

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission



Christopher Quasebarth, Chair

Colleen Clase

Shawn M. Cox

Rachael Denhollander

Liz Evan

Michelle Means

Colleen Phelan

Theresa Rassas

Richard Welsh

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United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to the Sentencing Guidelines

Dear Chair Reeves, Vice-Chairs, Members of the Commission:

The Victims Advisory Group ("VAG") appreciates this second opportunity this year to provide information to the Sentencing Commission ("Commission") regarding its proposed amendments to the Sentencing Guidelines ("Guidelines"). Our advisory group responsibility is to assist you in fulfilling your statutory responsibilities under 28 U.S.C. § 994(o) and to provide our views on how your proposed amendments may and will affect federal crime victims.

The VAG's review begins with three premises: First, victim survivors are harmed by criminal offenders and seek to have that harm righted in a fair and just manner. Second, victim survivors are important stakeholders in the federal criminal court process, possessing federal legal rights under the Crime Victim Rights Act (CVRA), 18 U.S.C. § 3771, that must be respected and enforced. Third, will the proposed amendments, if approved by the Commission, be applied retroactively, which application will reopen victim survivor wounds, require victim survivor notification and the right to be heard, and may undermine victim survivor faith in the fairness, justice and finality of the federal criminal court process? From this foundation, the VAG respectfully submits the following for your consideration.

SUPERVISED RELEASE

PART A: IMPOSITION OF SUPERVISED RELEASE

The imposition of a term of supervised release should be considered by a sentencing court in every federal case where there is a victim. The VAG agrees with the Commission's stated goal of having the sentencing court consider "whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety." Supervised release benefits defendants and communities through a supervised transition into the community from incarceration and supervised defendant rehabilitation. Victim survivors, as part of the community, particularly benefit from the promotion of public safety as they may be at a heightened risk of danger when a defendant is released from incarceration.

The Commission proposes guideline amendments addressing the imposition of supervised release, including its length and conditions, modification and revocation. The VAG supports the Commission's stated goals of providing greater discretion to sentencing courts to ensure that the supervised release decisions "fulfill rehabilitative ends, distinct from those of incarceration." See *United States v. Johnson*, 529 U.S. 694, 709 (2000).

The VAG agrees with the Commission's proposal that supervised release decisions be based upon individual assessments that consider a wide range of factors, including those at 18 U.S.C. §3553(a). This will help ensure that supervised release decisions are focused on rehabilitative needs and the need to protect the public. The changes proposed should allow courts to tailor their supervised release decisions to the specific needs of the defendants. However, the proposed amendments and the Guidelines are essentially silent about crime victim survivors.

By the time courts are addressing sentencing, victim survivors have suffered the stress and trauma inherent in crimes; suffered the stress inherent in criminal investigations; and the stress and trauma that arises during the duration of criminal prosecutions. Our criminal justice system is taken for granted by those involved in the system. To most victim survivors, however,

the “system” is foreign and difficult to understand and a source of more anxiety, stress, and trauma.

To assure that victim survivors are fully considered by the court in imposing or modifying supervised release, victim rights pursuant to the Crime Victims’ Rights Act (CVRA), 18 U.S. Code § 3771,¹ and the Victims’ Rights and Restitution Act (VRRRA), 34 U.S.C. § 20141, must be acknowledged and applied.

In the imposition and modification of supervised release, essential victim rights include: to be protected from the defendant; to be reasonably and timely notified of court hearings; to be reasonably heard at any public proceeding in the district court involving release, plea or sentencing; to full and timely restitution; and the right to be treated with fairness and with respect for the victim’s dignity and privacy.

¹ 18 U.S. Code § 3771(a) reads:

- (a) Rights of Crime Victims. — A crime victim has the following rights:
- (1) The right to be reasonably protected from the accused.
 - (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
 - (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
 - (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
 - (5) The reasonable right to confer with the attorney for the Government in the case.
 - (6) The right to full and timely restitution as provided in law.
 - (7) The right to proceedings free from unreasonable delay.
 - (8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.
 - (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
 - (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims’ Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims’ Rights Ombudsman of the Department of Justice.

Significantly, as to protecting victim survivors from a defendant, and consistent with the deterrence and public safety considerations required by 18 U.S.C. §3553(a)(2)(B) and (C), the Commission's proposed "Individualized Assessment" conducted before the imposition or modification of supervised release must include contacting and receiving input from the victim survivor as to the risks and safety concerns that they suffer from the defendant and whether a term of supervised release should include a "no contact" provision.

