March 3, 2025

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Practitioners Advisory Group Comment on Proposed Amendments to the Sentencing Guidelines, January 24, 2025

Dear Judge Reeves:

The Practitioners Advisory Group (PAG) submits these comments regarding the Commission's proposed multi-part amendments to: (1) the guidelines related to supervised release in Chapters 5 and 7 of the Guidelines Manual; and (2) U.S. Sentencing Guidelines §2D1.1 and §5C1.2, related to drug offenses.

I. Supervised Release

The Commission has proposed amendments to Chapters 5 and 7 of the Guidelines Manual to give sentencing courts greater discretion to determine terms and conditions of supervised release, and to respond to violations of a condition of probation or supervised release. The PAG supports these amendments and offers its views on both parts of these proposals below.

A. Chapter Five Amendments

Part A of the Commission's proposal directs sentencing courts to make an "individualized assessment" of the statutory factors under 18 U.S.C. §§ 3583(c)-(e) to assist courts in deciding whether supervised release is necessary, and, if so, the duration of the term and the conditions of supervision.[1] The PAG addresses each of the Commission's issues for comment.

[1] *See* U.S.S.C., Proposed Amendments to the Sentencing Guidelines ("Proposed Amendments") at 4-23 (Jan. 24, 2025), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf.

1(a). Guidance Provided by an Individualized Assessment of Statutory Factors

The PAG supports this amendment and believes it is consistent with several Supreme Court decisions. In *Koon v. United States*, the Court noted that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge *to consider every convicted person as an individual and every case as a unique study in human failings* that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[2]

Four years after *Koon*, the Court addressed the propriety of imposing a further term of supervised release after the original term was revoked. The Court explained that:

> [S]upervised release departed from the parole system it replaced by giving district courts the freedom to provide post-release supervision for those, and only those who needed it. . . . Congress aimed, then, to use the district court's discretionary judgment to allocate supervision to those releasees who needed it most."[3]

This proposed amendment highlights one of the foundations for supervised release – it should not be needlessly imposed, and precious probationary resources should not be "wasted on supervisory services for releasees who do not need them."[4] This is nothing new as this individualized assessment requirement has, at least impliedly, long been part of the federal sentencing process. It has informed, and will continue to inform, sentencing courts on issues including whether a supervised release term is appropriate, the length of the term, as well as the conditions of supervision.

1(b). Defendants' Criminal and Substance Abuse Histories

The Commission asks whether it should retain the commentary in §5D1.1 directing courts to consider, among other factors, a defendant's criminal history and substance abuse history when determining whether to impose a term of supervised release.[5] Given that this commentary incorporates the individualized sentencing factors under 18 U.S.C. § 3553(a),[6] these factors are already part of any individualized assessment. Maintaining criminal history and substance abuse history separate from the 3553(a) factors serves to highlight two factors among many that courts typically consider, and the PAG does not believe that it is necessary to single these out for specific attention in every case. Accordingly, the PAG does not support maintaining the factors of criminal history and substance abuse in the commentary to §5D1.1.

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[2] *Koon v. United States*, 518 U.S. 81, 113 (1996) (emphasis added).

[3] *Johnson v. United States*, 529 U.S. 694, 709 (2000).

[4] S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983).

[5] *See* Proposed Amendments at 6-7, 23-24.

[6] *See* Proposed §5D1.1 n.1, Individualized Assessment, Proposed Amendments at 6-7.

2. Supervised Release Should Not Be Imposed in Cases Involving Deportable Aliens

Under §5D1.1(c) and its commentary in §5D1.1 n.5, courts are generally discouraged from imposing terms of supervised release in cases where the defendant is a deportable alien.[7] The Commission has not specifically proposed an amendment to this guideline and its commentary, but seeks input on whether these provisions should be amended to "further discourage the imposition of supervised release for individuals who are likely to be deported."[8]

The PAG supports amending the guideline and/or the commentary to make clear that terms of supervised release for deportable aliens are: (1) inconsistently imposed across the country; (2) generally unnecessary since most aliens are deported; and (3) divert resources that are better allocated to other defendants who need more intensive assistance while on supervision.

To further discourage courts from imposing terms of supervised release in cases involving deportable aliens, the PAG proposes that §5D1.1(c) be amended as follows:

> Absent extraordinary circumstances, the court should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

In addition, the PAG recommends that the commentary in §5D1.1(c) n.5 be amended to be consistent with this, and that the last sentence of the existing commentary be excised.

3. Early Termination and the Proposed §5D1.4

The Commission proposes adding §5D1.4 to the Guidelines Manual, which provides a non-exhaustive six-factor checklist to consider in adjudicating motions for early termination of supervised release. The PAG supports this amendment as it provides courts, practitioners, and releasees a framework of issues to address and evaluate in determining the propriety of early termination. Furthermore, these considerations are consistent with the Commission's emphasis on making an "individualized assessment" of a releasee's performance on supervised release.

In the commentary to §5D1.4, the PAG suggests that the Commission encourage courts to grant early termination of supervised release if the only articulable ground for supervision is the collection of outstanding special assessments, fines, and/or restitution. In the PAG's experience, far too often releasees are not terminated early because of unretired financial obligations imposed as part of the original sentence. The PAG believes that probation offices should not serve as collection agencies, holding the cudgel of revocation over the heads of releasees to collect outstanding debts. Keeping a releasee on supervision for this sole purpose wastes finite supervision services on releasees who do not need them.

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[7] *See* §5D1.1(c) & n.5; see also Proposed Amendments at 6 & 8 (renumbering note 5 as note 6).

[8] *See* Proposed Amendments at 24.

Importantly, there is a well-funded mechanism already in place to efficiently and effectively collect these debts. Once a judgment memorializing fines, restitution and special assessments is filed, it becomes a collectible judgment. Each United States Attorney's Office's Financial Litigation Program (FLP) is staffed and equipped to collect these obligations without any assistance from a United States Probation Office.

4. Transfer of Earned Credits to Inmates Sentenced to Complete Supervised Release

In this issue for comment, the Commission has identified language in the First Step Act ("FSA") that allows the Director of the Bureau of Prisons ("BOP") to transfer earned time credits to inmates sentenced to complete terms of supervised release. This transfer could result in an inmate's early release, transition to an alternative form of incarceration, or placement on supervised release. The express language of this provision, 18 U.S.C. § 3624(g)(3), however, does not allow the transfer of these credits to inmates with no terms of supervision to complete.

FSA credits can be earned by all inmates who are eligible under 18 U.S.C. § 3632(d)(4)(D).[9] Thus, these credits are not contingent on an inmate's need to complete a term of supervised release; rather, these credits are predicated on an inmate fulfilling the statutory eligibility requirements and his or her successful participation in BOP programming. The potential for disparate treatment arises with the transfer of earned credits to inmates with supervised release terms; such transfer cannot occur to inmates without terms of supervised release. There are other statutory provisions outside of the FSA that can accomplish the same result for inmates without terms of supervision.

For example, the Director of the BOP

> shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.[10]

Unlike 18 U.S.C. § 3624(g)(3), this broad grant of authority is not limited to prisoners sentenced to a term of supervised release. Eligibility for early release under 18 U.S.C. § 3624(c)(1) is not automatic, but neither is it automatic under 18 U.S.C. § 3624(g)(3). Both provisions require the

[9] *See* 18 U.S.C. § 3632(d)(4)(D) (identifying approximately 68 statutes of conviction making an inmate ineligible to receive time credits under this provision).

