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SENTENCING GUIDELINES COMMITTEE**

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March 18, 2025

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

**Re: Defender Reply Comment on Proposed 2024–2025
Amendments on Supervised Release and Drugs**

Dear Judge Reeves:

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

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I. **Proposal 1: Supervised Release**

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

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

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

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

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

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

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

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

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

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

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

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

⁶ As discussed by the DOJ, if an individual received earned time credits but was not sentenced to a term of supervised release, they could only use their credits for prerelease custody to a halfway house or home detention. See [DOJ 2025 Comment](#), at 35. As a result, the individual would spend, in some cases, an extra year in the halfway house, limiting bed placement for others. See *id.* (“When RRC beds are occupied for an extensive time by a low-or minimum-recidivism risk inmates who have earned FSA time credits (but do not have a term of supervised release), they limit the opportunities for those inmates who are more likely to need the full benefit of community placements.”).

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

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

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

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

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

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

⁹ See [DOJ 2025 Comment](#), at 34.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹ See 18 U.S.C. § 3553(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁰ *See, e.g.*, [CLC 2025 Comment](#), at 7 ("[T]he Committee supports this separate Grade to distinguish new crimes from other violations of supervised release."); [TIAG Comment on the USSC's 2025 Proposed Supervised Release Amendments](#), at 12 (Mar. 3, 2025) ("It is TIAG's position that creation of a Grade D violation is appropriate so long as the manual provides additional guidance directing that its presence should not be viewed as a basis for treating Grade C violations more severely."); [Reform Alliance Comment on the USSC's 2025 Proposed Supervised Release Amendments](#), at 10 (Mar. 3, 2025) (appreciating the distinction of carving out a Grade D violation and "strongly encourag[ing] the Commission to provide for a presumption against revocation for technical violations . . . unless public safety is implicated and/or alternative interventions fail."); [Judge Katherine M. Menendez](#)

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

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

[Comment on the USSC's 2025 Proposed Supervised Release Amendments](#), at 4 (Mar. 3, 2025) ("[I] am glad to see the creation of a Grade D violation. However, Grade D might be most useful if it has a no-time floor at every criminal history category."); [NACDL Comment on the USSC's 2025 Proposed Supervised Release Amendments](#), at 4 (Mar. 3, 2025) ("NACDL commends the Commission's proposal to create a new Grade D . . ."); [Brennan Center Comment on the USSC's 2025 Proposed Supervised Release Amendments](#), at 2 (Mar. 3, 2025) ("We therefore urge the Commission to clarify that that revocation is only appropriate for Grade D violations when required by statute, and judges should otherwise focus on community-based responses.").

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

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

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

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

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

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

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

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

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

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

³⁹ See Underhill, *Supervised Release Needs Rehabilitation*, at 5; see also [Defenders’ Comment on Supervised Release](#), at 32 (“Even if a revocation sentence is short, it will nonetheless upend the individual’s life, potentially leading to loss of employment, housing, government benefits, treatment opportunities, parental custody, and . . . could lead to increased recidivism.” (citations omitted)); Barrett Testimony, at 5:40–5:41:35 (describing a 15-minute teleconference modification hearing to avoid what would have inevitably been a violation down the line).

II. Proposal 2: Drug Offenses

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

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

At the hearing last week, Chair Reeves asked witnesses what data would support the Commission reducing the Drug Quantity Table's maximum base offense level (BOL) *below* 30.⁴⁰ Defenders' initial comment noted that data pointed to 20 as an appropriate highest BOL, such that the Commission should at least adopt its lowest proposed cap of 30. In light of Chair Reeves's questions, Defenders expand upon this discussion.

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

The best available data relevant to Judge Reeves's questions relate to: 1) how frequently people receive sentences below the guideline range; 2) how far below guideline ranges average sentences fall; and 3) the average time served in prison for state drug-trafficking offenses. Each of these categories of data supports a base offense level no greater than 20.⁴¹

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

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

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

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

⁴³ USSC, FY2019 to FY2023 Individual Datafiles.

⁴⁴ *Id.*

⁴⁵ *Id.*

As to the second category, that is, data regarding the delta between guideline ranges and sentences, in FY2023, average imposed sentences fell substantially below the guideline minimum at every BOL above 16.⁴⁶ And as we discussed in our initial comment, it is beginning at BOL 20 that average sentences imposed are at least 20 percent lower than the guideline-range minimum.⁴⁷ Thus, while data regarding the frequency of departures would support a much lower cut-off, data regarding the extent of departures supports a cut-off more particularly at BOL 20. Given the degree of drop from the present drug quantity table, Defenders erred on the side of this higher BOL cap of 20.

Finally, state sentencing practice accords with capping base offense levels at no higher than 20. According to a 2021 Department of Justice study (cited in Defenders' initial comment), the average prison time served by a person convicted of drug trafficking in the state courts was 26 months⁴⁸—roughly the time served on a 30-month federal prison sentence for a person receiving good time credit.⁴⁹ Significantly, this state average necessarily includes the full panoply of state drug offenses. In other words, the 26-month average includes sentences served by people who would fall into federal CHC VI, who possessed weapons or used violence, who were kingpins, and/or who did not plead guilty.⁵⁰ At BOL 20, even a person falling into CHC I and with

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

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

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

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

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

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

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

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

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

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

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

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

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

Both concerns are resolved by: 1) not making §3B1.2 inapplicable to drug cases but instead providing as a special instruction that “[i]f the defendant receives the reduction at (b)(17) of this guideline, do not apply §3B1.2 (Mitigating role) to any portion of the defendant’s guideline calculated under §2D1.1;” and 2) establishing that the SOC entails a six-point reduction.

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

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

⁵³ *Id.* at 25–26.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁰ See [Public Data Briefing—Drug Offenses](#), at 22.

⁶¹ See *id.*

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

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

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

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

⁶³ USSG §5G1.1.

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

⁶⁵ *See id.*

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

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

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

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

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

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

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

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

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

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

⁶⁹ *Id.*

⁷⁰ *Id.* at 16.

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

⁷² See [DOJ 2025 Comment](#), at 29.

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

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

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

⁷³ See [CLC 2025 Comment](#), at 12.

⁷⁴ See [Defenders’ Comment on Drug Offenses](#), at 36–43.

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

penalties for privately manufactured firearms (“PMFs” or “ghost guns”) is equally flawed.⁷⁶

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

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

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

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

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

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

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

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

* * *

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

⁷⁸ See [Sieglar Comment on Drug Offenses](#), at 30–31, n.165.

Hon. Carlton W. Reeves
March 18, 2025
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Very truly yours,



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