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March 3, 2025

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

Re: Public Comment on 2025 Proposed Amendments

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our views on the Sentencing Commission's second set of proposed 2025 amendments, which are enclosed with this letter:

Proposal 1: Supervised release

Proposal 2: Drug offenses

We appreciate the Commission considering our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Defender
Chair, Federal Defender Sentencing
Guidelines Committee

cc (w/encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Scott A.C. Meisler, Commissioner *Ex officio*
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Federal Public and Community Defenders
Comment on Supervised Release

(Proposal 1)

March 3, 2025

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Defenders welcome both parts of the Commission's Proposed Amendment on Supervised Release. At the sentencing stage, by urging courts to make careful, individualized assessments as to whether to impose supervision and for how long, which conditions to require, and when to terminate supervision early, Part A reflects that Congress never intended lengthy terms of often-intensive supervision for everyone transitioning out of prison. At the supervision stage, by encouraging courts to consider interim steps and offering more moderate options to address non-compliance, as well as recalibrating the sentencing table for technical violations, Part B recognizes that Congress designed supervised release to further rehabilitative, not punitive, ends. In other words, this amendment reinforces the law and legislative intent, offering helpful guidance along the way. This is important because, in our experience, the law is not closely observed in many courtrooms across the country.

As this proposal acknowledges, Congress crafted supervised release to help ease returning individuals' transition back into their communities and to provide rehabilitation to those who need it. But not everyone needs this support. Some return home to loving family, caring communities, solid job prospects, and have benefitted from programming and other resources in the BOP that obviate the need for supervision upon release. On the other end of the spectrum are those who lack a support network, resources, or job skills, or who suffer mental illness, including substance use disorder. Yet, today, the vast majority of those convicted of a federal crime are sentenced to a term of supervised release following prison, even when not required by statute. Supervising the former group diverts scarce resources from the latter group. And stakeholders have long lamented that far from providing rehabilitation, supervised release has devolved into a means of expedient reimprisonment, often for minor and technical violations.[1]

But the story need not be so bleak. Supervision could be reformed to "focus on income support, healthcare, and employment programs, all of which

[1] Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 Va. L. Rev. Online 297, 325 (2022) ("The current supervised release system offers prosecutors and courts . . . an expedient route to imprisonment that avoids the inconveniences of obtaining an indictment, affording the right to jury trial, and proving guilt beyond a reasonable doubt."); *see infra* n.10.

effectively divert people from crime."[2] We all would benefit from a supervision system that promotes community reintegration and rehabilitation. Effective rehabilitation deters future crime and improves public safety, while over-supervision often leads to reincarceration, which, even for short periods, can have a criminogenic effect. That is why this amendment is critical. It is not an attack on probation officers, or on the supervised release system, wholesale. Quite the opposite. It would help the system function more effectively, efficiently, and fairly by reserving limited probation resources for those who truly need them, and it would reduce reincarceration rates without threatening public safety at a time when the Bureau of Prisons faces crisis-level overcapacity and understaffing problems.[3]

In Defenders' view, if the least restrictive version of this amendment were enacted as written, there would be a net positive impact, in many districts, on individuals leaving custody and their communities. That said, below we offer refinements that would more effectively serve the Commission's intent to provide courts greater discretion and promote rehabilitation. Many of our suggestions are contemplated by various "Issues for Comment" (IFCs), and merely build upon the strong foundation already embodied in the language of this amendment.

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[2] David J. Harding, Bruce Western & Jasmin A. Sandelson, *From Supervision to Opportunity: Reimagining Probation and Parole*, 701 ANNALS of the Am. Acad. of Pol. & Soc. Sci. 8, 17 (2022); *see also* DOJ, Report on Resources and Demographic Data for Individuals on Federal Probation and Supervised Release 8 (2023) ("In addition to medical, psychiatric, or psychological treatment that might be required by a district court, U.S. Probation and Pretrial Services also attempts to address other criminogenic needs, including deficits in educational, vocational, and employment skills. In FY22, U.S. Probation and Pretrial Services spent approximately $10,000 on education resources, $117,000 on employment resources, and nearly $700,000 on resources related to life skills."). Since January 20, 2025, a significant number of Executive branch documents have been removed from agency websites. As of this comment's filings, the documents cited herein were available online. Defenders maintain copies of the documents in case they become unavailable and are needed by the Commission or its staff.

[3] *See* Defenders' Comments on the USSC's 2025 Proposed Drug Amendments I.B. (March 3, 2025) (discussing crises in federal Bureau of Prisons and Commission's statutory mandate to formulate guidelines to address same).

I. PART A: Chapter Five, Part D

We applaud the Commission's efforts to move courts away from reflexively giving people long supervised release terms with little hope for early termination, and toward thoughtfully assessing (and reassessing) individualized needs, as envisioned by Congress.[4] In particular, the proposed new §5D "Introductory Commentary" provides crucial grounding for the portion of the sentencing hearing that's too often given short shrift by judges and attorneys alike. By setting forth the relevant legal framework, this commentary reminds courts that the law *requires* an individualized determination of need before imposing supervised release, and that the system serves rehabilitative aims distinct from the goals of incarceration.[5]

Given how routinely judges mete out lengthy supervised release terms, mechanistically imposing long (often identical) lists of restrictive "standard" conditions, the people we represent often confuse supervised release with probation and parole—types of punishment.[6] But as the proposed amendment observes, supervised release is neither probation nor parole. Congress chose to exclude punishment-oriented factors from the list of criteria to consider to impose supervised release.[7] Although its scope has

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[4] *See* 18 U.S.C. § 3583(a) ("The court . . . *may* include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment . . . ." (emphasis added)); S. Rep. No. 98-225 at 123 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3307 (emphasizing that placement on supervision following imprisonment "is dependent on whether the judge concludes [the individual] needs supervision").

[5] *See* 18 U.S.C. §§ 3583(c); 3553(a) (requiring the sentence, including the term of supervised release, to be sufficient without being greater than necessary).

[6] *See* Liman Center, *Collecting Conditions: A Release Snapshot of Conditions District Connecticut* 10–12 (2025) (examining individuals given supervised release in the District of Connecticut and finding for each of them, "judges imposed the District of Connecticut's entire list of standard conditions" and that "[f]or many of the most common types of conditions—including treatment and search conditions—we observed nearly identical condition language for most defendants") (on file with author).

[7] *See* 18 U.S.C. § 3583(c) (excluding the need to reflect offense seriousness, promote respect for the law, and provide "just punishment"); *see also* S. Rep. No. 98-225 at 124, 1984 U.S.C.C.A.N. at 3307 ("The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a

expanded over time to include more penalties for violations,[8] Congress' original and overarching goal was to design a supervised release system that helped ease a person's "transition into the community after the service of a long prison term" or "provide rehabilitation to a [person] who has spent a fairly short period in prison . . . but still needs supervision and training programs after release."[9]

For many people struggling to get their lives back on track after a period of incarceration, supervised release too often provides a trapdoor back into custody, instead of the tools they need to rebuild.[10] For others, who do

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term of supervised release . . . ."); *United States v. Granderson*, 511 U.S. 39, 50 (1994) ("Supervised release, in contrast to probation, is not a punishment in lieu of incarceration.").

[8] Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 999–1000 (2013) (explaining originally the "SRA allowed judges to treat a violation of the conditions of supervised release as a criminal contempt" but flagging that "[e]ven before the SRA went into effect in 1987, however, Congress added a revocation mechanism."); *see also* Jacob Schuman, *Supervised Release Is Not Parole*, 53 Loy. L.A. L. Rev. 587, 604–05 (2020) (explaining SRA did not originally contemplate that a minor supervised release violation should result in resentencing, and outlining how that changed over time).

[9] *See* S. Rep. No. 98-225 at 124 (1983); *see also Tapia v. United States*, 564 U.S. 319, 326 (2011) ("For example, a court may not take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release."); *Johnson v. United States*, 529 U.S. 694, 708–09 (2000) ("The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty.").

[10] Stefan R. Underhill, J., *Supervised Release Needs Rehabilitation*, 10 Va. J. Crim. L. 1, 3 (2024) ("Unfortunately, supervised release quickly became a means to ease the defendant's transition from the community back to prison. Indeed, over the past decade, revocations of supervised release have sent an estimated 100,000 or more former federal prisoners back to prison, principally for technical violations rather than for true recidivism."); Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 Fed. Sent. R. 204, 204 (1994) ("What was originally designed to assist re-integration into the community is instead facilitating reincarceration. Supervised release is set up so that a releasee is almost certain to do something that can be taken as a violation of some condition of release. Violations will become virtually universal unless probation officers and judges interpret release conditions liberally and even overlook some violations."); *United States v. Trotter*, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018) ("Violating a condition of supervised release can lead to—and in instances must lead to—additional incarceration. This situation can trap some defendants, particularly

not face the same struggles, supervised release is a needless intrusion on their lives and liberty. Part A, with its "individualized assessment of need" standard, would help ameliorate these problems. Courts are experts at applying the factors outlined in § 3583(c), which mirror (except for those focused on punishment) the § 3553(a) factors they know well. On balance, we believe Part A provides sufficient guidance and discretion to judges to impose supervised release to meet rehabilitative, not punitive, ends.

Below we discuss each §5D1 subsection in turn, explaining why these improvements are essential. We suggest alterations—including adding and removing some language—in keeping with the spirit of the amendment, but that would, in our view, better effectuate the statutory goals of reintegration, rehabilitation, deterrence, and community safety.

A. §5D1.1: It makes sense to impose terms of supervision only when required by statute or when warranted by an individualized assessment of need.

Defenders support the proposed changes to §5D1.1. Congress wanted to avoid wasting resources "on supervisory services for releasees who do not need them."[11] Yet in fiscal year 2023, 89% of people sentenced to prison were also sentenced to a term of supervised release.[12] And out of these individuals, only 28% were required by statute to be sentenced to some period of supervision, with over half being recommended by the Manual, while 21% of those terms were required by neither statute nor the Manual.[13] This is not only a burden on individuals who do not benefit from post-release supervision

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substances abusers, in a cycle where they oscillate between supervised release and prison.").

[11] S. Rep. No. 98-225, at 56–57, 1983 U.S.C.C.A.N. 3182, 3239–40; *see also Johnson*, 529 U.S. at 701 ("Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it. . . . Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most.").

[12] The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2023. The Commission's "Individual Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, Commission Datafiles.

[13] USSC, FY 2023 Individual Datafiles.

(and are not required by law to receive it), it also taxes limited court and probation resources as well.[14] The more strain on these scant, and in some places almost-non-existent, resources,[15] the less likely that individuals who truly need them will receive them. Of course, without rehabilitative capabilities, the function of post-release supervision becomes principally enforcement-oriented, that is, to monitor and control.[16] In this atmosphere, the revolving door of supervision, violation, reincarceration, and more supervision continues unabated, offering little in the way of increased public safety.[17]

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[14] One-Pager, Office of Sen. Chris Coons, Safer Supervision Act (last visited Mar. 1, 2025) ("[S]upervised release is now imposed in virtually every case, leading to a significantly overburdened system in which probation officers report that they are unable to provide supervisees with the close supervision that high-risk individuals need to reintegrate into society."); *see also* Harding, et al., at 15 (discussing the strain on supervision officers with high caseloads who are often left with "little time to do more than administer a drug test, check pay stubs and residential addresses, inquire about compliance with conditions, and collect supervision fees"); Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. St. Thomas L. J. 521, 522 (2006) ("Squandering our scarce correctional treatment program resources on low-risk [individuals] that do not need them is a waste of those resources.").

[15] DOJ Report on Resources, at 8 (documenting that nationally, the USPO spends only $10,000 on "education resources" and $117,000 on "employment resources," two of the rehabilitative services most needed by returning individuals).

[16] *See* Joseph A. DaGrossa, Dissertation, The Incapacitation and Specific Deterrent Effects of Responses to Technical Non-Compliance of Offenders Under Supervision: Analysis From a Sample of Federal Judicial Districts, at 149 (2018) (noting that supervision, as it currently exists, bears little resemblance to its historical mission of aiding individuals' adjustment to the community, focusing instead on "frequent drug testing, the administration of polygraph tests, and increased searches of [individuals'] person and residence" (citing Todd R. Clear & Natasha A. Frost, The Punishment Imperative 122 (2014))); *see generally* James Bonta et al., *Exploring the Black Box of Community Supervision*, 47 J. Offender Rehab. 248 (2008) (conducting a detailed examination of taped interviews between probation officers and their supervisees and concluding that probation officers spent too much time on the enforcement aspect of supervision and not enough time on the service delivery aspect).

[17] *See* Evangeline Lopoo et al., *How Little Supervision Can We Have?*, 6 Ann. Rev. of Criminol. 23, 37 (2023) ("[O]ur findings suggest that more probation and parole are associated with increased incarceration and fail to reduce crime . . . .");

To fix this, Part A removes the recommendation that supervised release be imposed whenever a sentence of more than one year is imposed. Instead, courts would be guided to use their discretion to impose supervision only when required by statute, or when (and only when) warranted by an individual's needs. The proposed language better tracks § 3583(c) because not everyone sentenced to more than one year in prison will need a term of supervised release under the factors listed there.[18] Additionally, we support encouraging courts to state on the record the reasons for imposing supervised release. Not only would this allow sentencing courts to consider the salient statutory factors more fully, but it would create a helpful record for decisionmakers down the road.

In response to IFC 1(b), Defenders do not believe there is added value in retaining the commentary in §5D1.1 directing courts to pay particular attention to criminal history or substance use. These factors are already incorporated into the individualized assessment, which includes the history and characteristics of the individual, and therefore they are unnecessary to highlight in isolation.

In response to IFC 2, with respect to noncitizens subject to removal from the country, Defenders urge the Commission to more forcefully discourage the imposition of supervised release by removing the last sentence of Application Note 5 that states supervision is appropriate "if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case." In its place, the Commission should add the language from this IFC: "Imposition of a term of supervised release in such cases may be excessive and may divert resources that would be better devoted elsewhere."

In 2011, the Commission recognized that the high proportion of noncitizens convicted in the federal system, combined with the high

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Harvard Kennedy School Malcolm Wiener Center, *Statement on the Future of Community Corrections* (May 17, 2018) (explaining that "[n]umerous jurisdictions have reduced the number of people on probation and parole and have instead focused supervision on those most in need of it and only for the time period they require supervision without negatively impacting public safety").

[18] We note that an additional administrative benefit: the fewer terms of supervised release imposed by a court on the front end, the fewer modification, early termination, or revocation proceedings the court must deal with on the back end.

likelihood of removal after completion of their sentence, meant that imposing supervision on this group is generally unnecessary.[19] This remains true today, as these individuals will "face prosecution for a new offense under the federal immigration laws if they were to return illegally to the United States."[20] Yet §5D1.1(c)'s guidance is apparently inadequate: out of the noncitizens sentenced in fiscal year 2023 who received a term of imprisonment, 72% received terms of supervised release to follow.[21] In our experience, courts are relying on the last sentence of Application Note 5 as a reason to impose supervised release. However, as Application Note 5 also recognizes, if the potential for a new federal prosecution will not deter this group, a potential revocation sanction is even less likely to do so.[22]

Finally, in response to IFC 4 on the impact of the amendment on an individual's eligibility to benefit from First Step Act earned time credits, Defenders request that the Commission add language to the commentary of §5D1.1(a) stating that courts should consider the imposition of a nominal term of supervised release for people who do not otherwise require post-incarceration supervision in order to incentivize their participation in recidivism-reduction programming and productive activities in prison.

The First Step Act of 2018 created a time credit system to reduce recidivism and promote rehabilitation.[23] Under this system, eligible individuals participate in evidence-based recidivism reduction programming or productive activities to earn time credits for early transfer to prerelease

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[19] USSG, App. C, Amend. 756, Reason for Amendment (2011).

[20] *Id.*

[21] USSC, FY 2023 Individual Datafiles.

[22] Thomas Nosewicz, *Watching Ghosts: Supervised Release of Deportable Defendants*, 14 Berkeley J. Crim. L. 105, 121 (2009) ("[W]hen someone ostensibly serving a term of supervised release is deported, the supervision becomes 'an empty gesture.'" (quotation and citation omitted)). Supervised release in these cases also becomes a costly endeavor: frequently a non-citizen returning after removal is arrested in a different district than imposed the supervised release term. He then faces the unlawful reentry prosecution in the arresting district, after which he is removed to the first sentencing district for a quick revocation, adding extra, unnecessary costs to the system.

[23] First Step Act of 2018, Pub. L. 115—391, § 3632(d)(4), 132 Stat. 5194, 5198.

custody or supervised release.[24] People may receive the early transfer to supervised release benefit only if "the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to [§ 3583]."[25] If "a term" of supervised release is required, the BOP can transfer the individual "to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits" under the statute.[26]

In light of this condition, and to ensure the full benefits of the First Step Act are realized, Defenders recommend the Commission add the following language to the Commentary of §5D1.1(a):

> **Nominal term of supervision to allow early transfer under First Step Act:** To realize the full benefits of the First Step Act, and to reduce recidivism, support rehabilitation, and protect the public, a nominal term of supervised release may be appropriate in some instances. The First Step Act of 2018, Pub. L. 115—391, created a time credit system that incentivizes individuals in custody to take programming designed to reduce recidivism and promote rehabilitation. Eligible individuals who successfully participate in evidence-based recidivism reduction programming or productive activities can earn time credits that "shall" apply "toward time in prerelease custody of supervised release." *See* 18 U.S.C. § 3632(d)(4)(C). A nominal term of supervised release would ensure that a person who earns credits as a result of successful participation can apply those credits towards a term of supervised release, not to exceed 12 months. *See* 18 U.S.C. § 3624(g)(3).

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[24] *See* 18 U.S.C. § 3632(d)(4)(C).

[25] 18 U.S.C. § 3624(g)(3).

[26] *Id.*

We believe this language would guard against unintentional unwarranted disparity resulting from people who fall in low-risk categories (and thus not given any supervision based on an individualized assessment) being held in custody up to 12 months longer than people given a term of supervision.

B. §5D1.2: The proposal rightly removes minimum supervised release term lengths, giving courts discretion to impose an appropriate term, which can be modified later, if needed.

Continuing with the theme of individualization, the proposed §5D1.2 would give judges more discretion to impose the supervised release term length they see fit, not to exceed the relevant statutory maximum. Not only is this sound policy, but the Guideline's current language, phrased in mandatory terms, also contravenes *Booker*—an independent reason to jettison that language.[27] The proposal then recommends courts state on the record the reasons for the length imposed, which would aid appellate review as well as later decisions at the district level to determine whether to modify, extend, or terminate supervision early. Defenders support these improvements.

Supervision terms are too long, on average.[28] And in Defenders' experience, judges are hesitant to vary from the supervised release guideline ranges, perhaps because this portion of the sentencing hearing has become so rote. On balance, shorter supervised release terms will make sense in many cases.[29] Unnecessarily long terms, combined with numerous and onerous

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[27] *See United States v. Booker*, 543 U.S. 220 (2005) (rendering the Guidelines advisory).

[28] In fiscal year 2023, individuals who received prison and supervised release terms, on average, received 62 months in prison, followed by 47 months supervision. USSC, FY 2023 Individual Datafiles.

[29] *See* Lopoo et al., at 37 (2023) (discussing incremental reforms such as "shortening supervision terms to no more than 18 months or two years with allowance of earned-time credit to further shorten them"); Malcolm Wiener Center (recommending "[r]educing lengths of stay under community supervision to only as long as necessary to accomplish the goals of sentencing").

conditions, increase reincarceration rates for violations,[30] which can threaten, rather than promote, public safety.[31] And as the Commission has recognized, individuals who violate their conditions of supervision typically do so within the first two years.[32] If a court determines these early struggles warrant

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[30] Underhill, *Supervised Release Needs Rehabilitation*, at 9 ("The purposes of [the Guidelines' supervised release] conditions are varied, but the effect is consistently to facilitate the reimprisonment of the person on supervised release."); DOJ Report on Resources, at 1 ("[S]upervision may also run the risk of imposing overly lengthy supervision terms, numerous and potentially burdensome requirements, and frequent surveillance, which, if too restrictive, can lead to unnecessary violations and reincarceration."); Lopoo, et al., at 36 (noting studies demonstrating that "more intensive or longer supervision terms do not improve recidivism," and "find[ing] evidence that community supervision may be increasing incarceration rates" without improving public safety such that jurisdictions should "experiment[] with supervision downsizing"); Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, 2004 Topics in Community Corrections 3, 5–8 (2004) (discussing meta-analyses and individual studies showing that more intensive correctional interventions can increase reincarceration rates for people identified as "low risk").

[31] PEW Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision* 45 (2020) ("Research shows that incarceration is no more effective than noncustodial sanctions at reducing recidivism and can deepen illegal involvement for some people, inducing the negative behaviors it is intended to punish. One meta-analysis found that, compared with community-based alternatives, incarceration either has no impact on reducing re-arrests or actually increases criminal behavior. This finding was further supported by a study showing that using jail stays to punish supervision violations did not improve probation and parole outcomes and offered no benefits over community-based sanctions."); Jennifer L. Doleac, *Study after study shows ex-prisoners would be better off without intense supervision*, The Brookings Institution (2018) (collecting studies showing that reducing the intensity of community supervision is a "highly cost-effective strategy" to maintain, and possibly even improve, public safety); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Institute, 2 (2017) (discussing how "there may be an 'inflection point' where increases in state incarceration rates are associated with higher crime rates"); DOJ, Five Things About Deterrence 1 (2016) ("[P]rison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment."); Harding et. al, at 17 ("The current focus on surveillance over support is . . . counterproductive from a public safety perspective. Research shows that we can improve public safety and reduce crime by focusing on integration rather than punishment.").