Crime victim survivors personally suffered through the defendant's offense. Many also know their offender, placing them in a unique position to provide significant insight to the court regarding the circumstances of the offense and the nature and character of the defendant, which is a required consideration of 18 U.S.C. §3553(a)(1). With the victims' input, supervised release decisions will be better informed and will more intelligently address what supervision time and conditions will be necessary to best rehabilitate the defendant and deter future criminal conduct, thereby protecting the victim survivor and the public.

The VAG offers two different approaches for the Commission to include victim input as part of the Individualized Assessment. The first is a simple reorganization, with an addition, to the proposed § 5D1.1. Commentary Application Notes. The second, a proposed Policy Statement.

§ 5D1.1. Commentary Application Notes

The Commission's proposed "Individualized Assessment" in § 5D1.1. Commentary Application Note 1 is too restrictive, limiting itself only to statutory references of 18 U.S.C. § 3583(c) and 18 U.S.C. § 3553(a). The "Individualized Assessment" should also include the additional factors currently listed in proposed § 5D1.1 Commentary Application Notes 2-6, as each have strong relevance for the court's consideration of whether and how to impose supervised release. Those additional factors, Criminal History, Substance Abuse, Domestic Violence, Community Confinement/Home Detention, and Deportation currently exist as "Factors to be Considered" in imposition of supervised release. Those factors should specifically be included as factors for Individualized Assessment.

Excluding Application Note 2-6 factors from the “Individualized Assessment” description, also excludes those factors from Individualized Assessment consideration in the proposed amendments to: § 5D1.2 Terms of Supervised Release, App. n. 3; § 5D1.3 Conditions of Supervised Release, App. n. 1; § 5D1.4 Modification, Early Termination and Extension of Supervised Release (Policy Statement), App. n. 1; 7C1.3 Responses to Violations of Supervised Release (Policy Statement), App. n. 1; and 7C1.4 Revocation of Supervised Release, App. n. 1.

Including all of those factors, however, in the Individualized Assessment will make the Individualized Assessment completer and more accurate for the imposition and other aspects of supervised release consideration.

In addition to the continued logic of including Application Notes 2-6, as part of an “Individualized Assessment,” the VAG asks the Commission to also include a new Application Note 7 to its proposed § 5D1.1. Commentary Application Notes, noted here in italics, which will read:

7. Crime Victim. — In a case in which there is/are victim(s), as part of the individualized assessment the court shall order the probation office to contact each victim and obtain a statement, either written or oral, addressing the circumstances of the offense, the nature and character of the defendant, the impact of the offense upon the victim, and any threat or danger perceived by the victim from the defendant, unless the victim previously requested not to be notified or contacted.

The addition of this proposed Note 7, as part of the Individualized Assessment, gives focus to victims, including victims of crimes of violence, fraud or financial crimes. The addition of proposed Note 7 will recognize the CVRA right to protection from a defendant that a victim possesses and is wholly consistent with § 5D1.1. Commentary Application n. 1(B), referencing “the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant [...] (18 U.S.C. § 3553(a)(2)(B)-[(C)].” The addition of this proposed Note 7 also is wholly consistent with § 5D1.1. Commentary Application n. 1(A), referencing “the nature and circumstances of the offense and the history and characteristics of the defendant (18 U.S.C. § 3553(a)(1)).”

Adding this proposed Application Note 7, and then including Application Notes 1-7 in the description of an Individualized Assessment in § 5D1.1 (with corrected references in: §§ 5D1.2, App. n. 3; 5D1.3, App. n. 1; 5D1.4, App. n. 1; 7C1.3, App. n. 1; and 7C1.4, App. n. 1), will support and clarify the Individual Assessment. The Individual Assessment will then serve a stronger foundation for determining the imposition, terms, conditions and the modification, early termination, extension or revocation of supervised release.

Policy Statement

If the Commission chooses not to adopt the above proposal to add an Application Note 7, and include Applications Notes 1-7 as describing an “Individualized Assessment,” the VAG proposes that the Commission use the same language of proposed Application Note 7, above, as a Policy Statement to assure that victim rights under the CVRA are protected. As a Policy Statement, victim input would then be included in Individualized Assessments by virtue of § 5D1.1. Commentary Application Note 1(D), which includes Commission policy statements as a consideration in determining supervised release.

§ 5D1.3. Conditions of Supervised Release

To ensure the CVRA right of protection of the victim from the defendant, and consistent with the requirements of 18 U.S.C. § 3583(d), the VAG asks the Commission to make the following addition, noted here in italics, to proposed § 5D1.3(b)(2)(L):

If the probation officer determines that the defendant poses a risk to the victim, or the victim wants no contact from the defendant, the defendant shall have no contact with the victim. If the probation officer determines that the defendant poses a risk another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with the instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

To ensure the CVRA right of protection of the victim from the defendant, and consistent with the requirements of 18 U.S.C. § 3583(d), the VAG also asks the Commission to make the following addition, noted here in italics, to proposed § 5D1.3(b)(3)(G):

(G) *SEX OFFENSES*
[...]
(iv) *A condition requiring the defendant to have no contact with the victim.*

.....

