'g Comm'n, Proposed Amendment: Supervised Release in *Proposed Amendments to the Sentencing Guidelines* 1–53 (Jan. 24, 2025).

[2] *See* Comment, Committee on Criminal Law of the Judicial Conference of the United States, at 5–6 (Mar. 3, 2025).

[3] *Id.* at 6.

[4] *Id.*

Guide to Judiciary Policy[5] language on early termination "could be forthcoming."[6] According to the Honorable Edmond E. Chang's testimony, there is no definite timeline for these projects.[7]

Despite the Committee's suggestion, the Commission should not wait. First, and most simply, while § 5D1.4 pulls from the early termination criteria set forth in the Guide to Judiciary Policy, the criteria listed in § 5D1.4 (and the changes that I suggested in my March 3 comment[8]) are rooted in what the statute already requires.[9] Research may shed light on why Courts are not using the guidance in the Guide to the Judiciary Policy or what type of criteria the Courts find most persuasive, but it would not alter what Courts are able to consider statutorily. And § 5D1.4 provides examples of appropriate, statutorily rooted considerations regardless of what additional research may show.

Second, even if research provides additional information about what guidance may be appropriate, that information will be included in an update to the Guide to Judiciary Policy, which courts can consider. Moreover, one of the greatest benefits of the U.S. Sentencing Commission is that it engages in an iterative process and can change policy statements, Guidelines, and commentary to reflect best practices and new information as it becomes available. In other words, the criteria would not be exclusive or set in stone.

Third, based on the testimony at the hearing and the written commentary, it appears there is general agreement that the disparity in early termination rates nationwide is concerning or of interest. Waiting to try and fix the problem will only increase inequity while wasting time and supervision resources. As I mentioned during my opening remarks, one of the most striking early termination cases that my Clinic has handled involved Ms. LaCresia White.[10] Ms. White was on CARES Act home confinement for more than 3 years before starting S/R, and when she received early termination she had been living in the community for more than 4.5 years. The number of people in Ms. White's position will dramatically increase over the next year. In December 2024, then-President Joseph Biden granted sentence commutations to "nearly 1,500" people on CARES Act home confinement.[11] In other words, there are now (or very soon will be) more than a 1,000

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[5] Guide to Judiciary Policy, Vol. 8E, Ch. 3, § 360.20.

[6] Comment, *supra* note 2, at 6.

[7] Testimony of the Hon. Edmond E. Chang on behalf of the Criminal Law Committee to the USSC, at 4:56:50–4:57:45 (Mar. 12, 2025) ("We might have more information on that [the Guide to Judiciary Policy criteria] in the upcoming year."); *id.* at 5:13:09–5:13:22 (noting a timeline may be set in June 2025).

[8] *See* Comment, Alison K. Guernsey, Clinical Prof. University of Iowa College of Law, at 15–17 (Mar. 3, 2025).

[9] *See* 18 U.S.C. §§ 3583(e)

[10] *See United States v. White*, 3:12-cr-00028-RGE-SBJ (S.D. of Iowa).

[11] Statement from President Joe Biden on Providing Clemency for Nearly 1,500 Individuals on Home Confinement and Pardons for 39 Individuals Convicted of Non-Violent Crimes (Dec. 12,

people on S/R who have spent 3, 4, and even 5 years of their lives living outside of prison walls. As President Biden remarked, these are people who "have successfully reintegrated into their families and communities."[12] Without additional guidance with respect to early termination, it is likely that the U.S. Probation Office will continue to supervise hundreds of people who simply do not need it, wasting valuable time, energy, and resources that could be spent on those who do.

The Commission should promulgate § 5D1.4 and its suggestive criteria now to encourage courts to use the early termination mechanism enshrined in the statute.

B. Proposed § 5D1.4 is consistent with 18 U.S.C. § 3583(e) and the decisions of all of the federal Circuit Courts that have interpreted its terms.

During the hearing, Vice Chair Murray asked Erin Haney, Chief Policy Officer of the REFORM Alliance, whether § 5D1.4 would be inconsistent with existing caselaw regarding early termination.[13] It would not.

I refer the Commission to my original comment where I addressed this concern,[14] but it is worth highlighting briefly here that 18 U.S.C. § 3583(e) allows for early termination when a person's "conduct" and the "interests of justice" require.[15] As Circuit Courts 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."[16] Although some district courts have inappropriately narrowed § 3583(e) by requiring or suggesting "a showing of new, unforeseen, or extraordinary or exceptional circumstances,"[17] every Circuit Court to address

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2024) ("I am also commuting the sentences of nearly 1,500 people who are serving long prison sentences . . . These commutation recipients [ ] were placed on home confinement during the COVID pandemic.").

[12] *Id.*

[13] Question from Vice Chair Claire Murray to Erin Haney, at 2:35:48–4:57:45 (Mar. 13, 2025) ("Is it your sense that [the line of cases requiring an extraordinary showing for early termination] are statutory interpretation cases such that there may be conflicts between our amendment and those cases that we would not be able to overturn?").

[14] *See* Comment, *supra* note 8, at 12–14.

[15] 18 U.S.C. § 3583(e).

[16] *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).

[17] *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)).

the question directly agrees that there is nothing in § 3583(e) that requires "extraordinary" or "exceptional" behavior.[18] The AO concurs.[19]

District courts wary of considering simple compliance with supervision as a justification for early termination often note that early termination would provide a windfall or a way to escape a previously imposed sentence.[20] But that approach misunderstands the statute's structure and purpose. As I mentioned during my testimony, engaging in a modification or granting early termination does not disrespect the sentencing court's original judgment or upset notions of finality. Rather, modification and early termination are necessary parts of the statutory scheme designed to ensure that the sentence someone serves is never greater than necessary. The rehabilitative purpose of S/R requires this conceptualization.

In short, § 5D1.4 would not conflict with Circuit Court law interpreting the boundaries of § 3583(e). The proposed amendment is consistent with the larger statutory scheme, which requires regular revaluation of the S/R term to ensure that the sentence remains appropriate under the relevant considerations set forth in 18 U.S.C. § 3553(a).