[10] 18 U.S.C. § 3624(c)(1).

Director of the BOP to make an individualized assessment of the inmate, both before and after sentence was imposed, to determine if early release is appropriate.[11]

There is no tangible difference in the custodial status for those released pursuant to either 18 U.S.C. §§ 3621(g)(3) or 3624(c)(1). Inmates falling under the umbrella of 18 U.S.C. § 3624(g)(3) would be placed on supervised release in "prerelease custody," which could take the form of either "home confinement"[12] or placement in a "residential reentry center."[13] Similarly, inmates falling within the ambit of 18 U.S.C. § 3624(c)(1) would be released to "prerelease custody," which consists of "home confinement"[14] or "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community" and which "may include a community correctional facility."[15]

There are three distinctions that can be made for prisoners released under 18 U.S.C. § 3624(g)(3) and those released under 18 U.S.C. § 3624(c)(1). First, if a prisoner is placed on supervised release under 18 U.S.C. § 3624(g)(3) and s/he violates a condition of supervision while in prerelease custody, a supervised release violation hearing would be convened. For inmates released under 18 U.S.C. § 3624(c)(1), any violation while in prerelease custody would result in their return to the BOP. That is because the individual would still be a ward of the BOP, not subject to court supervision, during prerelease custody when the violation occurred. Second, an important component for release under 18 U.S.C. § 3624(c)(1) is the sentencing court's recommendation,[16] whereas this is not a consideration under 18 U.S.C. §§ 3624(g)(1) & (3). Finally, 18 U.S.C. § 3621(b)(5) requires the Director of the BOP to consider the Commission's relevant policy statements, whereas 18 U.S.C. § 3624(g)(3) lacks a similar requirement.

The PAG believes the unintended consequence identified by the Commission in its issue for comment can be addressed by adding commentary to §5D1.2, reminding sentencing courts of three important points. First, all FSA credits will be awarded to eligible inmates who earn them. Second, these earned credits can be transferred to inmates with terms of supervised release and might result in their early release and placement on supervision; however, these credits will not be similarly transferred to inmates without terms of supervised release. Third, for those inmates without terms of supervised release, 18 U.S.C. § 3624(c)(1) authorizes the Director of the BOP to place eligible inmates in prelease custody.

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[11] Under 18 U.S.C. § 3624(g)(3), the Director of the BOP must consult criteria found in 18 U.S.C. § 3624(g)(1). In contrast, in making a judgment to release under 18 U.S.C. § 3624(c)(1), the Director must consult the factors listed in 18 U.S.C. § 3621(b).

[12] *See* 18 U.S.C. § 3624(g)(2)(A).

[13] *See* 18 U.S.C. § 3624(g)(2)(B).

[14] *See* 18 U.S.C. § 3624(c)(2).

[15] *See* 18 U.S.C. § 3624(c)(1).

[16] *See* 18 U.S.C. § 3621(b)(4)(B).

5. Reframing Conditions of Supervised Release in §5D1.3

The Commission's proposed amendments to §5D1.3 primarily involve a change in the nomenclature referencing "standard" and "special" conditions of supervised release.[17] The PAG supports the proposed amendment to rename "standard conditions" to "examples of common conditions." This modification is consistent with the Commission's emphasis that an individual's needs, not the rote application of standardized guidelines, should guide a court's decision on the appropriate conditions of supervision. Because supervisees are individuals, conditions of supervision should be tailored to their needs, not a laundry-list of "standards."

As part of the amendment, the Commission also adds a proposed "special condition" for a defendant to participate in a program to obtain either a high school or equivalent diploma. The PAG supports this special condition, but asks the Commission to add commentary indicating that a supervisee's failure to obtain either a high school or equivalent diploma, alone, should not be the basis for revocation of supervised release.

6. Completion of Reentry and Treatment Programs Should Be Included as Factors for Consideration in Determining Whether Early Termination of Supervised Release is Warranted

In addition to the factors listed under the proposed policy statement in §5D1.4(b), the PAG urges the Commission to include successful completion of reentry and similar programs. The completion of a reentry program fulfills many of the purposes promoted by the six factors already contained in §5D1.4. Moreover, given the intense nature of these programs, with the participation of judicial officers, probation officers, federal prosecutors and federal defenders, successful completion is a good predictor of rehabilitation and lower incidences of recidivism.[18]

At the time of sentencing, courts do not have a crystal ball. There is no way of knowing whether a defendant with substance use issues will be admitted to the BOP's Residential Drug Abuse Treatment Program ("RDAP"), and, even if admitted, there is no way of knowing whether the defendant will be an RDAP "Completer" or a "Participant."

In 2022, the Commission published a study analyzing the recidivism rates of inmates who participated in RDAP and were released in 2010.[19] Over the eight-year period studied, 48.2% of those who completed RDAP were rearrested, while 59.2% of those who merely participated in

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[17] *See* Proposed Amendments at 10-17.

[18] *See* S.G. Lawson et al., *Does Reentry Court Completion Affect Recidivism Three Years After Exit? Results from a Retrospective Cohort Study*, Corrections: Policy Practice and Research at 23 (2021).

[19] *See* U.S.S.C., *Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010* (May 2022) ("Recidivism and RDAP Report"), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf.

RDAP were rearrested. The recidivism rate for "RDAP Eligible Non-Participants" was 68%.[20] Completing RDAP and sobriety while on court supervision are reliable predictors of rehabilitation. For those defendants who both participated in RDAP and have demonstrated sobriety while on supervised release, §5D1.4 also should include these as factors for courts to consider when determining whether early termination of supervised release is warranted.

7. Procedures in Early Termination Cases

The Commission seeks comment on what guidance, if any, should be given to courts adjudicating motions for early termination under §5D1.4. The PAG believes this guidance is not within the purview of the Commission. Instead, this direction should come from the Judicial Conference's Standing Committee on Rules of Practice and Procedure ("Standing Committee"). This body advises the Judicial Conference on changes to federal court procedural rules and recommends proposed rule changes to the Judicial Conference. This committee is comprised of federal judges, practicing lawyers, law professors, state chief justices, and DOJ representatives. As the national policymaking body for federal courts, the Judicial Conference is the appropriate body to establish the procedural/due process guardrails for early termination cases.

It is noteworthy that the Standing Committee admirably performed this function in Federal Rule of Criminal Procedure 32.1, which carefully considered the due process rights afforded to defendants when their terms of supervised release are revoked or modified.

Despite a preference to defer to the Standing Committee to establish the procedural requirements, the PAG believes that the Commission should encourage courts to appoint counsel to assist indigent releasees in drafting motions for early termination. In the PAG's experience, when indigent clients approach courts for early termination, they are proceeding *pro se* and their filings are parochial. Typically, the "motion" takes the form of a handwritten letter that does not come close to synthesizing the six factors that may become the cornerstone of §5D1.4(b)(1)-(6). Because a releasee must shoulder the burden of demonstrating that the interests of justice and the releasee's conduct justify early termination,[21] courts should be encouraged to appoint counsel to assist indigent defendants in properly preparing and litigating motions for early termination after a *pro se* "motion" is received.

B. Chapter 7 Amendments

The Commission proposes to amend Chapter Seven, which addresses how courts are to consider violations of terms of probation and supervised release. The Commission has proposed an approach that: (1) gives courts and probation officers more guidance and flexibility when addressing violations of probation and supervised release; (2) clarifies the fundamental differences between the two; and (3) re-emphasizes the individualized nature of federal sentencing. The PAG supports this approach.

