March 3, 2025

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

Re: Proposed Amendments on Supervised Release and Drug Guidelines

Dear Judge Reeves:

This submission addresses the proposed amendments to (1) the Sentencing Commission's policies regarding supervised release and (2) §2D1.1 On all other issues in the proposed amendments not addressed in this letter, NACDL joins in the comments filed by the Federal Defenders.

## I. Proposed Amendments: Supervised Release

NACDL applauds the Sentencing Commission for revisiting the Guidelines pertaining to supervised release in both Chapters 5 and 7. While we appreciate the concern of judges and U.S. Probation officers that the proposed amendments could necessitate more time spent on supervised release—deciding whether to impose supervised release, terminate a term early, or sanction a violation of supervised release—NACDL believes the proposed amendments will work in concert to focus the courts' and U.S. Probation Office's attention where it is needed rather than increase the overall amount of time devoted to supervised release.

### Part A: Proposed Amendments to Chapter 5

#### A. NACDL supports the Commission's proposal to amend §5D1.1 to state a term of supervised release should only be imposed if warranted by an individualized assessment of the need for supervision.

NACDL concurs with the bipartisan Safer Supervision Act of 2023 and the Commission's Proposal to "ensure the provisions in Chapter Five 'fulfill[] rehabilitative ends, distinct from those of incarceration. *United States v. Johnson*, 529 U.S. 53, 59 (2000)."[1] For too

[1] USSC, Proposed Amendments to the Sentencing Guidelines dated January 24, 2025, at 6.

long, a multi-year term of supervised release has been imposed reflexively in most felony cases, without regard to whether the defendant has rehabilitative needs that can be addressed through supervision by the U.S. Probation Office. As a result, in 2021, more than 110,000 people were on supervised release.[2] The nearly automatic imposition of a multi-year term of supervised release without an individualized assessment of whether supervision fulfills the defendant's rehabilitative needs has the long-term impact of wasting the scarce resources of the U.S. Probation Office. An individualized assessment to determine whether a supervised release term is necessary and, if so, what conditions of supervised release are appropriate would help conserve scarce resources and provide individuals with the support that they actually need to be successful upon their return to the community.

In addition to conserving resources, an individualized assessment to determine whether, and how long, a term of supervised release is appropriate acknowledges that supervision can place an unnecessary restriction on the freedom of defendants who have already completed the term of incarceration imposed by the court. Standard conditions can be quite burdensome and rather than "ease the defendant's transition into the community" after service of a sentence[3], they can inhibit success upon release.[4] For example, being on supervised release often limits a formerly incarcerated person's geographic mobility, keeping them in the community where they initially offended and limiting their ability to pursue out-of-state work. Some employers will not hire people who are under court-ordered supervision. If an individualized assessment does not identify a clear need for the resources and supports that come through supervised release, its inherent restrictions cannot be justified and are counterproductive to the goal of having formerly incarcerated people quickly become productive members of their communities.

NACDL agrees with the Federal Defenders' recommended language to application note 5D1.1(a) for a nominal term of supervised release so that a defendant can benefit from the Earned Time Credits created by the First Step Act. NACDL also joins the Federal Defenders in asking the Commission to more strongly discourage imposition of a term of supervised release on those who will be removed from the United States at the end of their periods of incarceration.

### B. NACDL supports the addition of §5D1.4 to Chapter 5 to encourage modification of conditions and early termination of supervised release.

Just as important as encouraging judges to consider whether a term of supervised release is warranted when not statutorily required is empowering judges to consider modifying or

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[2] *See* United States Courts, Table E-2—Federal Probation System Statistical Tables For The Federal Judiciary (June 30, 2021), available at https://www.uscourts.gov/data-news/data-tables/2021/06/30/statistical-tables-federal-judiciary/e-2.

[3] *See Johnson*, 529 U.S. at 59 (quoting Senate Report No. 98-225, at 124 (1983)).

