United States Sentencing Commission

2023-2024 Amendment Cycle

Public Comment on Retroactivity for Amendment 1, Amendment 3 (Parts A and B), and Amendment 5 (Part D)

89 FR 36853

UNITED STATES SENTENCING COMMISSION

2023-2024 PUBLIC COMMENT ON RETROACTIVITY FOR AMENDMENT 1, AMENDMENT 3 (PARTS A & B), AND AMENDMENT 5 (PART D)

89 FR 36853

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2024, and request for comment.

SUMMARY: The United States Sentencing Commission hereby gives notice that the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index; and the Commission requests comment regarding whether it should include in the *Guidelines Manual* as changes that may be applied retroactively to previously sentenced defendants any or all of the following amendments: Amendment 1; Part A of Amendment 3; Part B of Amendment 3; and Part D of Amendment 5. This notice sets forth the text of the amendments and the reason for each amendment, and the request for comment regarding possible retroactive application of the amendments listed above.

DATES: *Effective Date of Amendments*. The Commission has specified an effective date of November 1, 2024, for the amendments set forth in this notice.

Written Public Comment. Written public comment regarding possible retroactive application of Amendment 1, Part A of Amendment 3, Part B of Amendment 3, and Part D of Amendment 5, should be received by the Commission not later than **June 21, 2024**. Written reply comments, which may only respond to issues raised during the original comment period, should be received by the Commission not later than **July 22, 2024**. Any public comment received after the close of the comment period, and reply comment received on issues not raised during the original comment period, may not be considered.

ADDRESSES: There are two methods for submitting written public comment and reply comments.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov. Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Issue for Comment on Retroactivity.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p). Absent action of the Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

(1) Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index

Pursuant to its authority under 28 U.S.C. 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index. Notice of the proposed amendment was published in the *Federal Register* on December 26, 2023 (*see* 88 FR 89142). The Commission held public hearings on the proposed amendments in Washington, D.C., on March 6–7, 2024. On April 30, 2024, the Commission submitted the promulgated amendments to the Congress and specified an effective date of November 1, 2024.

The text of the amendments to the sentencing guidelines, policy statements, commentary, and statutory index, and the reason for each amendment, is set forth below. Additional information pertaining to the amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

(2) Request for Comment on Possible Retroactive Application of Amendment 1, Part A of Amendment 3, Part B of Amendment 3, and Part D of Amendment 5

This notice sets forth a request for comment regarding whether the Commission should list in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants any or all of the following amendments: Amendment 1 (relating to acquitted conduct); Part A of Amendment 3 (relating to §2K2.1(b)(4)(B) enhancement); Part B of Amendment 3 (relating to the interaction between §2K2.4 and §3D1.2(c)); and Part D of Amendment 5 (relating to enhanced penalties for drug offenders).

The Background Commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

AUTHORITY: 28 U.S.C. 994(a), (o), (p), and (u); USSC Rules of Practice and Procedure 2.2, 4.1, and 4.1A.

Carlton W. Reeves,

Chair.

(1) AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, OFFICIAL COMMENTARY, AND STATUTORY INDEX

1. Amendment: Section 1B1.3 is amended—

in subsection (a), in the heading, by striking "*Chapters Two (Offense Conduct) and Three (Adjustments).*" and inserting "*Chapters Two (Offense Conduct) and Three (Adjustments).*—";

in subsection (b), in the heading, by striking "*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*" and inserting "*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*—";

and by inserting at the end the following new subsection (c):

"(c) *Acquitted Conduct*.—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.".

The Commentary to §1B1.3 captioned "Application Notes" is amended by inserting at the end the following new Note 10:

"10. *Acquitted Conduct.*—Subsection (c) provides that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct establishes, in whole or in part, the instant offense of conviction. There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.".

The Commentary to §6A1.3 is amended—

by striking "*see also United States v. Watts*, 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution);" and inserting "*Witte v. United States*, 515 U.S. 389, 397–401 (1995) (noting that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial, including information concerning uncharged criminal conduct, in sentencing a defendant within the range authorized by statute);";

by striking "*Watts*, 519 U.S. at 157" and inserting "*Witte*, 515 U.S. at 399–401";

and by inserting at the end of the paragraph that begins "The Commission believes that use of a preponderance of the evidence standard" the following: "Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. *See* §1B1.3(c) (Relevant Conduct). Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661.".

Reason for Amendment: This amendment revises §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to exclude acquitted conduct from the scope of relevant conduct used in calculating a sentence range under the federal guidelines. Acquitted conduct is unique, and this amendment does not comment on the use of uncharged, dismissed, or other relevant conduct as defined in §1B1.3 for purposes of calculating the guideline range.

The use of acquitted conduct to increase a defendant's sentence has been a persistent concern for many within the criminal justice system and the subject of robust debate over the past several years. A number of jurists, including current and past Supreme Court Justices, have urged reconsideration of acquitted-conduct sentencing. *See, e.g.*, *McClinton v. United States*, 143 S. Ct. 2400, 2401 & n.2 (2023) (Sotomayor, J., Statement respecting the denial of certiorari) (collecting cases and statements opposing acquitted-conduct sentencing). In denying certiorari

last year in *McClinton*, multiple Justices suggested that it would be appropriate for the Commission to resolve the question of how acquitted conduct is considered under the guidelines. *See id*. at 2402–03; *id.* at 2403 (Kavanaugh, J., joined by Gorsuch, J. and Barrett, J., Statement respecting the denial of certiorari), *but see id*. (Alito, J., concurring in the denial of certiorari). Many states have prohibited consideration of acquitted conduct. *See id.* at 2401 n.2 (collecting cases). And, currently, Congress is considering bills to prohibit its consideration at sentencing, with bipartisan support. *See* Prohibiting Punishment of Acquitted Conduct Act of 2023, S. 2788, 118th Cong. (1st Sess. 2023); Prohibiting Punishment of Acquitted Conduct Act of 2023, H.R. 5430, 118th Cong. (1st Sess. 2023).

First, the amendment revises §1B1.3 by adding new subsection (c), which provides that "[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court unless such conduct also establishes, in whole or in part, the instant offense of conviction." This rule seeks to promote respect for the law, which is a statutory obligation of the Commission. *See* 28 U.S.C § 994(a)(2); *id.* § 991(b)(1)(A) & (B); 18 U.S.C. § 3553(a)(2).

This amendment seeks to promote respect for the law by addressing some of the concerns that numerous commenters have raised about acquitted-conduct sentencing, including those involving the "perceived fairness" of the criminal justice system. *McClinton*, 143 S. Ct. at 2401 (Sotomayor, J., Statement respecting the denial of certiorari). Some commenters were concerned that consideration of

acquitted conduct to increase the guideline range undermines the historical role of the jury and diminishes "the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system." *McClinton*, 143 S. Ct. at 2402–03 (Sotomayor, J., Statement respecting the denial of certiorari); *see United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (expressing concern that "using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system"). They argue that consideration of acquitted conduct at sentencing contributes to the erosion of the jury-trial right and enlarges the already formidable power of the government, reasoning that defendants who choose to put the government to its proof "face all the risks of conviction, with no practical upside to acquittal unless they . . . are absolved of *all* charges." *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of reh'g en banc). For these reasons, "acquittals have long been 'accorded special weight,' distinguishing them from conduct that was never charged and passed upon by a jury," *McClinton*, 143 S. Ct. at 2402 (Sotomayor, J., Statement respecting the denial of certiorari (quoting *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980))) and viewed as "inviolate," *McElrath v. Georgia*, 601 U.S. 87, 94 (2024).

Second, the amendment adds new Application Note 10 to §1B1.3(c), which instructs that in "cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction . . . , the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the

instant offense of conviction and therefore qualifies as relevant conduct." The amendment thus clarifies that while "acquitted conduct" cannot be considered in determining the guideline range, any conduct that establishes—in whole or in part—the instant offense of conviction is properly considered, even as relevant conduct and even if that same conduct also underlies a charge of which the defendant has been acquitted. During the amendment cycle, commenters raised questions about how a court would be able to parse out acquitted conduct in a variety of specific scenarios, including those involving "linked or related charges" or "overlapping conduct" (*e.g.*, conspiracy counts in conjunction with substantive counts or obstruction of justice counts in conjunction with substantive civil rights counts). Commission data demonstrate that cases involving acquitted conduct will be rare. In fiscal year 2022, of 62,529 sentenced individuals, 1,613 were convicted and sentenced after a trial (2.5% of all sentenced individuals), and of those, only 286 (0.4% of all sentenced individuals) were acquitted of at least one offense or found guilty of only a lesser included offense.

To ensure that courts may continue to appropriately sentence defendants for conduct that establishes counts of conviction, rather than define the specific boundaries of "acquitted conduct" and "convicted conduct" in such cases, the Commission determined that the court that presided over the proceeding will be best positioned to determine which conduct can properly be considered as part of relevant conduct based on the individual facts in those cases.

The amendment limits the scope of "acquitted conduct" to only those charges of which the defendant has been acquitted in federal court. This limitation reflects the principles of the dual-sovereignty doctrine and responds to concerns about administrability. The chief concern regarding administrability raised by commenters throughout the amendment cycle was whether courts would be able to parse acquitted conduct from convicted conduct in cases in which some conduct relates to both the acquitted and convicted counts. The Commission appreciates that federal courts may have greater difficulty making this determination if it involves proceedings that occurred in another jurisdiction and at different times.

Third, and finally, the amendment makes corresponding changes to §6A1.3 (Resolution of Disputed Factors (Policy Statement)), restating the principle provided in §1B1.3(c) and further clarifying that "nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661."

2. **Amendment:** Section 2B1.1(b)(1) is amended by inserting the following at the end:

"**Notes to Table:*

(A) *Loss.*—Loss is the greater of actual loss or intended loss.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) For purposes of this guideline—

(i) 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) 'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) 'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) 'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3—

by striking subparagraphs (A) and (B) as follows:

"(A) *General Rule.*—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) *Actual Loss.*—'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) *Intended Loss.*—'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) *Pecuniary Harm.*—'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) *Reasonably Foreseeable Pecuniary Harm.*—For purposes of this guideline, 'reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) *Rules of Construction in Certain Cases.*—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award,

reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) *Offenses Under 18 U.S.C. § 1030.*—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.";

inserting the following new subparagraph (A):

"(A) *Rules of Construction in Certain Cases.*—In the cases described in clauses (i) through (iii), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(i) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(ii) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(iii) *Offenses Under 18 U.S.C. § 1030.*—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.";

and by redesignating subparagraphs (C), (D), (E), and (F) as subparagraphs (B), (C), (D), and (E), respectively.

The Commentary to §2B2.3 captioned "Application Notes" is amended in Note 2 by striking "the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 3 by striking "Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud) and Application Note 3 of the Commentary to §2B1.1".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 3(I) by striking "the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1".

Reason for Amendment: This amendment is a result of the Commission's continued study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary. In *Stinson v. United States*, 508 U.S. 36, 38 (1993), the Supreme Court held that commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Following *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), which limited deference to executive agencies' interpretation of regulations to situations in which the regulation is "genuinely ambiguous," the deference afforded to various guideline commentary provisions has been debated and is the subject of conflicting court decisions.