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[20] *See* Recidivism and RDAP Report at 20.

[21] *See* 18 U.S.C. § 3583(e)(1).

1. The Individualized Approach

First, the PAG supports the Commission's decision to adopt an "individualized" approach to addressing violations of probation and supervised release. A court's duty "to make a particularized assessment (based on the facts presented) of the [18 U.S.C.] § 3553(a) concerns" is "considered the hallmark of 'individualized' sentencing" under the Sentencing Reform Act of 1984 (SRA), as amended by *United States v. Booker* and *Gall v. United States*.[22] The PAG sees no reason why this same individualized approach should not be used when addressing violations of probation and supervised release.

Second, the PAG supports the Commission's decision to adopt new policy statements that specifically address violations of supervised release, thereby separating the guidelines' treatment of probation violations from violations of supervised release. Separating the two will remind all stakeholders that probation and supervised release are fundamentally different and serve different purposes in the sentencing process.[23] To that end, and in response to the Commission's sixth issue for comment regarding the second part of the amendment, the PAG suggests that a defendant's criminal history score at the time of sentencing should play *no* role in a court's response to alleged violations of that defendant's supervised release. The PAG views the defendant's criminal history score as nothing more than a criterion to assist a court in determining what type and amount of punishment should be imposed at the defendant's sentencing hearing. Since supervised release has nothing to do with punishment,[24] the PAG views the criminal history score as largely irrelevant in proceedings to address violations of supervised release but recognizes that it should still play a role in probation revocation proceedings.

2. Promoting Judicial Discretion

The PAG also supports how the proposed amendment increases judicial discretion for courts responding to violations of supervised release. For example, the PAG supports the Commission's decision to include commentary for the new policy statement in §7C1.3 for responding to violations of supervised release that provides sample guidance for how non-compliant behavior should be addressed. However, instead of merely referring to "additional resources" that a defendant may need to regain compliance, the PAG recommends adding

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[22] *United States v. Flores-Gonzalez*, 86 F.4th 399, 422 (1st Cir. 2023) (discussing *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007)).

[23] *See United States v. Lewis*, 90 F.4th 288, 294 (4th Cir. 2024) (discussing "the nature of supervised release" and how it is "a post-incarceration program intended to assist individuals in their transition to community life") (citation and internal quotation marks omitted); *United States v. Wright*, 607 F.3d 708, 714 (11th Cir. 2010) (observing that "probation is a sentence in and of itself" and that it "may be used as an alternative to incarceration, provided that the conditions imposed serve the statutory purposes of sentencing").

[24] *See* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release* ("Shadow Sentencing"), 18 Berkeley J. Crim. L. 180, 191 (2013) (discussing the origins of supervised release and how it was never "intended to be imposed for the purposes of punishment or incapacitation").

language that provides a non-exhaustive list of what the typical resources might be, *e.g.*, substance abuse treatment (outpatient and inpatient), mental health treatment, or vocational training. Including specific examples will leave no doubt that the Commission wants courts to be open-minded and flexible when responding to violations of supervised release. Again, the primary goal at this stage of the case is not to punish offenders but instead "to rehabilitate persons discharged from prison and to assist their law-abiding return to society."[25]

With respect to the Commission's proposed §7C1.3 which presents two options for how courts are to respond to violations of supervised release, the PAG encourages the Commission to select Option One, as that option is more consistent with the Commission's stated priority of encouraging courts to adopt an "individualized" approach when responding to violations of supervised release. In contrast, a blanket mandatory revocation rule for Grade A or B violations (Option Two) is not at all individualized, and the PAG believes such a rule would be inconsistent with the proposed amendment's goal of promoting judicial discretion in revocation proceedings. The PAG also believes that the Commission should *refrain* from providing further guidance about when revocation is appropriate and simply leave courts with discretion to conduct individualized assessments in each case.

To that end, the PAG recommends that the Commission replace the Supervised Release Revocation Table with more limited, general guidance. Such guidance could provide, for example, the statutory limits for minimum and maximum terms of imprisonment that may be imposed upon revocation, re-emphasize the importance of the individualized nature of the sentencing process, and remind district courts that they are in the best position to decide what should happen to a defendant who violates supervised release.[26] Such guidance would be consistent with the Commission's proposed approach for how courts should respond to non-compliant behavior in §7C1.3.

3. <u>The Bottom Line: The PAG Supports Increased Flexibility and Re-focusing on Rehabilitation of the Defendant</u>

Under the SRA, "the main purpose of supervised release was rehabilitation."[27] Since that time, however, commentators have observed that "the primary purpose of supervised release has

[25] *United States v. Neal*, 810 F.3d 512, 519 (7th Cir. 2016).

[26] *See, e.g.*, *United States v. Sandoval-Velazco*, 736 F.3d 1104, 1107 (7th Cir. 2013) (noting that "the sentencing court is in the best position to determine the role that a defendant had" in criminal activity.).

[27] *See* Shadow Sentencing at 191.

[evolved into a desire] to protect the community from an offender presumed to be dangerous."[28] That, however, is the primary purpose of imprisonment, rather than supervised release.[29]

With the proposed amendment, the Commission redirects the focus of all stakeholders to the primary purpose of supervised release and how it differs from probation and imprisonment. The PAG wholeheartedly supports the amendment and recommends that it be promulgated via an approach that gives courts and probation officers increased options and flexibility when responding to *individual* violations of supervised release.

II. Drug Offenses

The Commission has proposed several amendments to the drug guideline in §2D1.1: (1) amending the Drug Quantity Table in §2D1.1(c); (2) adding a new specific offense characteristic for low-level trafficking functions at §2D1.1(b)(17); (3) deleting references to Ice in the Drug Quantity Table and amending the 10:1 ratio between methamphetamine and methamphetamine (actual); (4) revising the enhancement for marketing fentanyl and fentanyl analogues; (5) including a new enhancement for machineguns; and (6) amending the safety-valve provision. The PAG addresses each of these amendments in turn below.

A. Lowering the Drug Quantity Table

The PAG is grateful to the Commission for proposing amendments that would shift the focus of sentences for drug offenses away from the weight or quantity of drugs involved to the function a person performs in an offense. The Commission has studied this issue for decades, and the research has repeatedly demonstrated that drug quantity is a poor proxy for culpability. Indeed, even if the proposed amendments are enacted, quantity would still play an oversized role in the length of a person's sentence. But the proposals would move the guidelines in the right direction, and for that reason the PAG wholeheartedly supports them.

With respect to the options presented in Part A, Subpart 1 of the Drug Offenses Amendment, the PAG recommends that the maximum base offense level in the Drug Quantity Table in §2D1.1 be reduced to 30. To the extent the Commission is considering setting the highest base offense level in §2D1.1 at a lower level, the PAG agrees that the base offense level should be set significantly lower. Years worth of Commission data supports such a reduction.

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[28] *Id.* (citing Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 Fed. Sent. R. 204, 205 (1994)).

[29] *See* Franklin Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime*, New York: Oxford University Press (1995).