[32] USSC, Federal Probation and Supervised Release Violations 4 (2020).

longer supervision, it can extend the term up to the statutory maximum.

We do have one suggestion related to Application Note 3: we appreciate its individualized assessment, but we suggest that the Commission replace the word "sufficient" with "sufficient, but not greater than necessary." This would highlight the parsimony principle embodied in § 3553(a), further urging courts to resist imposing counterproductive, needlessly long supervised release terms in every case.

C. §5D1.3: The Commission should remove the "standard" conditions label in favor of "examples of common conditions," and it should prune the list of common conditions to better promote rehabilitation and public safety.

The Commission proposes modest changes to §5D1.3, which lists conditions of supervised release. Most importantly, it brackets the possibility of jettisoning the "standard" conditions language, in favor of listing "examples of common" conditions. This may be a step in the right direction since the term "standard" inaccurately suggests that this long list of burdensome conditions is appropriate in the "standard," or typical, case (and of course, there is no standard or typical case in light of § 3553(a)'s individualized sentencing scheme). But the Commission should do more to ensure courts impose only those conditions necessary to promote rehabilitation and public safety.[33]

Unlike other aspects of this proposal, the long list of standard conditions does not lend itself to differentiation in case supervision based on an individualized assessment of risk and needs. Busy courts often reflexively impose the same numerous standard conditions without tailoring them to the individual being sentenced,[34] and without considering the relevant statutory mandate to impose "no greater deprivation of liberty than reasonably necessary" to afford adequate deterrence, protect the public, and provide the person with needed training, medical care, or other treatment.[35] This leads to

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[33] *See, e.g.*, Lopoo et al., at 37 (discussing reforms including "elimination of supervision conditions irrelevant to the person's criminal charge").

[34] Liman Center, at 10–12.

[35] 18 U.S.C. § 3583(d)(2).

unwarranted uniformity. No doubt this is a product of the guideline's one-size-fits-all approach to standard conditions, which is incompatible with evidence-based, social science research "emphasiz[ing] that effective interventions follow the principles of 'risk,' 'need,' and 'responsivity.'"[36]

Some individuals do have specific needs that conditions can address, such as mental health/substance use disorder, or difficulty with employment skills. However, others leave custody ready to get back on their feet. Far too often, numerous, unnecessary conditions hinder recovery and rehabilitation, resulting in needless revocations and reimprisonment, which does not promote public safety.[37] What's more, decades of research show "that overly supervising (by number of contacts, over-programming, or imposing unnecessary restrictions) low-risk [individuals] is likely to produce worse outcomes than essentially leaving them alone."[38]

Defenders appreciate what we assume to be the intention behind the proposed rebrand of §5D1.3(b)(2), and out of the two options, we prefer

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[36] Admin. Off. of the U.S. Courts, Probation & Pretrial Servs. Off., Overview of Probation and Supervised Release Conditions, at 10 (July 2024). Although this report goes through each of the standard conditions and purports to identify a relevant statutory purpose the condition serves, those purposes need not be furthered in every case and, as was indicated at the supervised release roundtable, many of the conditions do a poor job of promoting the purposes identified. *See* Statement of Marianne Mariano on behalf of Defenders to USSC on Compassionate Release and Conditions of Supervision, at 3–4 (Feb. 17, 2016) ("According to the evidence-based practices that the Office of Probation and Pretrial Services encourages local district offices to use, conditions of supervision should be directed toward the particular criminogenic needs and responsivity of the individual, while the intensity of supervision is based upon the person's actuarial risk score. If conditions of supervision are to be consistent with that approach, there should be few standard conditions. All conditions should be specifically targeted to the needs and responsivity of the individual who should be directly involved in the creation of the supervision plan rather than treated as a passive participant." (cleaned up)).

[37] *See supra* n.31.

[38] Vera Inst. of Just., *The Potential of Community Corrections to Improve Safety and Reduce Incarceration*, at 13 (July 2013); *see also* Latessa & Lowenkamp, *What Works in Reducing Recidivism?*, at 522–23 ("[R]esearch has clearly demonstrated that when we place low-risk [individuals] in our more intense programs, we often increase their failure rates (and this reduces the overall effectiveness of the program)" by needlessly exposing them to anti-social behaviors and disrupting pro-social networks).

"examples of common conditions" over the misleading "standard" label. But even the "common conditions" label is unsatisfying. In reality, these conditions are "common" only because the Guidelines and Judgment form list them as "standard," and judges mechanically impose them as such, often without objection from the defense. And we fear that even with the "individualized assessment" requirement, without more, inertia will compel decisionmakers to do what they have always done: impose a blanket set of conditions that, at best, go beyond what the individual needs, and at worst, set people up to fail in ways counterproductive to rehabilitation and community protection.

With this in mind, and in response to IFC 5, we suggest another approach: pruning the list of "examples of common" conditions, which is overbroad and not particularly individualized.[39] Presently, the Manual's list of discretionary conditions for supervised release (not designed as punishment) is even broader than the statutory list of discretionary conditions for probation (punishment).[40] And as Defenders articulated to the Commission in 2016:

> (1) A limited number of standard conditions is consistent with the statutory provisions at 18 U.S.C. §§ 3563(a) and 3583(d) which require the court to make specific findings when imposing conditions not mandated by statute; (2) There is no evidence the proposed list of standard conditions serves the purpose of facilitating the reintegration of the [individual] into the community; (3) An extensive list of standard conditions is counterproductive because it may increase re-incarceration and even the most technical of violations extends the term of imprisonment for the original offense; and (4) A lengthy list of standard conditions has a disproportionately negative impact on the poor.[41]

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[39] We also encourage the Commission to include in the Commentary the discretionary factors in § 3583(d) to remind decisionmakers of the statutory restrictions on imposing discretionary conditions.

[40] 18 U.S.C. § 3563(b).

[41] Mariano Statement, at 1.

Therefore, the Commission should maintain the conditions at proposed §5D1.3(b)(2)(A), (B), (E), (F), and (M), and identify the rest as special conditions or remove them entirely.[42] The conditions we suggest excising often run afoul of § 3583(d)(2)'s requirement that discretionary conditions impose "no greater deprivation of liberty than is reasonably necessary."[43] For example, prohibiting out-of-district travel makes no sense in smaller districts where one can easily cross district lines without even realizing it.[44] And for individuals who live in rural areas or whose best job prospects involve interstate travel (such as truck driving or seasonal oil and gas work), the travel restriction hurts their ability to find and maintain employment. Likewise, the boundaries of tribal nations often span multiple states—or even countries, making this restriction particularly problematic for our Native clients.[45]

Additionally, the non-felony association condition ignores that many individuals in overpoliced, low-income communities end up with felony records, which might include our clients' family members and neighbors, resulting in isolation instead of reintegration. And the full-time employment requirement will be difficult, if not impossible, for some individuals who have disabilities, are trying to complete intensive substance use programs, are in

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[42] *See* Liman Center, at 19, 27–28 (Appx. D) ("One jurist has determined that, in general, six of the thirteen standard conditions are not to be used, and seven are often appropriate in many cases." Those seven are: 1) report within 72 hours; 2) report as instructed to PO; 3) answer truthfully questions asked by PO; 4) live at place approved by PO; 5) allow PO to visit home; 6) lawful employment or try to find it; 7) follow instructions of PO related to conditions).

[43] *See* Mariano Statement, at 5–10 (pointing out problems with 10 of the Commission's standard conditions).

[44] At least one court has declined to impose this condition where it would be inappropriate. *See United States v. Shacquille Jackson,* No. 3:23-cr-00065-SRU, Judgment, ECF No. 64 (D. Conn. Jan. 9, 2025) (no travel condition, no felony association restriction, among others); *United States v. James Bowers*, No. 3-22-cr-00067-SRU, Judgment, ECF No. 114 (D. Conn Jan. 30, 2025) (no travel condition, no felony association restriction).

[45] *See* Mariano Statement, at 5–6.

school, or are older.[46] It also "overlooks that the availability of employment varies tremendously."[47]

In addition to these three objectionable conditions, in 2016 Defenders identified problems with several other then-standard conditions.[48] Not all our concerns were addressed by Amendment 803. We urge the Commission to review our 2016 statement, as well as Yale Law School's recent Liman Center study of supervised release in Connecticut, and revisit these standard conditions.

Many of the current special conditions should also be removed.[49] And we oppose the proposed "special" condition requiring completion of a high school or equivalent diploma in the proposed §5D1.3(b)(3)(I). While we understand the good intentions behind it, this could result in yet another revocation trapdoor for our clients—many who have disabilities that make educational attainment difficult, or are indigent and lack sufficient transportation, internet access, or free time after work to complete this requirement.

Trimming the list of discretionary conditions would not only simplify this guideline, but it would also promote judicial discretion to tailor conditions to needs, rather than enable institutional inertia.

D. §5D1.4: The new policy statement provides helpful guidance to courts on how to tailor lengths and conditions of supervision to a person's evolving needs.

Defenders support the proposed §5D1.4, which reinforces that courts can—and perhaps, *should*—revisit terms and conditions of supervision over time. Below we offer minor suggestions to better advance the goals of the amendment.

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[46] *See infra* II.C. (discussing medical model of supervision).

[47] Mariano Statement, at 8.

[48] *Id.* at 5–12.

[49] In particular, the "support of defendants," "debt obligations," "access to financial information," required participation in a program for the "treatment and monitoring of sex offenders," and "unpaid restitution" conditions can be onerous and add little value in terms of rehabilitation.

1. Modification of Conditions

On supervision, an individual's needs are dynamic and necessarily change over time, and they may even change significantly between sentencing and release.[50] Therefore, the proposed language on modification of conditions helpfully reminds courts that they should be prepared to right-size the number of conditions soon after a person's release from BOP. In this provision, Defenders support the use of the word "may," which tracks the statutory language of § 3583(e) and makes clear that the decision to modify, reduce, or enlarge conditions is discretionary, subject to an individualized assessment.

2. Early Termination

Early termination for individuals who no longer need supervision is sensible and conserves probation and court resources without threatening community safety.[51] Given the statutory goals of supervision and the evidence-based research on the harms of over-supervision, it is in everyone's best interest for terms not to exceed what's necessary.[52]

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[50] Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders under Federal Supervision*, 78 Fed. Prob. 41, 53 (2014) ("[M]any [individuals] initially classified at the highest risk levels moved to a lower risk category over time and . . . these changes were mostly driven by improvements in [individuals'] employment and substance abuse-related dynamic factors.").

[51] Thomas H. Cohen, *Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety*, at 21–22 (2025) ("In findings mirroring research conducted by Baber and Johnson (2013) and work focusing on early termination at the state level, this study found that early termination did not endanger community safety. Specifically, when matched on a range of criteria associated with the risk of recidivism, supervisees with early terminations manifested post-supervision arrest rates that were two percentage points lower for any offenses than those of their regular-termed counterparts. Moreover, the post-supervision arrest rates for violent offenses were relatively similar for the early- and regular-termed groups." (citing studies)).

[52] *See, e.g.*, *United States v. Roman et al.*, No. 3:06-cr-268-26 (JBA), Order Granting Defendant's Motion for Early Termination of Supervised Release at 1–2 (ECF No. 1883) (D. Conn. Jan. 4, 2023) (acknowledging the "significance to defendants of 'being off the papers' and becoming one's own person without reporting requirements and without having to request permission to engage in travel or other

On balance, Defenders support the proposed language in §5D1.4(b), telling courts they *"should"* terminate supervision early when warranted, and listing criteria to help guide judges' discretion. The use of the word "should" in (b) makes sense, from a policy perspective, because it provides important guidance, while still promoting discretion. Encouraging early termination does not mean it will happen automatically. Under (b), a court should terminate supervision only if appropriate under the factors in the guideline and statute. On the other hand, the word "may," would offer little guidance, would be too permissive, and would not change the culture in many districts, which rarely ever reconsider long terms of supervision.

Supervised release was not designed to be imposed as punishment, which is why the statute allows for termination after one year "in the interest of justice," after considering the relevant factors.[53] It makes sense to end supervision early for individuals who no longer have rehabilitative needs. This should, in fact, be the ultimate goal: remove people from community supervision once they've demonstrated successful reintegration. Unfortunately, the current rate of early termination varies by district, and is extremely low in some places, resulting in geographic disparity.[54] In our view, the proposed new §5D1.4(b)—with use of the word "should" and with the listed non-exhaustive criteria included to help guide judges' discretion—would go a long way toward remedying this disparity and promoting early termination in districts that do not regularly grant it.

With that said, we have suggestions to ensure the amendment does not inadvertently make early termination practices more restrictive in certain districts and to ensure it is uniquely responsive to some courts' failure to consider early termination in all but the most compelling cases.

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activities. Thus, terminating supervision, i.e., 'the papers,' represents a form of freedom . . . .").

[53] 18 U.S.C. § 3583(e)(1).

[54] Cohen, *Early Termination*, at 17 (finding "substantial disparity regarding the use of early terminations at the district level . . . even when they are adjusted to account for factors driving the use of early termination" and speculating this is "likely the result of cultural differences and policy preferences about how this method of case closure should be applied at the local level.").

a. The §5D1.4(b) factors

In response to IFC 3, Defenders suggest ways to refine the list of §5D1.4(b) factors to better advance the purposes of, and processes for, early termination. In discussing the proposed §5D1.4, some Defenders raised concern that the list of factors could be perceived as more restrictive than the Judicial Conference's Guide to Judiciary Policy ("the Guide"), which judges rely on to frequently grant early termination motions in their district. We do not believe the Commission intended this proposal to be more limiting than the Guide, given that IFC 3 states that the Commission drew from the Guide, as well as the Safer Supervision Act, in crafting the proposed early termination language. Accordingly, we recommend removing one factor and hewing more closely to the Guide for some of the other proposed factors.

First, for factor (1), we suggest focusing on any court-reported violations over a 12-month period, rather than "any history" of violations, no matter how remote they may be. This tracks the language of the Guide and is particularly important for individuals on lengthy terms of supervision. This would capture only a person's more recent conduct, and would avoid stale events that might reflect growing pains as someone adjusts to liberty and moves toward stability.

Next, for factor (5), we suggest the Commission refine the "demonstrated reduction in risk level" criteria because some people will start in the lowest possible risk category and are therefore unable to demonstrate any reduction, and others may be perfectly suitable for early termination but unable to reduce their risk level due to factors outside their control, such as age and criminal history.[55] To account for this, we suggest the Commission

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[55] We also note, as we have in the past, that risk assessment tools, which are often group-based risk predictors, cannot provide truly individualized predictive results, and may entrench racial disparities by overly relying on criminal history and using rearrest, instead of reconviction or reincarceration, as the metric of recidivism. *See* Roland Neil & Michael Zanger-Tishler, *Algorithmic Bias in Criminal Risk Assessment: The Consequences of Racial Differences in Arrest as a Measure of Crime*, 8 Ann. Rev. of Criminol. 97, 98 (2025) ("Arrest is used as a proxy of crime, which has long been known to be flawed . . . . Whether due to discrimination or other causes, people of different races with similar patterns of criminal behavior may differ in their chances of being arrested."); Laurel Eckhouse et. al., *Layers of Bias: A Unified Approach for Understanding Problems With Risk Assessment*, 46 Crim. Just.

hew more closely to the Guide on this criteria, and suggest instead that the factor provide for "a low risk level or a demonstrated reduction in risk level over the period of supervision for defendants in higher risk categories who are able to reduce their risk level."

Finally, as for factor (6), we suggest removal of this compound factor because it is redundant and overly complex. Courts already must consider public safety under the statutory framework, and more importantly, it is highly unlikely that a person who meets most of the first five factors will pose a risk to public safety. If the Commission feels it cannot remove this bulky factor, we suggest streamlining by cutting everything except for the core concern: "whether termination will jeopardize public safety."

The §5D1.4(b) factors would read as follows:

(1) whether the defendant remained free from court-reported violations over a 12-month period;

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

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

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

(5) that the defendant is in a low risk category or has demonstrated a reduction in risk level over the period of supervision for defendants in higher risk categories who are able to reduce their risk level~~;~~.

~~(6) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's record while incarcerated, the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information~~

& Behav. 1, 14 (2018) ("The risk-assessment instrument uses information about a group of people that does not include the defendant and provides a score based on others' behavior.").

~~provided by the victims of the offense, and other factors the court finds relevant.~~

b. Additional suggestions

Based on Defenders' experience both in districts with a robust early termination practice, and others with virtually none, we offer more ways to improve this provision.

First, the Commission should add commentary recommending that courts grant early termination if warranted by the statutory and guideline criteria, even if the individual is unable to show extraordinary, unforeseen, or changed circumstances. Some courts have held that individuals must make this type of showing to be afforded relief.[56] But this requirement is not supported by § 3583(e)(1) or by the criteria the Commission proposes to include in this section. The Safer Supervision Act, on which some of the Commission's language is based, disavows any need to show exceptional circumstances to justify early termination.[57]

Second, the Commission should strike the proposed language in subsection (b) that requires "consultation with the government and the probation officer," before granting early termination. This language suggests *ex parte* communications that weigh against appointing defense counsel and

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[56] *See, e.g.*, *United States v. Wesley*, 311 F. Supp. 3d 77, 81-82 (D.D.C. 2018) (concluding that an individual's mere compliance with the conditions of his supervised release is not enough to warrant early termination because courts in the district have required exceptional circumstances); *United States v. Bouchareb*, 76 F. Supp. 3d 478, 480 (S.D.N.Y. 2014) ("Having considered Bouchareb's motion, the circumstances of his conviction, and all other relevant factors under 18 U.S.C. § 3553(a), the Court concludes that Bouchareb has not presented an exceptional case warranting early termination of supervised release."); *United States v. McKay*, 352 F. Supp. 2d 359, 361 (E.D.N.Y. 2005) (requiring "exceptionally good behavior" to justify early termination of supervised release); *cf. United States v. Caruso*, 241 F. Supp. 2d 466, 469 (D.N.J. 2003) (denying motion for early termination of probation where movant was unable to show unusual or extraordinary circumstances). *But see United States v. Melvin*, 978 F.3d 49, 53 (3d Cir. 2020) (vacating district court opinion holding early termination is proper only upon a showing of new, unforeseen, or exceptional circumstances, finding no support for such requirement in the statute's text).

[57] The Safer Supervision Act of 2023, S.2681, 118th Cong. (1st Sess. 2023); The Safer Supervision Act of 2023, H.R. 5005, 118th Cong. (1st Sess. 2023).

involving the person on supervision. Plus, it's not needed. Federal Rule of Criminal Procedure 32.1(c) provides sufficient procedural guidance. [58] Nor is this one-sided consultation contemplated by the Guide. The government and probation will be notified of any early termination request made by an individual, and they can weigh in accordingly. Districts can also craft their own local rules on consultation requirements.[59]

Third, the Commission should add an application note to mirror the Guide explaining that the "existence of an outstanding financial penalty should not adversely affect early termination eligibility, as long as the person under supervision is in compliance with the payment plan for the prior 12 months."[60] Some fine or restitution amounts are large enough to be extremely challenging—if not impossible—to pay completely during any period of supervision. This should not be a barrier to early termination. Once a court terminates supervised release, the balance of any fine or restitution reverts to a civil judgment enforceable under civil procedure rules.

Our final suggestions respond to discrete IFCs. In response to IFC 6, the Commission should not at this time tie early termination to successful completion of a reentry program. Some courts already grant early termination to individuals who complete reentry court. More importantly, as helpful as reentry courts can be, their availability varies dramatically by district and by administration. And some reentry courts automatically exclude individuals convicted of certain offenses. We are concerned that the unavailability of, or inability to enroll in, a reentry program would inadvertently undercut an otherwise sound request for early termination and could lead to a disproportionate rejection rate in districts without these programs.[61]

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[58] *See* 18 U.S.C. § 3583(e)(1) (court may terminate supervised release "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation").

[59] *See* D. Conn. Local R. Crim. Pro 47 (2015) (when filing motion concerning supervised release, counsel shall identify the "probation officer assigned to the case and whether the officer objects to the relief sought in the motion").

[60] Guide to Judiciary Policy, Chapter 3, § 360.20(e).

[61] If the Commission decides to add this criteria, it should make clear that the lack of an accessible reentry court program or restrictive admission criteria should not be used against individuals moving for early termination.

In response to IFC 7, we do not believe that further procedural guidance is necessary, beyond the processes already outlined in Rule 32.1. More importantly, attempting to guide procedure may prove difficult or controversial given that different districts have differing resources and needs, and vary widely in protocol as a result. Procedures that might make sense in a smaller, low-volume district like Connecticut would make no sense in a larger, high-volume district like Arizona. Likewise, individual circumstances and cases vary; some requests for early termination might be contested, while others can be stipulated to by the parties to streamline the process. Stakeholders can work together to develop standing orders and best practices for their own district as some districts already have. As for notice to victims, we see no need to include additional layers of procedure beyond the suggested commentary text, given their statutory right to be reasonably heard in the Crime Victims' Rights Act.[62] To reduce the administrative burden, we suggest removal of the bracketed text requiring notification to victims of "any violation of a condition of supervised release," because, as discussed above, conditions can be extensive, technical, and only marginally related to the original offense.[63]

II. PART B: Chapter 7

Part B would bring much-needed change to Chapter Seven, a long-neglected area of the Guidelines Manual. Defenders appreciate that the proposed amendment highlights alternatives to incarceration for vulnerable individuals returning to society to address issues of non-compliance. We are particularly heartened that the amendment offers an option for revocation only when required by statute and that permits a revocation sentence to run concurrently with any new criminal sentence. Likewise, we welcome the introduction of Grade D violations, which appropriately recognize that these are the least serious types of violations.