Applying *Kisor*, the Third Circuit has held that Application Note 3(A) of the commentary to §2B1.1 (Theft, Property Destruction, and Fraud) is not entitled to deference. *See United States v. Banks*, 55 F.4th 246 (3d Cir. 2022). Application Note 3(A) provides a general rule that "loss is the greater of actual loss or intended loss" for purposes of the loss table in §2B1.1(b)(1), which increases an individual's offense level based on loss amount. In *Banks*, the Third Circuit held that "the term

'loss' [wa]s unambiguous in the context of §2B1.1" and that it unambiguously referred to "actual loss." The Third Circuit reasoned that "the commentary expand[ed] the definition of 'loss' by explaining that generally 'loss is the greater of actual loss or intended loss,' " and therefore "accord[ed] the commentary no weight." *Banks*, 55 F.4th at 253, 258.

The loss calculations for individuals in the Third Circuit are now computed differently than elsewhere, where other circuit courts have uniformly applied the general rule in Application Note 3(A). The Commission estimates that before the *Banks* decision approximately 50 individuals per year were sentenced using intended loss in the Third Circuit.

To ensure consistent loss calculation across circuits, the amendment creates Notes to the loss table in §2B1.1(b)(1) and moves the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself as part of the Notes. The amendment also moves rules providing for the use of gain as an alternative measure of loss, as well as the definitions of "actual loss," "intended loss," "pecuniary harm," and "reasonably foreseeable pecuniary harm," from the Commentary to the Notes. In addition, the amendment makes corresponding changes to the Commentary to §§2B2.3 (Trespass), 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions),

and 8A1.2 (Application Instructions — Organizations), which calculate loss by reference to the Commentary to §2B1.1.

While the Commission may undertake a comprehensive review of §2B1.1 in a future amendment cycle, this amendment aims to ensure consistent guideline application in the meantime without taking a position on how loss may be calculated in the future.

3. Amendment:

Part A (§2K2.1(b)(4)(B) Enhancement)

Section 2K2.1(b)(4)(B)(i) is amended by striking "any firearm had an altered or obliterated serial number" and inserting "any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye".

The Commentary to §2K2.1 is amended—

in Note 8(A) by striking "if the offense involved a firearm with an altered or obliterated serial number" and inserting "if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye"; and by striking "This is because the

base offense level takes into account that the firearm had an altered or obliterated serial number.";

and in Note 8(B) by striking "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number" and inserting "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye".

Part B (Interaction between §2K2.4 and §3D1.2(c))

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 by striking the following:

"*Weapon Enhancement*.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the

underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction

for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6)(B) would not apply.

In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).";

and inserting the following:

"*Non-Applicability of Certain Enhancements*.—

(A) *In General*.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to

use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6)(B) would not apply.

(B) *Impact on Grouping*.—If two or more counts would otherwise group under subsection (c) of §3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under §3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A). Thus, for example, in a case in which the defendant is convicted of a felon-in-possession count

under 18 U.S.C. § 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. § 924(c), the counts shall be grouped pursuant to §3D1.2(c). The applicable Chapter Two guidelines for the felon-in-possession count and the drug trafficking count each include 'conduct that is treated as a specific offense characteristic' in the other count, but the otherwise applicable enhancements did not apply due to the rules in §2K2.4 related to 18 U.S.C. § 924(c) convictions.

(C) *Upward Departure Provision*.—In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).".

Reason for Amendment: This amendment addresses circuit conflicts involving §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Part A addresses whether the serial number of a firearm must be illegible for application of the enhancement for an "altered or obliterated" serial number at §2K2.1(b)(4)(B), and Part B addresses whether subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has an 18 U.S.C. § 924(c) conviction.

Part A – Section 2K2.1(b)(4)(B) Enhancement

Part A of the amendment resolves the differences in how the circuits interpret the term "altered" in the 4-level enhancement at §2K2.1(b)(4)(B), which applies when the serial number of a firearm has been "altered or obliterated." A circuit conflict has arisen as to whether the serial number must be illegible for this enhancement to apply and as to what test for legibility should be employed.

The Sixth and Second Circuits have adopted the naked eye test. The Sixth Circuit held that a serial number must be illegible, noting that "a serial number that is defaced but remains visible to the naked eye is not 'altered or obliterated' under the

guideline." *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020). The Sixth Circuit reasoned that "[a]ny person with basic vision and reading ability would be able to tell immediately whether a serial number is legible," and may be less inclined to purchase a firearm without a legible serial number. *Id.* at 717. The Second Circuit followed the Sixth Circuit in holding that "altered" means illegible for the same reasons. *United States v. St. Hilaire*, 960 F.3d 61, 66 (2d Cir. 2020).

By contrast, the Fourth, Fifth, and Eleventh Circuits have upheld the enhancement where a serial number is "less legible." The Fourth Circuit held that "a serial number that is made *less* legible is made different and therefore is altered for purposes of the enhancement." *United States v. Harri*s, 720 F.3d 499, 501 (4th Cir. 2013). The Fifth Circuit similarly affirmed the enhancement even though the damage did not render the serial number unreadable because "the serial number of the firearm [] had been materially changed in a way that made its accurate information less accessible." *United States v. Perez,* 585 F.3d 880, 884 (5th Cir. 2009). In an unpublished opinion, the Eleventh Circuit reasoned that an interpretation where "altered" means illegible "would render 'obliterated' superfluous." *United States v. Millender*, 791 F. App'x 782, 783 (11th Cir. 2019).

This amendment resolves this circuit conflict by amending the enhancement to adopt the holdings of the Second and Sixth Circuits. As amended, the enhancement applies if "any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." This

amendment is consistent with the Commission's recognition in 2006 of "both the difficulty in tracing firearms with altered and obliterated serial numbers, and the increased market for these types of weapons." *See* USSG, App. C, amend. 691 (effective Nov. 1, 2006). By employing the "unaided eye" test for legibility, the amendment also seeks to resolve the circuit split and ensure uniform application.

Part B – Grouping: §2K2.4, Application Note 4

Part B resolves a difference among circuits concerning whether subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c). Section 3D1.2 (Grouping of Closely Related Counts) contains four rules for determining whether multiple counts should group because they are closely related. Subsection (c) states that counts are grouped together "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." The Commentary to §3D1.2 further explains that "[s]ubsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor."

While there is little disagreement that the felon-in-possession and drug trafficking counts ordinarily group under §3D1.2(c), courts differ regarding the extent to which the presence of the count under 18 U.S.C. § 924(c) prohibits grouping under the guidelines. Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) is applicable to certain statutes with mandatory minimum terms of imprisonment (*e.g.*, 18 U.S.C. § 924(c)). The Commentary to §2K2.4 provides that "[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense."

The Sixth, Eighth, and Eleventh Circuits have held that such counts can group together under §3D1.2(c) because the felon-in-possession convictions and drug trafficking convictions each include conduct that is treated as specific offense characteristics in the other offense, even if those specific offense characteristics do not apply due to §2K2.4. *United States v. Gibbs*, 395 F. App'x 248, 250 (6th Cir. 2010); *United States v. Bell*, 477 F.3d 607, 615–16 (8th Cir. 2007); *United States v. King*, 201 F. App'x 715, 718 (11th Cir. 2006). By contrast, the Seventh Circuit has held that felon-in-possession and drug trafficking counts do not group under these circumstances because the grouping rules apply only after the offense level for each count has been determined and "by virtue of §2K2.4, [the counts] did not operate as specific offense characteristics of each other, and the enhancements in

§§2D1.1(b)(1) and 2K2.1(b)(6)(B) did not apply." *United States v. Sinclair*, 770 F.3d 1148, 1157–58 (7th Cir. 2014).

This amendment revises Application Note 4 to §2K2.4 and reorganizes it into three subparagraphs. Subparagraph A retains the same instruction on the non-applicability of certain enhancements; subparagraph B explains the impact on grouping; and subparagraph C retains the upward departure provision. As amended, subparagraph B resolves the circuit conflict by explicitly instructing that "[i]f two or more counts would otherwise group under subsection (c) of §3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under §3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A)."

This amendment aligns with the holdings of the majority of circuits involved in the circuit conflict. Additionally, this amendment clarifies the Commission's view that promulgation of this Application Note originally was not intended to place any limitations on grouping.

4. **Amendment:** Section 5H1.1 is amended by striking the following:

"Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the

case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).";

and inserting the following:

"Age may be relevant in determining whether a departure is warranted.

Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.

The age-crime curve, one of the most consistent findings in criminology, demonstrates that criminal behavior tends to decrease with age. Age-appropriate interventions and other protective factors may promote desistance from crime. Accordingly, in an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).".

Reason for Amendment: This amendment makes several revisions to §5H1.1 (Age (Policy Statement)), which addresses the relevance of age in sentencing. Before the amendment, §5H1.1 provided, in relevant part, that "[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."

The amendment revises the first sentence in §5H1.1 to provide more broadly that "[a]ge may be relevant in determining whether a departure is warranted." It also adds language specifically providing that a downward departure may be warranted

in cases in which the defendant was youthful at the time of the instant offense or any prior offenses. In line with the Commission's statutory duty to establish sentencing policies that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process," 28 U.S.C. § 991(b)(1)(C), this amendment reflects the evolving science and data surrounding youthful individuals, including recognition of the age-crime curve and that cognitive changes lasting into the mid-20s affect individual behavior and culpability. The amendment also reflects expert testimony to the Commission indicating that certain risk factors may contribute to youthful involvement in criminal justice systems, while protective factors, including appropriate interventions, may promote desistance from crime.

5. Amendment:

Part A (Export Control Reform Act of 2018)

The Commentary to §2M5.1 captioned "Statutory Provisions" is amended by striking "50 U.S.C. § 1705; 50 U.S.C. §§ 4601–4623" and inserting "50 U.S.C. §§ 1705, 4819".

The Commentary to §2M5.1 captioned "Application Notes" is amended—

by striking Notes 1 through 4 as follows:

"1. In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

3. In addition to the provisions for imprisonment, 50 U.S.C. § 4610 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is $250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or $1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.

4. For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. § 4605).";

and by inserting the following new Notes 1, 2, and 3:

"1. *Definition*.—For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 1754 of the Export Controls Act of 2018 (50 U.S.C. § 4813).

2. *Additional Penalties*.—In addition to the provisions for imprisonment, 50 U.S.C. § 4819 contains provisions for criminal fines and forfeiture as well as civil penalties.

3. *Departure Provisions*.—

(A) *In General*.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the

guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict*.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.".

Appendix A (Statutory Index) is amended in the line referenced to 50 U.S.C. § 4610 by striking "§ 4610" and inserting "§ 4819".

Part B (Offenses Involving Records and Reports on Monetary Instruments Transactions)

Section 2S1.3(b)(2)(B) is amended by striking "committed the offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period" and inserting "committed the offense while violating another law of the United States or as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period".

Part C (Antitrust Offenses)

The Commentary to §2R1.1 captioned "Statutory Provisions" is amended by striking "§§ 1, 3(b)" and inserting "§§ 1, 3(a)".