1. Congressional and Commission History Support a Focus on Function, Not Quantity

The stated purpose of the Anti-Drug Abuse Act of 1986 ("ADAA") was to increase penalties for, and focus law enforcement resources on, "serious" and "major" drug traffickers.[30] Then-Senate Minority Leader Robert Byrd explained the legislation's purpose as follows:

> For the kingpins — the masterminds who are really running these operations — and they can be identified by the amount of drugs with which they are involved — we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail — a minimum of 5 years for the first offense.[31]

Congress repeatedly expressed its intent to focus on the function a person performed in an offense and to target those at the helm of drug trafficking operations. Unfortunately, in setting mandatory minimum sentences, the ADAA used a poor proxy for function: drug quantity. As a result, defendants charged with trafficking the requisite type and quantity of drugs were subjected to the same five- or ten-year mandatory minimum, regardless of whether they were "running the[] operations" or merely acting as a lookout or other low-level employee.[32]

That the ADAA would be incorporated wholesale into the guidelines was not a foregone conclusion. Before the first set of guidelines was promulgated, the Commission collected and analyzed federal sentencing data to anchor the guidelines to real world experience.[33] The Commission relied on the data to set the guidelines for most other offenses, but not drug

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[30] U.S.S.C., *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* ("2011 Mandatory Minimum Report"), at 24 (2011), available at: https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[31] *Id.* (first quoting 132 Cong. Rec. 27,193-94 (Sept. 30, 1986); and then citing 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.")).

[32] *Id.*; *see United States v. Diaz*, No. 11-CR-821, 2013 WL 322243, at *5 & n.38, *12–13 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.).

[33] *See* U.S.S.C., *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987), available at: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf.

trafficking.[34] Instead, the Commission "employed the [ADAA's] weight-driven scheme."[35] This decision would have severe consequences, particularly for those less involved in operations involving large drug quantities.[36]

The ADAA was only intended to impose enhanced penalties on the managers and leaders of drug trafficking operations. The Commission could have limited the ADAA's influence on the guidelines by disregarding the mandatory minimums in the guidelines while "stipulat[ing] that whenever a mandatory minimum exceeds the applicable range, the statutory sentence controls," or by incorporating the mandatory minimums into the role-based adjustments.[37] Instead, the Commission disregarded the sentencing data it relied on in setting the guidelines for other offenses and inexplicably extended the ADAA's drug quantity scheme to *all* drug trafficking offenses.[38] This decision "had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes," even for those with low-level functions.[39]

Many years of application have proven that drug quantity is a poor metric for assessing culpability. In 1994, a United States Department of Justice report showed that although "[o]ne may have expected that larger drug quantities would be associated with the higher level functional roles[, t]his was not the case." Rather, "those with a peripheral role were involved

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[34] *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports," but "[t]he Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.").

[35] *Id*.

[36] *See Diaz*, 2013 WL 322243, at *5; Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return*, at 4–6 (2015).

[37] *Diaz*, 2013 WL 322243, at *5.

[38] *See* U.S.S.C., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("Fifteen Years of Guidelines Sentencing"), at 49 (2004); accord Diaz, 2013 WL 322243, at *6.

[39] Fifteen Years of Guidelines Sentencing, at 49; U.S. Dep't of Just., *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, at 3 (1994) ("Even among low-level drug offenders, sentences have increased 150 percent above what they were prior to the implementation of Sentencing Guidelines and a significant sentencing legislation which established mandatory-minimum sentences for primarily drug and weapons offenses."); *id.* ("Even for low-level defendants, the most significant determinant of their sentence was drug quantity. The defendant's role in the offense had only a small influence on the length of the eventual sentence.").

with more drugs than couriers and street-level dealers and almost as much as high-level dealers."[40]

As early as 2004, the Commission itself acknowledged that drug quantity may be "a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making."[41] At the same time, the Commission noted that drug quantity may "*under*estimate offense seriousness, and promulgated commentary encouraging upward departure in these situations."[42]

The Commission reiterated this conclusion in its 2011 report on mandatory minimums, writing, "Commission analysis indicates that the quantity of drugs involved in an offense is not as closely related to the offender's function in the offense as perhaps Congress expected," because even "offenders who performed lower-level functions such as Couriers and Mules also were convicted of drug offenses carrying a mandatory minimum penalty in a significant proportion of their cases (49.6% and 43.1%, respectively)" in the sample studied by the Commission.[43]

And in 2015, the then-Chair of the Commission, Judge Patti B. Saris, testified before Congress that "drug quantity is often not a reliable proxy for the function played by the offender, as Congress may have envisioned," noting that "over half of all drug offenders – 5,721 of 10,966 – who were convicted of an offense carrying a mandatory minimum penalty in fiscal year 2014 were convicted of an offense carrying a 10-year mandatory minimum, a penalty Congress intended to reserve for 'major' traffickers."[44]

For more than two decades now, the Commission has recognized that the guidelines' focus on drug quantity does not adequately reflect defendants' culpability. The Commission's proposed amendments in Part A seek to address this problem, and the PAG wholeheartedly supports their adoption.

2. Judicial Sentencing Behavior and Commission Data Support a Shift Away from Quantity and Towards Function

Federal judges, too, have repeatedly expressed in survey responses their concerns about the drug trafficking guidelines being linked with statutory mandatory minimums and the outsized effect of drug quantity on the guidelines' application. In a 1996 survey by the Federal Judicial Center, nearly eighty percent of district judges strongly agreed or somewhat agreed that the "Sentencing Guidelines should be 'de-linked' from the statutory mandatory minimum sentences," with

[40] U.S. Dep't of Just., An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories, at 45.

[41] U.S.S.C., Fifteen Years of Guidelines Sentencing, at 50.

[42] *Id.*

[43] U.S.S.C., 2011 Mandatory Minimum Report, at 350.

[44] *Hearing on H.R. 3713, Sentencing Reform Act of 2015, Before the H. Comm. on the Judiciary*, 114th Cong. (Nov. 18, 2015) (statement of Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n).

"[c]ircuit and district judges ranking the use of quantity as a sentencing factor first and second, respectively, as an area requiring substantive change."[45]

In a 2003 Commission survey, judges were asked, "For those cases where you believe that the guideline punishment levels do not reflect the seriousness of the crime, was it because the punishment was generally less than appropriate, more than appropriate, or sometimes greater/sometimes less?"[46] Judges provided responses for seven offense categories, including drug trafficking. More than 73% of the 354 responding judges said that the punishment for drug trafficking crimes was generally greater than appropriate, with the accompanying report noting that drug policy was the judges' top concern and greatest challenge to the guidelines, and that many judges expressed concern "regarding the harshness of penalties for minor drug offenders (particularly mules)."[47]

Again in 2010, the Commission surveyed federal district court judges for their views on sentencing practices and the guidelines. One question asked judges whether the "sentencing guidelines should be "de-linked" from statutory mandatory minimum sentences."[48] Fifty-eight percent strongly agreed or somewhat agreed, and another 19% were neutral on the issue.[49]

Many judges also have spoken out in their written orders and in written testimony about the perverse results of the drug trafficking guidelines and their reliance on the ADAA's quantity-based mandatory minimums.[50] Other judges have expressed – and continue to express – their

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[45] Federal Judicial Center, The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey ("FJC 1996 Survey Results"), at 12 (1997).

[46] U.S.S.C., Survey of Article III Judges on the Federal Sentencing Guidelines, App'x D (2003) ("2003 Judges Survey").

[47] *Id.* at 44-46.

[48] U.S.S.C., Results of Survey of United States District Judges: January 2010 Through March 2010, at 9 (2010) ("2010 Judges Survey").

[49] *See id*.