C. The Commission should not promulgate a "standard" or "common" no-contact condition, and it should not be the U.S. Probation Office's responsibility to obtain victims' positions on early termination.

During the hearing, Christopher Quasebarth, Chair of the Victims Advisory Group, requested that the Commission consider adding a standard condition that would prohibit contact with victims[21] and suggested that the U.S. Probation Office ("USPO") be tasked with speaking with victims about early termination.[22] I express serious reservations about these proposals.

First, if the Commission is considering a no-contact-type condition, then it should be a special condition, not a standard one. As outlined in my March 3, 2025 comment, best practices advise limiting, not expanding, standard conditions.[23] Moreover, associational

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[18] *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.

[19] *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), which states that no extraordinary showing is required).

[20] *See, e.g.*, *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)).

[21] Testimony of Christopher Quasebarth on behalf of the Victims Advisory Group to the USSC, at 53:50 (Mar. 13, 2025) (responding to Chairman Reeves's question).

[22] *Id.* at 50:18–50:30.

[23] *See* Comment, *supra* note 8, at 7–8.

restrictions can implicate "particularly significant liberty interest[s]," depending on the relationship between the defendant and the victim, and some Circuits require specific or heightened findings before they can be imposed.[24]

Second, there already exists a condition that the Court can impose if it would like to prevent a defendant from contacting a victim. In the AO's publication, "Overview of Probation and Supervised Release Conditions," there are several special conditions crafted to restrict associational rights under 18 U.S.C. § 3563(b)(6), including: "You must not communicate, or otherwise interact, with [name of victim], either directly or through someone else, without first obtaining the permission of the probation officer."[25]

Third, the USPO should not be the entity responsible for contacting victims and obtaining their input on early termination. As the Criminal Law Committee noted, "the Department of Justice is in the best position to provide notice to victims[ ] because it maintains the Victim Notification System" and "is also in the best position to know whether the victim previously requested not to be notified."[26]

Moreover—and perhaps most concerning from a defense perspective—because the USPO is considered an "arm of the court," it is not subject to the same discovery disclosure requirements as the Department of Justice.[27] This makes obtaining information from the USPO much more difficult in supervised-release proceedings.[28] Given defenders' experience with discovery in revocation cases nationwide,[29] I worry about the exchange of information between a probation officer and a victim, and I question whether relevant information would be appropriately disclosed to the parties. To be clear, I do not believe that the USPO would hold back information for any nefarious reason; rather, as discovery disputes in revocation proceedings have shown, it is not part of the USPO's routine policy and practice to think about what they must, can, or should disclose. Keeping victim notification with the DOJ will ensure that it rests with an agency that has appropriate safeguards in place for both the victim and the defendant.

* * *

[24] *See, e.g.*, *United States v. Wolf Child*, 699 F.3d 1082, 1091 (9th Cir. 2012) (providing for "enhanced procedural requirement[s]" before a no-contact condition can be imposed when the condition "implicates a particularly significant liberty interest" (internal citations and quotation marks omitted)); *United States v. Reeves,* 591 F.3d 77, 82–83 (2d Cir. 2010) (applying strict scrutiny to special conditions that burden constitutional rights).

[25] Admin. Off. of the Courts, Chapter 3: Association and Contact Restrictions (Probation and Supervised Release Conditions) (last visited Mar. 18, 2025).

[26] Comment, *supra* note 2, at 7.

[27] Alison K. Guernsey, *Rethinking Supervised Release Discovery with an Eye Toward Real "Fundamental Fairness,"* 34 Fed. Sent. R. 295, 297 (June 2022).

[28] *See generally id.* (discussing the difficulties associated with obtaining information when it is held by the U.S. Probation Office, as opposed to a law enforcement agency or U.S. Attorneys' Office).

[29] *Id.*

In conclusion, I again want to express my appreciation for the Commission's willingness to tackle this burdensome and important aspect of the criminal legal system.

Sincerely,

Alison K. Guernsey
Clinical Professor

Thank you for the opportunity to submit my comments on the Proposed 2025 Amendments on Supervised Release.

SUPERVISED RELEASE IMPOSITION

As a criminal defense attorney, I have witnessed first-hand the Court's imposition of lengthy terms of Supervised Release post-incarceration for Federal offenders. Of note are the blanket sentences of lifetime Supervised Release imposed for those convicted of a sex offense per Section 5D1.2(b)(2).

This means that all offenses of a sexual nature receive the same lifetime supervision sentence under the current guidelines (absent a downward departure; however, here in my state all these cases are getting lifetime and have been for some time). This policy is severely unbalanced, unfair and most importantly, a denial of Due Process due to the lack of an individual assessment for each offender. All offenders and all charges are not created equal. Under the current guidelines, someone with one count of CSAM Possession is sentenced the same as someone with multiple hands-on offenses.

Most of the Possession of CSAM offenders are white males. Many are in their late teens or early twenties. During the last cycle, the commission voted to bring its sentencing guidelines into conformance with the large body of science now available into the development of the human brain. It voted to advise judges that a downward adjustment in sentencing "may be warranted in cases in which the defendant was youthful [defined as age 25 or younger] at the time of the instant offense or any prior offenses." In making that change, the commission acknowledged that it has a "statutory duty to establish sentencing policies that reflect "advancement in knowledge of human behavior." It is time that the guidelines for these offenders be amended.

The pervasiveness and ubiquity of the internet has made these offenders easy to locate, arrest and convict. Often, they are found due to the Government itself (FBI) seeding images of CSAM (Project Playpen) and tracking where they are downloaded.

Once released from prison, these young men face lengthy Registration requirements. With Lifetime Supervision, they are also subject to intense supervision with dozens of stipulations including monitoring of all phone and computer use, living restrictions, work restrictions, association restrictions, searches of their residence and vehicles, polygraphs (that ask them about their sexual behaviors including masturbation), surveillance by officers, tracking by officers, travel restrictions, bank account monitoring and many more. In addition to not being allowed to work in certain jobs, these men must have their officer approve their employment, they already have a criminal conviction, and they are on the Registry making finding gainful employment almost an impossibility.

