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

Dear Chairman Reeves and Members of the Sentencing Commission:

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

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

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

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

Discussion

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

I. Supervised Release Amendment

Part A. Imposition of a Term of Supervised Release

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part B. Revocation of Supervised Release

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

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

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

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

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

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

II. Drug Offense Amendment

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

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

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

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

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

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

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

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

Subpart 2: New Trafficking Functions Adjustment

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

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

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

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

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

Part B. Methamphetamine

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

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

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

Part C. Fentanyl

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

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

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

Part D. Machinegun Enhancement

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

Part E. Safety Valve

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

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

[6] *See* 18 U.S.C. § 924(c).

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

Conclusion

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

Respectfully submitted,

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