[50] *See, e.g., United States v. Robinson*, No. 21-CR-14, 2022 WL 17904534, at *3 & n.2 (S.D. Miss. Dec. 23, 2022) (Reeves, J.); *United States v. Carrillo*, 440 F.Supp.3d 1148, 1152–57 (E.D. Cal. 2020); *United States v. Johnson*, 379 F.Supp.3d 1213, 1219–22 (M.D. Ala. 2019); *United States v. Ibarra-Sandoval*, 265 F.Supp.3d 1249, 1253, 1256–57 (D.N.M. 2017); *United States v. Hayes*, 948 F.Supp.2d 1009, 1015–18 (N.D. Iowa 2013) (collecting cases); *Diaz*, 2013 WL 322243, at *12–14; *United States v. Hubel*, 625 F.Supp.2d 845, 853 (D. Neb. 2008); Statement of Chief Judge Robert J. Conrad, Jr., Before U.S. Sent'g Comm'n, at 4 (Feb. 11, 2009) ("Statutory mandatory minimum punishments and the guidelines written to implement them achieve the goals of uniformity at the cost of sometimes unjust sentences. This is so because the most common mandatory minimums are triggered solely by drug type and quantity and/or criminal history. Such a myopic focus excludes other important sentencing factors normally taken into view by the guidelines and deemed relevant by the Commission, such as role in the offense, use of violence, and use of special skill.").

policy disagreements through their sentencing practices.[51] As the Commission recently observed in its Public Data Briefing on these proposed amendments, only "[a]bout one-quarter or fewer of the individuals at base offense levels 30 through 38 received a within range sentence," while "between 43% and 49% of individuals at base offense levels 30 and above received a below range sentence."[52]

Others outside the judiciary also have urged the Commission to shift the guidelines' focus from drug quantity to function.[53] A task force created by Congress to provide evidence-based recommendations for justice reforms urged the Commission to revise the drug trafficking guidelines "to better account for role and culpability and to rely less on imprecise proxies such as drug quantity," in part by considering "[r]evenue or profit derived from drug trafficking," having "[c]learly defined aggravating and mitigating role factors," and providing "[a]lternatives to incarceration for lower-level drug trafficking offenses."[54] These recommendations were made in conjunction with a recommendation that Congress "repeal the mandatory minimum penalties for drug offenses," aside from those reserved for "drug kingpins as defined in the 'continuing criminal enterprise' statute."[55] If implemented, the task force's evidence-based recommendations would provide for more just, individualized sentences, reduce prison populations, and enhance public safety.[56]

The PAG strongly supports Option 3 of the Commission's proposal, which would set the highest base offense level in the Drug Quantity Table at level 30. By adopting Option 3, the Commission would take its first important step toward bringing the drug trafficking guidelines

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[51] *See, e.g.*, *Johnson*, 379 F.Supp.3d at 1226–30.

[52] U.S.S.C., Proposed Amendments on Drug Offenses, Data Briefing ("Drug Offenses Data Briefing"), Video Transcript at 2 (2025), available at: https://www.ussc.gov/education/videos/2025-drug-offenses-data-briefing.

[53] *See generally* Jonathan J. Wroblewski, *A Better Federal Drug Guideline*, Sentencing Matters Substack (Oct. 14, 2024), available at: https://sentencing.substack.com/p/a-better-federal-drug-guideline; Kevin Lerman, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. Irvine L. Rev. 679 (2017); Dan Honold, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 Harv. J. on Legis. 389 (2014); Stephen J. Schulhofer, *Excessive Uniformity – And How to Fix It*, 5 Fed. Sent'g Rep. 169 (1992); Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3. Fed. Sent'g Rep. 63 (1990).

[54] Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections*, at 23 (2016).

[55] *Id.* at 22.

[56] *Id.* at 17–23.

into alignment with "empirical data and national experience," thus fulfilling its statutory duties to promulgate guidelines that meet the sentencing objectives set forth in 18 U.S.C. § 3553(a).[57]

3. Issues for Comment

Issue 1: The Commission should set the highest base offense level in §2D1.1 no higher than 30

The PAG recommends that the Commission set the highest base offense level as low as possible, and in any case, no higher than 30, because drug quantity is a "poor proxy for culpability."[58] As the Commission itself noted, "[a]s the base offense level increases, the gap between the average guideline minimum and average sentence imposed also increases."[59] Between base offense levels 26 and 38, the average sentences imposed are no more than 77% of the average guidelines minimums.[60] At the highest base offense levels, the average sentences imposed are approximately two-thirds of the average guidelines *minimums*.[61]

In short, the current guidelines recommend sentences for drug trafficking defendants that are far harsher than sentencing judges deem appropriate, particularly when the quantity of drugs involved is higher. As a result, there are significant disparities between the guidelines' recommendations and the sentences that judges impose, with the greatest disparities occurring at the base offense levels applying to the greatest number of defendants.[62] For these reasons, the PAG recommends that the highest base offense level be set no higher than 30.

[57] *Kimbrough*, 552 U.S. at 109; *see Rita v. United States*, 551 U.S. 338, 348–50 (2007); 28 U.S.C. §§ 991, 994.

[58] *Johnson*, 379 F.Supp.3d at 1220.

[59] Drug Offenses Data Briefing, Video Transcript at 2.

[60] Drug Offenses Data Briefing, Slide 7. This figure includes defendants who received a departure under § 5K1.1 or § 5K3.1. But even excluding those defendants, the disparities are only slightly less pronounced. *See id.*, Slide 8.

[61] *See id.*, Slides 7 & 8.

[62] Commission data shows that 13,011 of the 17,173 defendants sentenced under §2D1.1(a)(5) in Fiscal Year 2023 were assigned a base offense level between 26 and 38. *See id.*, Slide 7.

Issue 2: The Commission should reduce all base offense levels in the Drug Quantity Table

As discussed at length above, the Commission erred when it disregarded its data and instead used the ADAA's mandatory minimums to create the Drug Quantity Table.[63] Accordingly, the PAG recommends that the Commission de-link the guidelines from the ADAA's quantity-based mandatory minimums altogether. Barring that, the Commission should reduce all base offense levels in the Drug Quantity Table as much as possible, regardless of drug type, because decades of experience have proven that drug quantity is not a good proxy for culpability.[64] Under the current guidelines, kingpins and low-level employees in the same scheme are treated the same when it comes to calculating the initial base offense level. Even if an employee "manage[s] to escape [a] mandatory sentence[,]" regardless of any minor adjustments that may apply, s/he will still be "subjected to excessively severe Guidelines ranges linked directly to those harsh mandatory sentences," just like the kingpin.[65] This is not the sentencing regime that Congress intended.[66] The PAG therefore supports a reduction of all base offense levels in the Drug Quantity Table.

Issue 3: The mitigating role cap should be reduced as much as possible

The PAG supports de-linking the guidelines from the ADAA's quantity-based mandatory minimums altogether. In addition, the PAG urges the Commission to reduce the mitigating role cap as much as possible, and at minimum, reduce the mitigating role cap by the same amount as it reduces the highest base offense level in the Drug Quantity Table. For defendants who are not subject to a mandatory minimum, reducing the mitigating role cap will reduce the impact of drug quantity on sentencing and result in fairer sentences for the least culpable drug trafficking defendants. For defendants who are subject to a mandatory minimum, reducing the mitigating role cap will not necessarily result in a fairer sentence, but will make clear at the time of sentencing that the Commission views the defendant as deserving a lesser sentence than that prescribed by Congress. "State sentencing commissions confronted with mandatory minimum

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[63] *See, e.g.*, *Robinson*, 2022 WL 17904534, at *2 ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, ... [t]he Guidelines use a drug quantity table based on drug type and weight to set base offense levels for drug-trafficking offenses.") (quoting *Kimbrough*, 552 U.S. at 96); *United States v. Pereda*, No. 18-CR-228, 2019 WL 463027, at *3 (D. Colo. Feb. 6, 2019) (Arguello, J.) ("[T]he Sentencing Commission deviated from the empirical approach when setting the Guideline ranges for drug offenses. Rather, the Commission chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for those crimes.") (collecting cases).