Chapter Seven was envisioned as a "first step in an evolutionary process," and promulgated as a flexible policy statement that would soon be

[62] 18 U.S.C. § 3771.

[63] U.S. Attorney Office victim-witness coordinators also often provide support to victims and can inform them of their rights and notice.

amended.[64] But stakeholders have called for supervised release reform for decades, and for 35 years no meaningful changes have been made.[65] Instead, districts have developed their own cultures around revocations of supervised release. And despite the fact that that supervised release was intended to be rehabilitative,[66] many districts treat reincarceration as the only option to address non-compliance.[67] For these reasons, we are particularly excited by the new introductions to Chapter Seven, including Part C, which clearly establish that the objective of supervised release is rehabilitation, which is hindered by incarceration. Of course, rehabilitation fosters community safety as well.[68]

While we appreciate that the Commission proposes to emphasize the rehabilitative aspect of supervised release, we caution against focusing too heavily on the punitive aspects of probation. With probation, a sentence imposed after revocation must serve all § 3553(a) purposes—just like an initial prison sentence.[69] Defenders are concerned that the introduction to

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[64] USSG Chapter 7, Introduction ("Moreover, the Commission anticipates that, because of its greater flexibility, the policy statement option will provide better opportunities for evaluation by the courts and the Commission . . . After an adequate period of evaluation, the Commission intends to promulgate revocation guidelines.").

[65] *See* Proposed Amendment, at 33 ("In the three decades since the promulgation of those policy statements, a broad array of stakeholders has identified the need for more flexible, individualized responses to violations of supervised release.").

[66] *Pepper v. United States*, 131 S. Ct. 1229, 1248 n.15 (2011) ("Supervised release follows a term of imprisonment and serves an entirely different purpose than the sentence imposed under § 3553(a)" (citing *United States v. Johnson*, 529 U.S. 53, 59 (2000) ("Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration")).

[67] *See* Underhill, *Supervised Release Needs Rehabilitation*, at 3–4 ("For decades now, statutes, court decisions, and the actions of hundreds of probation officers and judges have fostered the goal of protecting the public by reincarcerating supervisees and have all but eliminated the goals of assisted reentry and rehabilitation.").

[68] *Id.* at 5 ("[T]he dual purposes of rehabilitation and protection of the public reinforce each other when the principal focus of supervised release is on rehabilitation. After all, a rehabilitated offender poses no risk to the public.").

[69] *See* 18 U.S.C. § 3565(a)(1) & (2) ("If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable— continue him on probation . . . or revoke.").

Chapter Seven ("Updating the Approach" p. 33), as currently written, erroneously suggests that probation is solely punitive, which it is not, and could lead to misapplication of the law. Accordingly, for the introduction to "Updating the Approach," Defenders suggest the following language: "The Commission determined that violations of probation and supervised release should be addressed separately to reflect their different purposes. While probation serves all the purposes of sentencing set forth in 18 U.S.C. § 3553(a), *see* 18 U.S.C. § 3565(a), supervised release "fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000)."

A. Section 7B: The Commission should add Grade D violations to the probation revocation table.

Defenders support the Commission's proposal to separate the Probation and Supervised Release policy statements to emphasize the rehabilitative nature of supervised release. But we urge the Commission to add the concept of Grade D violations for non-criminal "technical" violations to the probation section in addition to the supervised-release section, providing for lower ranges in both. Technical violations are the least serious category of violation, regardless of whether someone committed a technical violation while on probation or on supervised release. More, mirroring the violation grades simplifies application of these policy statements.

B. Section 7C1.1: The Grade D category for technical violations of supervised release better promotes the dual purposes of rehabilitation and protecting the public, particularly for those struggling with recovery and access to resources.

The Commission has proposed a new Grade D violation category for supervised-release revocations which would encompass "technical" violations of conditions–the most common type of violation.[70] Defenders support this

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[70] Underhill, *Supervised Release Needs Rehabilitation*, at 15–16 ("[T]he largest portion of those revocations—at least half and recently more than two-thirds—involved technical violations rather than the commission of a new criminal offense."). Technical violations typically involve behavior that would not otherwise be considered illegal such as traveling to a different district without permission,

change, as the amendment rightly treats these minor infractions differently than new criminal conduct. Many technical violations result from mental health conditions, including substance use disorders.[71] Others stem from poverty, limited work or educational history, and related struggles. In essence, these violations reflect the many barriers to rehabilitation that are often beyond our clients' control.[72] As we discuss below, these violations should not result in prison time.

C. Section 7C1.3: The proposed language appropriately encourages alternatives to revocation and reflects courts' legal options, but the Commission should go further to discourage revocations and imprisonment for minor and technical violations.

We support the proposed new §7C1.3, which would encourage intermediary steps to address allegations and findings of non-compliance. At the roundtable the Commission heard feedback "identifying the need for more flexible, individualized responses to . . . violations." Administrative Office data from fiscal years 2021 and 2022, as reported by DOJ, support this need: "technical violations [made] up the majority of federal revocations—approximately two-thirds," and revocations for these minor violations "almost always resulted in a sentence of incarceration (approximately 99%), with the average sentence over 9.5 months long."[73] This amendment responds to this feedback and data, and would help shift the culture in many districts around

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violating curfew, failing to pay court fees, associating with another person who has a criminal record, or missing meetings with a probation officer.

[71] *Id.* at 22–23 ("[T]he formerly incarcerated are beset by a medley of problems that most of us cannot imagine: the stigma of a felony conviction, lack of education, minimal work history, drug addition, poverty, childhood trauma, housing restrictions, and an absence of pro-social role models . . . When we add to these common barriers to reentry the burdens of reporting to probation, submitting to location monitoring, restricting travel out of state, providing periodic urine samples for drug tests, allowing searches of residences and automobiles, and avoiding contact with other felons, it is hardly surprising that a large number of supervisees are unable to maintain complete compliance.").

[72] *See id.*

[73] DOJ Report on Resources, at 20.

handling non-compliance on supervision.[74]

For §7C1.3(a) (allegations of non-compliance), we support including the proposed bracketed language (including the bracketed Application Note 2) offering options other than revocation proceedings to handle allegations of non-compliance when warranted by an individualized assessment.[75] As was discussed at the roundtable, in some districts, courts and probation officers already avail themselves of these more rehabilitative options. But in others, nearly every allegation of non-compliance results in revocation proceedings. In the latter districts, rather than assisting vulnerable individuals recently released from incarceration with strategies for successful reentry, supervised release has come to center around monitoring and surveillance, leading to disruptive reincarceration instead of rehabilitation.

For §7C1.3(b) (finding of a violation), we support Option 1, which lists the same intermediary options to address violations and states that revocation is mandatory only if statutorily required under § 3583(g),[76] for

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[74] There is considerable variation in violation and revocation rates across districts, with some districts far more oriented to rehabilitation than others. *See* USSC, Federal Probation and Supervised Release Violations, at 18 (2020) (reporting that the district with the highest proportion of violations, the Southern District of California, was at 42%, while the district with the lowest proportion of violations, Connecticut, was at 5%); *see also* Underhill, *Supervised Release Needs Rehabilitation*, at 9 ("[S]ome [federal probation offices] are more law enforcement-oriented, and others are more focused on social services."). In Connecticut, the district with the lowest proportion of violations, tools such as compliance hearings, modifications of supervised release, Support and Reentry Courts, and early termination are used with ease and efficiency.

[75] To avoid future confusion and for consistency in application, the Commission should clarify that, when considering termination under §§ 7C1.3(a)(3) and 7C1.3(b)(3), the one-year period spent on supervised release can include periods on supervised release predating earlier revocations. *See* 18 U.S.C. § 3583(e)(1) (stating that a court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . .").

[76] Specifically, revocation is only mandatory if an individual on supervision 1) possesses a controlled substance 2) possesses a firearm in violation of federal law or his or her supervised release conditions; 3) refuses to comply with drug testing imposed as a supervised release condition; or 4) tests positive for illegal controlled substances more than three times within a year. § 3583(g). Notably, courts are

four primary reasons. First, Option 2, which purports to *require* revocation for Grade A and B violations (like the current §7B1.3(a)(1)), contravenes *Booker*. Because the guidelines are advisory, the Commission cannot tell courts that they "shall" revoke when revocation is not otherwise required by law.

Second, Option 1 better aligns with the Commission's goal to encourage greater individualization and discretion to respond to violations, moving courts away from unnecessary reincarceration, even for Grade A and B violations. As with responding to simple allegations of non-compliance, responding to proven instances of non-compliance with intermediary sanctions would help avoid the destabilizing and criminogenic effects of incarceration,[77] fostering personal growth and community safety.

Third, moving courts away from revocation for Grade A and B violations would help alleviate invidious racial disparities. For instance, DOJ recently observed, in fiscal years 2021 and 2022, Black supervisees had "the highest rates of revocations based on a new arrest charge."[78] In that time frame, "Black supervisees were sentenced to the longest terms of incarceration for revocations, averaging 11.3 months in 2021 and 11.5 months in 2022."[79] If courts are encouraged to think more creatively about how to respond to all types of violations, it is likely that fewer people under

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allowed to consider whether "the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception" to § 3583(g) "when considering any action against a defendant who fails a drug test." 18 U.S.C. § 3583(d).

[77] *See supra* n.31.

[78] *See* DOJ Report on Resources, at 16. This is not necessarily surprising given the research showing low-income African-American communities are overpoliced, and that Black individuals are more likely to be stopped and arrested than any other demographic group. *See also* Jessica Eaglin & Danielle Solomon, *Reducing Racial Disparities in Jails: Recommendations for Local Practice*, Brennan Ctr. for Just., at 17 (2015) ("A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every type of crime. At least 70 police departments arrested black people at a rate ten times higher than non-black people. In a suburb of Dearborn, Mich., the disparity in arrest rates for blacks was a staggering 26 times the rate for other races.").

[79] DOJ Report on Resources, at 17.

supervision would be reincarcerated, hopefully with a particularly pronounced positive impact on Black individuals and their communities.

Finally, many probation offices and courts treat a positive drug test as a Grade B violation.[80] Mandatory revocation language for Grade B violations pushes courts in the direction of prison time to address substance use disorder and relapse. Yet, even DOJ suggests avoiding carceral sentences for drug use, urging: to reduce the cycle of supervision, relapse, and incarceration and encourage pathways to substance use treatment, "courts, and/or USAOs, could establish a policy to no longer seek revocation for individuals based on drug use."[81] Indeed, using incarceration to address drug use contravenes the medical and scientific communities' understanding of substance use disorders as neurologically-based chronic conditions where relapse is a recognized feature of the recovery process, not a moral failing.[82] Addiction, the most severe form of substance use disorder, "is characterized by *compulsive* drug seeking and use, despite harmful consequences. It is considered a brain disease because drugs change the brain—they change its structure and how it works."[83]

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[80] *See, e.g., United States v. Crace*, 207 F.3d 833, 835 (6th Cir. 2000) (upholding district court's mandatory revocation of supervised release term based upon positive drug test and admission of use of a controlled substance).

[81] DOJ Report on Resources, at 20.

[82] *See* Brief for Mass. Med. Soc'y *et al.* as Amicus Curiae Supporting Pet., *Commonwealth v. Eldred*, 480 Mass. 90 (2018) (No. SJC-12279), 2017 WL 4273995, at *22–36; *see also id.* at *45 ("Scientific breakthroughs have revolutionized the understanding of substance use disorders. For example, severe substance use disorders, commonly called addictions, were once viewed largely as a moral failing or character flaw, but are now understood to be chronic illnesses characterized by clinically significant impairments in health, social function, and voluntary control over substance use."); *see also* Reena Kapoor, M.D., Comment on USSC 2025 Supervised Release Proposed Amendment, at 1 (on file with author) ("When considering what conditions of release to impose, courts and probation officers should recognize that a substance use disorder is not a moral failing, but rather a treatable illness.").

[83] Nat'l Inst. of Drug Abuse, *Drugs, Brain, and Behavior: The Science of Addiction*, at 5 (rev. 2014) (emphasis added); *see also* U.S. Dep't of Health & Human Servs., *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health*, at 2-1 (2016) ("[S]evere substance use disorders, commonly called addictions, were once viewed largely as a moral failing or character flaw, but are

Relapse is common among those recovering from a substance use disorder. The Surgeon General's 2016 Report, "Facing Addiction in America," advised that "[m]ore than 60 percent of people treated for a substance use disorder experience relapse within the first year after they are discharged from treatment, and a person can remain at increased risk of relapse for many years."[84] Medical and public health policy experts inveigh against incarceration as a sanction for relapse, warning: prison time "does not have the intended deterrent effect," "can undermine the rehabilitative purpose of punishment" by exacerbating the preexisting condition, creates an even greater risk for relapse and overdose death upon release, and "undermine[s] public health by reinforcing stigma associated with substance use disorder."[85]

Surely the Commission would not recommend imprisonment to treat diabetes, asthma, or hypertension. But substance use disorders share features in common with these other chronic illnesses.[86] "Although the mechanisms may be different . . . [a]ll of these disorders are chronic, subject to relapse, and influenced by genetics, developmental, behavioral, social, and environmental factors. In all of these disorders, affected individuals may have difficulty in complying with the prescribed treatment."[87] The Commission is charged with "reflect[ing], to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process[.]"[88] An advanced society is simply not one that sends people

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now understood to be chronic illnesses characterized by clinically significant impairments in health, social function, and voluntary control over substance use.").

[84] Surgeon General's Report, at 2-2; *see also* ACLU Comment on USSC 2025 Proposed Supervised Release Amendment, at 4 (on file with author) ("Relapse is a common and expected part of recovery.").

[85] *Mass. Med. Soc'y Amicus Br.*, 2017 WL 4273995 at *39, *42 (cleaned up); *see also* ACLU Comment, at 5 ("[R]evocation and incarceration . . . is detrimental to successful treatment and increases the risk of overdose for people with SUD—underscoring the importance of avoiding unwarranted incarceration for these individuals." (citation omitted)).

[86] *Mass. Med. Soc'y Amicus Br.*, 2017 WL 4273995 at *45–46; *see also* NIDA, *Science of Addiction*, at 5 ("Addiction is a lot like other diseases, such as heart disease. Both disrupt the normal, healthy functioning of the underlying organ, have serious harmful consequences, and are preventable and treatable, but if left untreated, can last a lifetime.").

[87] *Mass. Med. Soc'y Amicus Br.*, 2017 WL 4273995 at *45–46.

[88] 28 U.S.C. § 991(b)(1)(C).

back to prison for suffering a chronic, debilitating, neurological illness. To that end, we urge the Commission to issue commentary guiding courts away from treating drug use as "possession," and from revocation and incarceration as a response to a positive drug test.[89]

In addition to the language already proposed, the Commission asks in IFC 5 whether it should issue more specific guidance on the appropriate response to Grade D violations. Yes: The Commission should explain that revocation is not ordinarily appropriate for Grade D violations. As with drug use, DOJ acknowledges that reducing the use of carceral sanctions for technical violations helps "provid[e] a potential pathway to promote successful reentry."[90] Likewise, in his recent doctoral dissertation, Joseph DaGrossa studied the public safety and specific deterrent effects of different responses to technical supervision violations. He determined that people "incarcerated for technical violations of supervision are more likely to commit new crimes post-sanction (and sooner) than [people] subjected to intermediate sanctions."[91] He also found, "the greater the intensity of the intermediate sanction . . . the more likely an [individual] will be charged with

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[89] 18 U.S.C. § 3583(d) (giving judges discretion to avoid mandatory detention to accomplish a "treatment purpose"); *see also, e.g.*, *United States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1997) (concluding that a court may find possession based on a positive drug test, but is not required to do so; this is a discretionary decision); *cf. United States v. Crace*, 207 F.3d 833, 836 (6th Cir. 2000) (noting the former Assistant General Counsel of the Administrative Office of the Courts stated that: (1) her office had recommended that probation officers classify positive drug tests as Grade C violations; (2) positive drug tests were evidence of, but not determinative of, drug possession; and (3) courts should have discretion to decide whether a positive drug test constitutes possession for revocation purposes); ACLU Comment, at 3 ("The Commission should advise courts to treat substance use and mental health disabilities as public health matters outside of the criminal-legal system."); Kapoor Comment, at 1 ("[I]f an individual uses drugs or alcohol while on supervised release, revocation and/or incarceration should not be the first step . . . As the adage in substance use disorder treatment goes, 'Relapse is part of recovery.' In many cases, an individual can be referred to a higher level of care for their substance use disorder, such as an intensive outpatient program or an inpatient facility.").

[90] *Id.* at 20.

[91] DaGrossa, at 149.

subsequent technical violations during service of the sanction (often eventually resulting in incarceration)."[92]

By creating the new Grade D, the Commission correctly recognizes that technical violations are qualitatively different than new criminal offenses. They often stem from poverty and related struggles individuals face after prison.[93] "Reincarceration for technical violations of supervised release is obviously not rehabilitative."[94] Even if a revocation sentence is short, it will nonetheless upend the individual's life, potentially leading to loss of employment, housing, government benefits, treatment opportunities, parental custody,[95] and, as just discussed, could lead to increased recidivism.[96] It essentially resets the path to rehabilitation back to the beginning once the person is again released. And reducing reliance on incarceration for technical violations would help alleviate another kind of harmful demographic disparity, given that in fiscal years 2021 and 2022, "American Indians/Alaska Natives had the highest revocation rates for technical violation supervisees," at 80% and 82%, respectively.[97]

Although including this language in the Manual for Grade D violations would be a great start, the Commission should go a step further by adding

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[92] *Id.*

[93] Indeed, the reasons not to revoke and send someone to prison for drug use strongly support adding language to this section that discourages revocation for Grade D violations, given that some probation offices and courts treat a positive drug test as a technical violation.

[94] Underhill, *Supervised Release Needs Rehabilitation*, at 5.

[95] *See*, *e.g.*, Fiona Doherty, *The Revocation of Community Supervision: A Reform Project*, 20 Ohio St. J. Crim. L. 1, 6 (2023) (determining from study that 79% of Connecticut parolees lost their jobs as a result of being remanded into custody; 47% permanently lost their housing, and "[m]any also lost their property when they lost their housing"); *United States v. Faison*, No. 19-cr-27, 2020 WL 815699, *1 (D. Md. Feb. 18, 2020) ("[T]he difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family. Thus, it is crucial that judges give careful consideration to every minute that is added to a defendant's sentence. Liberty is the norm; every moment of incarceration should be justified.").

[96] *See* DaGrossa, at 149.

[97] DOJ Report on Resources, at 16. This is not surprising; in Defenders' experience, these individuals often live far from probation offices, their contracted treatment providers, and other services that may be mandated by the court.

similar guidance for Grade C violations. Misdemeanors, like technical violations, are often intertwined with economic instability, mental illness, and substance use disorders. For example, misdemeanor larceny often stems from poverty or substance use. DWIs or low-level substance-related offenses are often the result of struggles with a substance use disorder. And driving on a suspended license typically results from an individual's inability to pay a fine. Of course, nothing prevents a court from choosing to revoke upon a finding of a Grade D or C violation if it determines revocation is appropriate.[98]

Finally, while not contemplated by any of the IFCs, Defenders strongly urge the Commission to add language to §7C1.3 encouraging the use of summonses to bring people to court on violation petitions. The application note could read: Courts are encouraged to issue summonses rather than arrest warrants for supervised release violation petitions when an individual has regularly met with their probation officer and does not appear to present a serious risk of immediate danger to others. In cases where a warrant is issued, the warrant should be a matter of public record to facilitate the defendant's ability to appear voluntarily.

When an individual is brought to court on a summons, as opposed to an arrest warrant, that person has a much greater chance of being released on bond, which, in turn, allows for continued employment, health care, housing, access to public benefits, and child custody.[99] On the other hand, an arrest

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[98] In further response to IFC 5, the Commission should not state that revocations are appropriate for Grade D violations (or for any other grade of violations) simply because there have been multiple violations. There is simply too much disparity in the "various aspects of the work and procedure implementation" of U.S. Probation offices across the 93 districts to implement such sweeping language. DOJ Report on Resources, at 3. For example, in some districts, probation officers may list every possible violation in a violation report, while other districts only list the most concerning ones. There is simply no cohesive national policy to warrant this additional language. More, it's unclear if the Commission is referring to instances of multiple Grade D violations in one petition or situations where one person has been revoked multiple times.

[99] Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 Fed. Probation 13, 18 (Sept. 2018) (finding that the use of a summons resulted in a pretrial release rate of more than 90% in the federal system); Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, at 103 (July 2020).

has a profoundly detrimental impact on a person's life, hampering successful community reintegration. Our clients have been arrested on violation warrants and removed from inpatient drug treatment.[100] Some have lost housing and jobs—all because of a decision to issue an arrest warrant for a violation petition, rather than a summons. Discouraging arrests warrants when a person under supervision is maintaining contact with his probation officer, even if he is struggling to fully comply, would promote the broader goals of this amendment to give courts greater discretion to impose alternatives to incarceration and to support the rehabilitative function of supervised release.

D. Section 7C1.4: The Commission should acknowledge the full range of courts' authority and discretion in imposing sentences after revocation of supervised release.