[4] For this reason, NACDL joins the Federal Defenders in recommending the removal of the term "standard" to describe conditions as it connotes a presumption of applicability rather than the individualized assessment the case law and the Guidelines favor.

reducing conditions or terminating supervision early once it becomes clear that it is an unnecessary restriction on the defendant's freedom and an inefficient use of U.S. Probation resources. Currently, U.S. Probation petitions the court when it wants to add supervised release conditions. U.S. Probation seldom petitions the court to reduce conditions to make them less onerous. Parity is important, and the wording of §5D1.4(a) reflects this. NACDL recommends that the Commission use "should" rather than "may," with the understanding that conditions should only be modified if warranted by an individualized assessment.

NACDL similarly recommends that §5D1.4(b) adopt the "should" rather than "may" language to encourage early termination when it is warranted by the conduct of the defendant and the interests of justice. Each jurisdiction should be allowed to determine the common procedure for pursuing early termination, including ruling on the papers. But to provide courts with ample flexibility, such as considering early termination on the papers without need for a formal hearing, NACDL believes the Commission should recommend appointment of counsel to pursue motions filed pursuant to 18 U.S.C. § 3583(e)(1).

Relatedly, so as not to overburden the court, the parties or U.S. Probation with lengthy filings engaging in a multi-factor analysis, NACDL suggests that the Commission not include the bracketed factors in §5D1.4(b). However, should the Commission decide to keep an enumerated list of factors, NACDL discourages Factor 5 (a reduction in risk level). NACDL has previously raised concerns with the proper implementation of risk assessment tools.[5] Because the defense seldom has access to the tools, the lack of transparency renders them an unfair basis on which to evaluate whether early termination is appropriate. Factor 2 and Factor 4 (prosocial activities and support systems) could merge, since the elements in Factor 4 are often the best predictor of future success that Factor 2 attempts to predict.

Finally, on the issue of enumerating factors for consideration, while it is laudable that existing re-entry programs include early termination as an incentive for completion of the program, too few jurisdictions have problem-solving courts to include language in §5D1.4 that could be interpreted as making early termination contingent on completing such a program.

**Part B: Proposed Amendments to Chapter 7**

NACDL welcomes the Commission's proposed changes to Chapter Seven's policy statements and sentencing tables. These amendments will afford courts and probation officers more discretion in their ability to address individuals' non-compliant behavior while on supervision; and, with regard to supervised release specifically, will encourage the use of a broader array of options to help achieve the stated purpose of supervised release:

[5] *See, e.g.*, Melissa Hamilton, *Risk Assessment Tools in the Criminal Legal System – Theory and Practice: A Resource Guide* (Nov. 2020), at https://www.nacdl.org/Document/RiskAssessmentReport.

[T]o ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training purposes after release.[6]

**C. NACDL supports the Commission's proposal to issue separate policy statements in Chapter Seven to address probation revocations (Chapter Seven, Part B) and supervised release revocations (Chapter Seven, Part C) so as to reflect the different purposes served by probation and supervised release.**

Probation and supervised release serve two very different purposes: a sentence to a probationary term is imposed as an alternative to incarceration whereas supervised release is to "fulfill[ ] rehabilitative ends, distinct from those served by incarceration" after a term of incarceration has been served. *United States v. Johnson*, 529 U.S. 53, 59 (2000). For this reason, there should be separate frameworks – one for supervised release violations, and one for probation violations. As such, NACDL supports the Commission's proposal to separate the Chapter Seven policy statements on probation and supervised release revocations into two separate Parts (Part B – Probation, Part C – Supervised Release) – the purposes served by the two forms of supervision are quite distinct, and, thus, how violations of the two forms are addressed should be distinct as well.

**D. NACDL supports the Commission's decision to add a separate grade (Grade D) to § 7C1.1 for technical violations of supervised release.**

There is a difference between a violation of supervised release based on conduct that constitutes a new law violation and conduct that constitutes a technical violation of supervised release. NACDL commends the Commission's proposal to create a new Grade D that would recognize this distinction. The new Grade D violations would capture low-level, non-violent, non-criminal conduct often related to substance use disorders, poverty, or being unhoused. For this reason, NACDL strongly urges the Commission to include a stated presumption that reincarceration should **not** be imposed for revocations based on Grade D violations. Indeed, NACDL strongly urges the Commission to include a stated presumption that supervised release should **not** be revoked based on Grade D violations alone.