Paradoxically, their stipulations also require that they have a job. These restrictions, when taken as a whole, make it nearly impossible for them to locate a job while being simultaneously subject to being violated due to not having a job. The government may as well tell these offenders that they must win the lottery. They can buy tickets over and over (send in applications and go to interviews) but whether or not they win (land a job) is not under their control – it is up to the employer. In a world where even fast-food restaurants conduct background checks, these men are set up to fail.

Perhaps even more unfair is the discrepancy between sentencing for state offenses and federal offenses. A young man with a CSAM possession charge that is fortunate enough to be charged in a state court will face considerably less prison time and considerably less post-release supervision than will a man charged federally for the exact same offense.

The original reasoning behind these extensive sentences was due to the assertion that people who commit sex offenses do so at a "high and frightening" rate. This has been debunked repeatedly by studies showing that this group of offenders has a recidivism rate of less than 5%.

On the other hand, people who get convicted of a DUI charge have a 60-65% recidivism rate. Usually, DUI offenders get a slap on the wrist, do a class or two, pay a fine and their cases get closed. Isn't it true that someone puts a far greater number of people in danger driving while intoxicated than does a twenty-year-old male watching pornography in his bedroom? Yet, these CSAM possession offenders are lumped in with the "worst of the worst" violent sex offenders.

Furthermore, it is legal to watch online videos of people and animals being abused, shot and killed. The first-person shooter video game industry is extremely profitable. However, the act of viewing CSAM online – a federal offense that never leaves a young man's bedroom – results in a SWAT raid, being held at gunpoint, being arrested, imprisoned, and placed on scrutinous supervision for LIFE.

With the ubiquity of the internet and smart phones, studies state that the average age that children today start watching pornography is eleven years old. This statistic is trending downward. Men who watch pornography may develop an addiction to the dopamine and continually seek images that are wilder or exotic to attain the same level of arousal as before. This may lead to viewing of CSAM. Not because these men have pedophilic tendencies, but because they are searching for a high. This is the same way that drug addicts move to using harder drugs and larger dosages to get the same high. These men should not be subject to a lifetime of punishment.

The biggest argument for being tough on these offenders is that adult porn leads to CSAM which leads to a hands-on offense. This is due to the statement that men who commit hands on offenses often started with adult porn, then moved to CSAM prior to committing their offense. However, this does not mean that people who watch adult porn often will move to CSAM and then to a hands-on offense. This is the "IF A then B" problem. "IF A then B" is NOT equivalent to "IF B then A". That is a logical fallacy. Yet thousands of young men are subject to a lifetime of scrutiny, which costs likely MILLIONS of dollars under the guise of "community safety" because less than 5% of them MIGHT commit another offense? No other group of offenders is treated this harshly to the point where their entire lives are so scrutinized.

As it is, supervising officers have been known to state that "if you can't violate someone you aren't looking hard enough." If officers conduct a search and don't find any obvious violations, they will do whatever they can to come up with one. For example, someone living in a federal halfway house pre-release who gets searched and has no violations found could be written up at the officer's insistence for having "unsanitary living conditions" because of something as simple as an open water bottle. This is despite the fact that other residents may have food stored in their areas. I have witnessed this occurring firsthand.

Additionally, I have seen men on supervision being violated for the possession of "erotic" images. Even though their stipulations only specifically ban pornography, which is federally defined, these men have a "treatment contract" that they sign with their treatment provider providing that "erotic materials" are banned. Since "erotic" materials are not statutorily defined, this leaves these men with no notice of what does and doesn't constitute a violation. This is another case of the government "looking hard enough" to find a violation. I have witnessed men have been violated for viewing images of clothed adults and for viewing mainstream DVD movies.

The system as it stands cannot maintain itself. If all these offenders get lifetime supervision upon release, that means that the caseload of the officers will only continue to grow and grow with no relief. This will require hiring more officers, increasing caseloads and incurring more expenses.

Research shows that excessive supervision fuels mass incarceration and can increase the risk of recidivism by disrupting positive activities, counteracting its stated purpose of aiding rehabilitation. While supervised release aims to "facilitate reentry into society," practice shows that it often hinders successful reentry by creating trip-ups that lead to re-incarceration. The longer the supervision, the more likely a person will violate a condition that lands them back in prison. Additionally, the Administrative Office of the United States Courts Probation and Pretrial Services Office's 2016 report, "Overview of Probation and

Supervised Release Conditions," explained that "excessive correctional intervention for low-risk defendants may increase the probability of recidivism by disrupting prosocial activities and exposing defendants to antisocial associates." The report also notes that "good supervision is individualized. It is tailored to the risks, needs, and strengths presented by the individual defendant as determined by careful assessment of each case."

It is due to all these reasons and many others that I staunchly support the amendments providing that lifetime supervision no longer be presumptive for federal sex offenses. These men need a chance to rebuild, have a future and live their lives. There is no other category of crimes that punishes someone for life after they have completed their incarceration and paid their proverbial “debt to society”.

Please pass this amendment.

EARLY TERMINATION FROM SUPERVISED RELEASE

Since all federal sex offenders are currently being sentenced to lifetime supervision (absent any downward departure at sentencing), the Courts should anticipate an influx of supervisees filing for early termination when these amendments pass. This is great news for supervisees and will allow them to reenter society without the oppressive supervision conditions bearing down upon them and preventing their success. I am in 100% support of putting the onus on the Court to periodically evaluate offenders on supervision and to work toward getting them out of supervision. This is especially true because of the way that the current system is structured, whereby supervisees must petition the Court for release themselves and the overwhelming majority of these are denied. In my state, I do not know of a single instance where a federal judge has released someone convicted of a sex offense early from lifetime supervision. This is unconscionable and must be amended.

The biggest issue that should be considered before enacting these amendments is contained in Section 5D1.4(b)(1). This section provides that when considering early termination, the court should consider the listed factors 1-6. Due to the fact that the longer someone is on supervision, the more likely they are to have technical violations, the courts should be instructed to carefully consider Item 1. Item 1 “*any* history of court-reported violations over the term of supervision” should NOT be a bar to release from supervision (emphasis added).