Section 7C1.4 Option 1 calls for a flexible, individualized approach to revocation sentencing when multiple prison sentences are imposed or a person is already serving another sentence of imprisonment. Defenders support this option for two reasons.

First, the current policy statement, §7B1.3(f), suffers the same flaws as the current §7B1.3(a)(1). It is written in mandatory terms ("shall be ordered"),[101] purporting to tie the courts' hands when it comes to the

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[100] One AFPD shares the following story: "My client was struggling with a substance use disorder and voluntarily checked himself into an inpatient drug treatment program after he relapsed. Nevertheless, Probation obtained an arrest warrant from the district court for a supervised release violation petition based on the relapse. He was detained on the warrant. Months later, the district judge sentenced him to time served and added a requirement that he complete the very program he had been at when he was arrested for the violation. Unfortunately, he wasn't immediately released because the State took him into custody for failing to complete the treatment program that the federal warrant pulled him out of. After another months' long delay, the State Parole Board released him with a requirement that he comply with the federal court order to complete the program. Unfortunately, that initial arrest halted his momentum in treatment, undermined his perception of fairness in the federal justice system, and stifled his desire for change."

[101] USSG §7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release *shall be ordered to be served consecutively* to any

consecutive versus concurrent sentencing decision. But under 18 U.S.C. § 3584(a) and *Booker*, district courts have the discretion to impose *consecutive or concurrent sentences* "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." By conforming §7C1.4 to § 3584(a), Proposed Option 1 eliminates the conflicting language in §7B1.3(f) that suggests courts have no discretion to impose a concurrent sentence when, in fact, they do.[102]

Second, encouraging courts in every instance to impose consecutive revocation sentences, as Option 2 would, is poor policy and limits judicial discretion. With initial sentences, §5G1.3 and its commentary acknowledge that when an individual has multiple sentences arising from different cases, there are some circumstances where consecutive sentences are more appropriate and others where concurrent sentences are more appropriate. The same is true here. Courts are in the best position to decide whether concurrent, partially concurrent, or consecutive sentencing is appropriate based on an individualized assessment of the circumstances of the individual and the case. Option 1 properly acknowledges the necessary prominence of the sentencing court's role in this decision, where Option 2 wrongly contemplates that consecutive sentencing will always be appropriate irrespective of what mitigating factors may be present.

Regarding IFC 1(b), Defenders request that the Commission delete instructions on violations related to community confinement from §7C1.4's commentary. Community confinement, intermittent confinement, and home detention offer alternatives to incarceration that provide structure for individuals struggling on supervision, while still allowing these individuals to work, attend mental health and substance abuse treatment, and maintain prosocial relationships. Minor violations, particularly those involving the

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sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release." (emphasis added)).

[102] *See United States v. Taylor*, 628 F.3d 420, 424–425 (7th Cir. 2010) (finding plain error and remanding where the district court failed to appreciate its discretion to impose a supervised release violation concurrently or consecutively with a new sentence); *see also United States v. Salinas,* 365 F.3d 582, 588 (7th Cir. 2004) ("Although [supervised release] policy statements are nonbinding, they are to be given 'great weight' by the sentencing judge.").

illegal use of substances, should not prevent future placement in community confinement or a less restrictive sanction. Relapse is an expected part of the recovery process, and it is contrary to the goal of rehabilitation to deprive individuals of alternatives to incarceration (that allow continuation of substance use disorder treatment) due to a positive drug test or other minor violation while in community confinement or on home detention.[103]

E. Section 7C1.5: The Commission should recalibrate all revocation ranges down.

The Commission suggests in IFC 3 that it may consider getting rid of the Supervised Release Revocation Table. Defenders encourage the Commission to study the utility of the supervised release revocation table and its ranges. Replacing the table with different guidance may eventually prove to be the best path forward. But it seems premature to eliminate the table at this time. So, in this section we focus on what the table should look like, assuming that there is a table.

To summarize, we support adding a Grade D category for technical violations, as noted above. But we also support going much further: no Grade D category—indeed no category at all in the revocation table—should start above zero. One goal of this set of amendments is to give judges more discretion. Judges should always be permitted to consider non-carceral sentences; there is no directive requiring tight numerical ranges.[104] Thus, as long as the Commission retains a table that is based on the grade of violation and criminal history category, only the upper end of the ranges needs to progress upward, not the lower end. Further, Defenders urge the Commission to also lower the high end of the Grade C and D ranges and eliminate the

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[103] Human Rights Watch & ACLU, at 177. As an alternative to deleting this section, the Commission could replace the current language with the following: A court can consider community confinement, intermittent confinement, or home confinement for revocation sentences even if a previous violation specifically pertained to such alternative housing options, depending on the relevant 3583(c) factors involved in the case.

[104] *Compare* 28 U.S.C. § 994(b)(2) (in the initial-sentencing context, stating, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months").

higher ranges for Class A felonies. Together, these revisions would create a table that looks like the below:

Supervised Release Revocation Table
(in months of imprisonment)
Criminal History Category

Grade of Violation	I	II	III	IV	V	VI
Grade D	0-3	0-4	0-5	0-6	0-7	0-8
Grade C	0-7	0-8	0-9	0-10	0-11	0-12
Grade B	0-10	0-12	0-14	0-18	0-24	0-27
Grade A	0-18	0-21	0-24	0-30	0-37	0-41
~~Class A/Grade A*~~	~~0-30~~	~~0-33~~	~~0-37~~	~~0-46~~	~~0-57~~	~~0-63~~

*Note: In response to IFC # 3, Defenders encourage the Commission to eliminate the higher set of ranges for Class A/Grade A Violations.

Finally, the Commission should specifically allow retroactively applicable guideline amendments to apply to reduce the criminal history category used in this table.

1. **Section 7C1.5's ranges should all start at zero and the upper end of the Grade C and D ranges should be lowered.**

Defenders appreciate that the Commission proposes recommending revocation sentences of less than one month for those who are in Criminal History Category I and found to have committed a Grade D violation. The Commission has an opportunity to go further, however, and adopt reduced revocation ranges that begin at less than one month for all grades of violations and to decrease ranges for individuals charged with the lowest level offenses.

Regardless of the grade of violation, when courts revoke supervised release, they almost always order incarceration.[105] This is unsurprising: the lowest revocation range in the current table starts at three months.[106] In contrast, the Sentencing Guidelines Table at Chapter 5, Part A, starts many imprisonment ranges at zero months—even where the criminal history category is a VI. Beginning the revocation tables with higher sentences than original federal criminal conduct makes no sense; indeed, a person could face a more serious sentence for a revocation of supervised release than for their underlying offense.[107]

Accordingly, the bottom end of revocation ranges should be lowered to zero for all grades of violations. This might look strange at first, but that's because we have grown acclimated to the Sentencing Guidelines Table, where a directive requires very narrow ranges that restrict judicial discretion beyond what is sensible.[108] Here, there is no directive that prohibits the Commission from offering broad sentencing ranges for each category of case (starting at zero but with the top end of ranges getting progressively higher). Judges are in the best position to determine when a particular case raises a public safety concern and, when it does, whether incarceration is the best way to address that concern. And where incarceration is imposed, regardless of the grade of violation or criminal history, it need not be lengthy. It is axiomatic by this point that the certainty of being caught is a vastly more powerful deterrent than the length of the sentence.[109] And extended periods

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[105] DOJ Report on Resources, at 17 ("The AO reported that revocations almost always resulted in a sentence of incarceration (approximately 99%)" in FY 2021 and 2022); Federal Probation and Supervised Release Violations, at 35 fig. 13 (reporting violation hearing outcomes from FY 2013–2017; 95% of Grade C violations resulted in a sentencing imposed involving a term of imprisonment).

[106] *See* §7B1.4.

[107] Underhill, *Supervised Release Needs Rehabilitation*, at 22 ("Thus, for example, a person on supervised release following a two-month sentence for a misdemeanor, who has no other criminal history but failed to report to his probation officer as instructed, faces a Guidelines policy statement recommended sentence of three to nine months of imprisonment.").

[108] *See* § 994(b)(2).

[109] DOJ, Five Things, at 1.

of incarceration only make it harder for people to re-enter their communities and increases the likelihood they will recidivate.[110]

Moreover, revocation hearings offer few procedural protections.[111] This is particularly concerning for Grade A and B new law violations where a person faces significant penalties. And Grade A and B violations typically involve conduct that is already being prosecuted by a state or federal court; if convicted, that court will punish the individual appropriately, given all the relevant facts and circumstances.

In addition to starting all ranges at zero, the Commission should also considerably lower the high end of revocation ranges for Grade C and D violations. We join in Judge Underhill's suggested ranges of 0–3, 0–4, 0–5, 0–6, 0–7, and 0–8 months for Grade D violations.[112] The Commission should then move the high-end ranges for Grade Cs to the currently recommended high-end ranges for Grade D violations.

2. Class A/Grade A revocation ranges should be eliminated.

In further response to IFC 3, the Commission should eliminate the higher revocation ranges for people on supervised release as a result of a sentence for a Class A felony. Courts should not—or at least, need not—impose longer sentences after revocation solely because of the underlying conviction. In the supervised release context, the violation, not the

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[110] *See supra* nn.31 & 91.

[111] Human Rights Watch & ACLU, at 4 ("Basic rights in criminal proceedings, such as the exclusion of illegally obtained evidence and burden of proof beyond a reasonable doubt, generally do not apply during 'revocation hearings.'"); Underhill, *Supervised Release Needs Rehabilitation*, at 8–9 ("[T]he combination of statutory amendments and decisional law has resulted in near-meaningless procedures governing supervised release violation proceedings: no right to indictment, no right to a jury trial, no requirement of proof beyond a reasonable doubt, and no right to confront adverse witnesses.").

[112] Stefan R. Underhill Comments on USSC 2025 Supervised Release Proposed Amendment, at 4 (on file with author).

underlying offense, is the focus.[113] Courts also recognize that these higher revocation ranges, some of which reach over five years in prison—that is, above the statutory maximum sentence for many cases—are too harsh.[114] Between fiscal years 2013 and 2017, courts sentenced 56% of all Class A/Grade A violations *below* the recommended revocation range.[115]

The impact of the heightened Grade A ranges falls most heavily on those convicted of drug-trafficking offenses. Some of the most common of these convictions result in statutory maximums of life, which establish a Class A felony.[116] And the majority of overall Grade A violations—52%—were committed by individuals convicted of drug offenses.[117] This result is particularly incongruous as the Commission is currently seeking comment on a proposed amendment to §2D1.1 in an effort to calibrate sentences down for many federal drug offenses.

Equally ironic is the resulting disparity between the two revocation tables for probation and revocation.[118] The Commission untethered probation from supervised release to emphasize supervised release's non-punitive purpose, but, at the same time, eliminated Class A/Grade A ranges from the probation table.[119] Now, under the proposed amendment, the supervised release table at §7C1.5 includes the far more punitive ranges for Grade A/Class A violations while the probation revocation table at §7C1.4 does not. Given the Commission's goal of prioritizing rehabilitation in the supervised

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[113] *Id.* at 5 ("The only effect of considering the seriousness of the underlying conviction when revoking supervised release is to add an additional punishment for the original conviction. The double jeopardy problems with that approach are obvious.").

[114] *See* 18 U.S.C. § 3583(e)(3).

[115] Federal Probation and Supervised Release Violations, at 37 fig. 15.

[116] For example, 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B) (if a notice under 21 U.S.C. § 851 is filed) can result in the life maximum that constitutes a Class A felony. *See also* 18 U.S.C. § 3559(a)(1).

[117] Federal Probation and Supervised Release Violations, at 31–32 fig. 10.

[118] *See* Proposed Amendment at 38–39 (§7B1.4); 49 (§7C1.5).

[119] *See id.* at 38–39.

release context, it should eliminate Class A/Grade A violations in the supervised release revocation table as well.

3. Applying retroactive amendments to supervised release violations makes sense and would not be difficult.

In response to IFC 6, Defenders support permitting courts to apply retroactively applicable guideline amendments, such as status points, or any potential future change to the criminal history calculation, to reduce a person's criminal history category in the revocation table.[120] For status points, the Commission has already determined "that the policy reasons underlying the prospective application of the amendment apply with equal force to individuals who are already sentenced."[121] Moreover, implementing retroactive amendments that reduce a person's criminal history score should be relatively straightforward, requiring only a simple reduction of the individual's criminal history points and recalculation of their criminal history category.

At this time, Defenders need additional data from the Commission to study the implications of recalculating an individual's entire criminal history category at the time of the supervised release revocation. Unfortunately, despite the Commission having access, and possibly the duty, to gather annual data on probation and supervised release revocation sentences, it does

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[120] *See* USSC, App. C, Amend. 821, Amend. 825 (2023). Presumably, an individual on probation, who is actively serving their sentence, would be able to seek retroactive application under 18 U.S.C.§ 3582(c)(2).

[121] *See* Amend. 825, Reason for Amendment; *see also United States v. McNeal*, No. 2:20-CR-00099, 2025 WL 104551,*4 (S.D.W. Va. Jan. 15, 2025) ("The Court finds that the retroactive change to the calculation of status points should apply to the calculation of [Mr. McNeal's] criminal history category for purposes of his revocation hearing. The criminal history category applicable at his original sentencing is properly adjusted based on the retroactive amendment to the Guidelines. Should the United States prove that Mr. McNeal violated the conditions of his supervised release, his criminal history category will be II, based on the three criminal history points attributable to him at his original sentencing, without consideration of the no longer applicable status points.").

not provide this data to academics, researchers, or the public.[122] Such proceedings make up a large proportion of courts' caseloads and can result in lengthy terms of imprisonment, yet relatively scarce data are available on them. The Defenders accordingly request that the Commission release datasets with probation and supervised release revocation and sentencing data publicly every year as it does with substantive offenses.

[122] *See* 28 U.S.C. 995(a)(12)-(16); *see also* Federal Probation and Supervised Release Violations, at 1–2 ("As part of its continuing duty to collect, analyze, and report sentence data, the Commission has previously published two reports that focused on probation and supervised release. . .").

Federal Public and Community Defenders
Comment on Drug Offenses

(Proposal 2)

March 3, 2025

Table of Contents

As a matter of law, public policy, and practice, one thing is clear: Drug sentences are too high. Though not alone in blame, §2D1.1 contributes significantly to these sentencing excesses. As Defenders have detailed prior, drug sentences have achieved ignominious results. They have exploded the federal prison population. They have contributed to a prison population whose racial makeup bears little resemblance to the country as a whole. And they have, at best, co-existed with and, at worst, contributed to a drug supply that is cheaper, more broadly available, and more deadly than before the Sentencing Reform Act.

But there is a silver lining—the outsized role that §2D1.1 played in the harmful explosion of drug-sentence lengths also makes §2D1.1 an ideal target to redress harms. Defenders commend the Commission for proposing several significant steps towards remediating harms. We urge the Commission to adopt the most expansive version of its guideline-range-reducing proposals and reject changes that would increase guideline ranges.

This Comment starts with the problem at hand: §2D1.1's flawed, myopic focus on drug quantity and type. We explain how this has contributed to an explosion in the U.S. prison population and to multiple crises in the Bureau of Prisons that the Sentencing Guidelines must account for. Thereafter Defenders address each of the Commission's proposals, identifying the approaches most likely to alleviate some of §2D1.1's harms and proposing alternate language where warranted.

For Part A, this means adopting Option 3, setting 30 as the highest quantity-related base offense level (BOL). And it also means adopting the broadest version of the specific offense characteristic (SOC) for low-level trafficking offenses by: (1) using language that bridges the divide between Options 1 and 2, (2) further capping BOLs for those receiving the SOC, and (3) focusing on the "defendant's primary function in the offense."

As for the other parts, Defenders enthusiastically support the Commission's proposal to eliminate meaningless distinctions between different types of methamphetamine, making the current meth-mixture guideline the standard (Part B); we oppose Part C (reducing the mens rea required to apply the §2D1.1(b)(13) enhancement) and Part D (creating a new enhancement for a specified type of firearm); and we support and appreciate

the Commission's proposal to clarify operation of the safety valve that applies to drug offenses (Part E).

I. It is essential that the Commission's amendments to §2D1.1 result in meaningfully lower guidelines ranges.

In the Commission's organic statute, Congress required that the new entity it was creating "establish sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process . . ."[1] and that it ensure that penal practices are "effective in meeting" the purposes of sentencing.[2] Significantly, Congress also mandated that the Commission's system of federal sentencing guidelines be "formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ."[3] Indeed, Congress adopted § 994(g) over contemporaneous objection.[4]

Unfortunately, §2D1.1 has long rested on an anachronistic, disparity-driving foundation, resulting in sentences far greater than necessary to achieve the statutory sentencing purposes. And in significant part due to overlong drug sentences, the BOP is in crisis, many years into being fundamentally unable to safely and humanely handle the population in its custody. The Commission should seize this opportunity to bring the Guidelines Manual closer to meeting Congress's mandates and to relieve some of the catastrophic conditions in BOP.

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[1] 28 U.S.C. § 991(b)(1)(C).

[2] 28 U.S.C. §§ 991(b)(1)(A) & (b)(2).

[3] 28 U.S.C. § 994(g).

[4] *See* Statement of Ass't Att'y Gen. Stephen S. Trott, Hearings before the Subcomm. On Crim. Justice of the Comm. on the Judiciary House of Representatives on H.R. 2013, H.R. 3128, H.R. 4554, and H.R. 4827 at 827, 98th Cong. (May 3, 1984) (arguing that § 994(g)'s requirement to formulate guidelines to avoid exceeding prison capacity was "[a] major problem" with the legislation).

A. Section 2D1.1 reflects a policy choice by the original Commission to base §2D1.1 on politics instead of data and experience, and calls for sentences that are too high.

As Defenders,[5] judges,[6] stakeholders,[7] and academics[8] have long noted, §2D1.1 has been flawed since its inception. While the inaugural Commission generally took an empirical, data-based approach to establishing guidelines, it departed from that approach for certain provisions, including §2D1.1.[9] Instead, the Commission opted to shape the guideline around quantity-based, mandatory minimums enacted as part of the Anti-Drug Abuse Act of 1986 (ADAA).[10] The ADAA's mandatory minimum provisions provided for

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[5] *See, e.g.,* Defenders' Comment on Proposed Priorities for the 2022–2023 Amendment Cycle, at 12–18 (Sep. 14, 2022); Defenders' Comment on Certain Controlled Substances, at 2–5 (Mar. 10, 2017); Statement of James Skuthan on Behalf of Defenders, at 2–17 (Mar. 17, 2011); Defenders' Comment on Proposed Priorities for the 2006–2007 Amendment Cycle, at 25–33 (July 19, 2006).

[6] *See generally, e.g., United States v. Johnson*, 379 F. Supp. 3d 1213, 1217–18 (M.D. Ala. 2019); *United States v. Diaz*, No. 11-CR-00821-2, *3–*18 (JG), 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013); *United States v. Genao*, 831 F. Supp. 246, 248 (S.D.N.Y. 1993) (criticizing §2D1.1's emphasis on quantity instead of culpability); Joint Statement of 31 U.S. district judges on Revised Sentencing Guidelines enclosed with Letter from Hon. William C. Conner, U.S. District Judge to Hon. William W. Wilkins, Jr., Chair USSC at 2–3 (Mar. 16, 1987) (expressing concern with post-ADAA, weight-driven draft Guidelines Manual resulting in prison term for fact pattern where probation appropriate).

[7] *See, e.g.,* The Sentencing Project Comment on Proposed Priorities, 2024–2025 Amendment Cycle, at 2–3 (July 15, 2024); Statement of Alan J. Chaset on behalf of the Nat'l Assoc. of Crim. Def. Lawyers to the USSC, at 2 (Mar. 22, 1993) ([W]e share the view of many that the current version of the guidelines overemphasizes drug quantities . . . and provides insufficient emphasis on who the offense is and what function he/she may have played in the offense.").

[8] *See, e.g.,* Peter Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy Recommendations from a Working Group*, 85 Am. J. Pub. Health 1059, 1062 (1995) ("The U.S. Sentencing Commission should review [§2D1.1] to allow more attention to the gravity of the offense and not simply the quantity of the drug."); Albert W. Altschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chicago L. Rev. 901, 920 (1991) ("[I]n the area of drug crime . . . , Congress and the Commission appear to have pursued their goals of 'uniformity' and 'proportionality' by placing cases in strangely defined groups and plucking numbers from the air.").

[9] *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

[10] *See id.*

minimums of ten and five years in prison for offenses based solely on the quantity of certain types of drugs.[11]

It is by now axiomatic that Congress adopted these mandatory-minimum quantities as proxies for "kingpins" or "major drug dealers" (the ten-year minimum) and "serious drug traffickers" (the five-year minimum).[12] It is likewise firmly established that Congress chose those quantities without first determining that the quantities would actually achieve that goal of differentiating high-level drug trafficking individuals from the far greater-in-number, easily fungible, low-level workers.[13]

Congress enacted the ADAA in the time between the SRA's passage and the Commission's statutory 1987 deadline for promulgating the first Guideline Manual. Presumably relying on the SRA's requirement to promulgate guidelines "consistent with all pertinent provisions of any Federal statute,"[14] the Commission decided to build the structure of §2D1.1 around the mandatory minimum scheme, to create a quantity-based guideline.[15]

Defenders and stakeholders have, for years, emphasized both that the Commission was not legally obligated to take this approach and that this

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[11] *See id.* at 95.