The Commentary to §2R1.1 captioned "Application Notes" is amended—

in Note 3 by inserting at the beginning the following new heading: "*Fines for Organizations*.—";

in Note 4 by inserting at the beginning the following new heading: "*Another Consideration in Setting Fine*.—";

in Note 5 by inserting at the beginning the following new heading: "*Use of Alternatives Other Than Imprisonment*.—";

in Note 6 by inserting at the beginning the following new heading: "*Understatement of Seriousness*.—";

and in Note 7 by inserting at the beginning the following new heading: "*Defendant with Previous Antitrust Convictions*.—".

The Commentary to §2R1.1 captioned "Background" is amended by striking "These guidelines apply" and inserting "This guideline applies".

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. § 3(b) by striking "§ 3(b)" and inserting "§ 3(a)".

Part D (Enhanced Penalties for Drug Offenders)

Section 2D1.1(a) is amended by striking paragraphs (1) through (4) as follows:

"(1) 43, if—

(A) the defendant is convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or";

and by inserting the following new paragraphs (1) through (4):

"(1) 43, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the mandatory statutory term of life imprisonment applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(2) 38, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the statutory term of imprisonment of not less than

20 years to life applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(3) 30, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(4) 26, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

by striking Notes 1 through 4 as follows:

"1. *Definitions*.—

For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

For purposes of subsection (a), 'serious drug felony,' 'serious violent felony,' and 'felony drug offense' have the meaning given those terms in 21 U.S.C. § 802.

2. '*Mixture or Substance'*.—'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

3. *Classification of Controlled Substances*.—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

4. *Applicability to 'Counterfeit' Substances*.—The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. § 802 to

mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.";

and inserting the following new Notes 1 through 4:

"1. *Definition of 'Plant'*.—For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

2. *Application of Subsection (a)*.—Subsection (a) provides base offense levels for offenses under 21 U.S.C. §§ 841 and 960 based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

Subsection (a)(1) provides a base offense level of 43 for offenses under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the mandatory statutory term of life imprisonment applies because death or serious bodily injury resulted from the use of the controlled substance and the defendant committed the offense after one or more prior convictions for a serious drug felony, serious violent felony, or felony drug offense.

Subsection (a)(2) provides a base offense level of 38 for offenses under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the statutory minimum term of imprisonment of not less than 20 years to life applies because death or serious bodily injury resulted from the use of the controlled substance.

Subsection (a)(3) provides a base offense level of 30 for offenses under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies because death or serious bodily injury resulted from the use of the controlled substance and the defendant committed the offense after one or more prior convictions for a felony drug offense.

Subsection (a)(4) provides a base offense level of 26 for offenses under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies because death or serious bodily injury resulted from the use of the controlled substance.

The terms 'serious drug felony,' 'serious violent felony,' and 'felony drug offense' are defined in 21 U.S.C. § 802. The base offense levels in subsections (a)(1) through (a)(4) would also apply if the parties stipulate to the applicable offense described in those provisions for purposes of

calculating the guideline range under §1B1.2 (Applicable Guidelines) or to any such base offense level.

3. *'Mixture or Substance'*.—'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested

marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

4. *In General*.—

(A) *Classification of Controlled Substances*.—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

(B) *Applicability to 'Counterfeit' Substances*.—The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.".

Part E ("Sex Offense" Definition in §4C1.1 (Adjustment for Certain Zero-Point Offenders))

Section 4C1.1(b)(2) is amended by striking " 'Sex offense' means (A) an offense, perpetrated against a minor, under"; and inserting " 'Sex offense' means (A) an offense under".

Reason for Amendment: This multi-part amendment responds to recently enacted legislation and miscellaneous guideline application issues.

Part A – Export Control Reform Act of 2018

Part A of the amendment amends Appendix A (Statutory Index) to reference the new statutory provisions from the Export Control Reform Act (ECRA) of 2018, enacted as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115–232 (Aug. 13, 2018), to §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism). The ECRA repealed the Export Administration Act (EAA) of 1979 regarding dual-use export controls, previously codified at 50 U.S.C. §§ 4601–4623. At the same time, the Act promulgated new provisions, codified at 50 U.S.C. §§ 4811–4826, relating to export controls for national security and foreign policy purposes. Section 4819 prohibits a willful violation of the Act or attempts and conspiracies to violate any regulation, order, license, or other authorization issued

under the Act, with a maximum term of imprisonment of 20 years. Section 4819 replaced the penalty provision of the repealed Act, at 50 U.S.C. § 4610 (Violations), which had been referenced in Appendix A to §2M5.1. The Commission determined that §2M5.1 remains the most analogous guideline for the offenses prohibited under the new section 4819. As such, the amendment revises Appendix A to delete the reference to 50 U.S.C. § 4610 and replaces it with a reference to 50 U.S.C. § 4819, with conforming changes in the Commentary.

Part B – Offenses Involving Records and Reports on Monetary Instruments Transactions

Part B of the amendment revises the 2-level enhancement at subsection (b)(2)(B) of §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts) to better account for certain enhanced penalty provisions in subchapter II (Records and Reports on Monetary Instruments Transactions) of chapter 53 (Monetary Transactions) of title 31 (Money and Finance), United States Code ("subchapter II").

Most substantive criminal offenses in subchapter II are punishable at 31 U.S.C. § 5322 (Criminal penalties). Section 5322(a) provides a maximum term of imprisonment of five years for a simple violation. Section 5322(b) provides an

enhanced maximum term of imprisonment of ten years if the offense was committed while "violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period." Two additional criminal offenses in subchapter II provide substantially similar enhanced maximum terms of imprisonment, at sections 5324(d)(2) (Structuring transactions to evade reporting requirement prohibited) and 5336(h)(3)(B)(ii)(II) (Beneficial ownership information reporting requirements).

While §2S1.3(b)(2)(B) accounted for offenses involving a "a pattern of any illegal activity involving more than $100,000," the Department of Justice raised concerns that it does not address the other aggravating statutory condition of committing the offense while "violating another law of the United States." Addressing these concerns, the Commission determined that an amendment to §2S1.3(b)(2)(B) that expressly provides for this additional alternative factor more fully gives effect to the enhanced penalty provisions provided for in sections 5322(b), 5324(d)(2), and 5336(h)(3)(B)(ii)(II).

Part C – Antitrust Offenses

Part C of the amendment responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A to §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors). In 2002, Congress amended 15 U.S.C. § 3 to create a new criminal offense. *See*

Section 14102 of the Antitrust Technical Corrections Act of 2002, Pub. L. 107–273 (Nov. 2, 2002). Prior to the Antitrust Technical Corrections Act of 2002, 15 U.S.C. § 3 contained only one provision prohibiting any contract or combination in the form of trust or otherwise (or any such conspiracy) in restraint of trade or commerce in any territory of the United States or the District of Columbia. The Act redesignated the existing provision as section 3(a) and added a new criminal offense at a new section 3(b). Section 3(b) prohibits monopolization, attempts to monopolize, and combining or conspiring with another person to monopolize any part of the trade or commerce in or involving any territory of the United States or the District of Columbia. 15 U.S.C. § 3(b). At the time, the Commission referenced section 3(b) in Appendix A to §2R1.1 but did not reference section 3(a) to any guideline.

Part C of the amendment amends Appendix A and the Commentary to §2R1.1 to replace the reference to 15 U.S.C. § 3(b) with a reference to 15 U.S.C. § 3(a). This change reflects the fact that §2R1.1 is intended to apply to antitrust offenses involving agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, the type of conduct proscribed at section 3(a), and does not address monopolization offenses, the type of conduct prohibited by section 3(b).

Part D – Enhanced Penalties for Drug Offenders

Part D of the amendment clarifies that the alternative enhanced base offense levels at §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) are based on the offense of conviction, not relevant conduct. Sections 841 and 960 of title 21, United States Code, contain crimes with mandatory minimum penalties for defendants whose instant offense resulted in death or serious bodily injury and crimes with mandatory minimum penalties for defendants with the combination of both an offense resulting in death or serious bodily injury and prior convictions for certain specified offenses. The Commission received public comment and testimony that it was unclear whether the Commission intended for §§2D1.1(a)(1)–(a)(4) to apply only when the defendant was convicted of one of these crimes or whenever a defendant meets the applicable requirements based on relevant conduct.

The amendment resolves the issue by amending §§2D1.1(a)(1)–(4) to clarify that the base offense levels in those provisions apply only when the individual is convicted of an offense under sections 841(b) or 960(b) to which the applicable enhanced statutory mandatory minimum term of imprisonment applies, or when the parties have stipulated to: (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level. The amendment is intended to clarify the Commission's original intent that

the enhanced base offense levels apply because the statutory elements have been established and the defendant was convicted under the enhanced penalty provision provided in sections 841(b) or 960(b). The amendment also responds to comments made by the Federal Public and Community Defenders and the Department of Justice that the enhanced penalties should also apply when the parties stipulate to their application. The amendment also amends the Commentary to §2D1.1 to add an application note explaining the applicable mandatory minimum terms of imprisonment that apply "based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense."

Part E – "Sex Offense" Definition in §4C1.1 (Adjustment for Certain Zero-Point Offenders)

Part E of the amendment responds to concerns that the definition of "sex offense" in subsection (b)(2) of §4C1.1 (Adjustment for Certain Zero-Point Offenders) was too restrictive because it applied only to offenses perpetrated against minors.

In 2023, the Commission added a new Chapter Four guideline at §4C1.1 that provides a 2-level decrease from the offense level determined under Chapters Two and Three for "zero-point" offenders who meet certain criteria. *See* USSG App. C, amend. 821 (effective Nov. 1, 2023). The 2-level decrease applies only if none of the exclusionary criteria set forth in subsections (a)(1) through (a)(10) apply.

Among the exclusionary criteria is subsection (a)(5), requiring that "the [defendant's] instant offense of conviction is not a sex offense."
Section 4C1.1(b)(2) defined "sex offense" as "(A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition."

The amendment revises the definition of "sex offense" at §4C1.1(b)(2) by striking the phrase "perpetrated against a minor" to ensure that any individual who commits a covered sex offense against any victim, regardless of age, is excluded from receiving the 2-level reduction under §4C1.1. In making this revision, the Commission determined that expanding the definition to cover all conduct in the provisions listed in the definition regardless of the victim's age was appropriate for two reasons. First, given the egregious nature of sexual assault and the gravity of the physical, emotional, and psychological harms that victims experience, the Commission determined that its initial policy determination to treat adult and minor victims differently for purposes of the 2-level reduction should be revised. Second, the Commission concluded that while some individuals would already be excluded from the 2-level reduction if they employed violence or their conduct resulted in death or serious bodily injury to the victim (conduct which is taken into account at

§4C1.1(a)(3) and (a)(4), respectively), many serious sex offenses are committed through coercion and other non-violent means and can leave lasting consequences on victims.

6. **Amendment:** Section 1B1.1(a)(6) is amended by striking "Part B of Chapter Four" and inserting "Parts B and C of Chapter Four".

The Commentary to §1B1.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Frequently Used Terms Defined*.—";

in Note 1(F) by striking "subdivision" and inserting "clause";

in Note 2 by inserting at the beginning the following new heading: "*Definition of Additional Terms*.—"; and by striking "case by case basis" and inserting "case-by-case basis";

in Note 3 by inserting at the beginning the following new heading: "*List of Statutory Provisions*.—";

in Note 4 by inserting at the beginning the following new heading: "*Cumulative Application of Multiple Adjustments*.—";

in Note 4(A) by striking "specific offense characteristic subsection" and inserting "specific offense characteristic"; and by striking "subdivisions" and inserting "subparagraphs";

and in Note 5 by inserting at the beginning the following new heading: "*Two or More Guideline Provisions Equally Applicable*.—".