[64] *See Robinson*, 2022 WL 17904534, at *3; *Pereda*, 2019 WL 463027, at *4 ("[P]unishing low-level offenders as if they had played a prominent role in drug trafficking 'can lead to perverse sentencing outcomes.'") (collecting cases); *Diaz*, 2013 WL 322243, at *1; *Johnson*, 379 F.Supp.3d at 1219–22; 2010 Judges Survey at 9; 2003 Judges Survey at 44-46; FJC 1996 Survey Results at 12.

[65] *United States v. Leitch*, No. 11-CR-39, 2013 WL 753445, at *2 (E.D.N.Y. Feb. 28, 2013) (Gleeson, J.).

[66] *See* 2011 Mandatory Minimum Report, at 23–25.

statutes have largely adopted this approach, which has the advantage of 'mak[ing] clear when sentences uniquely result from application of mandatory penalty statutes.'"[67]

Given the Commission's past advocacy for Congress to reduce the ADAA's mandatory minimums, the Commission should not look to the mandatory minimums when determining the level at which the mitigating role cap should be set. At minimum, the Commission should reduce the mitigating role cap by the same number of levels as it reduces the highest base offense level, but the PAG believes that judicial sentencing behavior and Commission data support setting the mitigating role cap even lower.

Issue 4: The Commission should reduce the highest base offense level in the chemical quantity tables at §2D1.11

As discussed at length above, drug quantity is not a good proxy for culpability. Therefore, regardless of whether and to what extent the Commission reduces the highest base offense level in §2D1.1, the Commission should reduce the corresponding base offense levels in §2D1.11's chemical quantity tables as much as possible. Should the Commission reduce the highest base offense level in §2D1.1, the Commission should reduce §2D1.11's corresponding base offense levels by the same number of levels.

Issue 5: The Commission should reduce the impact of drug quantity on sentences for methamphetamine offenses and set the methamphetamine quantity thresholds at the current level for methamphetamine mixture

The proposed amendments relating to methamphetamine would delete all references to "Ice" in the Drug Quantity Table and would set the methamphetamine quantity thresholds at either the current level for methamphetamine mixture or the current level for methamphetamine (actual). The PAG strongly recommends that the Commission reduce the guidelines' reliance on quantity in favor of function, because quantity is a poor measure of a defendant's culpability. To the extent that quantity remains the trafficking guidelines' defining factor, the PAG recommends that the Commission set the methamphetamine quantity thresholds at the current level for methamphetamine mixture.

B. Low-Level Offense Functions

Subpart 2 of Part A of the Drug Offense amendment creates a new specific offense characteristic that offers a reduction for low-level trafficking functions that may be used in place of the mitigating role reduction in §3B1.2. This proposal suggests a 2-, 4-, or 6-level role reduction depending on the defendant's relative culpability among multiple participants.[68]

Both options for the low-level-trafficker specific offense characteristic describe functions analogous to a minimal participant under §3B1.2. Commentary to §3B1.2 describes a minimal

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[67] *Diaz*, 2013 WL 322243, at *5 (quoting Michael Tonry, *Sentencing Matters* 79, 96–98 (1996)).

[68] *See* Proposed Amendments at 70-77.

participant as a "defendant[] who [is] plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant."[69] The proposed low-level trafficker amendment likewise describes defendants who expressly lack knowledge of any broader conspiracy or lack knowledge by way of inference from the low-level tasks performed. For this reason, the adjustment under the proposed amendment should be no less than a 4-level reduction.

The PAG recommends a 6-level reduction for all qualified defendants given the many specific requirements in the proposed amendment, the extraordinarily high base offense levels in drug cases, and the specific acknowledgment that the defendant is a "low-level trafficker." Simply put, a continuation of the smaller reductions in §3B1.2 will not address the larger problem of unnecessarily high sentences in drug trafficking cases.[70]

The PAG finds that the new specific offense characteristic at §2D1.1(b)(17) properly captures low-level trafficking functions, and it supports Option 2 because it provides a list of examples of conduct that may qualify for the reduction, rather than a rigid checklist of requirements that a defendant must meet. This offers sentencing courts more flexibility in tailoring the application of this role reduction to individual defendants and the circumstances in their cases. The dynamics of the drug trade change regularly, and the drug trade differs across the country. Individual judges and litigants are best suited to identify what qualifies as low-level trafficking.

The PAG is not opposed to including 17(B), which requires that the defendant "not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." The PAG, however, encourages the Commission to confirm in commentary that "possession" as used for this reduction is determined under the same standard for safety-valve eligibility at §5C1.2 (actual possession by the defendant) as opposed to the enhancement found at §2D1.1(b)(1) (reasonably foreseeable possession by any member of the conspiracy). A low-level trafficker, for example, acting out of fear, should not be disqualified from the benefit of this reduction because he or she was aware that a more culpable co-defendant possessed a firearm during a drug conspiracy.

With respect to the Commission's question for comment regarding the distribution of retail or user-level quantities of controlled substances, the PAG believes that this merits a reduction when certain mitigating circumstances are present. Commission data supports this proposal. In Fiscal Year 2023, only 11.8% of individuals sentenced under §2D1.1 received the mitigating role cap found at §2D1.1(a)(5), whereas 30.2% of defendants in a sample of methamphetamine cases fell into the two lowest levels of offenders as "couriers" or "employee/worker."[71] These figures

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[69] §3B1.2 n.4.

[70] *See, e.g., Diaz*, 2013 WL 322243, at *7 (stating that existing role reductions "mitigate sentences slightly but still leave low-level offenders facing prison terms suitable for a drug boss.").

[71] *See* Drug Offenses Data Briefing, Slides 9 & 12.

suggest that the mitigating role reduction is failing to identify all low-level drug trafficking defendants.

In the PAG's experience, some of the mitigating factors with respect to role reductions that judges routinely consider include a defendant's age, particularly where younger individuals are manipulated by older members of a group; and a defendant's particular vulnerabilities, such as learning disabilities, dire economic circumstances, familial or intimate relationship connections, or a defendant's own addiction that drives their participation in the offense. These factors are typical of lower levels of culpability among drug trafficking defendants, and the PAG encourages the Commission to include these as factors for courts to consider when applying this specific offense characteristic.

Further, the PAG urges the Commission not to remove additional decreases to the base offense level under the mitigating role adjustment in §3B1.2. It should keep both decreases for mitigating roles as well as the option for a low-level trafficking reduction. These reductions are meant to reduce unnecessary reliance on drug quantity as a predictor of culpability. In some cases, there may be a perfect overlap between the mitigating role adjustments found at §3B1.2 and the proposed low-level trafficker amendment, but this is not always the case. The mitigating role reduction is comparative, meaning that different members of a drug conspiracy are compared for culpability purposes. The low-level trafficker reduction could be applied in the absence of multiple participants. It is conceivable that certain defendants in multi-participant cases would not be considered "low-level traffickers," but would still be entitled to an appropriate reduction under §3B1.2. The PAG recommends that the mitigating role adjustment at §3B1.2 remain in §2D1.1 along with the proposed low-level trafficker specific offense characteristic.