[12] *See, e.g., id.* at 95 ("Congress sought to link the ten-year mandatory minimum trafficking prison term to major drug dealers and to link the five-year minimum term to serious traffickers." (internal quotation omitted)).

[13] *See* PBS Frontline, Tr. of Interview with Eric Sterling (air date Jan. 12, 1999) (quoting former Congressional staffer who was tasked with initial drafts of ADAA's mandatory minimums as saying the legislation was "kind of cobbled together with chewing gum and baling wire. Numbers are picked out of the air."); *See also* USSC, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 23–24 (2011) ("Because of the heightened concern and national sense of urgency . . . , Congress bypassed much of its usual deliberative process. As a result, Congress held no committee hearings and produced no reports related to" the ADAA).

[14] 28 U.S.C. § 994(a)(1) (requiring, *inter alia*, that guidelines be consistent with federal statutes). Defenders say "presumably" because the historical record is virtually devoid of any contemporaneous explanation of the rationale. *See Diaz*, 2013 WL 322243, at *6 ("The original Commission was far from forthright about the role of its own data in formulating Guideline ranges for drug trafficking offenses.").

[15] *See Kimbrough*, 552 U.S. at 96–97.

approach has proved to be a fatal flaw in §2D1.1.[16] Defenders largely refer the Commission back to those prior criticisms and incorporate them here in support of the Commission's amendments beginning to step back from the quantity scheme. We note just two additional points here.

First, relying upon the ADAA's quantities has served to lock in place an anachronistic vision of the drug-trafficking marketplace. Congress enacted the ADAA at the height of a politically fraught uproar over a then-emerging drug: crack cocaine. Crack's primacy has long since faded as a parade of other substances have gained prominence, from home-cooked methamphetamine to prescription opiates, to heroin, and, more recently, to lab-produced meth and fentanyl.[17] So too has the nature of drug trafficking shifted, becoming increasingly global in nature with each passing year. We cannot fathom what the drug market will look like in one, five, or ten years. So long as §2D1.1 relies on quantity and type, it will lag perpetually behind the times. In contrast, the relevance to sentencing of an individual's role within a trafficking organization is evergreen.[18]

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[16] *See, e.g.,* Defenders' Comment on Proposed Priorities for the 2022–2023 Amendment Cycle, at 12–18 (Sep. 14, 2022); Defenders' Comment on Proposed Priorities for the 2006–2007 Amendment Cycle, at 25–33 (July 19, 2006). *See also, e.g., Diaz*, 2013 WL 322243 at *14–16.

[17] Drug crackdowns themselves have played a part in this series changing of substances prevalence. *Cf., e.g., generally* Julia Dickson-Gomez *et al.*, *The effects of opioid policy change on transitions from prescription opiates to heroin, fentanyl and injection drug use: a qualitative analysis*, 17 Subst. Abuse Treat., Prev., and Policy 55 (July 21, 2022) (finding evidence that reduced availability of prescription opiates after changes in prescribing practices led to individuals beginning to use heroin and/or fentanyl).

And the evolution of the market does not stop—presently, the DOJ is urging criminalization of xylazine. *See, e.g.,* DEA, *Xylazine Information* (accessed Feb. 26, 2025) (insisting legislative scheduling is needed for xylazine notwithstanding DEA's statutory authority to schedule substances). It is also raising alarms about emerging synthetic opioids, like nitazine. *See, e.g.,* DEA, *New Dangerous Synthetic Opioid in D.C., Emerging in Tri-State Area* (June 1, 2022).

[18] An aside by Judge Thompson underscores this consistency of culpability based on role even as the years pass and the type of drug changes. In criticizing the current §2D1.1 scheme, Judge Thompson "dr[e]w on the popular imagination" noting that "it is the Pablo Escobars, Stringer Bells, Tony Montanas, and Walter Whites of the world who bear the greatest culpability." *United States v. Johnson*, 379 F. Supp. 3d 1213, 1221 (M.D. Ala. 2019). Judge Thompson's examples are effective and

Second, focusing on mandatory minimum quantities is unduly myopic. The SRA requires that the Commission make guidelines "consistent with *all* pertinent provisions of Federal law."[19] Yet the Controlled Substances Act (CSA) extends beyond 21 U.S.C. §§ 841(b)(1)(A) and (B). The vast majority of controlled substances don't trigger mandatory minimums under those provisions,[20] and the CSA includes many criminal laws devoid of quantity thresholds for whatever substances, including the immediately succeeding provision, § 841(b)(1)(C).[21] And the relevant statutory scheme extends beyond the CSA. For example, subsequent to the ADAA, Congress enacted the statutory safety valve, which relieves certain people from otherwise-applicable mandatory minimums.[22] Tellingly, none of the safety valve's significant constraints consider the quantity or type of drugs involved in the offense, focusing instead on role and conduct.[23] Hinging §2D1.1 on role in the offense is fully consistent with the text of the safety valve, which the SRA gives no less or greater importance than other provisions in its requirement to align sentences with the law.

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understandable although Escobar (actually) and Montana (fictionally) trafficked cocaine in the 1980s, Bell (fictionally) led Baltimore heroin trafficking in the early 2000s, and White (again, fictionally) sold methamphetamine in the late 2000s.

[19] § 994(a) (emphasis added).

[20] *See* DEA, *Schedule of Controlled Substances* (Dec. 31, 2014) (listing hundreds of scheduled chemicals across a 21-page list).

[21] *See also, e.g.,* 21 U.S.C. §§ 841(b)(1)(E) (providing maximum sentence for schedule III substances without reference to quantity), 960(b)(3) (mirroring § 841(b)(1)(C), in the CSA's import/export subchapter). Section 841(b)(1)(C) is particularly notable given that it is a primary statute under which §2D1.1 sentencings arise. Significantly, at the time the Commission promulgated §2D1.1, the Commission would have considered a § 841(b)(1)(C) conviction to be for the same crime as a conviction under §§ 841(b)(1)(A) and (B). *See United States v. Hodges*, 935 F.2d 766, 769 (6th Cir. 1991) ("It is clear that the great weight of authority (if not all cases) holds that the quantity of the drug involved . . . is only relevant to the sentence that will be imposed and is not part of the offense."). However, after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 US 99 (2013), it is unquestionable that § 841(b)(1)(C) constitutes a separate crime. *See, e.g., United States v. Pizarro*, 772 F.3d 284, 292 (1st Cir. 2014) ("Under . . . *Alleyne*, each of the subsections of 21 U.S.C. § 841(b)(1), with its associated drug quantities and sentencing ranges, is a separate crime.").

[22] *See* 18 U.S.C. § 3553(f).

[23] *See id.*

Linking §2D1.1 to quantity and type has yielded dramatic, consistent harms. Driven in part by §2D1.1's sentencing ranges, the federal prison population has exploded in recent decades. In FY87, the last full fiscal year before the Commission promulgated the first Guidelines Manual, the federal prison population was 49,378 people.[24] In FY23, the federal prison population was 158,424 people, an over-200% increase.[25] And drug-trafficking sentences, mandated by §2D1.1 before *Booker* and anchored by §2D1.1 since, have helped drive that increase, with 43.8% of individuals in BOP custody as of February 22, 2025 serving time for drug offenses.[26]

This massive expansion in prison population has occurred in a racially disparate fashion. Black and Hispanic individuals comprise 70% of the people sentenced pursuant to §2D1.1[27] and, related to this, federal prisons are primarily filled with Black and Hispanic people.[28] This has hollowed out some low-income minority neighborhoods, destabilizing families and communities—factors that are linked to *increased* crime and *increased* demand for drugs.[29]

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[24] Bureau of Prisons, Past Inmate Population Trends (last visited Feb. 26, 2025).

[25] *Id.* Significantly, this 200% increase exists *after* consistent yearly prison population drops between FY13 and FY20. While our nation's population has grown, its growth pales in comparison to the prison population increase. *See* U.S. Census, Historical Population Change Data (Apr. 26, 2021) (noting 1980 population of 226,545,805 rising to 331,449,281 in 2020, which is a 46% increase).

[26] Bureau of Prisons, Offenses (last visited Feb. 27, 2025).

[27] The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023. The Commission's "Individual Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, Commission Datafiles.

[28] USSC, *Individuals in the Federal Bureau of Prisons Quick Facts* (Jan. 2024) (noting that Black and Hispanic people make up 34.8% and 31.1% of BOP population, respectively).

[29] Becky Pettit & Carmen Gutierrez, *Mass Incarceration and Racial Inequality*, 77 Am. J. Econ. & Sociol. 1153, 1153–82 (Oct. 29, 2018) ("By removing large numbers of young men from concentrated areas, incarceration reduces neighborhood stability. The cycling of men between correctional facilities and communities may even begin to trigger higher crime rates within a neighborhood, a process [one researcher] describes as 'coercive mobility.'"); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. of Justice, at 2 (2017) (discussing a neighborhood's "'tipping point,'" at which incarceration rates are so

Unsurprisingly, given all §2D1.1's flaws, judges are overwhelmingly rejecting that guideline's sentencing ranges. Over the past five fiscal years, only 29.4% of individuals sentenced under §2D1.1 received within-guidelines sentences.[30] Nearly everyone else received a below-guidelines sentence.[31]

B. The Commission is statutorily obligated to address the crises within the Bureau of Prisons, which are inseparable from the drug-sentence-fueled explosion in the federal prison population.

The explosion in the federal prison population, fueled in part by §2D1.1, has left the Bureau of Prisons in "crisis," with systemic inadequacies in staffing and infrastructure and no clear end in sight.[32] The Department of Justice's own words make plain how sentencing practices, including §2D1.1, are failing "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ."[33]

The Office of the Inspector General's 2024 report on challenges facing the DOJ paints a grim picture.[34] The report explains that "the long-standing

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high that they "break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system").

[30] Even excluding individuals who received §5K1.1 or §5K3.1 departures, 40.3% of people sentenced pursuant to §2D1.1 received below-guidelines sentences. Defenders note, however, that excluding individuals who received those departures necessarily excludes people who received other departures or variances because the Commission's data does not identify whether a person received more than those §5K departures.

[31] Only 1.6% of people sentenced pursuant to §2D1.1 received above-guidelines sentences. USSC, FY 2019 to 2023 Individual Datafiles.

[32] *See, e.g.,* DOJ Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice—2024*, at 1 (Oct. 10, 2024) ("Among the most important challenges facing [DOJ] is the long-standing crisis facing [BOP]."); Walter Pavlo, *Federal Prison Director on Record About Her Two Years At Helm*, Forbes (Aug. 6, 2024) (quoting then-Director Colette Peters as saying that concern with halfway house capacity is "almost as significant of a problem as [BOP's] recruitment and retention crisis and our infrastructure crisis . . . .").

[33] § 994(g).

[34] *See generally* DOJ OIG Report. Since January 20, 2025, a significant number of Executive branch documents have been removed from agency websites. As of this

crisis" at BOP is "[a]mong the most important challenges facing the U.S. Department of Justice . . . ."[35] And these problems are not new. Indeed, the OIG has issued over 100 reports in the past 20 years that "have identified recurring issues that impede the BOP's efforts to consistently ensure the health, safety, and security of all staff and inmates within its custody."[36]

Two of the OIG's primary concerns are particularly relevant to the Commission's § 994(g) directive: staffing and infrastructure. First, BOP has found itself unable to effectively recruit and retain sufficient employees to handle the prison population, which "create[s] security and safety issues" that "have a cascading effect on institution operations."[37] To make matters worse, BOP has addressed this problem in part through "augmentation": requiring non-corrections staff (*e.g.,* maintenance or teaching staff) to fill in as corrections officers.[38] BOP has also resorted to extensive overtime, which "can negatively affect staff morale and attentiveness and, therefore, institution safety and security."[39]

The harms of this staffing crisis are not merely possible, they are occurring. For example, last year, OIG described how understaffing of Health and Psychology Services positions impaired BOP's ability to "reduce the risk of inmate deaths."[40] And reporting beyond OIG has questioned whether even more inmates are dying than DOJ has acknowledged as a result of BOP's

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comment's filings, the documents cited herein were available online. Defenders maintain copies of the documents in case they become unavailable and are needed by the Commission or its staff.

[35] *Id.* at 1.

[36] *Id.*

[37] *Id.* at 2. The OIG identified these concerns before recent upheavals of the federal executive workforce, which have also reached BOP. *See, e.g.,* Walter Pavlo, *Trump's 'Deferred Resignation' Causes Concern At Bureau Of Prisons*, Forbes (Jan. 30, 2025) (discussing email sent to most of Executive branch purporting to offer continued pay in exchange for resignations, and noting concerns that both new and tenured BOP employees may resign) and Walter Palvo, *Bureau Of Prisons To Cancel Staff Retention Bonuses*, Forbes (Feb. 26, 2025).

[38] DOJ OIG Report at 2. This practice unsurprisingly impacts other matters—like prison maintenance and education programming, including First Step Act programs.

[39] *Id.*

[40] *Id.* at 3.

reporting practices. In 2024, OIG released a report examining 344 "non-natural" deaths in BOP custody between FY2014 and FY2021, finding "several operational and managerial deficiencies, which created unsafe conditions prior to and at the time of a number of these deaths . . . ."[41] Yet, as an NPR article explained one month prior, BOP has categorized "at least three-quarters of all federal prison deaths since 2009" as natural, and thus not subject to compulsory investigation.[42] But 70 percent of the people who died were under age 65, an age not primarily associated with natural deaths.[43]

Second, infrastructure. BOP's present facilities are crumbling, and BOP lacks any realistic plan or ability to prevent further deterioration let alone address existing problems.[44] This problem could not be more widespread; an OIG audit found that "*all 123 of the BOP's institutions required maintenance*—finding among other things, multiple facilities with seriously damaged and leaking roofs."[45] OIG's unannounced 2023 inspection of FCI Tallahassee provides one example. During that inspection, OIG discovered that people lived in housing units with leaking roofs.[46] Yet as of the end of 2024, FCI Tallahassee had not even yet "requested or received funding" to replace those roofs, let alone actually replaced them.[47] Infrastructure has likewise led BOP to close three of its facilities, which increases the strain on other facilities.[48]

And BOP is doubly impaired in its ability to address these infrastructure problems. First, it "lacks a well-defined and comprehensive

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[41] *Accord* DOJ Office of the Inspector General, *Evaluation of Issues Surrounding Inmate Deaths in Federal Bureau of Prisons Institutions* at i (Feb. 2024), *with id.* at 3 n.6 ("[O]ur evaluation examined nonnatural inmate deaths . . . we therefore did not examine inmate deaths resulting from natural causes.").

[42] Tirzah Christopher, *There is little scrutiny of 'natural' deaths behind bars*, NPR (Jan. 2, 2024).

[43] *See id.* (noting that "natural deaths" are those that happen "either solely or almost entirely because of disease or old age.").

[44] *See* DOJ OIG Report at 4.

[45] *Id.* (emphasis added).

[46] *See id.*

[47] *Id.*

[48] *See id.* at 1.

infrastructure strategy."[49] Second, it is unlikely to obtain sufficient funds to address its issues as "each year the Executive Branch requests a facilities budget for the BOP that is grossly inadequate to meet the BOP's needs."[50] For example, despite the $3 billion *backlog* in infrastructure needs, the Executive's fiscal year 2025 budget requested a total of only $260 million—a 91.3% shortfall—for buildings and infrastructure.[51]

Perhaps no individual facility puts a finer point on BOP's crises more than FCI Waseca. In May 2023, OIG chose FCI Waseca, a minimum-security women's prison, as the site of its first unannounced inspection—specifically because it was classified as a "low risk" facility from which OIG could "establish a baseline against which to compare the operations of other BOP institutions."[52] Despite that low-risk rating, OIG uncovered problems consistent with the overall agency crises. FCI Waseca was "struggling to maintain a staffing complement consistent with the BOP's determination of the needs of the institution."[53] At the time of the inspection, the facility was missing 25% of its total positions allotted, with vacancies "particularly acute" among correctional officers.[54] The Health Services and Psychology Services departments were both at least 25% below their staffing needs.[55] At the same time, the inmate population was "13 percent over capacity."[56]

OIG likewise identified "serious facility infrastructure issues that negatively affect the conditions of confinement for inmates and the work conditions for staff."[57] There were people in custody "liv[ing] in basements, with beds positioned in close proximity to pipes that occasionally leak" and

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[49] *Id.* at 4.

[50] *Id.*

[51] *See id.*

[52] DOJ Office of the Inspector General, *Inspection of the Federal Bureau of Prisons' Federal Correctional Institution Waseca*, at 1, Evaluation & Inspections Division (May 2023).

[53] *Id.* at 3.

[54] *Id.*

[55] *See id.*

[56] *Id.*

[57] *Id.* at 4.

roofs that "routinely leak" in the "food service area, health services area, recreation area, and Special Housing Unit . . . ."[58]

And things appear to be getting worse at BOP, not better. BOP "is currently experiencing significant upheaval, with a wave of leadership departures leaving the agency without clear direction during a critical time."[59] BOP's most-recent Director, Colette Peters, was recently terminated.[60] And her termination has been followed by the ensuing Acting Director announcing his retirement, "accompanied by the resignations of five other senior leaders, including [BOP's] General Counsel . . . and two regional directors."[61] BOP was already ill-equipped to handle the population entrusted to its care and is moving further from that minimum.

In such an atmosphere, it is perhaps not surprising that abuse is rampant. No abuse case is presently more prominent than that of the recently closed FCI Dublin, where BOP staff sexually assaulted dozens of people in custody, eventually resulting in eight officials (including the former warden and the former chaplain) being charged with crimes.[62] But Dublin was far from alone in mistreatment, "a 2022 Senate investigation found that bureau staff have sexually abused [people detained in federal women's prisons] in at least two-thirds of those facilities over the past decade."[63] And while these women's facilities garner headlines, BOP's male facilities are likewise rife with mistreatment.[64]

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[58] *Id.*

[59] Walter Pavlo, *Bureau of Prisons Executives Announce Retirement Ahead of New Director*, Forbes (Feb. 17, 2025).

[60] *See id.* Even the separation is chaotic, with the former Director having challenged as unlawful her removal to the Merit Systems Protection Board. *See* Tom Temin, *A Biden appointee sues to keep her job under Trump*, Federal News Network (Feb. 21, 2025) (interviewing former Director Peters's attorney in complaint before MSPB).

[61] *Id.*

[62] *See, e.g.,* Lisa Fernandez, *Feds Closed a Prison Notorious for Abuse, Things Only Got Worse*, Rolling Stone (June 5, 2024).

[63] Cecilia Vega, *Inside the Bureau of Prisons, a federal agency plagued by understaffing, abuse, disrepair*, 60 Minutes (Jan. 28, 2024).

[64] *See, e.g.,* Askia Afrika-Ber, *Hunger and Violence Dominate Life at USP McCreary, Where Men are Incarcerated*, Washington City Paper (Jan. 19, 2024)

In short, it is painfully evident that BOP lacks the capacity to safely and humanely hold the people sentenced to federal prison.[65] Defenders encourage the Commission to follow its § 994(g) mandate and to reformulate §2D1.1 in a manner that will materially reduce BOP's overcapacity.[66]

(detailing the "house of horrors" at USP McCreary where "Prisoners are hungry [and v]iolence is everywhere" due to Warden's "policy of collective punishment); *accord* D.C. Corrections Information Council, *USP McCreary Report on Findings and Recommendations*, at 5 (noting "[k]ey themes" of interviews with detained persons being "staff conduct (including allegations of physical abuse of inmates . . .), the frequency of lockdowns and commissary restrictions, and the lack of hygiene supplies in the Special Housing Unit"; and also noting that staff indicated it would not investigate assault reports unless anonymous survey respondents' identities were disclosed).

[65] These issues cannot be depicted as some quirk in the most recent Presidential administration's handling of BOP, for example by blaming it for ending many private prison contracts. The OIG identified identical staffing and infrastructure concerns prior to the most recent administration as well. *See, e.g.,* DOJ Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice—2019*, at 3–5 (Oct. 18, 2019) (detailing in 2019 BOP's problems with staffing, healthcare, and infrastructure).

[66] Following the first Guidelines Manual's promulgation, litigants contended that the Commission's projection of a likely 10% increase in prison populations revealed a violation of § 994(g). While courts rejected those arguments, they did so on questionable grounds—to say nothing of the fact that the Commission itself profoundly underestimated the increase. For example, the first appellate court to reject this argument relied in significant part on a Senate Report that it said clarified that § 994(g) did not mandate that the Commission try to avoid overcrowding. *See United States v. White*¸ 869 F.2d 822, 828 (5th Cir. 1989) (quoting S. Rep. 98-225, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358); *see also United States v. Erves*, 880 F.2d 376, 380 (11th Cir. 1989) (relying upon *White*, 869 F.2d at 829). But Senate Report 98-225 was written in August 1983, regarding a Senate bill containing a version of § 994(g) *that did not yet contain the relevant language*: it did not require that the guidelines be "formulated to minimize the likelihood that the Federal prisons population will exceed" prison capacity. *See* Comprehensive Crime Control Act of 1983 § 994(g), S.1762 (Sep. 20, 1983) (containing language materially different than current 28 U.S.C. § 994(g)). This directive language did not emerge until a later date, as a provision in a separate House precursor to the enacted SRA. *See* Sentencing Act of 1983 § 3791(d), H.R. 4554 (Nov. 18, 1983) (including the "formulated to minimize" requirement).