Chapter Two is amended in the Introductory Commentary by striking "Chapter Four, Part B (Career Offenders and Criminal Livelihood)" and inserting "Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)".

Section 2B1.1(b)(7) is amended by striking "Federal" and inserting "federal"; and by striking "Government" both places such term appears and inserting "government".

Section 2B1.1(b)(17) is amended by striking "subdivision" both places such term appears and inserting "subparagraph".

Section 2B1.1(b)(19)(B) is amended by striking "subdivision" and inserting "subparagraph".

Section 2B1.1(c) is amended by striking “subdivision” and inserting “paragraph”.

The Commentary to 2B1.1 captioned “Application Notes” is amended—

in Note 1 by striking “ ‘Equity securities’ ” and inserting “ ‘Equity security’ ”;

in Note 3(E), as redesignated by Amendment 2 of this document, by striking “subdivision (A)” and inserting “subparagraph (A)”;

in Note 3(E)(i), as redesignated by Amendment 2 of this document, by striking “this subdivision” and inserting “this clause”;

in Note 3(E)(viii), as redesignated by Amendment 2 of this document, by striking “a Federal health care offense” and inserting “a federal health care offense”; and by striking “Government health care program” both places such term appears and inserting “government health care program”;

and in Note 4(C)(ii) by striking “subdivision” and inserting “subparagraph”.

The Commentary to §2B6.1 captioned “Application Notes” is amended in Note 1 by striking “United State Code” both places such term appears and inserting “United States Code”; and by striking “subdivision (B)” and inserting “subparagraph (B)”.

Section 2B3.1(b)(3) is amended by striking "subdivisions" both places such term appears and inserting "subparagraphs"; and by striking "cumulative adjustments from (2) and (3)" and inserting "cumulative adjustments from application of paragraphs (2) and (3)".

The Commentary to §2B3.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Definitions*.—";

in Note 2 by inserting at the beginning the following new heading: "*Dangerous Weapon*.—";

in Note 3 by inserting at the beginning the following new heading: "*Definition of 'Loss'*.—";

in Note 4 by inserting at the beginning the following new heading: "*Cumulative Application of Subsections (b)(2) and (b)(3)*.—";

in Note 5 by inserting at the beginning the following new heading: "*Upward Departure Provision*.—";

and in Note 6 by inserting at the beginning the following new heading: " *'A Threat of Death'*.—".

Section 2B3.2(b)(3)(B) is amended by striking "subdivisions" and inserting "clauses".

Section 2B3.2(b)(4) is amended by striking "subdivisions" both places such term appears and inserting "subparagraphs"; and by striking "cumulative adjustments from (3) and (4)" and inserting "cumulative adjustments from application of paragraphs (3) and (4)".

The Commentary to §2B3.2 captioned "Application Notes" is amended—

in Note 2 by inserting at the beginning the following new heading: "*Threat of Injury or Serious Damage*.—";

in Note 3 by inserting at the beginning the following new heading: "*Offenses Involving Public Officials and Other Extortion Offenses*.—";

in Note 4 by inserting at the beginning the following new heading: "*Cumulative Application of Subsections (b)(3) and (b)(4)*.—";

in Note 5 by inserting at the beginning the following new heading: "*Definition of 'Loss to the Victim'*.—";

in Note 6 by inserting at the beginning the following new heading: "*Defendant's Preparation or Ability to Carry Out a Threat*.—";

in Note 7 by inserting at the beginning the following new heading: "*Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims*.—";

and in Note 8 by inserting at the beginning the following new heading: "*Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim*.—".

Section 2C1.8(b)(3) is amended by striking "Federal" and inserting "federal".

The Commentary to §2C1.8 captioned "Application Notes" is amended in Note 2 by striking "Federal" both places such term appears and inserting "federal"; and by striking "Presidential" and inserting "presidential".

Section 2D1.1(b)(14)(C)(ii) is amended by striking "subdivision" and inserting "subparagraph".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

in Note 8(D)—

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the following:

"1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm";

and inserting the following:

"1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg";

and under the heading relating to Schedule III Substances (except Ketamine), by striking "1 unit of a Schedule III Substance" and inserting "1 unit of a Schedule III Substance (except Ketamine)";

and in Note 9, under the heading relating to Hallucinogens, by striking the following:

"2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg";

and inserting the following:

"2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
3,4-Methylenedioxyamphetamine (MDA)	250 mg
3,4-Methylenedioxymethamphetamine (MDMA)	250 mg
Mescaline	500 mg
Phencyclidine (PCP)*	5 mg".

The Commentary to §2D1.1 captioned "Background" is amended by striking "Section 6453 of the Anti-Drug Abuse Act of 1988" and inserting "section 6453 of Public Law 100–690".

The Commentary to §2D1.2 captioned "Background" is amended by striking "Section 6454 of the Anti-Drug Abuse Act of 1988" and inserting "section 6454 of Public Law 100–690".

The Commentary to §2D1.5 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Inapplicability of Chapter Three Adjustment*.—";

in Note 2 by inserting at the beginning the following new heading: "*Upward Departure Provision*.—";

in Note 3 by inserting at the beginning the following new heading: " *'Continuing Series of Violations'*.—";

and in Note 4 by inserting at the beginning the following new heading: "*Multiple Counts*.—".

The Commentary to §2D1.5 captioned "Background" is amended by striking "Title 21 U.S.C. § 848" and inserting "Section 848 of title 21, United States Code,".

Section 2E2.1(b)(2) is amended by striking "subdivisions" both places such term appears and inserting "subparagraphs"; and by striking "the combined increase from (1) and (2)" and inserting "the combined increase from application of paragraphs (1) and (2)".

The Commentary to §2E2.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Definitions*.—";

and in Note 2 by inserting at the beginning the following new heading: "*Interpretation of Specific Offense Characteristics*.—".

Section 2E3.1(a)(1) is amended by striking "subdivision" and inserting "paragraph".

The Commentary to §2E3.1 captioned "Application Notes" is amended in Note 1 by striking "§ 2156(g)" and inserting "§2156(f)".

Section 2H2.1(a)(2) is amended by striking "in (3)" and inserting "in paragraph (3)".

The Commentary to §2H2.1 captioned "Application Note" is amended in Note 1 by inserting at the beginning the following new heading: "*Upward Departure Provision*.—".

Section 2K1.4(b)(2) is amended by striking "under (a)(4)" and inserting "under subsection (a)(4)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 1 by striking "United State Code" both places such term appears and inserting "United States Code".

The Commentary to §2S1.1 captioned "Application Notes" is amended—

in Note 1 by striking "authorized Federal official" and inserting "authorized federal official";

and in Note 4(B)(vi) by striking "subdivisions" and inserting "clauses".

Section 3B1.1(c) is amended by striking "in (a) or (b)" and inserting "in subsection (a) or (b)".

The Commentary to §3B1.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Definition of 'Participant'*.—";

in Note 2 by inserting at the beginning the following new heading: "*Organizer, Leader, Manager, or Supervisor of One or More Participants*.—";

in Note 3 by inserting at the beginning the following new heading: " *'Otherwise Extensive'*.—";

and in Note 4 by inserting at the beginning the following new heading: "*Factors to Consider*.—"; and by striking "decision making" and inserting "decision-making".

The Commentary to §3D1.1 captioned "Application Notes" is amended in Note 2 by inserting at the beginning the following new heading: "*Application of Subsection (b)*.—".

The Commentary to §3D1.1 captioned "Background" is amended by striking "Chapter Four, Part B (Career Offenders and Criminal Livelihood)" and inserting "Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)".

The Commentary to §3D1.5 is amended by striking "Chapter Four, Part B (Career Offenders and Criminal Livelihood)" and inserting "Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)".

Section 4A1.1(b) is amended by striking "in (a)" and inserting "in subsection (a)".

Section 4A1.1(c) is amended by striking "in (a) or (b)" and inserting "in subsection (a) or (b)".

Section 4A1.1(d) is amended by striking "under (a), (b), or (c)" and inserting "under subsection (a), (b), or (c)".

The Commentary to §4A1.1 captioned "Application Notes" is amended—

in Note 1, in the heading, by striking "*§4A1.1(a)*." and inserting "*§4A1.1(a)*.—";

in Note 2, in the heading, by striking "*§4A1.1(b)*." and inserting "§*4A1.1(b)*.—";

in Note 3, in the heading, by striking "*§4A1.1(c)*." and inserting "*§4A1.1(c)*.—";

in Note 4, in the heading, by striking "*§4A1.1(d)*." and inserting "*§4A1.1(d)*.—";

and in Note 5, in the heading, by striking "*§4A1.1(e)*." and inserting "*§4A1.1(e)*.—".

Section 4A1.2(a)(2) is amended by striking "by (A) or (B)" and inserting "by subparagraph (A) or (B)".

Section 4A1.2(d)(2)(B) is amended by striking "in (A)" and inserting "in subparagraph (A)".

Section 4C1.1(a) is amended—

in paragraph (9) by striking "and";

by striking paragraph (10) as follows:

"(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;";

and by inserting at the end the following new paragraphs (10) and (11):

"(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role); and

(11) the defendant was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;".

Section 5E1.2(c)(2) is amended by striking "in (4)" and inserting "in paragraph (4)".

Section 5F1.6 is amended by striking "Federal" and inserting "federal".

The Commentary to 5F1.6 captioned "Application Note" is amended in Note 1 by inserting at the beginning the following new heading: "*Definition of 'Federal Benefit'.*—".

The Commentary to §5G1.2 captioned "Application Notes" is amended—

in Note 1 by striking "*See* Note 3" and inserting "*See* Application Note 3";

in Note 2(A) by striking "subdivision" and inserting "subparagraph";

in Note 4(B)(i) by striking "a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory

maximum)" and inserting "a drug trafficking offense (5-year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20-year statutory maximum)";

in Note 4(B)(ii) by striking "one count of 18 U.S.C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum)" and inserting "one count of 18 U.S.C. § 924(c) (5-year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20-year statutory maximum)";

and in Note 4(B)(iii) by striking the following:

"The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. § 113(a)(3) (10 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460–485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.";

and inserting the following:

"The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5-year mandatory minimum on each count) and one count of violating 18 U.S.C. § 113(a)(3) (10-year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 262 months is appropriate (applicable guideline range of 262–327 months). The court then imposes (I) a sentence of 82 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 60 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 120 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.".

The Commentary to §5K1.1 captioned "Application Notes" is amended—

in Note 1 by inserting at the beginning the following new heading: "*Sentence Below Statutorily Required Minimum Sentence*.—";

in Note 2 by inserting at the beginning the following new heading: "*Interaction with Acceptance of Responsibility Reduction*.—";

and in Note 3 by inserting at the beginning the following new heading: "*Government's Evaluation of Extent of Defendant's Assistance*.—".

The Commentary to §5K1.1 captioned "Background" is amended by striking "*in camera*" and inserting "in camera".

Section 5K2.0(e) is amended by striking "*in camera*" and inserting "in camera".