§ 5D1.4. Modification, Early Termination, and Extension of Supervised Release

In proposed § 5D1.4(a) and (b), the VAG asks the Commission to adopt the bracketed language “may” rather than “should” to give the court clear direction that a decision on the modification or early termination of supervised release is discretionary with the court.

The VAG believes that the non-exhaustive list of factors in § 5D1.4(b), appear appropriate and should certainly include the proposed clause in § 5D1.4(b)(6) “any statements or information provided by the victims of the offense”.

The VAG is in agreement with the proposed language of Application n. 2, regarding timely notification of a victim and the victim’s right to be heard, and the inclusion of the bracketed clause “and of any violation of a condition of supervised release.”

§ 5B1.3 Conditions of Probation

The VAG asks the Commission to add a subsection to § 5B1.3(d)(7) that reads: “A condition requiring the defendant to have no contact with the victim.”

PART B: REVOCATION OF SUPERVISED RELEASE

The VAG finds no reference to timely notification of victims, or the right to be heard, which are rights provided by the CVRA, in any of these proposals regarding revocation of either probation or supervised release. Victims have the right to notified and the right to be heard. Probation or supervised release violations may be offenses specifically directed to the

victim, affect ordered restitution payments or otherwise affect the victim. These Guidelines need to address victim notification and the right to be heard.

Additionally, as to specific proposed amendments:

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

The Commission should approve Option 2 (Mandatory Revocation when Statutorily Required and for Grade A and B Violations). This option directs the court to revoke supervised release when statutorily required and for the most serious violations but leaves discretion on the sanction to impose for lesser violations. This option encourages the defendant on supervised release to abide by the terms imposed and better protect public and victim safety.

§ 7C1.4 Revocation of Supervised Release (Policy Statement)

The Commission should approve Option 1 (Concurrent or Consecutive Sentences). This option requires the court to conduct an Individualized Assessment, which if the Commission accepts the VAG's proposal above will include victim input in § 5D.1.1, and allows the court to exercise discretion as to whether the sentence imposed for a revocation of supervised release should be concurrent or consecutive. With victim input required as part of the Individualized Assessment, the court will be better informed as to whether a concurrent or consecutive sentence will better protect public and victim safety.

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DRUG OFFENSES

As important stakeholders with recognized statutory rights in the federal criminal court process, victims deserve fair, just and predictable outcomes in the criminal justice process. Communities, also real victims of the burgeoning drug pandemic, are equally victimized by dangerous drugs, like fentanyl and methamphetamine.

PART B: METHAMPHETAMINES §2D1.1

Drug Offenses Part A, subpart 2:

The VAG has no objection to the addition of § 2D1.1(b)(17) to add a low-level offense reduction for certain low-level drug trafficking offenders. However, the VAG disagrees that this

reduction should be available to all low-level traffickers. Specifically, where the low-level trafficker is involved in a conspiracy with an offender (1) who has an aggravating role against a victim, as defined by §2D1.1(b)(16)(B), or (2) who commits, or attempts to commit, a sexual offense against a victim, as described in §2D1.1(e)(1), the low-level trafficker should not receive the benefit of a reduction as defined in §2D1.1(b)(17). If this type of conduct constitutes a §2D1.1(b)(2) use of violence, credible threat of violence or directing the use of violence, then the proposed amendment to § 2D1.1(b)(17) will not apply. This comports with the understanding of criminal responsibility.

If this is the case, the VAG recommends that the Commission approve Option 1, with the bracketed language of proposed § 2D1.1(b)(17)(B) (“the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense”) and the first clause of the bracketed language of § 2D1.1(b)(17)(C) (“the defendant’s most serious conduct in the offense was limited to performing any of the following low-level trafficking functions.”) These bracketed clauses appear to be able to exclude more serious conduct of violence or the threat of violence in relation to the drug trafficking offense.

PART C: MISREPRESENTATION OF FENTANYL AND FENTANYL ANALOGUES §2D1.1

One pill can kill.

Before the Commission is the opportunity to amend the Guidelines overly restrictive two- or four-level adjustment for traffickers of fentanyl who represent or market the drug as any other substance. The Victims’ Advisory Group asks that you adopt the third option, with the second set of bracketed language. That language would increase the base offense level where a substance containing fentanyl is nefariously marketed or represented² as another substance and the defendant knows or recklessly disregards the actual content of the substance.