Regardless, in the present day § 994(g) could easily provide reason for courts to vary even more frequently. *Cf., e.g., United States v. Colucci*, 743 F. Supp. 3d 452 (E.D.N.Y. 2024) (varying downward based on conditions of confinement despite

II. PART A: Defenders urge the Commission to remove at least all base offense levels over 30 and to provide a six-level role-based reduction that is clear and simple to apply.

Given its foundational problems, §2D1.1's flaws are best addressed with a start-from-scratch approach. But Defenders fully endorse both subparts of Part A as meaningful steps toward a more-rational guideline. If the Commission takes the most fulsome steps that it is currently considering, it can make a significant dent—perhaps larger than ever prior—in the excessive influence that quantity and type exert on sentences.

A. The Commission should, at minimum, remove all base offense levels over 30.

The Commission's data supports capping §2D1.1 BOLs well below 30—perhaps at 20. And, of course, the lower BOLs are capped, the more significantly the Commission will be able to reverse course from a regime that currently calls for unduly harsh sentences in most cases and which has contributed to a crisis within federal prisons. Certainly, the Commission should at the very least adopt its lowest proposed top offense level of 30.

According to Commission data, judges are not imposing guideline sentences across most of §2D1.1's base offense levels. In FY23, at every BOL from 18 up, most individuals sentenced under §2D1.1 received any below-guideline-range sentences.[67] And for BOL 18 and higher, over 40% of individuals received below-range sentences for reasons other than reductions under §5K1.1 or fast-track programs.[68]

As the Commission explained in its introduction to this proposal, average sentences imposed at the highest §2D1.1 base offense levels diverge the most from the guideline minimums.[69] This is why the lowest BOL cap

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having "reasons to question the depth of [defendant's] remorse"), which is further reason for the Commission to rely upon § 994(g) as it fixes §2D1.1.

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

[68] *Id.*

[69] USSC, *Proposed Amendment to the Sentencing Guidelines*, at 57 (Jan. 24, 2025). Defenders note that it is hard to determine why this is so, as Commission data do not allow us to determine how many people who received either a §5K1.1 or

option is set at 30. And Defenders do support this option as a minimum change. But while the highest offense levels certainly have the highest gap between sentences imposed and guideline minimums, the Commission's data shows substantial variation even at BOLs below 30. Specifically, when including cases receiving §5K1.1 and §5K3.1 adjustments, with only one exception, at every BOL from 20 up, courts have been imposing sentences at least 20% lower on average than the guideline minimum.[70] Even when excluding §5K1.1 and §5K3.1—which disregards cases in which, along with applying those provisions, the court varied or departed further—BOLs 20, 22, and 24 all have sentences that, on average, fall below the guideline minimum.[71]

Commission data demonstrates the potential for a reduced maximum BOL to decrease racial disparities in the federal prison population. Racial disparities are present at every offense level, with white individuals never comprising more than 33.7% of individuals sentenced although they make up a majority of the U.S. population.[72] Hispanic people constitute the largest demographic group at every §2D1.1 drug quantity-based BOL above 28, and make up a majority of those with BOLs of 34 and higher.[73] While Hispanic people will still make up a disproportionate number of the people sentenced at a new, 30-capped BOL, they will garner significantly lower guideline ranges. In order to meaningfully reduce sentences for Black individuals, the proposal would need to go further, since Black individuals are disparately represented, and the most frequently sentenced people, at all BOLs below 28.[74]

The Commission's proposals come after an extended history of criticism of the current drug quantity table, and at a time when it is clear

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§5K3.1 departure also received another departure or variance. Defenders routinely represent clients who receive variances in addition to either departure.

[70] *See* *Public Data Briefing—Drug Offenses*, at 7 (showing average actual sentence imposed versus average guideline minimum at each quantity base offense level). That lone instance where the 20% level requires rounding is BOL 24, where the rate is 19.7%. *Id.*

[71] *Id.* at 8.

[72] USSC, FY 2019 to 2023 Individual Datafiles.

[73] USSC, FY 2019 to 2023 Individual Datafiles.

[74] USSC, FY 2019 to 2023 Individual Datafiles.

that the BOP cannot now, and has no plan that will enable it in the future to, handle a prison population in line with current sentencing trends. Defenders urge the Commission, in taking its approach of capping base offense levels, to go as low as the data provides, and certainly not higher than 30.[75]

B. The Commission should adopt a broad, six-level, role-based reduction for individuals involved in low-level trafficking.

Defenders especially welcome the Commission's proposal for a new, low-level trafficking SOC. Defenders encourage the Commission to take the broadest steps possible in adopting this SOC as doing so will help to substantially reduce §2D1.1's overreliance on drug quantity and type for many individuals, and will remediate some of the reason for §2D1.1's too-high (and often-rejected) sentencing ranges.

Hoping to most efficiently convey Defenders' thoughts on how to accomplish these goals, we start by illustrating how all of our suggestions would look as a complete SOC. As the Commission can see in our illustration, we work from the structure of Option 1 but borrow conceptually from Option 2. The big difference between the options is Option 1 provides an exhaustive list of roles warranting a reduction while Option 2 provides a non-exhaustive list of roles as examples of circumstances that may (but do not necessarily) warrant a reduction. Defenders oppose an exhaustive list of roles warranting a reduction; inevitably there will be cases involving especially low-level trafficking that the Commission has not contemplated. But while flexibility is key, so are clarity and consistency. Defenders predict (and fear) that if the Commission merely provides an optional list of examples, the result will be widely disparate treatment of similar conduct.

In this illustration, the Commission's proposed language is in black (ordinary typeface); Defenders' choices among Commission-created options

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[75] The Commission also seeks comment on whether to make changes to §2D1.11's chemical quantity tables, which are "generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1." *Proposed Amendments* at 69. For consistency, the Commission should strike as many of the top base offense levels in §2D1.11's tables as it strikes in §2D1.1.

are in **bold**; and Defenders' suggestions for additional language and subtractions are in red.

(b)(17) If—

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

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

~~(C)~~ **the defendant's primary function in the offense was performing a~~**~~ny of the~~** **low-level trafficking function**~~s~~**,** including any of the below—

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

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

(iii) distributed retail or user-level quantities of controlled substances to end users **or similarly situated distributors** and **one or more of the following factors is present**: (I) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an event; (II) the defendant was motivated primarily by a substance use disorder; (III) the defendant was engaged in the distribution of controlled substances infrequently or for brief duration; (IV) the defendant received little or no compensation from the distribution of the controlled substance involved in the offense; **(V) the defendant had limited knowledge of the distribution network**;

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

* * *

(e) Special Instructions

* * *

(2) If the defendant receives the reduction at (b)(17) of this guideline, do not apply §3B1.2 (Mitigating role) to any portion of the defendant's guideline calculated under §2D1.1;

* * *

Commentary

* * *

21. Application of 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.~~

(B) The Commission intends that Subsection (b)(17) be liberally construed to decrease the potential that the Drug Quantity Table will be the sole driver of sentencing for individuals who are not the "major drug traffickers" or "serious drug traffickers" envisioned by the Anti-Drug Abuse Act of 1986's mandatory minimum scheme. *See Kimbrough v. United States*, 552 U.S. 85, 95 (2007) (discussing purposes of the mandatory minimum quantities).

* * *

To summarize, our revised proposal provides for a six-level reduction for anyone whose primary role in the drug-trafficking market was one of several enumerated roles or a similarly low-level role. If the primary role was

a qualifying low-level role, no other factors are automatically disqualifying. Courts are instructed to apply this reduction liberally, to achieve meaningfully lower sentencing ranges. People who get this reduction have a BOL cap (at 17). And while they cannot also get the Chapter 3 mitigating-role reduction for their drug offenses if they get the (b)(17) reduction, they are eligible to get the mitigating-role reduction otherwise.

Expanding upon this summary, here we discuss each decision point for the proposed amendments, in the order in which they appear in the proposal:

Proposed (b)(17)(A) & (B). *If an individual otherwise qualifies for the low-level-trafficking SOC, neither violence nor weapon possession should automatically disqualify him.* Violence and the use of weapons are quintessential considerations for sentencing judges.[76] But both are misplaced as disqualifiers within the new SOC for three reasons. First, including these disqualifiers will not further the purpose of the amendment. The Part A proposals are inspired by long-pending criticisms of §2D1.1's overreliance on quantity and drug type instead of role in the offense. Whether a person used violence or a weapon is a relevant fact (that is addressed in other SOCs), but it does not alter that person's role in the offense.

Second, including the proposed disqualifiers would result in problematic double-counting. Section 2D1.1 already includes two separate, two-level enhancements for possession of a weapon and using violence.[77] If the Commission promulgates the SOC with either (or both) disqualifiers, two otherwise-identical couriers would have guideline ranges separated by as many as *eight levels* based solely on the presence of violence or a gun.[78] This

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[76] Defenders have no doubt that courts will factor in any violence or weapons when choosing where within (or beyond) the guideline range to sentence a person. Defenders here simply contend that those factors should only shape the guideline range via the already-in-place corresponding SOCs, not an additional preclusion.

[77] §§2D1.1(b)(1), (b)(2).

[78] An example puts this in perspective: If the Commission adopts both the 30 BOL cap and the six-level SOC option, a CHC I person with the highest BOL and a weapon enhancement would have an offense level 32, for a 121–151 month range, while a person equal in all ways except the weapon would have a level 24, for a 51–63 month range. That 70-month increase to the bottom of the guideline range attributable solely to the weapon is almost two years longer than the average

double-counting could even become triple-counting when combined with the Commission's proposal (as currently written) to foreclose §3B1.2 for §2D1.1 in light of the new low-level trafficking SOC. Presently, violence or weapons do not bar a role reduction, and thus a person would simultaneously lose access to §3B1.2 while also being blocked from the new SOC. The better approach is simply to keep the low-level trafficker SOC as it is: a reduction meant to reflect the mismatch between drug quantity and a person's role, and to rely on the long-existing enhancement SOCs to create marginal punishment increases for violence or weapons.

Third, the Commission's data reveal that the current drug sentencing ranges are too high even for individuals who received an enhancement for violence, a weapon, or both. Over the last five fiscal years for which data is available, people receiving the §2D1.1(b)(1) dangerous weapon SOC received sentences below the guideline range in 63% of cases, including 40% of cases in which neither a §5K1.1 nor §5K3.1 departure applied.[79] Likewise, among people receiving the §2D1.1(b)(2) violence enhancement, 67% received below-range sentences, including 45% of people who received neither §5K1.1 nor §5K3.1 departures.[80] Even people receiving *both* SOCs mostly received below-range sentences, with 67% of people who received both sentenced below the range, including 46% for reasons other than §5K1.1 or §5K3.1.[81] In short, judges are telling the Commission that drug sentencing ranges are too high even in weapon and violence cases.

Proposed (b)(17)(C) introductory language. *The SOC should turn on a person's primary function, rather than allowing a single aberrant action in an offense to set aside a person's low-level function.* By focusing on a person's "primary function," the SOC will better fulfill its promise: decreasing the near-total impact that drug quantity and type have on sentencing ranges. If a person can fairly be said to have had a primary role of a low-level trafficker, it makes little sense to leave that person in the mid- or high-level trafficker pool based upon as little as one identified aberration in their

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firearm sentences. *See* USSC, *2023 Annual Report*, at 17 (noting 49-month average sentence for firearms offenses in FY23).

[79] USSC, FY 2019 to 2023 Individual Datafiles.

[80] USSC, FY 2019 to 2023 Individual Datafiles.

[81] USSC, FY 2019 to 2023 Individual Datafiles.

conduct. Aberrant, beyond-primary-role behavior will of course remain fair ground for courts choosing ultimate sentences.

Also, the SOC should provide a clear list of qualifying conduct but leave open the possibility of qualifying conduct that is not specifically listed. As flagged at the top of this subsection, Defenders' revision effectively merges Option 1 with Option 2: offering a list of qualifying conduct (as Option 1 does) but also using language that makes clear that other, unlisted conduct of a similar variety may qualify as well (as Option 2 does).[82] As discussed, this balances the need for flexibility with the need for clarity and consistency.

Even now we have questions about circumstances where this reduction should—but perhaps might not—apply. For example, how would these categories work with inchoate offenses?[83] And what about individuals who played a role that would be consistent with the "broker/steerer" category that the Commission has identified as less culpable than street-level dealers?[84] But we also don't know what questions we have not thought of yet; thus, the most sensible approach would allow for flexibility. As for the need for clarity and consistency, our experience with the Commission's 2015 amendment to the mitigating-role reduction shows that if the Commission permits discretion in the kinds of cases courts consider low-level, we will see judge-based disparities in similarly situated cases.[85]

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[82] To accomplish this, we add the phrase "including any of the below" to the opening clause of Option 1. And according to the Commission's rules of construction, "[t]he term '***includes***' is not exhaustive[.]" USSG §1B1.1 App. N. 2.

[83] If we are dealing with a conspiracy that never came to fruition, the person may never have "performed any low-level function" in the offense, although they would have conspired to perform such a function.

[84] *See* USSC, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 167.

[85] *See* USSG App. C, Amend. 794, Reason for Amendment (2015) (amending §3B1.2 because mitigating role was "applied inconsistently and more sparingly than the Commission intended"), *see also, e.g., id.* (noting substantial interdistrict disparity for couriers receiving role reduction with low of 14.3% in one district and high of 97.2%). Even after the Commission's 2015 Amendment, Defenders continue to encounter dramatically different applications of §3B1.2 among and between districts. *Cf. Proposed Amendment: Drug Offenses*, at 57 ("[C]ommenters have raised concerns that the mitigating role adjustment . . . is applied inconsistently in drug trafficking cases . . . .").

Defenders are hopeful that by enumerating a list of roles that qualify for the reduction and also allowing for the possibility of other, unenumerated low-level roles, the Commission can ensure that courts actually apply the SOC to reach the numerous people currently convicted for low-level trafficking roles.[86]

Proposed (b)(17)(C)(i), (ii). *The SOC should only exclude people who possess a "significant share" of the ownership interest in controlled substances.* In both Option 1 and Option 2, the Commission excludes from the first two categories of low-level traffickers any individual who held "an ownership interest in the controlled substance." This is unduly broad. While the Commission is certainly right that low-level traffickers are unlikely to be the sole owners of large quantities of substances, Defenders routinely have cases in which a client's payment for their low-level trafficking consists solely or partially of some amount of the controlled substances.[87]

The solution to this problem is found only a few words later in the same sentence. When it comes to the profit from trafficking, the Commission's proposal only excludes those individuals who "claim[] a substantial share" and not those who claim any share. The same logic of preserving the SOC for those whose interests pale in comparison to the overall industry works for substances as well. Defenders thus propose adding "a significant share of the" before "ownership interest in the controlled substance."

Proposed (b)(17)(C)(iii). *The Commission should require only one additional factor, if any, for street-level retailers or distributors to obtain the low-level trafficking SOC.* With (b)(17)'s other enumerated drug-trafficking

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[86] The Commission's data make clear that a substantial portion of the numerous people sentenced for drug offenses are low-level actors. *See* *Public Data Briefing—Drug Offenses*, at 12 (identifying as street level dealer, broker, courier, or employee/worker 46.8% of a sample of individuals sentenced in FY22 for methamphetamine); *id.* at 15 (identifying as street level dealer, broker, courier, or employee/worker 60.8% of sample of sentenced individuals in FY19 for fentanyl and fentanyl analogue offense).

[87] *See, e.g., United States v. Stibbe*, 337 F. App'x 575, 575-76 (7th Cir. 2009) (affirming sentence of individual solely alleged to have regularly transported others to and from drug purchases in exchange for $20 of heroin for personal use each time).

roles, the focus is solely on an individual's role, not their motivation. But the Commission parts ways with that approach when it comes to individuals who "distributed retail or user-level quantities . . . to end users or similarly situated distributors." For these individuals, the Commission lists a series of motivations for engaging in the activity, including substance use disorder, familial ties, or coercion, making it harder for an individual to obtain the SOC from a sales-related offense.

To be clear, street-level dealers ought to be included in the SOC without any greater requirements than other people who perform low-level functions. At bottom, the Commission's proposal is addressing the overreliance on weight and quantity, a flaw that holds just as true for street dealers as for other low-level individuals. Indeed, it remains beyond reasonable dispute that street dealers were not Congress's target with its quantity-based scheme. The Commission has recognized that these are not high-culpability cases.[88] And the very criticisms that have inspired the SOC have included street dealers among low-level activity.[89] Further, the prosecution of street dealers, as one judge complained back in 1993, is "simply a matter of taking minnows out of a pond."[90] Long sentences in these cases accomplish nothing—they have "absolutely no effect on the life of the pond" these individuals previously inhabited.[91]

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[88] Statement of Judge Patti B. Saris, Chair, USSC, for the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences," Comm. on the Judiciary, U.S. Senate, at 5 (Sept. 18, 2013) (describing "street level dealers" as "many steps down from high-level suppliers and leaders of drug organizations").

[89] *See, e.g., United States v. Johnson*, 379 F. Supp. 3d 1213, 1220 (M.D. Ala. 2019) ("To draw on the popular imagination, it is the Pablo Escobars, Stringer Bells, Tony Montanas, and Walter Whites of the world who bear the greatest culpability, *not the street peddlers, middlemen*, and mules . . . ." (emphasis added)). Defenders' retail-level clients are routinely barely (if at all) making ends meet and are often foreclosed from garnering lawful employment (including due to convictions like those triggering §2D1.1).

[90] Hon. Whitman Knapp, *The War on Drugs*, 5 Fed. Sent. R. 294, 295 (1993).

[91] *Id.*

Because including any extra barrier is at odds with this reality and the SOC's purpose, the Commission should, at most, require only one of the additional listed mitigators for street-level dealers.[92]

Proposed (b)(17) concluding language. *The low-level trafficker SOC should result in a six-level decrease and, for the same reasons, the Commission should amend §2D1.1(a)(5) to cap at 17 the BOL for a person receiving the low-level trafficking SOC.* Consistent with our overarching point that drug sentences are far too high and that BOP is not equipped to handle the present number of people within its custody, Defenders submit that the Commission should adopt its highest proposed reduction, six levels—though going even higher would be fully merited. For related reasons, either the SOC itself or a modified §2D1.1(a)(5) should cap the base offense level for a low-level trafficking case at 17.

Defenders would not be surprised if, at first blush, a BOL cap set at 17 seems like a decrease too far.[93] But a study by the DOJ supports this proposal. In 2018, DOJ looked at the nationwide average time served by offense category for people sentenced in state courts across the nation.[94] For drug-trafficking offenses—distinct from possession offenses—the average length of sentence served was 26 months, with the median at 17 months.[95] It would make sense for the Commission to cap the BOL at a level that would

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[92] While Defenders are confident that a substantial portion of street-level dealers are motivated by the mitigating factors the Commission has chosen, Defenders are particularly worried about courts splitting hairs over what constitutes "little . . . compensation." Courts will of course remain authorized to factor into their § 3553(a) decision the rare instances where an individual facing sentencing was well compensated or was drug trafficking by actual choice.

[93] Admittedly, arriving at a cap that will make sense to more than the defense community has proved a difficult task. The Commission appears unlikely to consider pre-1984 data to determine this level. But at the same time contemporary federal sentencing data is irreparably tainted because of the too-high guideline's anchoring effect. *See Peugh v. United States*, 569 U.S. 530, 541, 543–44 (2013) (discussing how post-*Booker* guidelines anchor sentences).

[94] DOJ Office of Justice Programs, Bureau of Justice Statistics, *Time Served in State Prison, 2018* at (March 2021).

[95] *See id.*

place this national average time-served for drug trafficking within the CHC I guideline range.[96]

This BOL cap change addresses the current crises within the BOP with the level of boldness that circumstances require, but it would also address a disparity that this body rarely considers but is always top of mind for our clients: the disparity between state and federal sentences.

Proposed (e)(2). *A §3B1.2 mitigating-role reduction should remain available to individuals who do not get the §2D1.1(b)(17) reduction.* Defenders do not object generally to the Commission's effort to establish that a person cannot be both a minor participant and a low-level trafficker, to prevent double-counting—as many hypothetical examples where low-level trafficking is present would also trigger the role reduction for the same reasons. However, there are recurrent circumstances that do not exhibit that concern.

There will be people who could receive a role adjustment but aren't able to get the (b)(17) SOC despite their offense level being set by §2D1.1. We have already flagged earlier in this Comment one category of people potentially in that situation: individuals convicted of inchoate offenses.[97] And consider fictitious stash house robberies—a deeply problematic category of cases in which federal law enforcement officers have persuaded people to rob non-existent stash houses and have then pursued sentences based on inflated

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[96] Defenders' proposed level 17 cap errs on the side of *higher* sentences. Section 2D1.1's BOL cap applies only if the person received the low-level trafficking SOC and fell in CHC I. But the DOJ's study average was not limited to people in low-level positions or to people with limited criminal histories; it necessarily also included people convicted of mid- and high-level activities and people with more-extensive criminal histories. Inevitably, the Study's average sentence determination would be even lower if it looked only at apples-to-apples low-level trafficking cases with limited criminal history.

[97] In addition, Commission data identify at least one category of drug-trafficking role that occasionally obtains a role reduction, but that is unlikely to obtain the Commission's proposed SOC: wholesalers. As part of the data presentation for this proposal, the Commission coded for role from a sample of methamphetamine and fentanyl cases from FY22 and FY19, respectively. The Commission determined that 2.8% of the methamphetamine wholesalers sample received a mitigating role adjustment, as did 2.3% of the fentanyl wholesalers sample". *See* *Public Data Briefing—Drug Offenses* at 13, 16. To entirely preclude both the SOC and mitigating role for wholesalers would constitute a de facto increase in sentences for the small but apparently extant number who receive mitigating role.

quantities of non-existent drugs.[98] It is hard to see how a person convicted for planning a fictitious stash house robbery could qualify for a (b)(17) reduction, given that the offense isn't about trafficking per se, although it often comes within §2D1.1. But it is not hard to imagine the same person meeting §3B1.2's requirements. At best, this would be the subject of litigation.