The Commentary to §5K2.0 captioned "Application Notes" is amended in Note 3(C) by striking "subdivision" and inserting "subparagraph".

Section 6A1.5 is amended by striking "Federal" and inserting "federal".

The Commentary to §8B2.1 captioned "Application Notes" is amended in Note 4(A) by striking "any Federal, State," and inserting "any federal, state,".

Reason for Amendment: This amendment makes technical, stylistic, and other non-substantive changes to the *Guidelines Manual*.

The amendment makes technical and conforming changes in response to the recent promulgation of §4C1.1 (Adjustment for Certain Zero-Point Offenders), which provides a 2-level decrease for certain defendants who have zero criminal history points. The decrease applies only if none of the exclusionary criteria set forth in subsection (a) applies. Currently, the exclusionary criteria include subsection (a)(10), requiring that "the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848." Since promulgation of §4C1.1, several stakeholders have questioned whether either condition in subsection (a)(10) is

disqualifying or whether only the combination of both conditions is disqualifying. The Commission intended §4C1.1(a)(10) to track the safety valve criteria at 18 U.S.C. § 3553(f)(4), such that defendants are ineligible for safety valve relief if they either have an aggravating role or engaged in a continuing criminal enterprise. It is not required to demonstrate both. *See, e.g.*, *United States v. Bazel*, 80 F.3d 1140, 1143 (6th Cir. 1996); *United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020). To clarify the Commission's intention that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision, the amendment makes technical changes to §4C1.1 to divide subsection (a)(10) into two separate provisions (subsections (a)(10) and (a)(11)).

The amendment also adds references to Chapter Four, Part C (Adjustment for Certain Zero-Point Offenders) in §1B1.1 (Application Instructions), the Introductory Commentary to Chapter Two (Offense Conduct), and the Commentary to §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 3D1.5 (Determining the Total Punishment). These guidelines and commentaries refer to the order in which the provisions of the *Guidelines Manual* should be applied.

Finally, the amendment makes technical and clerical changes to—

- the Commentary to §1B1.1 (Application Instructions), to add headings to some application notes, provide stylistic consistency in how subdivisions are designated, and correct a typographical error;

- §2B1.1 (Theft, Property Destruction, and Fraud), to provide consistency in the use of capitalization and how subdivisions are designated, and to correct a reference to the term "equity security";

- the Commentary to §2B1.6 (Aggravated Identity Theft), to correct some typographical errors and provide stylistic consistency in how subdivisions are designated;

- §2B3.1 (Robbery), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;

- §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), to provide stylistic consistency in how subdivisions are designated and add headings to some application notes in the Commentary;

- §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving

a Donation in Connection with an Election While on Certain Federal Property), to provide consistency in the use of capitalization;

- §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), to provide stylistic consistency in how subdivisions are designated, make clerical changes to some controlled substance references in the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9, and correct a reference to a statute in the Background Commentary;

- the Background Commentary to §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), to correct a reference to a statute;

- the Commentary to §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), to add headings to application notes and correct a reference to a statutory provision;

- §2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means), to provide

stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;

- §2E3.1 (Gambling Offenses; Animal Fighting Offenses), to provide stylistic consistency in how subdivisions are designated and correct a reference to a statutory provision in the Commentary;

- §2H2.1 (Obstructing an Election or Registration), to provide stylistic consistency in how subdivisions are designated and add a heading to the application note in the Commentary;

- §2K1.4 (Arson; Property Damage by Use of Explosives), to provide stylistic consistency in how subdivisions are designated;

- the Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to correct typographical errors;

- the Commentary to §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), to provide consistency in the use of capitalization and how subdivisions are designated;

- §3B1.1 (Aggravating Role), to provide stylistic consistency in how subdivisions are designated, add headings to the application notes in the Commentary, and correct a typographical error;

- the Commentary to §3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to add a heading to an application note;

- §4A1.1 (Criminal History Category), to provide stylistic consistency in how subdivisions are designated and correct the headings of the application notes in the Commentary;

- §4A1.2 (Definitions and Instructions for Computing Criminal History), to provide stylistic consistency in how subdivisions are designated;

- the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction), to provide stylistic consistency in how subdivisions are designated, fix typographical errors in the Commentary, and update an example that references 18 U.S.C. § 924(c) (which was amended by the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018) to limit the "stacking" of certain mandatory minimum penalties imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing,

or discharging a firearm in furtherance of a crime of violence or drug trafficking offense);

- the Commentary to §5K1.1 (Substantial Assistance to Authorities (Policy Statement)), to add headings to application notes and correct a typographical error;

- §5K2.0 (Grounds for Departure (Policy Statement)), to correct a typographical error and provide stylistic consistency in how subdivisions are designated;

- §5E1.2 (Fines for Individual Defendants), to provide stylistic consistency in how subdivisions are designated;

- §5F1.6 (Denial of Federal Benefits to Drug Traffickers and Possessors), to provide consistency in the use of capitalization and add a heading to an application note in the Commentary;

- §6A1.5 (Crime Victims' Rights (Policy Statement)), to provide consistency in the use of capitalization; and

- the Commentary to §8B2.1 (Effective Compliance and Ethics Program), to provide consistency in the use of capitalization.

(2) REQUEST FOR COMMENT ON POSSIBLE RETROACTIVE APPLICATION OF AMENDMENT 1, PART A OF AMENDMENT 3, PART B OF AMENDMENT 3, AND PART D OF AMENDMENT 5

On April 30, 2024, the Commission submitted to the Congress amendments to the sentencing guidelines, policy statements, official commentary, and Statutory Index, which become effective on November 1, 2024, unless Congress acts to the contrary. Such amendments and the reason for each amendment are included in this notice.

Section 3582(c)(2) of title 18, United States Code, provides that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Pursuant to 28 U.S.C. 994(u), "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Commission lists in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2).

The following amendments may have the effect of lowering guideline ranges: Amendment 1 (relating to acquitted conduct); Part A of Amendment 3 (relating to §2K2.1(b)(4)(B) enhancement); Part B of Amendment 3 (relating to the interaction between §2K2.4 and §3D1.2(c)); and Part D of Amendment 5 (relating to enhanced penalties for drug offenders). The Commission intends to consider whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any or all of these amendments should be included in §1B1.10(d) as an amendment that may be applied retroactively to previously sentenced defendants. In considering whether to do so, the Commission will consider, among other things, a retroactivity impact analysis and public comment. Accordingly, the Commission seeks public comment on whether it should make any or all of these amendments available for retroactive application. To help inform public comment, the retroactivity impact analyses of these amendments will be made available to the public as soon as practicable.

The Background Commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

The Commission seeks comment on whether it should list in §1B1.10(d) as changes that may be applied retroactively to previously sentenced defendants any or all of the following amendments: Amendment 1 (relating to acquitted conduct); Part A of Amendment 3 (relating to §2K2.1(b)(4)(B) enhancement); Part B of Amendment 3 (relating to the interaction between §2K2.4 and §3D1.2(c)); and Part D of Amendment 5 (relating to enhanced penalties for drug offenders). For each of these amendments, the Commission requests comment on whether any such amendment should be listed in §1B1.10(d) as an amendment that may be applied retroactively.

If the Commission does list any or all of these amendments in §1B1.10(d) as an amendment that may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced?

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street, Room 2346
Chicago, IL 60604

Honorable Roy Altman
Honorable Kenneth D. Bell
Honorable Mark Jeremy Bennett
Honorable Terrence G. Berg
Honorable Nathanael Cousins
Honorable Katherine Polk Failla
Honorable Charles B. Goodwin
Honorable Beryl Howell
Honorable Joseph Laplante
Honorable Diana Saldaña
Honorable Patty Shwartz
Honorable Charles J. Williams

TELEPHONE
(312) 435-5795

Honorable Edmond E. Chang, Chair

June 21, 2024

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chair Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, we appreciate the opportunity to offer comment on whether the U.S. Sentencing Commission should give retroactive effect to certain amendments promulgated in the 2024-2025 cycle. The views expressed in this letter are those of the Committee, and we do not speak in this submission on behalf of the entire federal judiciary or for individual judges.

Background

The jurisdiction of the Committee on Criminal Law within the Judicial Conference includes overseeing the federal probation and pretrial services system and reviewing issues relating to the administration of criminal law. The Committee provides comments and feedback to the Sentencing Commission as part of the Committee's oversight role on the implementation of the sentencing guidelines and its role monitoring the workload and operation of probation offices. The Judicial Conference has authorized the Committee to "act with regard to submission

from time to time to the Sentencing Commission of proposed amendments to the Sentencing Guidelines, including proposals that would increase the flexibility of the Guidelines."[1]

Moreover, the Judicial Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2] In the past, the Committee has presented testimony and submitted comments expressing support for Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity. The Committee's comments focus on administration of justice issues, especially on the potential impact of retroactivity on judicial resources, including administrability issues and the increased workload and staffing needs for the probation system that could impact community safety.

This amendment cycle, the Commission is considering four amendments for retroactive application: Amendment 1, relating to acquitted conduct; Amendment 3, Part A, addressing the circuit conflict over the firearms enhancement for an altered or obliterated serial number at §2K2.1(b)(4)(B); Amendment 3, Part B, addressing the circuit conflict over the interaction between the firearms guideline at §2K2.4 and the §3D1.2(c) grouping rules; and Amendment 5, Part D, a miscellaneous amendment related to enhanced penalties for drug offenders.

Discussion

The Committee, in this submission, focuses its comments on concerns with retroactive application of the acquitted-conduct amendment. In its comment and testimony earlier this year, the Committee did not support the proposal to limit or eliminate consideration of acquitted conduct at sentencing based, in part, on the difficulty of administering the proposed amendment, even prospectively. The reasons stated were that: (1) the then-proposed definition of acquitted conduct lacked clarity; (2) the proposed amendment would have been unduly difficult to administer; and (3) excluding or limiting acquitted conduct would arguably prevent courts from making fully informed decisions on the statutory goals of sentencing.[3] The amendment, as adopted, contains no definition of acquitted conduct, a choice that resolves some but raises other definitional concerns in application, and thus the Committee expects judges to face significant difficulties in applying the amendment retroactively. Challenges will be especially likely when courts are required to parse out acquitted conduct in older cases, when, at any resentencing, a different judge may preside, different counsel may be involved on either side, or sentencing and trial transcripts may be unavailable.

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[1] JCUS-SEP 90, p. 69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful." 28 U.S.C. § 994(o).

[2] JCUS-MAR 2005, p. 15.

[3] February 22, 2024 comment letter from the Judicial Conference's Committee on Criminal Law to the Sentencing Commission regarding the proposed 2023-2024 proposed amendments, at 3 et seq. In the letter, the Committee further stated that "the Committee believes that the concerns that appear to underlie this proposed amendment are best addressed through the already-existing discretion of judges to mitigate a sentence when the offense level is based in some part on acquitted conduct. Relying on this existing, well-understood mechanism would avoid the problems associated with having to craft a workable, universal definition of acquitted conduct."