**E. NACDL supports Option 1 for the proposed new §7C1.3, which allows for courts to exercise greater discretion and individually assess how to address non-compliant behavior.**

Although the current policy statement sets forth several options upon a finding of a Grade C violation, including extending the term of supervised release and/or modifying the conditions

[6] *Johnson*, 529 U.S. at 709 (*citing* S. Rep. No. 98-225, p. 124 (1983)).

of supervision, *see* U.S.S.G. § 7B1.3(a)(2), statistics demonstrate that courts are not utilizing this discretion but, rather, are reverting to reincarceration in the vast majority of cases regardless of the violation grade. Indeed, courts imposed reincarceration in 83.2% of revocations that involved only Grade C violations. *See* United States Sentencing Commission, *Federal Probation and Supervised Release Violations,* July 2020, at p. 35. In revocations involving Grade B violations, that percentage increased to 93.7%. *Id.* Revocation and reincarceration is not the answer to low-level violations; it disrupts prosocial activities, re-exposes individuals to anti-social features of incarceration, and interferes significantly with an individual's re-entry into society, causing them to lose housing, benefits, and employment. If the purpose of supervised release is, as legislatively stated, to fulfill rehabilitative ends and to ease the transition back into society after a period of incarceration, revocation and reincarceration should be *the last resort* – not the default option suggested for all violations as set forth in § 7C1.5's Sentencing Table.

Option 1 for the proposed new § 7C1.3 appropriately sets forth that, should revocation not be statutorily required, an individualized assessment should be conducted to determine what response – *if any* – is appropriate. Option 1 serves to refocus courts on the stated purpose of supervised release and provide suggested, clear alternatives to revocation. Directing an individualized assessment upon finding a violation would serve to recognize that many Grade D violations are related to substance abuse disorders or poverty and, thus, a more appropriate response would be to address the underlying issues in the community. Revocation is not the appropriate response for all violations, and certainly not for the lower grade violations. Option 1 appropriately recognizes that there are several other alternatives to revocation.

NACDL joins the Defenders in urging the Commission to add language to § 7C1.3 encouraging the use of summonses to bring people to court on violation petitions when those individuals have met regularly with their probation officer and there is no serious risk of immediate danger to others.

### F. NACDL supports Option 1 for the proposed new § 7C1.4 as it properly encourages courts to exercise discretion, assess each case individually, and recognize the non-punitive purpose of supervised release.

As noted *supra,* supervised release does not serve a punitive purpose; rather, its stated legislative purpose is to ease one's transition back into the community after a long period of incarceration. In the case of a revocation of supervised release – which, as set forth in the preferred Option 1 to § 7C1.3, should **not** be the response to the majority of supervised release violations, the court should have the discretion to determine how a term of reincarceration will be served in relation to any other sentence of imprisonment the defendant is serving. Of import, as stated by the Commission in its Introductory Commentary to the new Part C, "imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence."

NACDL supports Option 1 for the proposed new § 7C1.4, providing courts the appropriate discretion to determine, following an individualized assessment, how best to account for any other sentence of imprisonment. Eliminating the recommendation that sentences be imposed consecutively is encouraged. U.S.S.G. § 4A.1.1(e) already accounts for the commission of the new offense while on supervision when calculating the advisory sentence for the new offense (when the specified factors are met). Thus, to run the term of reincarceration for the supervised release revocation consecutively would only serve to further punish the defendant in direct contradiction to the stated purpose of supervised release.

### G. NADCL supports amending the Supervised Release Revocation Table found in § 7C1.5 but believes the Commission should go further and eliminate minimum terms of reincarceration.