Courts should be able to take violations into account, but they should distinguish between *technical* violations (violations of a condition of supervision) and actual violations, where a new criminal offense has been committed. This is particularly important for supervisees

who have been on years of supervision. If the amendments are enacted, this could create a disparity where the newly sentenced could serve one year of supervision then be released early, whereas someone who has completed years of supervision may not be released due to having "technical" supervision violations due to his length of supervision.

This would result in men who have completed long terms of supervision before the amendments are enacted not being released from their lifetime of supervision and men who are just sentenced being able to complete one year and be released.

I request that the Commission allow Courts to make individualized assessments, and that it NOT amend the guidelines in such a way so that the Items 1-6 are a checklist that must be followed in order for a supervisee to earn early termination.

I implore the Commission not to forget about the thousands of men currently serving sentences of lifetime supervision and to allow them to be given the opportunity to have that terminated early (prior to their death).

These Amendments are definitely a move in the right direction in aligning supervision with current data regarding offenses and brain science. These amendments should be enacted with the understanding that supervision as it currently stands does not work to make the community safer – it only works to create more prison time for people technically violating their conditions.

Please give people a chance to be terminated from this lifetime supervision. I agree that the termination should be allowed for general compliance and not make the standard for release so high that it is unattainable.

Thank you for this opportunity to share my thoughts.

Your Honorable Justices of the United States Supreme Court,

As someone who has personally witnessed a loved one endure an excessively harsh sentence thus costing Every American Tax Payer due to outdated and inflexible sentencing guidelines, I respectfully urge you to consider the proposed amendments. These changes acknowledge the inherent flaws in a system that, far too often, imposes punishments that far exceed what is just, focusing more on the quantity of drugs rather than the true culpability of the individual.

The proposed reduction in base offense levels for drug-related crimes represents a crucial step toward ensuring fairness and proportionality in sentencing. While accountability is vital, justice should not

equate to excessive sentences that deprive individuals of the opportunity to rebuild their lives. By embracing these changes, the Sentencing Commission takes a critical step toward recognizing that punishment must be balanced with the potential for rehabilitation and second chances.

These reforms would offer families like mine the hope that our loved ones will one day return home, equipped with the chance to reintegrate into society and contribute in a meaningful way. I humbly ask for your mercy in supporting these necessary changes.

Respectfully,
NICHOLAS ANTHONY

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Brianna Blackwell-Miller

Topics:

Supervised Release

Drug Offenses

Comments:

Dear U.S. Sentencing Commission:

I never thought I'd be writing a letter like this, but here I am—hoping that my loved one won't be forgotten. These sentencing changes are a step toward fairness and I truly appreciate the work being done by your commission to improve our justice system.

The fact that these policies are being reconsidered shows that they weren't working as intended. If the Commission believes these changes are necessary for future cases, I ask—shouldn't they also apply to those already sentenced under the same outdated guidelines?

For families like mine, this isn't just a policy change—it's personal. My husband is serving a federal sentence under guidelines that are now being reviewed because they don't reflect justice as it should be. He (and others) has done everything asked of them-taken classes, stayed out of trouble and held onto hope.

But hope only goes so far when the rules change for others but not for them. We can't turn back time, but we can ensure that justice applies to everyone—not just those lucky enough to be sentenced under new rules. I know the Commission has tough decisions to make, but I hope you will consider applying these changes retroactively. Doing so would align with the very reason these reforms are being considered—to correct past injustices and ensure fairer outcomes for all.

Thank you for your time and for the work you do in shaping a more just system.

Sincerely,

Brianna Blackwell-Miller

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,

I sincerely appreciate the opportunity to submit my strong support for reducing sentencing for drug offenses. Nearly nine years ago, I was incarcerated for 40 months at Hazelton S.F.F. for a non-violent drug offense. This experience profoundly shaped my perspective on the criminal justice system and the urgent need for reform.

Incarceration did not rehabilitate me. Instead, it exposed me to violence, unsanitary conditions, and highlighted the racial inequities that pervade our judicial system. The prison environment is not designed to meet the unique

needs of women, who face particular challenges in areas such as sexual and reproductive health. For example, being denied necessary gynecological care while incarcerated is not just an oversight—it is a violation of human rights that jeopardizes long-term health and well-being.

Since my release, I have dedicated myself to working with a harm reduction organization, where I provide technical assistance to groups serving individuals at risk of incarceration or opioid overdose. I also offer Crisis Intervention Training (CIT) to law enforcement and EMS professionals, helping them understand how to compassionately address substance use issues. Through my work, I have had the privilege of training probation officers across two federal districts in North Carolina on recognizing and reversing opioid overdoses, as well as responding with empathy to those struggling with addiction.

As our nation confronts the consequences of over-incarceration, it is increasingly clear that mandatory minimum sentences for drug offenses have not achieved the intended societal benefits. In fact, these policies have fueled mass incarceration without addressing the underlying issues of substance use and its root causes.

For decades, the War on Drugs has disproportionately harmed communities of color and low-income individuals, while continuing to treat addiction as a criminal issue rather than a public health crisis. The current sentencing framework fails to account for the social determinants of health—factors such as poverty, lack of education, limited access to healthcare, and the trauma often experienced by those struggling with addiction. These social and economic factors contribute to substance use but are rarely considered within the existing sentencing structure.

Instead of punitive measures, we need a shift toward rehabilitative, health-centered approaches. Reducing federal drug sentences would allow for more individualized sentencing, offering incarcerated individuals access to treatment and support that promotes rehabilitation and successful reintegration into society. This shift would also ease overcrowding in federal prisons and reduce the financial burden of prolonged incarceration.

Research and state-level reforms have shown that alternatives to mandatory minimums—such as diversion programs, harm reduction initiatives, and restorative justice practices—are far more effective in reducing recidivism and improving long-term outcomes. By approaching addiction from a public health perspective, we can begin to address the root causes of drug use and its related crimes in a more compassionate and effective manner.

Reducing federal drug sentencing is crucial not only for justice and equity but also for improving public health outcomes. Addiction is not simply a criminal issue; it is a complex health issue, deeply connected to social determinants such as access to healthcare, housing, and education. The current system of mandatory sentencing disregards these factors, disproportionately impacting marginalized communities and exacerbating health disparities.