Relatedly, there are individuals whose offense level would be determined under some other guideline but with significant offense-level increases coming from §2D1.1's drug quantity table—*e.g.,* money laundering under §2S1.1. A person involved in laundering trafficking proceeds, but not trafficking itself, wouldn't seem to be capable of getting the (b)(17) SOC. But under the Commission's current (e)(2) language—"if the defendant's offense level is determined under this guideline"—it appears that they would nevertheless be excluded from the §3B1.2 mitigating-role reduction. Again, at best, this would be the subject of litigation.

There will also be individuals who are convicted of a drug-trafficking offense and some other offense where grouping rules come into play. It is important that §2D1.1 not preclude courts from applying the mitigating-role reduction to the other offense that's calculated under some other guideline, if that reduction is appropriate.

Proposed application note 21(B). *The Commission should not include language that ordinarily forecloses the low-level trafficker SOC where the individual was "convicted of a significantly less serious offense than warranted by the defendant's conduct."* The Commission proposes to incorporate certain commentary from §3B1.2 into the low-level trafficker SOC. Most concerningly, this would include Application Note 3 of §3B1.2,

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[98] *See, e.g, Conley v. United States*, 5 F.4th 781, 787 (7th Cir. 2021) (discussing prior circuit opinions describing fictitious stash house stings as "tawdry" and "troubling" in that they targeted mostly "poor people of color" who might have otherwise stayed out of trouble and gave "law enforcement free rein to manipulate sentences by setting imaginary drug amounts," among other concerns); *United States v. Evans*, __ F. Supp. 3d __, 2024 WL 5080545, at *2 (S.D. Fl. Dec. 10, 2024) ("Although the ATF's [reverse stash-house] sting operations have withstood challenges on the grounds of entrapment . . . , reviewing courts . . . have expressed deep concerns about the extensive use of deception, and the methods by which targets are selected.").

which provides that the mitigating role reduction is "ordinarily not warranted when the defendant received a lower offense level by virtue of being convicted of a significantly less serious offense." Defenders urge the Commission not to incorporate this commentary, which could largely undermine the new SOC.

The primary purpose of the proposed §2D1.1(b)(17) is deemphasizing to some extent drug type and quantity while elevating a better measure of culpability: function in the offense. Unfortunately, the Controlled Substances Act defines offense seriousness almost exclusively with reference to drug type and quantity (under the deeply flawed structure set by the ADAA back in 1986).[99] Thus, in the mine-run of cases, the very reason the individual could have been convicted of a more serious offense will be precisely because of the quantity and type of drug involved in the offense—the precise factor the SOC is intended to deemphasize.[100] Indeed, in a case where the individual was convicted of the highest possible mandatory minimum permitted by the facts, the new SOC wouldn't be useful anyway, because the mandatory minimum would override a lower guideline range.[101] Thus, the proposed Application Note 3 text could effectively cancel out the new (b)(17).

Application Note 3 to §3B1.2 was designed for a different purpose. Section 3B1.2 is an applicable-to-all-guidelines mitigation provision that calls on courts to compare individuals who have engaged in the same or similar conduct to determine who is more or less culpable. In that context, a judge could reasonably find that the applicable statutory sentencing ranges already sufficiently account for the mitigating circumstance. The proposed §2D1.1(b)(17) isn't really about "mitigation" (although individuals who come within it will often be said to have engaged in mitigated conduct), and it's not about comparing the individual being sentenced with others. The low-level trafficking SOC is designed to account for offense conduct bearing on

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[99] *See, e.g.,* 21 U.S.C. § 841(b).

[100] *See, e.g., United States v. Ware*, No. 22-10674, 2024 WL 1993482, at *2 (11th Cir. May 6, 2024) (affirming denial of mitigating role adjustment pursuant to Application Note 3 where person convicted of five-year mandatory minimum instead of ten-year minimum). It makes even less sense when one considers that we would expect a prosecutor to offer this sort of plea deal when the prosecutor agrees that the individual had a low-level role.

[101] *See* USSG §5G1.1(b).

culpability beyond drug type and quantity. In this context, the focus is on conduct regardless of the statute of conviction.

What's more, importing this application note into the new context places unnecessary additional power in the hands of prosecutors: they could leverage harsher statutes to force pleas while also seeking to use that exchange to foreclose an SOC designed to remedy a key flaw in §2D1.1.[102]

Defenders' proposed application note 21(B). *To avoid overly narrow construction like §3B1.2, the Commission should include commentary encouraging liberal construction of the SOC.* Defenders' experiences, and the Commission's data, show that even when the Commission has openly sought to improve the uptake of a role-based reduction, courts have nonetheless narrowly construed the provision. We are hopeful that by expressing the intent of this provision in the Guidelines Manual itself (not only in a "reason for amendment"), the Commission can ensure full uptake of this important amendment.

III. PART B: Defenders support the Commission's efforts to eliminate purity distinctions in the methamphetamine guidelines.

Part B of the proposed amendment addresses unwarranted disparities created by overlapping drug categories that trigger dramatically different sentences: "Methamphetamine," "Methamphetamine (Actual)," and "Ice."[103] Subpart 1 would eliminate references to "Ice" from the Guidelines while

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[102] In *United States v. Stibbe*, a woman was sentenced after pleading guilty to a distribution causing death and the corresponding 20-year mandatory minimum. 337 F. App'x 575, 575–76 (7th Cir. 2009). The government alleged that her sole conduct had been regularly driving others to and from heroin purchases, being paid each time with $20 worth of heroin for her personal use. *Id.* Despite pleading to a 20-year mandatory minimum and having only served as a driver on trips in which she herself was obtaining drugs along with passengers, the Seventh Circuit held that Application Note 3 made her ineligible for a role reduction because while she could have been charged for numerous other trips, she was charged only with the one. *Id.* at 578. Indeed, the Seventh Circuit not only affirmed the mitigating-role denial but also indicated that it might have constituted plain error if the district court had granted the reduction, in light of Application Note 3. *Id.*

[103] *See* USSC, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, at 14 (June 13, 2024) (describing the legal distinctions among the three categories).

providing for a two-level reduction for methamphetamine in non-smokable, non-crystalline form. Subpart 2 would eliminate the 10:1 ratio between methamphetamine-actual and meth-mixture, presenting two options for setting quantity thresholds. Defenders strongly support both proposals and specifically urge the Commission to adopt Option 1 under Subpart 2.

As Defenders said before the start of this amendment cycle: "The time has come to fix the methamphetamine offense levels."[104] There is no empirical basis for punishing meth-actual and "Ice" ten times more harshly than meth-mixture.[105] Purity-based distinctions in methamphetamine sentencing fail as a reliable measure of culpability and harm.[106] And if purity-based distinctions ever made sense, today's market realities have thoroughly undermined them. As the Commission's 2024 Report on Methamphetamine Trafficking Offenses finds, meth seized in federal cases is "highly and uniformly pure," with minimal variation in purity between meth-actual, "Ice," and mixture cases.[107] Thus, as we have noted before, meth sentencing has become "a game of chance,"[108] with guideline ranges tied to disparate district practices—not actual purity, much less meaningful distinctions in culpability and harm.

What's more, guideline ranges for all meth cases—but especially "Ice" and meth-actual cases—are far too high, with courts imposing below-guideline sentences in the vast majority of cases.[109] Under the current

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[104] *See* Defenders' Annual Letter to the USSC, at 2 (May 15, 2024).

[105] *See id.* at 5 & n.11; Defenders' Annual Letter to the USSC, at 9–10 (May 24, 2023). Commissioners should not interpret Defenders' relatively concise discussion of Part B as suggesting anything less than its critical importance. We have addressed this issue extensively in previous submissions and simply wish to avoid unnecessary repetition while emphasizing our continued strong advocacy for these changes.

[106] *See* Defenders' 2024 Annual Letter, at 2–10; Defenders' 2023 Annual Letter, at 8–13 (Aug. 1, 2023).

[107] 2024 Meth Report, at 4 (providing that, "[t]he methamphetamine tested in fiscal year 2022 was uniformly highly pure regardless of whether it was sentenced as methamphetamine mixture (91.0% pure on average), methamphetamine actual (92.6%), or Ice (97.6%).").

[108] Defenders' 2024 Annual Letter, at 7.

[109] *See id.* at 51 (indicating that within-range sentences are 26.1% for meth-mixture cases, 23% for meth-actual cases, and 21.3% for "Ice" cases). As we have noted before, pure meth is not more dangerous (and may even be less dangerous)

framework, street-level meth dealers and couriers are routinely subject to guideline penalties designed for kingpins, creating an unwarranted disparity between offense seriousness and punishment.[110]

Part B of the Commission's §2D1.1 amendments appropriately recognizes that "purity is no longer an accurate measure of offense culpability."[111] Subpart 1 does this by striking "Ice" from the Guidelines Manual. We support this wholeheartedly: the "Ice" designation is an obsolete relic that fails to distinguish between more and less serious offenses. As for the related proposal to include a two-level reduction for methamphetamine in non-smokable, non-crystalline forms, this should adequately address any concerns related to the decades-old congressional directive that spawned the "Ice" guideline.[112]

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than many other major drug types. *See* Defenders' 2024 Annual Letter, at 4 (citing Defenders' 2023 Annual Letter, at 12).

[110] *See also United States v. Havel*, No. 4:21-CR-3075, 2023 WL 1930686 at *5 (D. Neb. Feb. 10, 2023) ("[T]he ready availability of methamphetamine (actual) to everyone in the chain of distribution, from the kingpin to the mule to the end user, has utterly severed any connection between the purity of the drug and the defendant's position in the criminal enterprise—and as a result, contrary to § 3553(a), the guideline is treating all of them like kingpins."); *United States v. Johnson*, 379 F. Supp. 3d 1213, 1224 (M.D. Ala. 2019) ("Given that the Guidelines treat actual methamphetamine and ice more harshly than methamphetamine mixture, the national average of more than 90% purity meant that the sentencing Guidelines would treat the average individual convicted of a crime involving methamphetamine as a kingpin or leader, even though that simply is not true . . . . In other words, the high purity of methamphetamine in a specific case does not reliably indicate the offender's role in the drug trade, given that methamphetamine throughout the U.S. market is highly pure.") (cleaned up). While courts are charged with avoiding unwarranted disparities in sentencing similarly situated people, it is also important to avoid "unwarranted *similarities*" among differently situated people. *See Gall v. United States*, 552 U.S. 38, 55 (2007) (emphasis in original).

[111] *Proposed Amendment: Drug Offenses*, at 80.

[112] *See* 2024 Meth Report, at 14 ("Ice is not a statutorily defined substance but is included in the guidelines in response to a congressional directive in 1990 that offense levels in cases involving smokable crystal methamphetamine (popularly known as 'Ice') be two levels above those for other forms of methamphetamine." (citing Crime Control Act of 1990, Pub. L. No. 101–647 (Nov. 29, 1990), 104 Stat 4789)). As Defenders have explained in the current and prior Amendment Cycles' Simplification comments, the Commission's ongoing obligations under § 991 and § 994 mean that the Commission is not handcuffed permanently by *ad hoc*

Subpart 2 takes the other necessary step: it eliminates references to "methamphetamine (actual)" from the Manual, as distinct from "methamphetamine" (meth-mixture). Defenders also wholeheartedly support this proposal, as presented in Option 1, which maintains the current meth-mixture quantity levels. Meth-mixture cases already trigger harsh penalty ranges that result in longer sentences than any drug except "Ice" and meth-actual—including cocaine, heroin, and fentanyl.[113] Furthermore, while variance rates are high across all meth cases, individuals sentenced under the meth-mixture guideline received guideline-range sentences more frequently than those sentenced under the "Ice" or meth-actual guidelines.[114] Adopting the mixture threshold would align with current sentencing practices that seek to avoid excessive penalties.

Option 2 of Subpart 2 is a non-starter. It would set all meth offenses at the current meth-actual levels, purporting to resolve purity-based disparities while pushing guideline ranges even further from sentences that judges are finding appropriate under § 3553(a). This option would also exacerbate existing problems by almost certainly increasing variance rates, as evidenced by higher rates of within-guideline sentences for meth-mixture cases compared to meth-actual or "Ice" cases.[115] Additionally, it would create new disparities, as some judges adhere closely to the guidelines while others are more willing to vary based on § 3553(a) factors. Simply put, there is no empirical or policy justification for elevating offense levels for all meth cases.

Finally, one of Part B's issues for comment asks about the 18:1 quantity ratio between powder cocaine and cocaine base. Defenders encourage the Commission to eliminate this unwarranted disparity in a future amendment cycle. The Fair Sentencing Act of 2010 made important progress in reducing what was originally a 100:1 ratio to 18:1. But there is no pharmacological justification for maintaining any disparity between these

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directives. However, the Commission need not engage with that argument here, as its proposal complies with the decades-old directive.

[113] *Compare* *id.* at 5, 50 (showing that in FY2022, meth-mixture cases received an average sentence of 83 months), with USSC, *Drug Trafficking Offenses Quick Facts* (FY 2022) (showing that in fiscal year 2022, the average sentences for crack, powder cocaine, heroin, and fentanyl were 70, 68, 66, and 65 months, respectively).

[114] *See* 2024 Meth Report, at 51.

[115] *See* 2024 Meth Report, at 51.

substances[116] and no legal reason that the Guidelines must maintain this disparity.[117] Moreover, this continued disparity perpetuates documented racial disparities.[118] The time has come for the Commission to eliminate the arbitrary distinction between powder and crack cocaine entirely.

IV. PART C: The Commission should maintain meaningful mens rea requirements for the fentanyl misrepresentation enhancement.

Defenders oppose Part C of the proposed amendment, which would weaken the mens rea requirements under §2D1.1(b)(13), providing either a

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[116] *See* C.L. Hart, J. Csete, D. Habibi, *Methamphetamine: Fact vs. Fiction and Lessons from the Crack Hysteria*, at 2 (Feb. 2014) (explaining that there are no pharmacological differences between crack and powder cocaine to justify their differential treatment); D.K. Hatsukami & M.W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580 (1996) (concluding that the "physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base)"). For instance, in *Kimbrough* and *Spears*, the Supreme Court held that it was reasonable for the court to disregard § 2D1.1's guideline range that resulted from a quantity-based offense level applied to crack-cocaine offenses that lacked any empirical basis, even in the mine-run case—instead, the range was simply keyed to Congress's mandatory minimum scheme and based on politics. *See Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 261 (2009).

[117] [CITE PART A discussion of ADAA does not require this].

[118] *See* Regina LaBelle, Acting Dir., Off. of Nat'l Drug Control Policy, *Testimony Before the S. Judiciary Comm. on Examining Federal Sentencing for Crack and Powder Cocaine* at 3 (June 22, 2021) (observing that the crack-powder sentencing disparity reflects a broader system of separate and unequal treatment of people of color and white people who use drugs or have substance use disorders); *see also* Office of Sen. Cory Booker, *Booker, Durbin, Armstrong, Jeffries Announce Re-Introduction of Bipartisan Legislation to Eliminate Federal Crack and Powder Cocaine Sentencing Disparity* (Feb. 17, 2023) (highlighting the widespread recognition among lawmakers that the crack-powder sentencing disparity has driven racially disparate outcomes in the justice system and calling for the elimination of the disparity as a critical step toward addressing racial injustice in sentencing); *cf.* USSG, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 132 (Nov. 2004) (noting that the crack-powder ratio contributed more to racial disparities in sentencing between Black and white offenders than any other factor and that revising the thresholds would significantly reduce the gap and improve fairness).

two- or four-level increase for misrepresenting or marketing as another substance, a mixture or substance containing fentanyl or a fentanyl analogue.[119] Each option presented would effectively gut a mens rea requirement that the Commission deemed appropriate after extensive comment and public hearings.[120]

Indeed, the history of §2D1.1(b)(13) tells an important story. In 2018, after a comprehensive study including multiple public hearings, the Commission established a four-level enhancement requiring knowing misrepresentation, explicitly stating this mens rea requirement was necessary "to ensure that only the most culpable offenders are subjected to these increased penalties."[121] In 2023, the Commission modified this mens rea to include willful blindness, over Defenders' objection, to address "fake pills."[122] Now, just over a year after the 2023 amendment went into effect, the Commission proposes to dilute further or potentially eliminate mens rea—the very approach it rejected in 2018. This is a huge step backward, with no evidence that weakening the mens rea in 2023 has improved public safety or reduced overdoses. It is also out of line with recent Supreme Court decisions stressing the importance of mens rea in assessing criminal culpability.[123]

The rationale for this new proposal is that some commenters complained that courts rarely apply the §2D1.1(b)(13) enhancement, suggesting that the enhancement may be vague and causing "application

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[119] *See* §2D1.1(b)(13).

[120] USSG App. C, Amend. 807, Reason for Amendment (2018).

[121] *Id.*

[122] *Compare* USSG App. C, Amend. 818, Reason for Amendment (2023) (providing for new 2-level enhancement to "reflect[ ] the increased culpability of an individual who acted with willful blindness or conscious avoidance of knowledge that the substance the individual represented or marketed as a legitimately manufactured drug contained fentanyl or a fentanyl analogue."); *with* Statement of Michael Caruso on Behalf of Defenders to USSC on Counterfeit Pills, at 15–21 (Mar. 7, 2023) (opposing the 2023 willful blindness amendment on the grounds that the amendment lacked empirical support, contravened established Supreme Court precedent emphasizing the importance of adequate mens rea and swept broader than necessary to capture the most serious individuals).

[123] *See* Defenders' Comment on the USSC's Proposal on Firearms, at B-3 & n.13 (Feb. 3, 2025) (noting that the Supreme Court has reaffirmed the importance of mens rea in recent years and collecting cases).

issues."[124] Defenders are unaware of widespread concerns about this enhancement. We are aware of DOJ's claim that the enhancement has "proven not to be very useful"—a claim they based on data showing a similar number of enhancement applications during a mere two-month period in late 2023 compared to the same brief period in 2022.[125] From this limited sample, DOJ speculates about the reason for the lack of uptick in the enhancement's application, suggesting—with no supporting evidence—that it may be because drug traffickers either speak in code or make no explicit representations at all, letting the appearance of the pills speak for itself.[126]

Defenders have not found evidence that courts are struggling to apply the enhancement for any reason, including those that DOJ speculates.[127] Moreover, the premise that an enhancement requires amendment because it applies in relatively few cases fundamentally misunderstands the purpose of SOCs, which are meant to differentiate more serious conduct from the baseline case.[128] If the Commission wants to increase base offense levels for fentanyl cases, that specific proposal would deserve robust debate and thorough public comment.[129] But that's not the proposal on the table. Rather,

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[124] *Proposed Amendment: Drug Offenses*, at 104.

[125] *See* DOJ Annual Letter to the USSC, at 5 (July 15, 2024).

[126] *See id.* at 5–6.

[127] While not exhaustive, Defenders have been unable to identify any case in which a court has expressed difficulty applying §2D1.1(b)(13). In contrast, in several cases examined, courts have easily applied the enhancement. In *United States v. Wiley*, 122 F.4th 725, 731 (8th Cir. 2024), the court straightforwardly applied the enhancement where an individual advertised counterfeit pills as "perks" (the accepted name for Percocet) while knowing they were not. Similarly, in *United States v. Allen*, No. 21-3900, 2022 WL 7980905, at *3 (6th Cir. Oct. 14, 2022), the court had no difficulty applying the enhancement based on hearsay evidence that an individual had been directly informed that the heroin he was selling contained fentanyl.

[128] *See* USSG, Ch. 1, Pt. A (Basic Approach) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."); *see also United States v. Ziesel*, 38 F.4th 512, 516 (6th Cir. 2022) ("Enhancements are a type of specific offense characteristic and are promulgated for distinct and separate acts of violence in order to impose punishment based on the severity of the individual's conduct.") (cleaned up).

[129] Defenders do not deny the human suffering that comes from fentanyl addiction and overdoses. But as we (and many others) have said over and over, raising sentences does not actually help reduce drug trafficking, drug addiction, or

what's being suggested would expand an SOC to capture a larger percentage of fentanyl cases, functioning as a sort of back-door elevation of base offense levels and fentanyl sentences generally, based on speculation.

Instead of this unsound approach, Defenders encourage the Commission to pause and first study how courts actually apply the current enhancement before making changes. If evidence shows that courts are struggling to apply the enhancement as intended, the Commission could then develop and propose a precise, tailored amendment to capture the individuals the Commission believes should receive the enhancement. The Commission's 2018 decision to establish a mens rea requirement for the enhancement followed comprehensive study, public hearings, and careful deliberation to ensure the enhancement targets "only the most culpable" individuals.[130] Any further weakening of the enhancement's knowledge standard should undergo the same rigorous process of study, public input, and evidence-based analysis that led to its adoption.

V. PART D: If the Commission wants §2D1.1(b)(1) to meaningfully distinguish between more and less serious conduct, it should not focus on "machineguns"; instead, it should amend that SOC's overbroad application standard.