² The Victims’ Advisory Group provides no additional guidance regarding whether “represents” and “markets” are sufficient to achieve the intended purpose of the proposed amendment. If other commentators provide recommendations, we encourage the Commission to consider that feedback with the purpose of accurately capturing the proscribed conduct.

How is fentanyl so deadly? It is made by killers.

Fentanyl has made it clear: drug crimes are victim crimes. The fentanyl epidemic has created a terrifying scenario where drug dealers commit deadly fraud on their victims. Fentanyl is the leading cause of death for 18- to 45-year-old Americans.³

Some overdose victims are users aware they are using fentanyl – but are sold a violently potent pill.⁴ Those deaths are tragic.

More tragic, though, are overdoses that are the result of lies. Unlike cocaine, methamphetamine, and heroin, fentanyl may not appear to be an illegal drug. The pressed pills are disguised to look like an FDA-approved pharmaceutical drug or an over-the-counter pill taken to remedy menstrual cramps or headaches.^{5 6}

Unlike medically used fentanyl, illicit fentanyl is the result of a global effort to make money at the risk of death. The precursor chemicals for illicit fentanyl often originate in China.⁷ The chemicals are received in Mexico where the chemicals are crudely mixed with cutting agents.⁸ The resulting powder or liquid is often either smuggled to the United States as raw powder or pressed into pills in Mexico before arriving in the United States.⁹

Many fake pills are made to look like prescription opioids – such as oxycodone (Oxycontin®, Percocet®), hydrocodone (Vicodin®), and alprazolam (Xanax®); or stimulants

³ [Fentanyl Supply Chain | DEA.gov; https://www.dea.gov/resources/fentanyl-supply-chain](https://www.dea.gov/resources/fentanyl-supply-chain) (last visited February 11, 2025).

⁴ [Facts about Fentanyl; https://www.dea.gov/resources/facts-about-fentanyl](https://www.dea.gov/resources/facts-about-fentanyl) (last visited February 11, 2025).

⁵ [Fake Prescription Pills; https://www.dea.gov/factsheets/fake-prescription-pills](https://www.dea.gov/factsheets/fake-prescription-pills) (last visited February 11, 2025).

⁶ ['It's just everywhere': Seattle police seize thousands of fentanyl pills, guns in ongoing operation; https://www.police1.com/drug-interdiction-narcotics/articles/its-just-everywhere-seattle-police-seize-thousands-of-fentanyl-pills-guns-in-ongoing-operation-vff3x2W0zhyEUWg4/](https://www.police1.com/drug-interdiction-narcotics/articles/its-just-everywhere-seattle-police-seize-thousands-of-fentanyl-pills-guns-in-ongoing-operation-vff3x2W0zhyEUWg4/) (last visited February 11, 2025).

⁷ [China continues to subsidize fentanyl ingredients bound for US : NPR; https://www.npr.org/2024/04/16/1244964595/fentanyl-china-precursor-overdose](https://www.npr.org/2024/04/16/1244964595/fentanyl-china-precursor-overdose) (last visited February 11, 2025).

⁸ [The shadowy 'brokers' smuggling fentanyl chemicals for Mexican cartels; https://www.reuters.com/investigates/special-report/drugs-fentanyl-brokers/](https://www.reuters.com/investigates/special-report/drugs-fentanyl-brokers/) (last visited February 11, 2025).

⁹ [Fentanyl Supply Chain | DEA.gov; https://www.dea.gov/resources/fentanyl-supply-chain](https://www.dea.gov/resources/fentanyl-supply-chain) (last visited February 11, 2025).

like amphetamines (Adderall®) – but contain unknown amounts of fentanyl. The user believes they are consuming a drug approved by our FDA and prescribed by licensed doctors. These fake pills are widely available and are more lethal than ever before. DEA lab testing revealed that two out of five pills with fentanyl contain a potentially lethal dose.

The United States’s drug laws, years ahead of this epidemic, proscribed trafficking this schedule II substance – specifically with a statute the addresses those drug dealers whose trafficking results in death.¹⁰

The DEA’s Family Summit on the Overdose Epidemic is a system of meetings held throughout the country gathering the surviving families and friends of fentanyl overdose death victims.¹¹ Conference rooms around the country fill with people mourning their overdose victims. Their tragic stories tell of athletes and students who died making what should have been a small mistake – taking a pill not prescribed to them, but a pill prescribed to *someone*. But instead, they consume a *fake* pill, usually pressed in Mexico, that contained a lethal amount of fentanyl.