The Commission asks for comment on whether the "mitigating role cap" in §2D1.1(a)(5) should be amended if the low-level trafficking functions amendment is adopted. The mitigating role cap has varied from 30 to 32 under prior Commission amendments. The stated purpose in those prior amendments was to "respond[] to concerns that base offense levels derived from the Drug Quantity Table in §2D1.1 overstate the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under §3B1.2."[72]

The PAG supports the continued use of a mitigating role cap to avoid situations where high drug quantity alone overstates the culpability of otherwise low-level traffickers. The PAG further supports lowering this cap back to 30 or less, given the reality that drug quantity still overstates culpability notwithstanding the mitigating role cap.

For the same reasons, the PAG does not support a special instruction limiting the availability of the mitigating role adjustment in §3B1.2 when a defendant's offense level is determined under §2D1.1. Given the outsized impact that drug quantity has on even a low-level defendant's base

[72] *See* §2D1.1 Amends. 640 & 668.

offense level, these combined reductions are necessary to ensure that the guidelines sentencing ranges accurately reflect, and do not overstate, a defendant's culpability.

Finally, the PAG believes that it is appropriate to include guidance in §2D1.1 that tracks guidance currently contained in the commentary to §3B1.2. The policy reasons supporting §3B1.2 and the low-level trafficker amendment are similar as a general concept, and the PAG believes that this guidance applies to the proposed amendment. The PAG defers to the Commission on how it incorporates the guidance contained in §3B1.2.

C. Methamphetamine

Part B of the Commission's proposed amendment to the drug guideline has two subparts. Subpart 1 addresses offenses involving Ice, and Subpart 2 addresses the present purity-based distinction in the drug quantity table which differentiates actual methamphetamine from methamphetamine that is part of a mixture, and Ice.[73]

The present statutory structure for crimes relating to methamphetamine trafficking, 21 U.S.C. §§ 841 and 960, sets statutory mandatory minimums based on either the gross quantity of a substance containing a mixture of methamphetamine, or the actual amount of methamphetamine in a substance as determined by its purity.[74] The distinction between Ice and other kinds of methamphetamine is not addressed by statute.

The guidelines set different base offense levels based on both the quantity and type of methamphetamine at issue. Specifically, §2D1.1(c) differentiates between methamphetamine, which is defined as the entire weight of a mixture or substance containing a detectable amount of methamphetamine; methamphetamine (actual), which is defined as the actual weight of the methamphetamine contained within a mixture or substance (as determined by purity analysis); and Ice, which is defined as "a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity."[75]

These distinctions have a significant impact on a defendant's offense level. The guidelines contain a 10:1 ratio between methamphetamine and methamphetamine (actual). That same 10:1 ratio is applied between methamphetamine and Ice. So, for example, a defendant needs only to be responsible for 2 grams of methamphetamine (actual) or Ice to be at offense level 18, whereas the same defendant would have to have at least 20 grams of methamphetamine attributed to him or her to be at the same offense level.

The Commission's data over the past two decades shows that the number of methamphetamine cases has remained stable, whereas the number of methamphetamine (actual) and Ice cases have exploded. Methamphetamine (actual) cases have risen by 299%, and Ice cases have risen by

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[73] *See* Proposed Amendments at 80-102.

[74] *See* 21 U.S.C. §§ 841(b)(1)(A)(viii), (B)(viii), 960(b)(1)(H), & 960(b)(2)(H).

[75] *See* §2D1.1(c), nn. A, B & C.

881% during the same period. Methamphetamine mixture cases now account for only 35.4% of all methamphetamine cases, while 63.6% involve methamphetamine (actual) or Ice.[76]

Whatever purity or type distinctions may have existed in the past, the Commission's present data establishes that almost all recent methamphetamine cases – whether they are sentenced as mixture, actual, or Ice cases – involve almost pure methamphetamine. The average purity of methamphetamine involved in these cases was 93.2%, and the median purity was 98.0%.[77] For all three types of methamphetamine, average sentences fell far below the minimum of the recommended guideline range: 37 months lower in methamphetamine cases; 44 months lower in methamphetamine (actual) cases, and 50 months lower in Ice cases. Only 26.1% of methamphetamine cases, 23% of methamphetamine (actual) cases, and 21.3% of Ice cases were sentenced within the guidelines range.[78]

Differentiating between the type or purity of the methamphetamine attributed to a defendant, and increasing the offense level through the 10:1 ratio in the Drug Quantity Table, no longer makes sense. In the late 1990s and early 2000s, when most methamphetamine was created domestically in homemade labs, the drug often was diluted substantially as it made its way down the distribution chain from manufacturer to distributor to dealer to consumer. Additionally, since methamphetamine "cooking" operations were notoriously amateurish and used a wide variety of "recipes," the possession of pure methamphetamine often denoted the existence of a more sophisticated, large-scale domestic lab. Thus, a defendant caught with pure methamphetamine was perceived as someone higher in the distribution network or part of a more sophisticated operation. Now, "garden variety" methamphetamine is the same purity as Ice. Possession of Ice or high purity methamphetamine says nothing about the culpability or sophistication of the defendant. In sum, purity and type no longer act as proxies for relative culpability related to where a defendant sits in a distribution network's hierarchy.

For these reasons, the PAG endorses the Commission's proposal in Subpart 1 to delete all references to Ice, but the PAG recommends the Commission eliminate all distinctions between methamphetamine, methamphetamine (actual), and Ice. Given the high levels of purity of all types of methamphetamine currently being distributed, these distinctions no longer accurately predict the seriousness of a defendant's conduct or culpability. And sentencing data reflects this – only about a quarter of all methamphetamine cases are sentenced within the guidelines range, and most sentences are the result of below-range departures or variances.

The PAG also supports the Commission's proposal to add a new specific offense characteristic at §2D1.1(b)(19) providing a 2-level reduction if the offense involved non-smokable, non-crystalline methamphetamine because of the reduced potency of this form of the drug. The PAG defers to experts in the fields of pharmacology and the relevant scientific and behavioral

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[76] *See* Proposed Amendments at 80.

[77] U.S.S.C., *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, at 4 (June 2024), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

[78] *See* Drug Offenses Data Briefing, Slides 21 & 22.

sciences, the questions regarding this form of methamphetamine's pharmacological effects, its potential for addiction and abuse, and patterns and harms of abuse associated with use of the drug and its trafficking.

With respect to Subpart 2 of this proposal, the PAG supports Option 1, which treats methamphetamine and methamphetamine (actual), as methamphetamine, instead of applying the 10:1 ratio presently used in the Drug Quantity Table. This is supported by the Commission's sentencing data, reflecting the extensive use of downward variances and departures in methamphetamine cases. This suggests that the guideline ranges are far too high, and that a greater drug quantity should be used to set the base offense level in methamphetamine cases. The PAG does not support the inclusion of the 10:1 ratio between methamphetamine and Ice which remains in this proposal, given that nearly all methamphetamine is of high purity and meets the definition of Ice. Eliminating these distinctions and treating all methamphetamine as methamphetamine will promote the goals of uniformity and fairness. It will remove the present disparities that are based on antiquated distinctions in the type and purity of methamphetamine, distinctions that fail to accurately reflect differences in culpability or responsibility.