Treating addiction through incarceration, rather than comprehensive health-based solutions, only worsens the challenges faced by individuals and communities. It removes people from the support systems needed for recovery—such as mental health services, addiction treatment, and stable employment opportunities. Reducing sentences would allow for health-centered alternatives, providing individuals with the resources necessary to

address the root causes of substance use and its broader social implications.

Additionally, reducing federal sentencing would help alleviate strain on the overburdened criminal justice system, enabling resources to be redirected toward public health initiatives. It would also help mitigate the stigma surrounding addiction, empowering individuals to seek the help they need without the fear of punishment.

I urge you to consider the public health and equity implications of the current sentencing structure and to support reforms that prioritize rehabilitation, compassion, and evidence-based solutions. By doing so, we can build a more just and effective system that views addiction through the lens of public health, ultimately improving outcomes for individuals and communities alike.

Thank you for your time and consideration.

Alicia Brunelli

North Carolina

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Amber Crawford

Topics:

Supervised Release

Drug Offenses

Comments:

The Need for Reform in Supervised Release and Drug Sentencing

The criminal justice system in the United States is in dire need of reform, particularly in the areas of supervised release and drug sentencing. These systems, as they currently operate, often do more harm than good—perpetuating cycles of incarceration and disproportionately affecting marginalized communities. A more equitable and effective approach would consider individual circumstances, assess the risk of reoffending, and eliminate the racial disparities embedded in drug-related sentencing.

Supervised release, intended to help individuals transition from incarceration back into society, often functions as an extended form of punishment. While the goal is to monitor and support formerly incarcerated individuals, the reality is that long periods of supervision create barriers to reintegration. Individuals under supervision must adhere to strict conditions—such as regular check-ins, employment mandates, and restrictions on travel—often for years after serving their time. Violating these conditions, even for minor infractions, can result in re-incarceration. This creates a revolving door between prison and society, making it difficult for individuals to rebuild their lives.

A more effective system would treat supervised release on a case-by-case basis rather than applying a one-size-fits-all model. Implementing comprehensive risk assessments could better determine the length and intensity of supervision needed. Factors such as age, employment prospects, family support, and a demonstrated commitment to rehabilitation should be evaluated to tailor supervision accordingly. For low-risk individuals, shorter or alternative forms of supervision could facilitate smoother reintegration while preserving public safety.

Drug sentencing in the United States has long been criticized for its racial bias. Studies consistently show that African Americans are disproportionately arrested, charged, and sentenced for drug-related offenses despite using drugs at similar rates as white Americans. Policies like mandatory minimum sentences and the disparity between crack and powder cocaine penalties have contributed to these inequities. For instance, before the Fair Sentencing Act of 2010, possessing just five grams of crack cocaine—a drug more commonly associated with Black communities—triggered the same mandatory prison sentence as 500 grams of powder cocaine, which is more frequently used by white Americans.

These harsh penalties fracture families and communities, creating a ripple effect of social and economic instability. It is particularly troubling that drug trafficking offenses often carry sentences comparable to, or even longer than, those for violent crimes like murder. This inconsistency undermines the principles of justice and proportionality. Sentencing reform should prioritize alternatives to incarceration—such as drug treatment programs—and eliminate mandatory minimums that remove judicial discretion. Additionally, retroactively applying changes in sentencing laws could provide relief to those serving unjustly lengthy prison terms.

The current frameworks for supervised release and drug sentencing are not only ineffective but also perpetuate racial and social inequalities. Reform is urgently needed to create a system that is fair, proportionate, and rooted in rehabilitation rather than perpetual punishment. By adopting individualized approaches to supervised release and addressing racial disparities in drug sentencing, the criminal justice system can move closer to fostering genuine rehabilitation and community safety.

It is time for lawmakers, community leaders, and the public to advocate for these necessary changes. The status quo is not working—and until systemic reforms are enacted, the cycle of injustice will continue.

Submitted on: March 18, 2025

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Jaylah Davenport

Topics:

Drug Offenses

Comments:

While drug purity can be a factor in understanding the potential harm of the drugs involved, it should not be the sole or primary determinant of a defendant's culpability in sentencing decisions. A more comprehensive approach that considers the defendant's role, intent, and other contextual factors would likely lead to fairer outcomes.

Submitted on: March 12, 2025

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Maria Flournoy

Topics:

Drug Offenses

Comments:

Subject: Public Comment on Proposed Amendments to §2D1.1 – Drug Offenses

Dear United States Sentencing Commission,

I am writing to express my support for lowering the base offense level in §2D1.1 and for eliminating the sentencing disparity based on drug purity, particularly in relation to methamphetamine ("Ice"). These changes are critical to ensuring a more just sentencing system.

My son was sentenced to 15 years in federal prison as a result of a controlled buy, despite clear evidence that he was not actively dealing drugs. On the recorded tape, he had to call someone else to obtain the drugs, which demonstrates that he did not have an ongoing drug business. However, because of the strict sentencing guidelines and the purity of the substance involved, he received a severe sentence.

This was not his first experience with the justice system—he previously served seven years for dealing. However, despite his history of addiction, he was never offered rehabilitation or any meaningful support for recovery. He was simply released and expected to stay sober without any treatment or assistance. Predictably, his addiction persisted, and instead of receiving help, he was punished even more harshly the second time.

Furthermore, the way he was arrested was unjust. His probation officer deceived him, telling him to come to the office under false pretenses, only for the U.S. Marshals to be waiting to arrest him. Such tactics erode trust in the system and fail to serve the interests of justice.

I urge the Commission to adopt amendments that reduce the harshness of drug sentences, particularly for those struggling with addiction. Lowering the base offense level and removing the purity-based sentencing enhancement would prevent unnecessarily long sentences for

individuals who are not major traffickers but instead suffer from substance use disorders. The justice system should focus more on treatment and rehabilitation rather than excessively punitive measures that fail to address the root causes of addiction.