Victims suffer from fentanyl dealers, regardless of the mental state of the defendant.

Mens rea requirements with drug trafficking limits convictions to defendants who act with knowledge their conduct involves a federally controlled substance. That is, it has never been required that the government prove the defendant knew *which* drug they were distributing – as long as the defendant knows they are distributing a drug, and that drug is federally prohibited.¹²

When a defendant is charged with distribution of fentanyl in violation of Section 841 of Title 21 of the United States Code, the government must prove each of the following elements beyond a reasonable doubt: (1) the defendant knowingly distributed a measurable or detectable amount of fentanyl; and (2) the defendant knew that it was fentanyl *or some other federally controlled substance*.

¹⁰ 21 U.S.C. § 841(b)(1)(C).

¹¹ <https://www.dea.gov/familysummit> (last visited February 24, 2025).

¹² See 21 USC § 841.

If the distribution results in death, the government faces an uphill battle in proving to a jury that the death was a result of the use of the fentanyl distributed. In other words, the government must prove that that “but for” the use of the fentanyl that the defendant distributed, the victim would not have died.¹³ The government need not prove that the death was a *foreseeable* result of the distribution of the controlled substance.¹⁴

The issue of causation is decided by the jury “[b]ecause the ‘death results’ enhancement increased the minimum and maximum sentences to which [the defendant] was exposed ... [and] must be submitted to the jury and found beyond a reasonable doubt.”¹⁵ “[A] phrase such as ‘results from’ imposes a requirement of but-for causation.”¹⁶ In *Burrage*, the Supreme Court declined to accept or reject a special rule allowing the government to satisfy the causation requirement by showing that use of the controlled substance was an independently sufficient cause of death or bodily injury.¹⁷

The third option related to the misrepresentation of fentanyl and fentanyl analogues, with tiered enhancements, harmonizes with both the existing law and the reality that the harms suffered by victims is not one-size-fits all. The third approach most harshly punishes a defendant when they actually know, have reason to know, or recklessly disregard that the substance they are trafficking contains fentanyl. Even with that knowledge, the defendant provides the substance to a user as something else. Today, with the efforts to communicate the dangers of fentanyl, any criminal defendant who is aware of the presence of that drug and hides it to his customer should face the harshest penalty.

The third approach recognizes that although the defendant’s mental state may not be the same when they don’t know the drug contains fentanyl, the harm to the victim is not reduced.

¹³ Crm. Rev. Jury Instr. 12.4 (Rev. June 2024).

¹⁴ *United States v. Houston*, 406 F.3d 1121, 1125 (“Cause-in-fact is required by the ‘results’ language, but proximate cause, at least insofar as it requires that the death have been foreseeable, is not a required element.”).

¹⁵ *Burrage v. United States*, 571 U.S. 204, 210 (2014).

¹⁶ *Id.* at 214.

¹⁷ *Id.* at 214-15; *See Id.* at 218-19 (“a defendant cannot be liable under the penalty enhancement provision of 21 U. S. C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.”).

In this instance, the government will have shown that the defendant knows it contains a federally prohibited drug, and they present that unknown substance as if it were not fentanyl.

For all these reasons, we ask that the Commission adopt the thoughtful approach outlined in the third option.

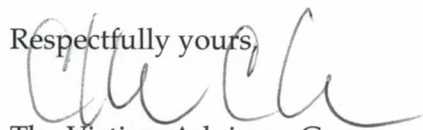
PART D: MACHINEGUNS §2D1.1

The VAG supports the proposed amendment to subsection (b)(1) of §2D1.1, which would create a tiered enhancement based on whether a machine gun was possessed. The 4-level enhancement would hold traffickers who possess machine guns accountable, deter use, and protect the public. Machine guns are extraordinarily dangerous compared to other types of weapons including other firearms. There is increased fire power, it is more lethal than other types of firearms and will fire rapidly and continuously as long as the trigger is pulled and until the magazine is empty. There is a lack of control and accuracy due to the rapid rate of fire and increased recoil. There is an increased risk of injury or death when large amounts of ammunition can be fired in a short period of time eliminating any opportunity that a victim may have to flee, to find cover, or to attempt to defend themselves. There is an increased potential for mass casualties when used in public or crowded places. Thus, when a drug trafficker possesses a machine gun, the offense becomes far more dangerous. Thus, the 4-level enhancement is justified.

Conclusion

The VAG appreciates the opportunity to comment upon these proposals. The VAG seriously takes its commitment to advise the Commission, share victim perspectives on the sentencing process and respect the rights of victim survivors.

Respectfully yours,



The Victims Advisory Group
Christopher Quasebarth, Chair

cc: Advisory Group Members