



DUE PROCESS

INSTITUTE

March 3, 2025

The Honorable Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle NE
Washington, DC 20002

RE: Comment to the Commission's January 2025 proposed amendments relating to Supervised Release and Drug Offenses

Chairman Reeves and Members of the Commission,

Due Process Institute is a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system. Procedural due process concerns transcend “liberal” and “conservative” political labels and therefore we focus our work on core principles and values that are shared by all Americans. Guided by a bipartisan Board of Directors, and supported by bipartisan staff, we create and support achievable solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

PROPOSED AMENDMENTS RELATING TO THE IMPOSITION, LENGTH, AND CONDITIONS OF SUPERVISED RELEASE

We unequivocally support your recent proposals directing courts to base supervised release decisions on individualized assessments and removing recommended minimum terms of supervised release. Originally designed to be limited in use and only when necessary to preserve public safety, supervised release is unfortunately imposed in almost every single federal case. This has led to a bloated and burdened system, putting strain on actors in the criminal legal system as well as on citizens returning to their communities after completing their terms of sentence. The overuse of long periods of supervised release has created a number of undesirable consequences—probation officers are too overwhelmed to effectively supervise high-risk cases, low-risk defendants are unnecessarily recidivating under unnecessarily onerous burdens, and this broken system is costing American taxpayers \$500 million annually.

In response to the Commission's request for fine attunement of its proposals, Due Process Institute first suggests the Commission consider strengthening its guidance towards courts by characterizing the early termination of supervised release as a rebuttable presumption, rather than merely a modification that “may” occur. This revision would ensure a much-needed course correction for our overburdened system, would more directly provide incentives for people reentering society on supervised release, and would free up resources for probation officers so that they could better focus on cases with serious public safety implications. We recommend that the Commission take the fullest opportunity it can to redirect our nation's supervised release

apparatus. We further recommend that the Commission adopt an approach to revocation of supervised release that maximizes a court's ability to consider the fullest set of considerations (rather than be tied to the grade of violation).

Second, as for the enumerated factors that a court should consider, Due Process Institute recommends that any amendment and/or any relevant commentary relating to the initial setting of a term of supervised release include specific factors that relate to a defendant's post-arrest yet pre-sentence conduct, and, similarly that any amendment and/or any relevant commentary relating to the modification or early termination of a term of supervised release include specific factors that relate to a defendant's conduct during pre-trial release (if applicable) as well as during any period of incarceration. Specifically, a defendant's efforts during these critical times relating to attempted restitution, rehabilitation, education, mental health services, drug/alcohol use or abuse treatment, family reunification, vocational training, programmatic involvement (including but not limited to specific reentry training), and participation in restorative justice measures, among other factors, are all useful indicators in assessing whether and for how long a term of supervised release should be imposed and Due Process Institute recommends that such factors be more explicitly included in the Commission's amendments.

Due Process Institute also recommends the Commission provide clarification that courts should not deny early termination solely on the grounds of unpaid fines or restitution and that willful nonpayment of financial obligations when defendant had the means to pay should be treated differently from situations in which a defendant has not practicably been able to fulfil his or her financial obligations to others.

Finally, Due Process Institute encourages the Commission—to the fullest extent it has authority to do so—to ensure that all defendants are given notice of their rights pursuant to any adopted proposed amendments, that any relevant proceedings ensure adequate due process rights to the defendant, and that defendants are afforded adequate appointed counsel to pursue their rights.

RECONSIDERING THE DISPARITY BETWEEN COCAINE AND COCAINE BASE

We wish to commend you for also seeking public comment on whether the Commission should reconsider the disparity between cocaine ("powder cocaine") and cocaine base ("crack cocaine") in the Drug Quantity Table at §2D1.1(c). Currently, the Drug Quantity Table reflects an 18-to-1 ratio between crack cocaine and powder cocaine. Due Process Institute strongly encourages the Commission to reconsider this disparity in a future amendment cycle.

The current disparity exists because of a well-intentioned but un-scientific overreaction to crack cocaine abuse in the 1980s. This initially led to crack cocaine being arbitrarily treated 100 times worse than powder cocaine in our federal sentencing laws, despite the fact that crack cocaine and powdered cocaine are pharmacologically the same. The primary differences between the drugs are that crack cocaine is cheaper and easier to access, particularly in poor communities that are already marginalized, and in the way the substances are typically ingested. The manner in which crack cocaine is ingested is, as the Commission has noted, "not a reliable basis for establishing longer penalties."

In the 2000s, policymakers began to rethink the disparate treatment between crack cocaine and powdered cocaine and have partially revisited their misguided approach. In 2010, the sentencing disparity was reduced to the current 18-to-1 ratio for current and future offenses. The Commission amended the *Sentencing Guidelines* to reflect the policy change and made the amendment retroactive, but those changes provided only limited relief. Since then, the First Step Act made the 18-to-1 ratio retroactive to all individuals incarcerated for crack cocaine offenses, which brought some additional relief to those punished by the original 100-to-1 sentencing disparity.

It is undeniable that the disparate treatment of crack cocaine and powder cocaine has hit communities of color the hardest. The percentage of Black crack cocaine trafficking defendants has consistently ranged between 77 percent and 86 percent. In FY 2023, 79 percent of crack cocaine trafficking defendants were Black while another 14.2 percent were Hispanic.¹ Further evidence of the racial impact of the disparate treatment of crack and powder cocaine is the fact that nearly 90 percent of individuals who received sentencing reductions through the Commission's retroactive application of the 2010 crack cocaine amendment were Black² and 92 percent of the individuals who benefited from Sec. 404 of the First Step Act were Black.³

However, the 18-to-1 ratio currently reflected in the Drug Quantity Table still does not reflect sound policy. There is no scientific basis for treating crack cocaine offenses more harshly than powder cocaine offenses. And there is no cultural or social impetus for the overly harsh treatment. In fact, the number of defendants whose primary drug type is crack cocaine has steadily declined from 6,168 in FY 2008 to only 855 in FY 2023.⁴ And crack cocaine defendants as a percentage of all drug trafficking defendants have declined from 26.8 percent in FY 1996 to 4.6 percent in FY 2023.⁵ The time has come for the Commission to correct the existing unnecessary and unfair disparity between cocaine offenses in the Drug Quantity Table.

We appreciate the Commission's continued thoughtful approach to these two areas of concern and look forward to continuing to work with you on ensuring that federal sentencing laws promote public safety and reintegration. We greatly appreciate the Commission's leadership in setting forth its supervised release proposals and seeking comment on the crack cocaine sentencing disparity. We encourage the Commission to finalize these amendments without delay.

Sincerely,

Shana-Tara O'Toole, President
Jason Pye, Vice President

¹ <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/TableD2.pdf>

² https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf

³ <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20220818-First-Step-Act-Retro.pdf>

⁴ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2008/Table33_o.pdf and <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/TableD1.pdf>

⁵ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1996/TAB-29_o.pdf