I. General Comments on Retroactivity

The Committee is not taking a position on retroactivity of the two-part circuit conflict amendment or the miscellaneous amendment, in part, because the Committee did not oppose promulgation of those amendments, and, in part, because those amendments are not likely to impact a large number of cases. The Committee would note, however, that a Commission determination to give retroactive effect to those amendments would certainly increase judiciary workload at a time when budgets and staffing are already constrained, impacting the resources and priorities of the courts and of probation and pretrial services offices. Some of those amendments could also prove difficult to administer retroactively. As just one example, resentencing will likely be difficult in older cases involving altered and obliterated serial numbers, under §2K2.1(b)(4)(B), if the firearm or photos of the serial number are not available.

The Committee also has concerns about the cumulative effect on the system of what may be seen as a trend toward applying amendments retroactively, even where the amendment does not rectify a fundamental inequity or unfairness. Reducing sentences of lawfully sentenced individuals in those cases could undermine the essential principle of finality of criminal sentences and, therefore, erode the goal of deterrence, one of the main goals of punishment under the system of certain and determinate sentencing established by the Sentencing Reform Act of 1984.[4] Even when constitutional rules develop over time, "applying 'constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (*quoting Teague v. Lane*, 489 U.S. 288, 309 (1989)); *Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect.").[5]

A presumption in favor of the retroactive application of amendments also would tax the limited resources of the courts and the probation office system. *See Edwards*, 593 U.S. at 263 (cautioning against retroactive application of new constitutional rules in part because of the drain on resources). As discussed in more detail below, the cumulative impact of increased work related to complex resentencings and the need to supervise larger numbers of early releasees could take resources away from high-risk supervision cases – especially where impact estimates are unavailable to facilitate effective planning and real-world budgeting.

In addition, if amendments that do not address a fundamental unfairness or inequity – like last cycle's two-part criminal history amendment – continue to be routinely deemed retroactive, then over time the perception may arise that the Guidelines themselves are fundamentally unfair, thereby undermining public confidence in the system of certain and determinate sentencing established by the Sentencing Reform Act of 1984.

II. Concerns About Retroactive Application of Acquitted-Conduct Amendment

The Commission's decision to make an amendment retroactive "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the

[4] 18 U.S.C. § 3553(a)(2)(B).

purposes of sentencing," and that, "in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants."[5] To assist in its decision regarding the four amendments in question, including the acquitted-conduct amendment, on May 17, 2024, the Commission published a Retroactivity Impact Analysis to provide an estimate of the impact of each of the amendments if the Commission were to give them retroactive effect.[6]

In addition to public comment, the Commission considers the following factors in making the retroactivity decision:

1. Purpose of the amendment;
2. Magnitude of the change in the guideline range made by the amendment; and
3. Difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b).[7]

The Commission has asked that public comment, to the extent practicable, address each of these factors.

A. Retroactive Application Would Undermine Principles of Finality, Certainty, and Deterrence

A determination by the Commission to give retroactive effect to the acquitted-conduct amendment could undermine the principle of finality in criminal sentencing. Historically, the Commission has rarely made amendments retroactive.[8] The Committee would counsel against establishing, in effect, a presumption in favor of retroactive application of any guideline amendment that the Commission estimates would result in potential reduction of an otherwise final sentence.

Relatedly, retroactive application of the amendment could undermine one of the central purposes of criminal sentences: deterrence. *See* USSG Ch.1, Pt.A.2 (2023). A key premise of the Sentencing Reform Act of 1984 is truth in sentencing, and the central tenets of the Act are determinate and certain sentences. Allowing for the resentencing of previously sentenced individuals based on each year's amendments, especially where those amendments do not address a fundamental equity issue, goes against those central tenets and could undermine the deterrent effects of sentencing. Although retroactive application is often warranted – and supported by the Committee – when an amendment would rectify an inequity, routinely giving

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[5] *See* USSG §1B1.10, comment (backg'd).

[6] The Retroactivity Impact Analysis can be found at this link.

[7] *See* USSG §1B1.10.

[8] U.S. Sentencing Commission, *Federal Sentencing: The Basics* at 36 (noting that, as of 2020, the Commission had given retroactive effect *only* to 30 of its over 800 amendments).

retroactive effect to amendments risks undermining the principle of finality.

In addition, were the Commission to give retroactive effect to the acquitted-conduct amendment, it could be introducing an unfairness rather than rectifying one. Specifically, the Guidelines were designed to "contain a significant number of real offense elements," USSG Ch. 1, Pt. A.4(a), in part to "impose[] a natural limit upon the prosecutor's ability to increase a defendant's sentence," through charging decisions, id. Retroactive application of this amendment when the acquitted conduct at issue overlaps with other conduct supporting a conviction or adjustment based on a real offense element (e.g., presence of a gun, amount of money actually taken or other specific offense characteristics) may give these defendants a break due to a charging decision. The result of retroactive application in those cases would be "unwarranted sentencing disparities" among similarly situated defendants, the very type of unfairness that the Guidelines were designed to avoid. If this amendment were given retroactive effect, previously sentenced defendants who went to trial and were acquitted of such conduct would benefit from application of the retroactive amendment while similarly situated defendants who decided not to go to trial in exchange for dismissal of one or more charges would now be penalized for their choice to plead guilty because their dismissed conduct would continue to be counted in their sentences (as specific offense characteristics or other adjustments). Distinct from any issues with prospective application of the amendment is the fact that previously sentenced defendants (and prosecutors) may have made different choices had they known that the guidelines would prohibit consideration of acquitted conduct.

B. Difficulty of Retroactive Application Outweighs Other Factors

With regard to the acquitted-conduct amendment, the Committee has considered the three factors outlined in the guidelines, along with the Committee's recommendations on prior questions of retroactivity and the information provided in the Commission's May 17, 2024, Retroactivity Impact Analysis. Based on these considerations, the Committee is concerned about the workload implications for federal judges, as well as our probation officers, given the difficulty of applying this complex and novel amendment language retroactively. In many cases where overlapping conduct relates to both the acquitted and convicted counts, it will be difficult for resentencing courts to parse acquitted from convicted conduct. That would be especially true in older cases, in those cases where the sentencing judge will not be conducting the resentencing, where transcripts may not be available, and in cases involving different counsel.

In addition, with no existing caselaw interpreting the language introduced by the new amendment, caselaw would have to develop in the retroactivity context. As a result, a Commission decision to give the acquitted-conduct amendment retroactive effect would result in caselaw issued by resentencing courts while they try to reconstruct history, instead of new sentencing caselaw stemming from current trials and prospective sentencings in which the lawyers and judges are more likely to have participated.

In the Committee's earlier public comment and testimony sharing concerns about the language of the proposed amendment, the Committee asked the Commission to try to apply the proposed options for the acquitted-conduct amendment to a sample of cases (which the Commission had already identified in its database), that is, to apply the proposed amendment language retroactively to a few previously sentenced individuals with at least one acquitted

count.[9] But no sampling of applications was generated, so courts will face this task on their own, in the doubly difficult context of retroactive application.

In the past, the Committee has supported retroactive application for amendments that eliminated an inequity in sentencing, even where the burden on the courts was significant. For example, the Committee supported retroactive application of amendments that reduced crack cocaine sentences, reduced the crack-powder disparity, and reduced the influence of mandatory minimum drug sentences. Here, however, the acquitted-conduct amendment removes from consideration facts that constitute relevant conduct and are otherwise reliably proven by a preponderance of the evidence, the long-standing burden of proof for sentencings.

On workload, the Retroactivity Impact Analysis did not specifically estimate the number of previously sentenced individuals who would be eligible for a reduced sentence if the amendment were made retroactive, the magnitude of change in the guideline range that would result from retroactive application, or the number of ineligible individuals who would possibly file motions for resentencing. Instead, the analysis estimates that there are 1,971 current inmates who went to trial and were acquitted of one or more charges. Courts can probably expect motions under a retroactive amendment from at least that number of individuals, with some unknown portion of those individuals ultimately eligible for a reduction.[10]

Also, the workload for resentencings will vary significantly by district under a retroactive acquitted-conduct amendment. According to the Impact Analysis, the number of inmates convicted after a trial ranges from a single inmate convicted after trial in one district to 743 inmates convicted after trial in another district. Extrapolating from Table 1 of the Impact Analysis, if the amendment were made retroactive and the 14.6% acquittal-percentage estimate is accurate, then six districts could have more than fifty potentially eligible defendants while more than half of the districts would have ten or fewer eligible defendants.

Perhaps more importantly, the Commission's analysis shows that nearly half of the inmates who would be eligible for a resentencing if the amendment were made retroactive were convicted of violent offenses. This is significant because the early release of violent offenders presents a greater risk to the community, requires a higher level of supervision, and necessitates more probation-office resources. After drug trafficking, murder was the most common offense of convictions for previously sentenced individuals who were acquitted of at least one charge at trial. Specifically, 12.1% of potentially eligible, previously sentenced individuals were convicted at trial of murder (239 inmates convicted of murder would be potentially eligible),

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[9] *See* Committee's February 22, 2024 comment letter to the Commission regarding the proposed 2023-2024 proposed amendments at 5. The Commission had previously identified 286 individuals in Fiscal Year 2022 acquitted of at least one offense or found guilty of only a lesser included offense. The Committee's comment letter suggested that the Commission review the charging instrument and, if available due to an appeal, the jury instructions, sentencing transcript, and/or trial transcript, which would be the same record that courts would have to access and review to try to apply the acquitted conduct amendment retroactively.

[10] Notably, the Commission did not actually determine the number of inmates with one or more acquitted counts. Instead, it took a random sample of 10% of the inmates convicted at trial, determined 14.6% of those inmates had been acquitted on at least one count, and applied that percentage to the total number of inmates convicted at trial.

11.2% were convicted at trial of firearms offenses (221 inmates potentially eligible), 10.1% were convicted at trial of robbery offenses (198 inmates), and 9.2% were convicted at trial of sexual abuse offenses (182 inmates).

Given the complexities of resentencing, the Committee is concerned that retroactive application of the amendment would impose significant burdens on the judiciary, including an increased workload for the probation officers who would be tasked with recalculating the guidelines and drafting new reports. For purposes of anticipating probation officers' potential workload increase if the amendment were made retroactive, it is likely that many inmates who went to trial and even some who did not go to trial would seek reductions, even though only a small fraction of them would be eligible for a reduction. Retroactivity also would introduce a sudden increase to the workload of supervision officers, who would be responsible for supervising a greater number of violent offenders who could be eligible for release on the amendment's November 1, 2024 effective date. It bears repeating that, unlike most other amendments that reduce a guideline range, the number of eligible defendants and the magnitude of the decrease are not known for the acquitted-conduct amendment.

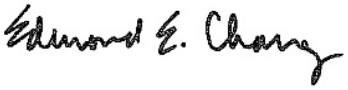
The Committee requests that, if the acquitted-conduct amendment is made retroactive, then the Commission limit the impact on the courts and the probation offices by applying the amendment only to those defendants sentenced within the past five years. That way, it would be more likely that judges, probation officers, and counsel will have the necessary information available to assess, if possible, which conduct was acquitted conduct and which was convicted conduct.

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on the issue of retroactivity of the acquitted-conduct amendment. The Committee believes that the longstanding principle of finality of criminal sentences, the Sentencing Reform Act's important goal of deterrence, and the difficulty of fair and accurate retroactive administration of the amendment outweigh the benefits of retroactive application.