Thank you for considering my comments. I hope that these proposed amendments will be enacted to create a fairer, more compassionate approach to drug sentencing.

Sincerely,
Maria Flournoy
[redacted]

Submitted on: March 18, 2025

United States Sentencing Commission,

First and foremost I would like to take this time to commend you on your efforts on adjusting some of the guidelines and statutes. I believe these proposals are an enormous leap in the right direction. I am writting to give my opinion and touch on a couple of the said proposals.

With the proposed amendment relating to supervised release, I agree wholeheartedly that the courts should have greater discretion. I haven't gotten the opportunity to read over the entire proposal, however from what I have read; providing the courts greater discretion to respond to a violation of supervised release condition would help greatly with the rehabilitation aspect of our justice system.

The proposed amendments on drug offenses; again in my opinion, are an enormous leap forward in the right direction in correcting the overly harsh punishments that has been given out for decades now and is well overdue. Specifically in regards to the methampletamine and fentanyl purity distinctions. The methamphetamine purity metric was originally installed to target traffickers at the highest level of the drug. In a 2019 "DEA methamphetamine Profiling Program" it was discovered that in the majority of meth seizures the average purity level was shown to be 97% and above. Which is a clear showing of the metric to be outdated and well overdue of said proposal adjustments. To do away with all references to "ice" would do a tremendous justice to our current system, as it would remove the power and bargaining tool the U.S. Attorney have been using against undeserving defendants for years.

The misrepresentation of fentanyl and fentanyl analogues another issue I would like to commend the commission for addressing. Since implimented

it has been abused by the U.S. Attorney in giving out overly harsh penalties and done little to anything in helping rehabilitate. It has been as a complete representation of crimes individuals are being charge for and a result have been giving unjust sentences. Revision of the mens rea requirement would be one remedy in making fentanyl related sentences a bit more rational. Another suggestion I would recomend is to address the issue with cases involving a "detectable amount" of fetanyl. In my opinion, I believe the sentences defendants recieve as a result are completely outragous. I believe defendants serving manditory minimum sentences for a large quantity substance that only contained a minute amount of fentanyl is absolutely unjust and unfair.

Unfortunately I did not receive the proposals in time to make the deadline to give my input on the career offender amendments, but I would just like to say that has been a severe issue with our justice system for decades and making corrections or adjustments is long overdue. It was implimented to target high level drug trafficers and Kingpins but has instead has been harsh and unjustly effecting the sentences of low level street dealers and users. Overall in my opinion it has been almost completely ineffective for what it was originally intended for. I believe the career offender guidelines is one of our justice system most important issues to be corrected or adjusted. I thank you in advance for your time and consideration. I hope the proposals are decided on for the better improvement of our justice system.

Sincerely,

Jackie Johnson

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Mark Jones

Topics:

Supervised Release

Comments:

Please pass the law for the shorter supervised release because it's like a sentence on top of their sentence...10. Years plus 3 years is 13 years not the 10 they was sentenced too ...It's time for change we are the only country with millions of people in prison there has to be a better way ....

Submitted on: March 9, 2025

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

Attention: Public Affairs - Proposed Amendments

March 3, 2025

Re: 2025 Proposed Amendments on Drug Offenses

I am writing you in regards to the 2025 Proposed Amendments on Drug Offenses as it relates to (A) Recalibrating the use of Drug Weight in §2D1.1; (B) Amendments to §2D1.1 relating to "ice" and the Purity Distinction between (actual) Methamphetamine and Methamphetamine Mixture, and, (C) other issues relating to §2D1.1 that were not addressed in the proposals but are of great Public importance.

I understand that your time is limited, however, and you will probably be receiving many comments/letters in regards to these issues so, I will try to keep this letter short and to the point.

(A) First, I do understand the reason behind seperating different types of Drugs and Drug Weights in different categories, and assigning a different offense level as it relates to such categories, however, I also very strongly believe that §2D1.1(c) absolutely overly relies on Drug type and Quantity as a measure of offense culpability and because of that it has, and will continue to, result in sentences far greater than necessary to accomplish the true purposes of Sentencing.

I believe that the factors that should hold the most weight in determining an individuals sentence are already properly listed in §3553(a), and most notably, Drug type

and Quantity of Drugs are not specifically Mentioned one single time in the §3553(a) Sentencing Factors.

In addition, based on the current state of the law a Defendant charged with certain Drug type(s) and Quantities can receive an offense level as high as 38, which depending on an individuals criminal history Score, can result in extremely harsh Sentences up to life imprisonment which I believe is excessive and harsh. I truly believe that regardless of the drug type and/or Quantity no Drug offense(s) should result in an offense level higher then 30. All offense levels higher than 30 should be reserved for the most violent, worst of the worst offenses, and should not apply to non-violent Drug offenses. In short, while I Do believe that §2D1.1 absolutely needs to be changed, I also believe that any changes to §2D1.1(c) should also lead to changes in the §841(b)(1)(A) and (b)(1)(b) Statute as it relates to the Mandatory Minimum(s) attached to Certain types of Drugs and Quantities of these Drugs. I believe that this change needs to be Made because it would be Meaningless to change the offense levels (which are used to determine a Defendants guideline Range Sentence) if the Mandatory Minimums remain the same, since the Mandatory Minimum Sentence will always override the guideline Range Sentence (with the Limited exception in cases involving the Safety valve and §5K1.1 cooperation agreements). Furthermore, I also believe that if the offense levels are changed and Defendants are no longer eligible to Receive extreme Sentences such as Life,

than the Statutory Maximums should also be changed Accordingly.

B) In regards to the Proposed Amendment to the guidelines relating to Methamphetamine, to keep it short, I Absolutely Support the Proposal to Delete All References to "Ice" From the Sentencing guidelines, and to Remove the "Actual" Methamphetamine Guidelines Completely since Neither one of these Serve any Legitimate purpose and have Never Made any Sense in the real World. Methamphetamine is Methamphetamine regardless of the purity level, but if you would Compare Purity Levels the Statistics clearly show almost all of the Methamphetamine cases involve Methamphetamine With Purity Levels higher than 80% so, I believe that regardless of the original idea(s) behind these Distinctions, they have turned into Nothing More than another tool For the United States Attorneys across America to use to Coerce criminal Defendants into accepting Plea Agreements, i.e., by threatening to charge A Defendant With "Actual" Meth When they are currently only charged With A "Mixture" offense, unless they plead guilty) so, as I stated before I Fully Support this proposal.