Reincarceration should not be recommended for the majority of supervised release violations – especially those premised upon Grade C and Grade D violations. Accordingly, the Supervised Release Revocation Table should not include a minimum term of reincarceration for Grade B, C, or D violations. Rather, the Table should include only the high end of what the Commission has recommended. Recognizing the option of a "minimum" sentence other than a minimum term of reincarceration would encourage courts to examine alternatives when conducting the required individualized assessment.

As such, NACDL joins the Defenders in their proposal of a revised Supervised Release Revocation Table that specifically denotes "0" as the bottom end of each proposed range. NACDL further joins the Defenders in their requests that the upper end for Grade C and D violations should be lowered and that the higher range for Class A/Grade A Violations be stricken entirely from the Supervised Release Revocation Table.

### H. Criminal History Category Computation Considerations

NACDL believes that a defendant's criminal history should be recalculated to reflect changes made by amendments listed in U.S.S.G. § 1B1.10(d) if said changes have an ameliorative effect on the defendant's Criminal History Category. It is appropriate for the defendant to get the benefit of retroactive changes in the law reflecting or addressing prior practices or laws that have since been corrected (e.g. status points that had been shown to have a racially-biased application).

Further, NACDL urges the Commission to balance the considerations of post-sentencing conduct in the Application Notes: if courts can consider intervening criminal conduct for an "upward departure" under App. Note 3 of §7 C1.4, courts must also be able to consider mitigating conduct (e.g. a clean record during incarceration in the Bureau of Prisons, post-conviction rehabilitation, etc.) for a "downward departure." The Application Note should reflect this balance of considerations.

## II. Proposed Amendments: Drug Guidelines

NACDL applauds the Sentencing Commission for revisiting the drug guidelines, which have driven the exponential growth in the federal prison population since the late 1980s, fueled racial, economic, and gender disparities, and yielded unnecessarily lengthy prison sentences that have devastated individuals, families and communities. Indeed, it is no exaggeration to say that these guidelines have played a key role in quintupling the federal prison population from the mid-1980s to the 2010s,[7] and generating a dramatic expansion in racial disparities.[8] While state prison systems have radically reduced their numbers of imprisoned drug offenders,[9] those convicted of drug offenses continue to form the backbone of the Bureau of Prisons population. Current BOP statistics reveal that 43.8% of its population is serving time for a drug offense.[10] That only tells part of the story. Over 50% of the current population is serving sentences of over 10 years – a function primarily of lengthy drug sentences, given the number of imprisoned drug offenders.[11]

A key reason for excessive sentences in drug cases is the Commission's fateful decision to abandon its empirical role in setting sentencing ranges based on past practices, and instead linking its drug guideline ranges to drug weights.[12] By structuring the guidelines around the quantity of drugs involved, rather than assessing individual culpability, the system frequently imposes severe sentences on low-level offenders who have little to no leadership or proprietary role in trafficking operations.[13] This approach is further exacerbated by the Commission's

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[7] National Research Council, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES at 33 (2014) (The US incarceration rate--measured as the proportion of the population held in state and federal prisons plus local jails--nearly quintupled from 1972 (161 per 100,000) to its peak in 2007 (760 per 100,000.)).

[8] *See* USSC, *Demographic Differences* at 4 (Nov. 2023), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf (noting that Black and Hispanic males receive longer sentences than white counterparts, and more likely to be sent to prison in the first place).

[9] Only one in five incarcerated individuals at the state level is locked up for a drug offense. *See* Prison Policy Initiative, Mass Incarceration, the While Pie, 2024, available at https://www.prisonpolicy.org/reports/pie2024.html#myths.

[10] Bureau of Prisons, Sentences Imposed, available at https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited March 2, 2025).

[11] 54.6 of the BOP inmate population is serving sentences of 10 years or more. Bureau of Prisons, Sentences Imposed, available at https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last visited March 2, 2025).

[12] *See United States v. Diaz*, 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013) ("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.").