The members of the Criminal Law Committee look forward to working with the Commission to ensure that our sentencing system remains fair, transparent, workable, predictable, and flexible. Thank you for your consideration.

Sincerely,



Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
THOMAS F. EAGLETON U.S. COURTHOUSE
111 S. TENTH STREET, ROOM 14.148
ST. LOUIS, MISSOURI 63102

CHAMBERS OF
STEPHEN R. CLARK
CHIEF DISTRICT JUDGE

314/244-7540

June 24, 2024

Via email [redacted]

United States Sentencing Commission
c/o Hon. Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Re: Retroactivity of 2024 Amendment to §2D1.1

Dear Chairman Reeves and Members of the Sentencing Commission:

We submit this comment in support of applying the 2024 amendment to §2D1.1 *prospectively* only. Prospective application will recognize that the majority of the sentences were negotiated in a plea agreement and promote the essential principle of finality of criminal judgments. Prospective application will also avoid the imposition of renewed trauma on the victim's family, and conserve scarce probation office and court resources.

The Office of Research Data and Office of General Counsel in their May 17, 2024, Memorandum identified a group of 538 individuals who appear to have been sentenced pursuant to §2D1.1(a)(1)-(4) using a Base Offense Level (BOL) relating to death or serious bodily injury, but who were not charged in such a way as to apply the statutory mandatory minimum term of imprisonment for drug cases involving death or serious bodily injury. The Commission does not collect information as to whether the parties have stipulated that the offense falls under §2D1.1(a)(1)-(4) for calculating the BOL under the guidelines. If the Commission authorizes the retroactive application of the Part D amendment, a maximum of 538 people would be eligible to seek modification of their sentences. Therefore, the number of people eligible for resentencing will more than likely be significantly less than 538. We do not minimize the significance of a sentencing reduction to individual offenders. For the most part, however, their sentences were negotiated in a plea agreement.

The practice of the United States Attorney's Office in the Eastern District of Missouri is as follows:

(1) If the defendant is charged with and pleads guilty to an indictment that includes an allegation that death resulted from use of the substance, the 20-year mandatory minimum

applies, and defendant would begin at BOL 43 (if defendant has a qualifying prior conviction) or 38 (if no qualifying prior conviction).

(2) If death was charged in the indictment and the plea agreement allows a defendant to plead to a lesser-included offense, or even if the death was not charged but resulted, the parties may agree that the BOL is 43 or 38 only if the defendant agrees in the facts of the plea agreement that the drugs distributed resulted in death.

(3) In cases where the defendant pleads to a lesser-included offense or to a count where the death was not charged and contests that the death resulted, the BOL 43 or 38 does not apply and the issue regarding the death is litigated at sentencing as the basis for an upward departure and/or variance from the otherwise applicable guideline range.

Assuming that a similar practice is followed throughout the various districts, retroactive application would allow negotiated plea agreements to be essentially dismantled, leaving the Government bound to hold up its end of the bargain while the offender reaps a greater benefit than he or she bargained for. Prospective application would preserve the integrity of those plea agreements. Additionally, consistent with the practice outlined above, if a defendant were to be resentenced the Government would put on evidence and argue for an upward departure or variance to obtain the same sentence. Because the sentencing guidelines are advisory and are just one of a host of factors courts must consider in imposing sentence under 18 U.S.C. § 3553(a), it is impossible to foresee how many offenders whose guidelines ranges might be retroactively reduced would realize actual sentence reductions. It is even more difficult to anticipate the actual magnitude of any such reduction.

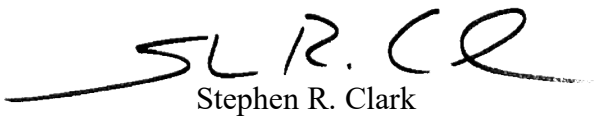
Prospective application will also preserve the finality of the criminal judgment. Finality of a criminal judgment serves as a cornerstone of the justice system, promoting fairness, efficiency, and legal stability while safeguarding the rights of both victims and defendants. As the Supreme Court recently reiterated in *Edwards v. Vannoy*, "applying 'constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" 141 S. Ct. 1547, 1554 (2021) (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)). "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague,* 489 U.S. at 309. Similarly, in *Barajas v. United States*, the Eighth Circuit recognized "the importance of protecting the finality of criminal convictions," and held "that the *Teague* limit on retroactivity applies to collateral review of both state and federal convictions." 877 F.3d 378, 382 (8th Cir. 2017) (citing *Teague*, 489 U.S. at 310).

It is also essential to recognize that each of these cases involved victims. The families of those victims undoubtedly suffered during the original proceedings, and hopefully began to heal and move forward after the original sentencing proceedings concluded. Resentencing proceedings would reopen their wounds, and subject them to renewed trauma and unwarranted strain. In addition, some family members may not fully understand why resentencing is occurring. As a result, they may feel frustrated with our criminal justice system, and lose confidence in it.

Finally, retroactive application is certain to produce a substantial number of meritless motions. Despite their lack of merit, they would need to be addressed by courts and probation offices, significantly burdening already scarce judicial and probation resources. In sum, weighing retroactivity's potential benefit to some individual offenders against its certain costs in the context of the entire federal criminal justice system and the families of the victims, counsels strongly in favor of prospective application only.

For these reasons, our Court respectfully submits that the Commission should apply the amendment prospectively only. If you have any questions or would like further information, please feel free to contact me.

Sincerely,



Stephen R. Clark
Chief United States District Judge
Eastern District of Missouri

cc: Alan Dorhoffer (via email[redacted])

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

324 W. MARKET STREET
GREENSBORO, NORTH CAROLINA 27401

CATHERINE C. EAGLES
CHIEF UNITED STATES DISTRICT JUDGE

TELEPHONE (336) 332-6070
FAX (336) 332-6078

May 30, 2024

The Honorable Carlton Reeves, Chair
& Sentencing Commission Members
U.S. Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002

Re: Retroactivity of 2024 Amendments

Dear Commissioners:

I understand the Commission is seeking comment on whether to make retroactive certain guideline changes expected to go into effect later this year. For this set of amendments, I urge the Commission not to do so.

First, there should be no presumption of retroactivity. Constant revisions to sentences undermine public trust and confidence in the justice system.

Second, retroactive application would not be straightforward for any of these amendments. These are not amendments where one can always look at the Pre-Sentence Report and easily determine how the guideline change affected the guideline range calculation or the ultimate sentence. As the memo from your Office of Research and Data makes clear, that office has not been able to tell how many cases would be subject to such reductions because the inquiries are so fact-specific.

This complexity increases the likelihood that such motions will be evaluated unevenly and inconsistently. It also means the workload associated with these motions is increased. There will be many cases that require significant time to evaluate whether a defendant is even eligible, and there will be associated complexity in evaluating whether a sentence reduction is appropriate.

Third, the Commission should remember that anytime an amendment is made retroactive, there is a lot of extra work for many people in the justice system and that many defendants who are not eligible file these motions anyway. All motions must be examined individually, first to "triage" the motions in case they require immediate attention and action, and, then or later, with more careful attention from the probation office and then by a judge. In our district, we often appoint counsel for defendants to be sure we have not overlooked a defendant's eligibility or to address the § 3553(a) factors.

The U.S. Attorney's office often weighs in. The time spent drafting and revising orders is substantial.

Meritless motions add to the work. Many defendants who are not eligible nonetheless file motions asking for a sentence reduction, and these motions consume significant resources. This delays judges, probation officers, prosecutors, and criminal defense attorneys from reaching other matters. At the moment, our district is swimming in motions for sentence reduction based on the 2023 retroactive guidelines, many of which were filed by ineligible defendants. If you make the 2024 amendments retroactive, district judges in circuits that previously interpreted the guidelines consistently with the 2024 amendments made to resolve circuit splits may be particularly hard-hit by these meritless motions. Courts receive no additional probation staff or law clerk assistance to divide the wheat from the chaff.

Finally, the Commission should consider the human costs of repeat retroactive resentencings. Sentencing is hard. PSRs are full of real-life tragedy and trauma. Judges are required to take all relevant factors into account when we sentence someone, and the Guidelines are advisory. I take sentencings seriously. When you make a guideline retroactive, you are demanding that judges do the hard work of considering the § 3553(a) factors all over again. And, often, again.

There have been many retroactive changes to the guidelines and statutes over the last fifteen years, along with scores of other sentence reduction motions brought because of the statutory changes to § 3582(c)(1)(A)(i), colloquially if inaccurately known as "compassionate release." I am now working on retroactivity motions related to the 2023 amendments where defendants have had their sentences re-examined several times. I don't mind hard work, but it is mentally exhausting to do the same difficult task over and over, often to no benefit to the defendant or the justice system. Decision fatigue sets in, further delaying resolution of other matters. And when we must repeatedly consider whether and how much to resentence people, it is as if our previous struggles to craft an appropriate sentence under § 3553(a) were meaningless.

In closing, I appreciate that some, though not all, of the concerns I have expressed apply to all retroactivity decisions. That does not make them irrelevant; they should be weighed in light of the benefits. Sometimes retroactivity is appropriate despite all of these demands on time, resources, and judicial well-being. I have reduced a number of sentences based on retroactive guidelines over the years, for good reason.

But with the possible exception of the acquitted conduct change, the 2024 amendments are highly technical. They were largely enacted to improve consistency or to clarify, not to reduce injustice or to better align sentences with current research on recidivism. Retroactivity of these provisions would raise significant issues with consistent application between and among defendants and would be more time-consuming for all involved than some past retroactive resentencings. For this set of guidelines in particular, at this point in time, the costs are high and the benefits small. Retroactivity is a bad idea.

Feel free to contact me with questions.

Sincerely,

Catherine C. Eagles

CCE:pj

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

District Judge Charles Williams, Iowa, Northern

Topics:

Acquitted Conduct (Amendment #1)

Firearms Enhancement for Altered/Obliterated Serial Number (Amendment #3A)

Firearms Grouping Rules (Amendment #3B)

Comments:

Don't, as in don't apply them retroactively. The default should be not making retroactive amendments, not a presumption of retroactivity. Finality in sentencing is a very important consideration that is largely ignored by the Commission. Further, the difficulty of applying the acquitted conduct and altered serial number amendments retroactively cannot be overstated. It would require at the very least an exhaustive review of the record and transcript of trial and sentencing hearings and likely an evidentiary hearing.

Submitted on: June 5, 2024

From: Joe Anderson
Sent: Wednesday, June 5, 2024 3:30 PM
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission

Thank you for the invitation to comment. I appreciate the hard work of the Commission. I have been sentencing offenders since 1987 (two years before the guidelines took effect). Since 2014, I have been on senior status, with a 50 per cent case load. But retroactive changes to the guidelines , coupled with compassionate release requests, have actually added about 25 percent of a case load to my work.

I fully understand the need to periodically revise and improve the guidelines. And yes, some of them need to be made retroactive. But every time a new change goes on the books, those of us out here "in the trenches" are flooded with requests to modify a sentence, oftentimes from those defendants to whom the guidelines change does not apply. In other words, a totally frivolous request. Going through the old records (some are even in old paper files in our basement) to cull out those who do not qualify takes more time than one might imagine.