C) There is one other issue that to My knowledge has not been addressed through any proposal(s) but, I believe should be as it is of great public importance, and that is Note (A) to the Drug Quantity table in §2D1.1(C)

To be Specific, Note (A) states "unless otherwise specified, the Weight of A Controlled Substance set Forth in the table refers to the entire Weight of any Mixture or

substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level."

I believe note (A) should be addressed and corrected on two levels. The first relates to the first part of this note which has led to absurd results over the years. For example, based on this wording, if an individual is charged with 1000 grams of a substance that contains only one gram of cocaine but 999 grams of baking soda then that individual will be charged with possessing 1000 grams of a "mixture or substance containing a detectable amount of cocaine", and will be sentenced based on the total weight of the entire substance (1000 grams) even though it actually only contained one single gram of cocaine, which I believe is made even more absurd since drugs can easily be tested for their purity levels and their contents so, I believe that this is an issue that definitely needs to be addressed.

The second issue that exists with note (A) is the wording of the second part of the note which states that "If a mixture or substance contains more then one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level."

I believe that this wording has always created problems

but, has in the Past few years become A MAJOR issue because of the dramatic increase in Fentanyl cases. For example, IF an individual possesses 100 grams of A substance which contains 99 grams of heroin or cocaine and 1 gram of Fentanyl, that individual will be charged with 100 grams of "A Mixture or substance containing A Detectable amount of Fentanyl" and Sentenced under the Fentanyl guidelines because Fentanyl carries the higher offense level, even though in most cases the individual didnt even know that the substance contained any amount of Fentanyl, and I believe that this issue has led to many individuals being Sentenced to much more time than they should have been so, I believe that this is an issue that should be addressed as well.

In conclusion, I believe that IF this commission is serious about addressing the concerns cited in the Proposal(s) and assuring that the Sentencing guidelines truly are Just and Fair, and that individuals are not receiving Sentences greater than necessary to accomplish the true purposes of Sentencing then you will pass these proposals, Make them retroactive, and continue to address each issue as it is brought to your Attention.

I Sincerely thank you For your time.

Respectfully,

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Kristen Perraut

Topics:

Supervised Release

Drug Offenses

Comments:

Dear United States Sentencing Commission,

I commend the Commission's recent efforts to enhance fairness in our justice system through the proposed amendments to the Career Offender Guidelines, Supervised Release, and Drug Sentencing policies. These initiatives are pivotal in ensuring that sentencing practices are just and reflective of individual circumstances.

However, to fully realize the benefits of these reforms, it is imperative that they be applied retroactively. Applying these amendments only to future cases would perpetuate existing disparities, leaving those previously sentenced under outdated guidelines without recourse. Justice and fairness should be consistent, irrespective of sentencing dates.

Key Considerations for Retroactivity:

Consistency in Justice: Retroactive application ensures that all individuals, regardless of when they were sentenced, are subject to the same standards of justice.

Reduction in Overcrowding: Many incarcerated individuals could benefit from reduced sentences under the new guidelines, addressing prison overcrowding and associated costs.

Rehabilitation and Reintegration: Individuals serving sentences longer than what the new guidelines recommend may face unnecessary challenges in rehabilitation and reintegration into society.

The Commission has previously sought public comment on the retroactive application of

amendments, highlighting the importance of this issue. By making these changes retroactive, the Commission would reaffirm its commitment to a fair and equitable justice system for all.

Thank you for considering this crucial aspect of sentencing reform.

Sincerely,
Kristen Perraut

Submitted on: March 10, 2025

TRULINCS [redacted] - PONTEFRACT, CLYDE J - Unit: FTD-D-C

[redacted]
TO:
SUBJECT: ussc
DATE: 03/06/2025 08:16:56 AM

From: Clyde Pontefract, [redacted]
FCI Fort Dix
PO Box 2000
JBMDL, NJ 08640

Topic: United States Sentencing Commission's Proposals

My name is Clyde Pontefract and I am a federal prisoner with a term of imprisonment that started in 2007. Since this time I have studied federal criminal law. I do not claim to be an expert but I have learned a great deal and I am very knowledgeable in the area of criminal justice. I first thank the United States Sentencing Commission (SC) on their proposal for 2025-26. I do have some concerns and recommendations. This SC ask for comment on five topics and I would like to address them.

First, as a federal prisoner performing time under the federal Bureau Of prisons (BOP) my thought is that within the "introductory commentary to Part D of Chapter five", page 4 & 22, issues for comment, 1a, that it should include with the courts Supervised Release (SR) determinations 18 USC 4042 and the programs that the court might recommend as a sentence during sentencing that the BOP offers under the First Step Act. If a prisoner completes or fails to complete the courts recommendations it allows the court to make determinations in the future in regards to SR. This would compel prisoners to complete these courses during their incarceration. This would also support a courts determination that concerns SR conditions or releasing the prisoner from SR. This would give the court strength through a court contempt order if needed or a revocation. This would be contradictory to the Commission's statutory use of 3583(c). My thoughts are that 3583(c) within the first proposal. My thoughts are that 3583(c) is only used during revocations of SR when a defendant violates a criminal statute.

For example:

"A sentencing court will evaluate a supervised person who has been released from federal incarceration inregards to 18 USC 3583(d) & (e) for the persons full conduct while incarcerated with completions or non-completions of any programs recommended by the sentencing court of any programs the person completed by the sentencing court, any programs the person completed on their own, and any recidivism risk under the Federal Bureau of Prisons or similar recidivism risk established by the Sentencing Commission using table ?-?." (The SC should have a table that the court would use to establish an individual's risk similar to Offense levels.)

I feel that 18 USC 3583(c) should not be used directly against an incarcerated person after the original sentencing. If used, it hinders rehabilitation to move forward in life and improve themselves. Their original sentence could be a factor within a risk assessment table as their over-all risk. This would help with all judges to be fair and equal across all court districts.