The Commission also asks whether, given this proposal regarding methamphetamine, it should reconsider the 18:1 ratio between crack and powder cocaine.[79] In light of the extensive data that the Commission and other stakeholders have collected over the years regarding the lack of any meaningful difference between crack and powder cocaine, the PAG supports eliminating this disparity in the treatment of crack and powder cocaine under the guidelines.[80]

D. Fentanyl & Fentanyl Analogues

The Commission proposes revising the enhancement for knowingly misrepresenting or marketing as another substance a mixture or substance containing fentanyl or a fentanyl analogue.[81] The proposal is the result of commenters urging the Commission to revise this enhancement because "courts rarely apply" it and it is "vague and has led to disagreement on

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[79] *See* Proposed Amendments at 103.

[80] *See* U.S.S.C., *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 198 – 200 (Feb. 1995) ("strongly recommend[ing] against a 100-to-1 quantity ratio" and explaining reasons for this finding), available at: https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf; U.S.S.C., *Amendments to the Sentencing Guidelines for the United States Courts*, 60 Fed. Reg. 25075-25077 (1995) (proposing to reduce the crack/powder quantity ratio from 100-to-1 to 1-to-1); *see also* The Office of the Attorney General, Memorandum for all Federal Prosecutors, *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases* at 4 & n.3 (Dec. 16, 2022), available at: https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf ("the crack/powder disparity is simply not supported by science, as there are no significant pharmacological differences between the drugs: they are two forms of the same drug, with powder readily convertible into crack cocaine.").

[81] *See* Proposed Amendments at 105-106.

when it should be applied."[82] At this time, the PAG believes that any revision to this enhancement requires additional information and data about how the enhancement is applied. As a result, the PAG does not support this proposal, but if the Commission must act, then the PAG supports Option 2, which maintains a *mens rea* requirement for this enhancement.

First, with respect to the criticism that this enhancement is vague, the PAG does not agree, and does not understand what portion of this enhancement can be considered vague. Further, this enhancement has been considered repeatedly in recent years, in 2018 and in 2023, and in the comments, the PAG is not aware of criticism that this enhancement is vague.

Second, if, as suggested, this enhancement is not being applied frequently, then sentencing data should reflect upward departures or variances to account for this. Instead, the Commission's data show that even when this enhancement is applied, the average sentences imposed by courts are well below the average guideline minimum.[83]

The PAG believes this enhancement is clear, and that it is applied appropriately. Were it not, the data would reflect upward departures and variances across the board in these cases. Instead, the data reflects that even in those cases where this enhancement is applied, courts are imposing sentences below the minimum guideline. And, to the extent that commenters suggest the *mens rea* requirement is causing this enhancement to be applied insufficiently, that, too, is not supported by the sentencing data. If that were the case, then one would expect to see upward departures and variances in these cases. Accordingly, the PAG does not support this proposal, but as noted above, if the Commission acts, the PAG finds Option 2 the least objectionable, since it maintains the *mens rea* requirement.

E. Enhancement for Machineguns

The Commission proposes a new, 4-level enhancement under §2D1.1(b)(1) if a machinegun was possessed in connection with a drug trafficking crime.[84] Currently, a 2-level enhancement is applied if a dangerous weapon was possessed.[85] The reasons for this amendment are that the dangerous weapon enhancement does not distinguish between machineguns and other weapons, and, to reflect the increased presence of machinegun conversion devices ("MCDs").[86] The PAG does not support this enhancement.

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[82] Proposed Amendments at 104.

[83] *See* Drug Offenses Data Briefing, Slides 29-30.

[84] *See* Proposed Amendments at 108.

[85] *See* §2D1.1(b)(1).

[86] *See* Proposed Amendments at 108.

As discussed earlier in this letter, over the years, the drug guideline has been criticized for being "deeply and structurally flawed. As a result, it produces ranges that are excessively severe across a broad range of cases[.]"[87]

> The flaw is simply stated: the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.[88]

As a result, Commission data shows that the average sentences imposed in cases adjudicated under §2D1.1 are below the minimum of the applicable guideline range. In other words, courts frequently vary and depart downward in cases sentenced under the drug guideline.[89] And this appears to be the reason that the Commission is currently proposing to reduce the highest base offense level in the Drug Quantity Table.[90]

Given the excessively high sentencing ranges that already exist under §2D1.1, the PAG does not support the current proposal for a "tiered" approach to the dangerous weapon enhancement under §2D1.1(b)(1). If courts already are imposing sentences below the minimum of the guideline range in drug trafficking cases, this suggests that there is no need to provide for an increased enhancement related to machineguns. If the circumstances of an offense are significantly serious that the danger of the presence of a machinegun is not adequately reflected in the recommended guidelines range, then the court has the discretion to vary upward to account for that conduct.

F. Safety-Valve

The "safety valve" under 18 U.S.C. § 3553(f) allows courts to sentence defendants without regard to any statutory minimum when five listed conditions are met.[91] The fifth condition requires the defendant to provide to the government "all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."[92] The guidelines mirror the safety valve statute.[93] The Commission raises the concern that defendants otherwise eligible for safety valve relief may decline to

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[87] *Diaz*, 2013 WL 322243, at *1.

[88] *Id*.

[89] *See* Drug Offenses Data Briefing, Slides 6-8.

[90] *See* Proposed Amendments at 57; *see also* discussion above in Section II(A) regarding this proposal.

[91] *See* 18 U.S.C. § 3553(f)(1)-(5).

[92] 18 U.S.C. § 3553(f)(5).

[93] *See* §5C1.2.

provide the required information to the government out of fear for their safety, thereby foregoing the benefit of the safety valve. The Commission's concern is well founded.

For example, a PAG member currently represents a 19 year old defendant who pled guilty to possessing with the intent to distribute 500 grams or more of cocaine, an amount that triggers a 5 year mandatory minimum sentence.[94] The defendant has no criminal history, the case does not involve violence, firearms or injury, and the defendant did not play an aggravating role. Thus, the defendant easily satisfies the first four safety valve conditions. But this defendant is afraid for his safety. He is convinced that if he reports to federal prison after receiving a safety valve reduction, he will be labeled a "snitch" and will be assaulted. With the safety valve, this defendant's guideline range would be 30-37 months. But the defendant has declined to provide information pursuant to the safety valve and will receive a sentence of at least 60 months. The PAG sees cases like this with some degree of frequency.

The only way to completely solve this problem is to amend the statute and remove the fifth safety valve condition currently codified at 18 U.S.C. § 3553(f)(5), requiring the defendant to provide information to the government. This fifth condition, it seems, has little practical value to the government since the information provided by the defendant need not be new, relevant, or useful. Some say that the fifth condition is necessary to force defendants to face up to their conduct by admitting it to the government – a sort of extra mea culpa. But this is unnecessary given that in most cases, a safety valve-eligible defendant has pled guilty. The Commission has the authority to recommend to Congress modifications of grades/maximum penalties for which an adjustment appears appropriate and to make data-based recommendations for legislation.[95] The PAG suggests that it is appropriate for the Commission to recommend to Congress that the fifth safety valve condition be deleted from the statute.

As long as the fifth condition remains, the Commission's proposed addition to the Application Note to §5C1.2, specifying that a defendant need not meet in person with representatives of the government but may provide the required information in writing, is fully supported by the PAG. Although this will not solve the problem of otherwise eligible defendants declining safety valve benefits in every case, it will solve the problem, at least in some cases. And a partial fix is better than no fix at all.

[94] *See* 21 U.S.C. § 841(b)(1)(B)(ii)(II).

[95] *See* 28 U.S.C. §§ 994 (r) and (w)(3).

III. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding the Commission's proposed amendments. We look forward to further opportunities for discussion with the Commission and its staff.

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