Defenders oppose Part D of the proposed Amendment, which would add a four-level enhancement in §2D1.1(b)(1) for drug offenses involving the possession of a machinegun, as defined in 26 U.S.C. § 5845(b). Section §2D1.1 already suffers from factor creep, empirically unsupported expansions, racial disparity, and overly harsh sentence recommendations.[131] This proposed

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drug overdoses. *See* Defenders' 2024 Annual Letter at 2–3 & nn.4 & 5 (explaining that, "research overwhelmingly shows that increased drug-crime prosecutions and ever-stiffening drug penalties have utterly failed to curb drug dealing or use, or overdose deaths.").

[130] USSG App. C, Amend. 807, Reason for Amendment (2018).

[131] *See* Defenders' Annual Letter to the USSC, at 6 (July 15, 2024) ("2024 Defenders' Letter") (noting original §2D1.1 guideline had only one special offense characteristic enhancement, whereas today it has expanded to 16); Statement of Molly Roth on behalf of Defenders to USSC on Proposed Amendments to the Guidelines for Drug Offenses, at 20 (Mar. 13, 2014) (discussing several of the unsupported SOC increases); *see* § 2D1.1 (Nov. 1 2024) (including 16 enhancements); USSC, Quick Facts Drug Trafficking Offenses (reporting that among individuals sentenced for drug trafficking in FY23, "43.5% were Hispanic, 27.6% were Black,

enhancement would further exacerbate those problems. And if the Commission is looking to draw meaningful distinctions within §2D1.1(b)(1), it is looking in the wrong place.

1. It makes no sense to call for a higher offense level for a drug offense based on whether a weapon meets the NFA definition of "machinegun."

This proposal arises from DOJ concerns about dangers posed by machineguns—which it claims is particularly acute now because of an increased prevalence of machinegun conversion devices ("MCDs"), which make regular firearms operate like machineguns.[132] But the Commission's data identify only 148 cases that received the §2D1.1(b)(1) enhancement involving a machinegun, which is too small of a sample size on which to base national policy.[133] With such limited data, the Commission should obtain more information on how these cases are sentenced and their offense characteristics to determine whether the existing guideline adequately captures the seriousness of this conduct. Until then, we continue to urge the Commission to listen to the gun safety and public health experts who warn that we cannot incarcerate our way out of gun violence and increases in punishment will not have a deterrent effect.[134]

25.8% were white, and 3.0% were Other races"); *see also United States v. Diaz*, No. 11-cr-821-2, 2013 WL 322243, at *10 (E.D.N.Y. Jan. 28, 2013) ("[T]he Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.").

[132] *See* USSC, *Proposed Amendment: Drug Offenses*, at 108 (Jan. 24 ,2025); *see also* DOJ 2024–2025 Priorities Letter, at 2–5 (July 14, 2024).

[133] USSC, *Public Data Briefing Proposed Amendments on Drug Offenses*, at 32.

[134] *See* Defenders' Comment on the USSC's Proposal on Firearms, at A-1–2 (Feb. 3, 2025) (discussing how "public health and firearms safety experts warned that protecting communities from gun violence demands systemic solutions beyond increased incapacitation of individual downstream actors"); *cf.* Defenders' Comment on the USSC's 2023 Firearms Proposed Amendments, at 26 (March 14, 2023) ("While DOJ requested the serial-number increase to 'provide stronger deterrence and better reflect the harm of these offenses', since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value.").

The idea here is that there's a need to distinguish between machineguns (defined to include MCDs) and other weapons.[135] But as far as we know, no guideline distinguishes between specific firearm types other than guidelines dealing with firearm-based offenses.[136] In non-firearm-offense guidelines, to the extent that there is a distinction related to firearms, it is based on conduct: *how* the firearm was used rather than the specific type involved.[137] It does not make sense to break new ground here by creating an especially high sentence enhancement for §2D1.1 simply because this type of firearm is currently (or at least was recently) a DOJ priority.[138]

Introducing this unprecedented distinction would only exacerbate the problems already present in §2D1.1. As discussed above in Part A, the drug trafficking guideline already produces ranges that judges and commentators have criticized as "excessively severe,"[139] meaning that guideline ranges need

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[135] *See* DOJ 2024–2025 Priorities Letter, at 4 (claiming that it makes "little sense" to treat all firearms identically).

[136] *Compare, e.g.,* USSG §2B1.1(b)(2) (providing enhancements for firearms without reference to type), *with, e.g.,* USSG §§2K2.1(a)(3) (providing different base offense level for offenses involving firearms described in 26 U.S.C. § 5845(a)), 2K2.4 (similar). The Commission's introduction to this proposal compares §2D1.1 with § 924(c), which *does* distinguish between firearms. *Proposed Amendment: Drug Offenses*, at 108. But this just underscores that §2D1.1 is a guideline for offenses that don't distinguish between types of firearms while firearm-focused offenses (and their corresponding guidelines, such as §2K2.4) do just that. And indeed, this reference to § 924(c) is a reminder that if the government is concerned about a particular type of firearm, it has statutory tools for addressing that, making an increase to the drug trafficking guideline unnecessary. *See also* § 922(o) (unlawful possession of a machinegun).

[137] *See, e.g.*, USSG §§2A2.2(b)(2) (aggravated assault), 2B3.1(b)(2) (robbery).

[138] We have a new federal executive since DOJ submitted its priority letter regarding machineguns, so it remains to be seen if this will remain a priority. *See* Exec. Order No. Order 14,206, 90 Fed. Reg. 9503 (Feb. 7, 2025) (ordering that within 30 days, the Attorney General shall review all actions and positions of executive departments "to assess any ongoing infringements of the Second Amendment rights of our citizens"); *see also United States v. Brown*, No. 3:23-cr-123, 2025 WL 429985, at *5 (S.D. Miss. Jan. 29, 2025) (finding a § 922(o) prosecution unconstitutional under the Second Amendment after finding that the government failed to identify a sufficient historical tradition justifying dispossession of machineguns).

[139] *See, e.g., Diaz*, 2013 WL 322243, at *1; USSC, Results of Survey of United States District Judges January 2010 through March 2010, Question 3 (2010) (finding 58% of judges surveyed believe the guidelines should be "delinked" from

to go down, not up. Furthermore, this proposal undermines the goal of simplification.[140] Countless distinctions could be drawn between different types of weapons—after all, §2D1.1(b)(1) currently encompasses weapons ranging from walking sticks to firearms to rocket launchers.[141] But doing so would only add unnecessary complexity to a guideline already burdened with 16 SOC enhancements.[142] And it would also shift focus away from the core offense at issue: drug trafficking.

Making matters worse, the proposal would lead to absurd results. By incorporating the National Firearms Act definition in 26 U.S.C. § 5845(b) ("NFA"), the four-level increase would apply to unattached MCDs. As we've emphasized in earlier comments this Amendment Cycle, MCDs are firearm parts, not standalone firearms. [143] They can resemble innocuous items like a Lego piece or bottle opener. On their own, they are harmless. Yet, under this proposal, an unattached MCD (which cannot cause injury) would be punished more severely than a fully manufactured firearm (which can cause death). This defies common sense, as it would mean that the weapon on the left warrants only a two-level enhancement, while the harmless item on the right results in a four-level enhancement:

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statutory mandatory minimum, which would reduce severity while only 22% disagreed); Peter Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) ("Federal sentences for drug offenders are often too severe; they offend justice . . . .").

[140] *See* R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) ("complexity of the guidelines" has created a "facade of precision" that "undermines the goals of sentencing").

[141] Under the current framework, §2D1.1(b)(1) makes no distinction among dangerous weapons—whether they are fake guns, knives, handguns, sniper rifles, or something else. *See United States v. Dayea*, 32 F.3d 1377, 1379 (9th Cir. 1994) ("[C]ourts have found that, in the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes, irons, and stink bombs.").

[142] *Compare with* USSG §2D1.1(b) (1987) (containing just one specific offense characteristic: (b)(1)—the SOC addressed by this proposal). It is worth emphasis here: the current proposal would alter the only SOC that has been with us from the very start, extending §2D1.1's "factor creep" problem to (b)(1) internally).

[143] *See* Defenders' 2025 Firearm Comment, at A-12–13.

2-level enhancement (50-caliber sniper rifle)	4-level enhancement (MCD)
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2. If the goal is to draw meaningful distinctions within §2D1.1(b)(1), Defenders urge the Commission to focus on the standard underlying that SOC, which currently fails to distinguish between personal and vicarious weapon possession.

Section 2D1.1(b)(1)'s two-level enhancement applies anytime "a dangerous weapon (including a firearm) was possessed," regardless of whether the individual being sentenced personally possessed the weapon.[145] It does not require that the individual even be aware of another person's possession of the weapon, so long as it was reasonably foreseeable.[146] In drug cases, courts frequently conclude that firearms and drug activity are inherently linked, effectively making weapon possession almost always foreseeable and the enhancement almost always applies when drugs and guns are found.[147] Contrast this standard with Congress's assessment of

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[144] The image of the 50-caliber sniper rifle does not depict the actual size of a 50-caliber sniper rifle; the picture of the MCD attempts to approximate the size of numerous, actual MCDs.

[145] *See United States v. Hernández*, 964 F.3d 95, 105 (1st Cir. 2020) (discussing how it is enough that someone involved with the offense possessed the weapon, so long it as it is reasonably foreseeable).

[146] *See id.* (rejecting without disputing Defendant's contention that his lack of awareness of firearm foreclosed SOC).

[147] *See, e.g., United States v. Miranda-Martinez*, 790 F.3d 270, 276 (1st Cir. 2015) ("[W]e have often observed that firearms are common tools in drug trafficking conspiracies involving large amounts of drugs . . . ." (quotation omitted)); *United States v. Ramirez*, 783 F.3d 687, 690–91 (7th Cir. 2015) ("We have said that 'the

when possession of a firearm makes a drug offense more serious: where "*the defendant* . . . possess[ed] a firearm or other dangerous weapon (or induce[d] another participant to do so) in connection with the offense."[148]

And taking §2D1.1(b)(1)'s already broad standard further, guideline commentary provides that the enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."[149] This "clearly improbable" standard is unique—it appears nowhere else in the guidelines or criminal law. The Eighth Circuit views it as setting an extremely "low bar for the government" to establish the weapon's connection to the drug offense,[150] while others treat it as imposing an (extremely high) burden on the defense to disprove the connection.[151] Either way, this standard ensures that the enhancement applies in nearly every case where a weapon is found, no matter how attenuated its connection to the drug offense.[152] In *United States v. Anderson*, for example, the Eighth Circuit affirmed the two-level enhancement where the firearm was never seen in the

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drug industry is by nature dangerous and violent, and a reasonable fact-finder is permitted to use his or her common sense in concluding that in a drug deal involving sizable amounts of money, the presence of firearms is foreseeable.'" (citation omitted)); *United States v. Garcia*, 909 F.2d 1346, 1350 (9th Cir. 1990) (applying enhancement where individual had no knowledge of co-conspirator's firearm, after finding he "should reasonably have foreseen that [co-conspirator] would possess a gun during the execution of such a major drug sale").

[148] 18 U.S.C. § 3553(f)(2) (emphasis added); *see also* USSG §5C1.2 (safety valve guideline based on § 3553(f)), §4C1.1(7) (zero-point offender exclusion).

[149] USSG §2D1.1 App. N. 11(A).

[150] *See, e.g.*, *United States v. Anderson*, 618 F.3d 873, 877 (8th Cir. 2010) ("The [§2D1.1(b)(1)] enhancement creates a very low bar for the government to hurdle.").

[151] *See, e.g.*, *United States v. Montenegro*, 1 F.4th 940, 945–46 (11th Cir. 2021) (placing on defendant burden to "negate any possible connection" between firearm and drug offenses); *see also United States v. Denmark*, 13 F.4th 315, 318 (3d Cir. 2021) (noting defendant bears the burden of proving a lack of connection after the government makes its initial showing that a dangerous weapon was possessed); *United States v. Lee*, 966 F.3d 310, 328 (5th Cir. 2020) (same); *United States v. Kennedy*, 65 F.4th 314, 318 (6th Cir. 2023) (same).

[152] *See, e.g., United States v. Drozdowski*, 313 F.3d 819, 822 (3d Cir. 2002) (noting that "defendants have rarely been able to overcome the 'clearly improbable' hurdle"); *United States v. Garcia*, 925 F.2d 170, 173 (7th Cir. 1991) (interpreting the enhancement to apply in all but very rare cases, with exceptions limited to those where the facts are "nearly identical to those" of the Application Note's hypothetical unloaded rifle in the closet).

individual's possession and was instead secured in a locked safe, within a locked storage unit, located miles away from the residence where he was trafficking drugs.[153] Likewise, in *United States v. Lucas*, the Sixth Circuit upheld application of the enhancement to a driver found with a firearm, even though the stop occurred at a location unrelated to the drug trafficking conspiracy, on a date with no evidence of drug sales, and in a vehicle with no drug paraphernalia (the vehicle was pulled over solely because it had expired plates and excessive window tint).[154]

The flaws with §2D1.1(b)(1)'s standard have not gone unnoticed by the bench or legal commentators.[155] In his concurrence in *Anderson*, for example, Judge Kornmann minced no words:

> The Sentencing Commission should immediately revise in a logical fashion Application Note [11(A)] to the guideline in question . . . . We are told to apply the enhancement "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." What does it mean to "be present"? Apparently, it is sufficient if the weapon is present somewhere or perhaps anywhere . . . . There is something fundamentally wrong with this state of the law. What ever happened to the common requirement that all the evidence against the defendant at a sentencing hearing must meet at least a preponderance of the evidence standard? Should

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[153] *Anderson*, 618 F.3d at 877; *see also* Appellant's Br. in *Anderson*, No. 09-1733, 2009 WL 2003609 (8th Cir. June 29, 2009) (discussing how the trial testimony established that "pistol was located in a Sentry brand safe in a locked storage unit rented by defendant's girlfriend," which was located "several miles from Anderson's apartment," and no witness "testified to observing a pistol on Anderson's person at any time or at his apartment").

[154] *Cf. United States v. Lucas*, 529 F. App'x 463, 464–65 (6th Cir. 2013) (describing circumstances of arrest), *with id.* 466 (holding that possessing firearm during the time period of a conspiracy sufficed to apply enhancement).

[155] *See, e.g.*, *Anderson*, 618 F.3d 873, 886 (Kornmann, J., concurring); Brian R. Christiansen, Comment, *The Clearly Improbable Intent of United States Sentencing Guideline Section 2D1.1(b)(1): Imposing Additional Prison Time Whenever a Weapon 'Is Present Somewhere, Perhaps Anywhere*,*'* 34 Hamline L. Rev. 331 (2011); Ellen E. Cranberg, Note, *A Definition Out of Reach*, 105 Iowa L. Rev. 1799 (2020).

> enhancements be levied based on "might haves" or "could haves" or something similar? I submit not . . . . A "not clearly improbable" standard, in effect, shifts the burden of proof to the defendant. This should not be permitted under our system of justice.[156]

These criticisms may help explain why, in fiscal year 2023, over 65% of cases sentenced under §2D1.1 that received the (b)(1) enhancement received sentences that fell *below* the guideline range.[157]

This standard would create additional and unique problems if applied to MCDs—problems that would be magnified if MCDs garnered an even higher enhancement. By permitting an enhancement based on the relevant conduct of others, there is a substantial risk that individuals will face a 4-level increase despite being wholly unaware that an MCD was involved. MCDs come in many forms and can be difficult to recognize without specialized firearms training. For example, they can resemble innocuous objects like a Lego piece, coat hanger, or bottle opener, as shown below:



These devices are not only easy to overlook when they are unattached to a firearm, but their small and low-profile design make them easy to overlook

[156] *Anderson*, 618 F.3d at 886 (Kornmann, J., concurring).

[157] USSC, FY 2023 Individual Datafiles.

when affixed to a firearm—even by those who are familiar with firearms, and especially by those who are not.[158]

In short, §2D1.1(b)(1)'s incredibly broad, nearly automatic application fails to distinguish between more and less culpable conduct, or even between firearm possession that was truly connected to drug-trafficking rather than any of the reasons non-drug-trafficking Americans possess firearms—which is important, considering that this guideline is intended to address drug trafficking, not firearms offenses. Defenders anticipate these problems will worsen with the inclusion of MCDs.

For the above reasons, the Defenders urge the Commission to reject Part D of the proposed amendment. If the Commission believes action is necessary, the proposed enhancement should, at a minimum, (i) be tailored to the individual's conduct, (ii) include a mens rea requirement, and (iii) avoid capturing unaffixed MCDs because they represent less of a danger than a fully manufactured firearm. And regardless of what the Commission does with the Part D proposal, Defenders urge the Commission to revisit §2D1.1's application standard, by amending the text of this enhancement so that it mirrors § 3553(f)(2)—focusing on whether "the defendant" possessed a dangerous weapon or induced another participant to do so, "in connection with the offense" and also eliminating the "clearly improbable" language from guideline commentary.

VI. PART E: The Commission should promulgate this part of the proposal, to help clarify the law and reduce unwarranted disparities.

Defenders thank the Commission for Part E of the proposed amendment, which provides a much-needed clarification to U.S.S.G. §5C1.2's "safety valve" provision by confirming that eligibility does not require an in-person meeting with law enforcement. Nothing in the text of 18 U.S.C. § 3553(f) imposes such a requirement. Yet, in some districts, a practice has developed in which our clients must meet with law enforcement or an Assistant U.S. Attorney before the government will acknowledge their

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[158] *See* Erin Wise, *ATF sees rise in quarter-sized switch that turns handguns into machine guns*, WBMA (May 19, 2022) (describing police officer not recognizing Glock switch on seized weapon before submitting as evidence).

truthful statements, and the court will grant safety-valve relief. This unwarranted practice has created an extra-statutory hurdle, resulted in geographic sentencing disparities, and exposed our clients to safety risks.

As the Commission recognizes in its introduction to Part E, there is no legal basis for requiring in-person meetings. Section § 3553(f)(5) simply mandates that, "not later than the time of the sentencing hearing, the defendant has truthfully provided the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." As courts have recognized, the "safety valve statute does not specify the form, place, or manner of disclosure."[159] All that matters is that the individual provide complete and truthful information.

Even so, an informal survey among Defenders revealed stark inconsistencies across jurisdictions. Some U.S. Attorney's Offices mandate in-person meetings before they will agree that § 3553(f)(5) is satisfied, while others do not. Even within the same office, some prosecutors impose the requirement, while others do not. These inconsistencies create arbitrary sentence disparities based purely on where a case is prosecuted or which prosecutor is assigned. And requiring an in-person meeting prioritizes form over substance, imposing an unnecessary barrier that distracts from the core statutory requirement: a complete and truthful disclosure.

Section 3553(f)(5) is not a tool for extracting cooperation, akin to §5K1.1 substantial assistance. The purpose of the safety valve is to allow individuals with limited criminal history who are convicted of low-level, non-

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[159] *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999); *see also, e.g.*, *United States v. Mejia-Pimental*, 477 F.3d 1100, 1107 n.12 (9th Cir. 2007) ("That the proffer was written and not oral is of no consequence, because the safety valve allows any provision of information in any context to suffice, so long as the defendant is truthful and complete." (quotation omitted)); *United States v. Montanez*, 82 F.3d 520, 522 (1st Cir. 1996) ("Nothing in the statute, nor in any legislative history drawn to our attention, specifies the form or place or manner of the disclosure" to satisfy the safety valve disclosure requirement); *United States v. Altamirano-Quitero*, 511 F.3d 1087, 1092 n.7 (10th Cir. 2007) (Section 3553(f) "does not specifically mention debriefing," nor does it "further prescribe how the defendant must convey this information to the government. . . . There may be many ways that a defendant could provide the Government with information sufficient to satisfy § 3553(f)(5)").

violent drug offenses to avoid mandatory minimums, so long as they are honest about their offense; it is not an investigative tool for prosecuting others. Congress enacted § 3553(f) "to remedy an inequity in the old system, which allowed [§5K1.1] relief from statutory minimum sentences to those defendants who rendered 'substantial assistance to the Government'—usually higher-level offenders, whose greater involvement in the criminal activity resulted in their having more information—but effectively denied such relief to the least culpable offenders, who often 'had no new or useful information to trade."[160] Thus, § 3553(f)(5) explicitly says that an individual's inability to provide relevant or useful information does not disqualify them from receiving safety-valve relief.[161] By contrast, §5K1.1 explicitly ties sentencing reductions to an individual's cooperation in investigating or prosecuting others. The two provisions serve distinct purposes[162] and attempts to conflate them undermines Congress's intent.

And where prosecutors require in-person meetings with law enforcement, safety concerns arise. Indeed, as the Commission's proposal recognizes, many of our clients forego seeking safety-valve relief due to these concerns. Requiring an in-person meeting often necessitates transporting an individual from a detention facility to a U.S. Attorney's Office, which immediately marks the individual as a potential cooperator and places them at significant risk of harm. Further, clients fear a report of that safety valve meeting's information will be disclosed to other individuals once they are charged, labeling them as "cooperators" when they really did not – all the risk with none of the benefit and given only with the hope of receiving less than the mandatory minimum.

By clarifying that in-person meetings are not required, the Commission will help protect the safety of our clients, curb this improper

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[160] *United States v. Reynoso*, 239 F.3d 143, 148 (2d Cir. 2000) (cleaned up)).

[161] § 3553(f)(5) ("[T]he fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.").

[162] *See United States v. Acosta-Olivas*, 71 F.3d 375, 379 (10th Cir. 1995) ("Section 5K1.1 concerning substantial assistance operates very differently from § 5C1.2.").

practice, and ensure that safety-valve relief is applied consistently, as Congress intended.