Second proposal. I agree with the SC on the second proposal, except, I do not understand as to why the USSG has never, nor even now, included Congresses Intent from the Sentencing Reform Act of 1984, (PL 98-473, 98 stat 1987) in senate Report No. 225 p. 111-116, see Exhibit, that supports 18 usc 3559 & 3581. These are Statutes and supports the SC views of "a court would be required to impose supervised release only when required by statute."

Explaining why I feel this is important, congress through 18 USC 3581 set limits for judges to imprison defendants from specific class of felony's. They did not limit judges when sentencing a defendant under any specific federal criminal statue with supervision of supervised release. It is important to understand that Congress used the words "sentence" and "imprisonment" with two different intents. "Sentence" was used as a complete sentence of imprisonment, probation, and supervised release under a judges full criminal statutory authority. "Imprisonment" was used as an amount of time for just imprisonment within a persons sentence. See Appendix page 115/3298 and their example from Class C felonies. The Statute of 3581 supports this. Some courts opinioned that the Statute of 3581 was overruled by a criminal statute but are distinguished. See United States V. Avery, 15 F.3d 816 (CA9, 1993)(This case never analyzed the distinction between "imprisonment" and a "sentence" from S. 225, 115); United States V. Benabe, 436 Fed Appx 639 (7th Cir., 2011)(This case misconstrues 18 USC 3559(b). Section 3559 (b) supports a felony classification with a criminal statute of imprisonment. Section 3581 specifies the imprisonment time for the offense.); United States V. Simpson, 796 F.3d 548 (CA5, 2015); United States V. Wilson, 10 F.3d 734 (CA10, 1993)(They refused to examine Legislative History.) But Congress never has rescinded their 3581 intent from the SRA and the courts are

not able to overrule congress' purpose of 3581 unless the courts made 3581 unconstitutional.

These court opinions were decided without the full intent of Congress with the enactment of the SRA and Statute 3581. See "[t]he subsection is no more intended to indicate the actual sentence a judge is expected to impose in each case than are the analogous provisions of current federal statutes that also customarily set forth only the maximum limit on the judge's discretion." p. 115. Congress was explaining that 3581 set the max imprisonment for each individual and allowed the judges, up to the full individual sentence, to allow for their SR. SR under these circumstances allows the court to put a person who violates his conditions to be put back into prison under revocation.

The third proposed amendment falls squarely with the above. I do want to add that I agree with the SC to remove the Life Time requirement of SR for sex offense cases. Again the above suggestion would support and show each individual would be assessed on their own sentence and rehabilitation efforts.

The fourth proposed amendment would also be supported by the above recommendations.

The fifth proposed amendment is a slightly different explanation. The above suggestion does effect its reasoning. If the above Congressional Intent is properly understood you will see a different conclusion. SR is applied two different ways. Like the above supervised release would be applied as part of the original sentence, and indoing so, SR is part of the sentence and the conditions are part of the sentence. As Congress explained in S. 225 there could be SR given by the court after the persons sentence is completed. In which case SR Conditions can be only given as a part of a persons full rehabilitation after serving his full criminal sentence. In these cases the above suggestions allow and support a fair analysis of each persons supervision.

For questions please consider contacting Pontefract at the above address.

March 1 2025,

cf: Senator, Brown (Ohio)
Senator, Booker (New Jersey)
Senator Kim (New Jersey)
Senator Cruz (Texas)
Office of the President, President Trump

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Vanessa Rodriguez

Topics:

Supervised Release

Drug Offenses

Comments:

Supervised released for drug offenders with no violent history can help the individual rehabilitate and reintegrate into society. It gives them opportunity to be with their family. The opportunity to work and earn money. A second chance at life.

Submitted on: March 10, 2025

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Simpson Shawn

Topics:

Drug Offenses

Comments:

Long prison sentences for people with addiction issues set their life back makes more difficult for them to stay sober and destroys any support they have... i've done almost 15 years in prison for drug offenses never has this helped me in anyway I've had to restart my life three or four times at zero again each time being told that they are there to help me it is temper been true the last sentence I did in the Federal system was four years. I'm almost 60 years old trying to restart my life again from zero of course I can do this. I have previous experience doing it, but it's not something a person want to go through time again because they have an addiction that they cannot seem to get a hold of more prison time doesn't make for a better start in life. It doesn't make your dick issues go away. I just put them on hold for a minute while they build and grow stronger with each day. I've been to college to be a drug now call counselor they don't even have it figured out what we do know is prison makes it worse so why do we keep doing it cheaper to put them in a rehab and it may even help him. I'm sure that it won't hurt them. Long prison sentences still take, and cause harm the person destroyed. The most is the one that is serving the prison time

Submitted on: March 15, 2025

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Jenessa Stowers

Topics:

Drug Offenses

Comments:

Dear U.S. Sentencing Commission,

I appreciate the work being done to improve fairness in sentencing, and I strongly support the proposed changes to Career Offender Guidelines / Supervised Release & Drug Sentencing.

The fact that these policies are being reconsidered shows that they needed to change—but if they only apply to future cases, those already sentenced under the old rules will be left behind.

I respectfully ask the Commission to make these changes RETROACTIVE so that individuals who are currently incarcerated can receive the same consideration as those sentenced moving forward. Fairness shouldn't depend on the date of sentencing—justice should apply to everyone.

Thank you for your time and for considering this important step toward a more just system.

Sincerely,
Jenessa Stowes

Submitted on: March 10, 2025

Public Comment - Reply Comment on Proposed 2025 Amendments on Supervised Release and Drug Offenses

Submitter:

Linda Vaughn

Topics:

Drug Offenses

Comments:

The new trafficking function should be implemented at a six level decrease, Not use the mitigating role for this purpose because judges rarely use. Also this would seem exclude single defendants who have possession with intent to distribute charge. These changes should be made retroactive to impact all those who have committed the same crimes.

Submitted on: March 15, 2025

UNITED STATES SENTENCING COMMISSION
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Washington, DC 20002-8002
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