[13] In a series of articles, the Dallas Morning News has profiled typical low-level, non-violent individuals subject to harsh sentences under the drug guidelines, and the patterns of childhood deprivation and abuse, undiagnosed mental illness, and drug addiction are painfully familiar to federal defense lawyers in NACDL's membership. *See* Kevin Krause, *Clemency gave these North Texas Moms a Second chance at Life after Meth Imprisonment*, Dallas Morning

decision to tie these weight-based guidelines to the excessive mandatory minimum sentences set by Congress for major traffickers and kingpins.[14] As a result, minor participants – such as couriers or street-level dealers – often receive sentences originally intended for high-level drug bosses, distorting proportionality in sentencing and contributing to mass incarceration without meaningfully deterring drug crime. These overstatements reflect that §2D1.1 never actually reflected empirical observations and conclusions, but rather followed political decisions to set mandatory minimum sentences no matter individual circumstances, in an effort to seem "tough on crime."[15]

The current proposals to reduce the sentences produced by U.S.S.G. § 2D1.1 will go a long way towards redressing these injustices.

### A. Lowering Top Base Offense Level and Adding Culpability Reduction

NACDL strongly supports the proposal to lower the highest base offense level (BOL) in the drug guidelines from 38 to 30, and the addition of a specific offense characteristic (SOC) that would grant a six-level reduction for those involved at the lower-level levels in drug trafficking.

*First*, NACDL favors setting the BOC at the lowest level that captures the seriousness of the offense, and submits that current drug offense levels regularly and grossly overstate the nature of offender culpability. Resetting the highest base offense level to 30, and reducing other base offense levels correspondingly, brings the quantity of drugs into a driving yet coordinate role in empirically assessing overall culpability. Reducing the highest base offense level, and adjusting all other base offense levels downward, will also reduce the political pull of mandatory minimum sentences over individualized assessments of individual responsibility.

This broad reduction in drug quantity base offense levels should apply across the board, to all drug types and at all offense levels, excepting no substances or offense types. All current levels are ultimately products of the "drug war" mania that consumed the country throughout the 1980s. This across-the-board reduction would fully reflect the Commission's transition from politically driven to empirically based drugs guidelines. By coordinating the reductions with additional culpability adjustments, the Commission can capture the kingpins actually meant to

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News, December 5, 2024, available at https://www.dallasnews.com/news/investigations/2024/12/05/clemency-gave-these-north-texas-moms-a-second-chance-at-life-after-meth-imprisonment/; Kevin Krause, *Biden Clemencies Free more North Texans Serving Long Meth Sentences*, Dallas Morning News, February 14, 2025, available at https://www.dallasnews.com/news/courts/2025/02/14/biden-clemencies-free-more-north-texans-serving-long-meth-sentences/.

[14] *See Diaz*, 2013 WL 322243, at *1 ("The genesis of the structural flaw is easily traced. It is rooted directly in the fateful choice by the original Commission to link the Guidelines ranges for all drug trafficking defendants to the onerous mandatory minimum penalties in the Anti–Drug Abuse Act of 1986 ("ADAA") that were expressly intended for only a few.").

[15] *See, e.g., Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").

see long prison terms, and so further Congress' goals of sentencing – particularly the primary mandate, that sentence lengths be no greater than necessary to achieve those goals.

Similar offense level reductions should follow at the chemical quantity tables at §2D1.11. The purpose for reducing the drug quantity offense levels is to bring the Guidelines into better balance with offense culpability over adherence to mandatory minimum sentencing schemes. The same political factors that drove drug base offense levels upward over decades, since their very inception, have similarly tainted the chemical quantities assessments. Across the board reductions will allow the entire drugs guideline to reflect sound criminological research regarding punishment's certainty rather than sentence length as best addressing recidivistic risk,[16] and so the ultimate goal of criminal sentencing: crime reduction.[17]

NACDL appreciates the discussion about reducing methamphetamine offense levels to bring them into line with other controlled substances. NACDL believes the reductions to methamphetamine base offense levels should resemble those of other drugs covered by §2D1.1, but only after independently reducing meth base offense levels to reflect the common chemical compositions involved in meth offenses. NACDL discusses its positions and recommendations for methamphetamine adjustments in the Guidelines structure.

*Second*, with respect to the proposed six-level role-based reduction, which would supplant the reductions set forth in §3B1.1, NACDL supports the formulation proposed by the Defenders. By amalgamating Options 1 and 2, the Defenders' proposed revisions create a broad and inclusive set of scenarios covering low-level individuals in drug trafficking schemes who should qualify for this sentence reduction. While comprehensive, this list remains non-exhaustive, allowing room for defense advocacy and judicial discretion to address unforeseen cases. This flexibility ensures continuous refinement and expansive application of the proposed reduction to further mitigate the impact of the harsh drug guidelines.

**B. Eliminating Purity Distinctions in the Methamphetamine Guidelines.**

NACDL supports the Commission's proposal to eliminate purity distinctions in the methamphetamine guidelines, specifically eliminating references to "Ice" (Subpart 1) and "Methamphetamine (Actual)" (Subpart 2), thus erasing the empirically unjustifiable 10:1 ratio between methamphetamine-ice/actual and methamphetamine-mixture. NACDL supports Option 1 in Subpart 2, which keeps the current meth-mixture quantity levels, and opposes Option 2, which would apply meth-actual levels, as meth-mixture levels are closer to sentencing practices across the country and avoid the unnecessarily and arbitrarily harsh sentences produced by the ice/actual guidelines.

[16] Daniel S. Nagin, Crime and Justice Vol. 42, No. 1, Crime and Justice in America 1975–2025 (August 2013), at 199-263 (Univ. Chicago Press).
[17] *See* U.S. Sentencing Guidelines, Part A, Sec. 1(1) (Authority).

The Commission's proposal reflects the growing awareness among sentencing judges across the country that the methamphetamine guidelines, like the crack guidelines to which they were linked, lack any empirical basis. The U.S. Supreme Court statements in *United States v. Kimbrough,* 552 U.S. 85 (2007), about the crack cocaine guidelines – that the Commission abandoned its usual empirical approach based on past sentencing practices for a weight-driven approach, *id.*, at 96 – applies with equal force to the methamphetamine guidelines, which were based in part on the crack guidelines.[18] In fact, it applies to all drug guidelines that are based on mandatory minimums, rather than empirical data.[19] Like the former crack cocaine guidelines, the Sentencing Commission has consistently linked the meth guideline ranges to statutory penalties, even though not required to do so.[20] None of these sentencing increases had anything to do with an examination of sentencing practices or any of the sentencing objectives set out in 18 U.S.C. § 3553. In fact, the severe penalties for methamphetamine are not justified by any purpose of sentencing. As to the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), methamphetamine and all stimulants combined are less physically dangerous or addictive than heroin or cocaine, yet methamphetamine is now punished more severely than any other drug.

Not only do the current meth guidelines lack a legislative basis, they also lack any practical empirical basis. In 1989, when the 10:1 ratio was developed, untested methamphetamine mixture typically received a presumed purity of 10%.[21] Today's typical methamphetamine mixture hovers close to 95%.[22] Thus, sentences have received arbitrary enhancement based on whether the methamphetamine was tested.[23] All else being equal, a 90% pure methamphetamine sample, untested, would lead to a Guidelines range of 51–63 months; tested, it would lead to a Guidelines range of 97–121 months.[24] The chances that a sample will receive testing is subject to factors unrelated to culpability, like whether the lab had a chance to complete testing, or when in the case the defendant pled guilty.[25]

The Sentencing Guidelines justify enhancements based on purity "[s]ince controlled substances are often diluted and combined with other substances as they pass down the chain of

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[18] *See*, *e.g.*, *United States v. Valdez*, 268 Fed. App'x 293, 297 (5th Cir. 2008); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1010-11, 1016 (D. Neb. 2008).

[19] *See Gall v. United States*, 552 U.S. 38, 46 n.2 (2007) (noting "Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses").

[20] *See, e.g.,* USSC, Methamphetamine: Final Report of the Working Group 7 (1999), https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf.

[21] *United States v. Weimer*, 2024 WL 2959187, at *2 (D. Idaho June 11, 2024).

[22] *Id.* ("Today, methamphetamine is almost always imported from foreign drug labs and the purity levels are much higher. A recent 2015–16 survey of drug purity levels in the District of Idaho revealed an average purity level of 92.6% with a low of 88% and a high of 100%.").

[23] *Id.* at *3 (Simply put, the presumed purity of 10% for untested methamphetamine is no longer valid. This, in turn, has led to substantial and unwarranted disparities in sentencing based solely on whether methamphetamine is lab tested.").

[24] *Id.*

[25] *Id.* at *3 ("Today, most methamphetamine seized at all distribution levels is remarkably pure, which means that higher purity is not a good indicator of a defendant's place in the chain of distribution. The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level.").

distribution," postulating that "unusually high purity . . . is probative of the defendant's role or position in chain of distribution." USSG § 2D1.1, note 27(C). But many low-level offenders do not know the quantity or quality of the product they are involved in distributing. A qualitative research study of federal prisoners charged with drug crimes shows that the organizational structure of drug trafficking includes smaller, decentralized units operating independently of others.[26] Individuals had limited knowledge of others' roles in the enterprise and the structure of the larger operation.[27] It was common that members of the drug smuggling trade were involved in other enterprises, including legitimate means of employment, but found themselves in a tight spot that led to the drug world.[28]

Noting the arbitrariness and disparities outlined above, numerous courts have determined that the treatment of methamphetamine (actual) versus methamphetamine (mixture) produces inequitable and unusually long sentences and have elected to deviate from the guidelines.[29] Indeed, the Commission's own data reveals substantial and extensive below-guidelines sentences in methamphetamine cases.[30]

In sum, NACDL supports the elimination of the 10:1 actual/ice to mixture ratio, and favors adopting Option 1 of Subpart 2, which would set all methamphetamine guidelines at the mixture level. As the Federal Defenders lay out in detail in their submission, this proposal is better aligned with sentencing practices, where courts already treat meth-mixture cases as the baseline, and apply larger variances in cases involving meth-ice/actual.

Respectfully submitted,

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[26] Jana S. Benson & Scott H. Decker, *The Organizational Structure of International Drug Smuggling*, 38 J. CRIM. JUSTICE 130, 135 (2010).

[27] *Id.*

[28] *Id.* at 136.

[29] *See e.g. United States v. Celestin,* 2023 WL 2018004, at *3 (E.D. La. Feb. 15, 2023) (citations omitted); *United States v. Robinson,* 2022 WL 17904534, *3 (S.D. Miss. Dec. 23, 2022) (noting that in a recent case, "the United States conceded that there is no empirical basis for the Sentencing Commission's 10-to-1 weight disparity between actual methamphetamine and methamphetamine mixture," and that other district courts had concluded there was no empirical basis for the disparity); *United States v. Ferguson*, 2018 WL 3682509, at *8 (D. Minn. Aug. 2, 2018) ("[M]ethamphetamine purity is no longer a proxy for, and thus not probative of, the defendant's role or position in the chain of distribution."); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1026 (N.D. Iowa 2013) ("This issue [of punishing a pure substance more than a mixed substance] is heightened when the offender was merely a courier or mule who has no knowledge of the purity of the methamphetamine he or she is transporting."); *United States v. Ortega*, No. 8:09CR400, 2010 U.S. Dist. LEXIS, at *21 (D. Neb. May 17, 2010) ("To punish [a street-level distributor] as harshly as an upper-level distributor because of a presumptive ten-to-one ratio does not reflect his position in the hierarchy nor will it promote respect for the law."); *Castro*, 2018 U.S. Dist. LEXIS 39367, at *7 ("The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level.").

[30] *See* USSC, Methamphetamine Trafficking Offenses Quick Facts (FY 2023) (in fiscal year 2023, 41% of all individuals convicted of methamphetamine trafficking received a non-guideline sentence; out of those, 99% were downward variances averaging a 35% reduction), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Methamphetamine_FY23.pdf.

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