To make matters worse, case law now tells us that even when Congress expressly declares a change in sentencing law to be non retroactive, we trial judges may nevertheless consider them in compassionate release requests. So we are now substantially reducing sentences for serious offenders when the deal that was struck way back when would never have been agreed to by the prosecution, had they known that a future application of a supposedly non-retroactive change in the law would wipe out half or more of the sentence. This has happened many times in my court.

When you are on senior status (and thus working for free), retroactive changes, repetitive motions for compassionate release, and frivolous requests have taken a lot of enjoyment out of the job that I love dearly. To sum it up. I guess I am saying that these after-the-fact re-sentencings fall hardest on judges like me, who have been sentencing people for 38 years, with no credit being assigned for our work on these old cases. I have done hundreds of them. Judges coming on the bench within the past six years have virtually none.

From: Joe Heaton
To: Chair
Subject: Recommendation
Date: Friday, June 7, 2024 12:09:54 PM

Judge: My only recommendation is that the Commission raise the bar on making guideline amendments retroactive. The guidelines are advisory (important and helpful, but still just advisory) and only truly significant and substantial changes should be made retroactive. Otherwise, it triggers a large amount of largely pointless work to reconsider matters already substantially addressed at initial sentencing. Thanks - JH

From: William Shubb
To: Chair
Subject: Re: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Sunday, June 9, 2024 11:31:54 AM

My advice would be to stop making amendments retroactive. It creates procedural nightmares for sentencing judges and windfalls for some sentenced prisoners.

_____
Judge William Shubb

From: Terry Wooten
Sent: Wednesday, June 5, 2024 5:49:09 PM
To: Joe Anderson
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission

Joe, your remarks regarding retroactive guidelines hit the mark. With your many years of experience and service on the bench, they should be given full consideration.

From: Joe Anderson
Sent: Wednesday, June 5, 2024 3:30 PM
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission

Thank you for the invitation to comment. I appreciate the hard work of the Commission. I have been sentencing offenders since 1987 (two years before the guidelines took effect). Since 2014, I have been on senior status, with a 50 per cent case load. But retroactive changes to the guidelines , coupled with compassionate release requests, have actually added about 25 percent of a case load to my work.

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U.S. Department of Justice

Criminal Division

Appellate Section

Washington, D.C. 20530

June 21, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the Sentencing Commission's request for comment on whether four recently promulgated amendments should be applied retroactively to previously sentenced defendants: the amendments to relevant conduct (§1B1.3) concerning the use of acquitted conduct under the guidelines, the four-level enhancement under the firearms guideline for altered or obliterated serial numbers (§2K2.1(b)(4)(B)), enhanced penalties under §2D1.1 for drug trafficking offenses involving death and serious bodily injury where the defendant was convicted of drug trafficking but not of the applicable statutory mandatory minimum, and grouping rules under §3D1.2 for defendants convicted of multiple firearms offenses.[1] The Department appreciates that the Commission narrowed the reach of the acquitted-conduct amendment from the language initially proposed. However, for the reasons set forth below, the Department opposes retroactive application of that amendment, as well as those for altered or obliterated serial numbers and enhanced penalties for drug offenders. We do not oppose retroactive application of the amendment relating to grouping (the interaction between §2K2.4 and §3D1.2(c)).

If the Commission proceeds with retroactivity, the Department requests that the Commission delay the effective date of any orders granting sentence reductions. Last year, the Commission delayed the effective date for Amendment 821 by three months to allow the Bureau of Prisons (BOP) and the U.S. Probation Office sufficient time to prepare and coordinate reentry services for eligible offenders. With the exception of the amendment on grouping, this year's amendments are very different from last year's amendments; involve more complex eligibility determinations; and would require at least as much, if not more, preparation time.

[1] NOTICE OF SUBMISSION TO CONGRESS OF AMENDMENTS TO THE SENTENCING GUIDELINES EFFECTIVE NOVEMBER 1, 2024, AND REQUEST FOR COMMENT, 89 Fed. Reg. 36853 (proposed May 3, 2024), https://www.federalregister.gov/documents/2024/05/03/2024-09709/sentencing-guidelines-for-united-states-courts.

I. Summary and Principles Guiding the Department's Position on Retroactivity

The Background to the Commentary under §1B1.10 states that, when determining whether to apply a guideline amendment retroactively, the Commission has been guided by "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range."[2] As was true in the previous amendment cycle,[3] the Department has taken these same considerations into account in formulating its position on retroactivity, along with the justice system's strong interest in the finality of criminal sentences, public-safety concerns, and the burden that retroactivity would impose on courts and victims. We begin with a summary of the relevant considerations before providing detailed comments on each particular amendment.

a. Finality

Retroactive application of guideline amendments has historically been the exception, not the rule. As then-Commissioner Howell observed in 2011, "the Commission has over its history used its authority under 28 U.S.C. § 994(u) infrequently to [make] retroactive guideline amendments that reduce sentencing ranges."[4] That same year, then-Chair Saris explained that, "because of the importance of finality of judgments and the burdens placed on the judicial system when a change to the guidelines is applied retroactively, the Commission takes this duty very seriously and does not come to a decision on retroactivity lightly."[5]

Historical practice bears out those observations. Since the first guidelines took effect in 1987, the Commission has voted to make amendments retroactive on only about 30 occasions.[6] The Commission's own rules suggest caution in making amendments retroactive: the Rules of Practice and Procedure recognize that, "[g]enerally, promulgated amendments will be given prospective application only."[7]

That measured approach makes good sense. Finality is critical to criminal law—and, in particular, to ensuring that it has deterrent effect.[8] Making guideline amendments retroactive, however, undermines finality and other important tenets of the justice system. As Chief Judge

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[2] USSG §1B1.10, comment. (backg'd.).
[3] JONATHAN J. WROBLEWSKI, U.S. DEP'T OF JUST., LETTER TO HON. CARLTON REEVES, CHAIR (June 22, 2023), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=33.
[4] *Public Meeting, June 30, 2011*, *Before the U.S. Sent'g Comm'n*, 22:15-21 (statement of Beryl Howell, Comm'r) ("because the finality of judgments is an important principle in our judicial system, . . . we require good reasons to disturb final judgments."), https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.
[5] *Id.* at 3:12-17 (statement of Chair Patti Saris); *see also id*. at 13:5-9 (statement of Comm'r Ketanji Brown Jackson on retroactivity of amendments to implement the 2010 Fair Sentencing Act) ("The crack cocaine guideline penalty reduction is not some minor adjustment designed to facilitate efficient guideline operation, but it reflects a statutory change that is unquestionably rooted in fundamental fairness.").
[6] USSG §1B1.10(d) (Covered Amendments).
[7] U.S. SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE, RULE 4.1A (Retroactive Application of Amendments) (Aug. 2016).
[8] *See Teague v. Lane*, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect"); *see also United States v. Frady*, 456 U.S. 152, 166 (1982) (concluding that the federal government has an interest in the finality of criminal judgments).

Catherine Eagles recently put it in a letter to the Chair, "constant revisions to sentences undermine public trust and confidence in the system."[9] Such negative effects are of primary concern to the Department, which is responsible for enforcing federal criminal laws.

b. Public Safety

Section 3553(a)(2) of Title 18 requires courts to impose a sentence that, among other factors, promotes respect for the law, provides adequate deterrence, and protects the public.[10] The Department has supported retroactive application of guideline amendments in circumstances where doing so was consistent with those statutory objectives.[11] In the current context, however, making retroactive the 2024 amendments on acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenses would not only undermine finality; it would also do so in cases that risk undermining public safety.

For example, the Commission's own analysis of the acquitted-conduct amendment estimates that approximately 14.6% (1,971) of the 13,500 defendants in BOP custody who were convicted following a trial were also acquitted of one or more charges in their cases.[12] Then, among all of the 13,500 defendants convicted following a trial, the Commission estimates that:

- 35.3% were convicted of drug trafficking,
- 12.1% were convicted of murder,
- 11.2% were convicted of an offense involving firearms,
- 10.1% were convicted of robbery,
- 9.2% were convicted of sexual abuse,
- 3% were convicted of child pornography,
- 2.6% were convicted of assault, and
- 1.8% were convicted of kidnapping.[13]

These figures are important because, if it is the case that the 1,971 defendants acquitted of at least one charge are otherwise similar to larger group of 13,500 defendants convicted following a trial, then about 85% of persons currently incarcerated at BOP and eligible for this amendment were convicted in their instant offense for drug trafficking, murder, an offense involving a firearm, robbery, sexual abuse, child pornography, assault, or kidnapping.

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[9] Hon. Catherine C. Eagles, Chief District Judge, Letter to Hon. Carlton Reeves, Chair (May 30, 2024).
[10] 18 U.S.C. § 3553(a).
[11] *See, e.g.*, *Public Meeting, June 1, 2011, Before the U.S. Sent'g Comm'n,* 14:6-13 (statement of Eric Holder, Att'y Gen.) (supporting retroactivity of amendments to implement the 2010 Fair Sentencing Act), https://www.ussc.gov/sites/default/files/Hearing_Transcript_1.pdf; *see also Public Hearing on Retroactivity of 2014 Drug Amendment June 10, 2014, Before the U.S. Sent'g Comm'n*, 105:15-21 (statement of Sally Yates, U.S. Att'y) (supporting limited retroactivity of the pending drug guideline amendments), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf.
[12] U.S. SENT'G COMM'N, RETROACTIVITY IMPACT ANALYSIS DATA REPORT OF CERTAIN 2024 AMENDMENTS (2024) (hereinafter RETROACTIVITY IMPACT ANALYSIS), at 7, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2024-amendments/2024_Amdts-Retro.pdf.
[13] *Id.* at 10-11.

Likewise, the vast majority of the offenders potentially eligible for relief under the amendment on altered or obliterated serial numbers are recidivists.[14] Since 2021, the President and the Attorney General have focused on combatting gun violence and other violent crime,[15] and Attorney General Garland has noted further that "an effective violent crime reduction strategy must also address the illegal trafficking of firearms and focus on keeping guns out of the wrong hands."[16] Figures from the FBI indicate a decrease in violent crime in communities across the country in 2024 compared to the prior year, including an approximately 26% decline in murder.[17] However, many jurisdictions are still struggling with guns and violence,[18] and it would be counter-productive to shift resources from "combatting the epidemic of gun violence and other violent crime" to having federal prosecutors revisit closed—and fairly adjudicated—gun cases.

The amendments on enhanced penalties for drug offenses also raise public-safety concerns. The affected cases all necessarily involve a victim who suffered serious bodily injury or death. The United States experienced more than 107,000 overdose deaths during 2023,[19] and more than 300,000 children lost a parent due to a drug overdose from 2011 through 2021.[20] Empowering courts to reduce sentences in cases where the defendant's drug trafficking caused a death or serious bodily injury sends the wrong message at the wrong time.

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[14] U.S. SENT'G COMM'N, WHAT DO FEDERAL FIREARMS OFFENSES REALLY LOOK LIKE? 4 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf ("The vast majority of the offenders sentenced under §2K2.1 were convicted under 18 U.S.C. § 922(g).").

[15] THE WHITE HOUSE, FACT SHEET: BIDEN-HARRIS ADMINISTRATION ANNOUNCES COMPREHENSIVE STRATEGY TO PREVENT AND RESPOND TO GUN CRIME AND ENSURE PUBLIC SAFETY (June 23, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/.

[16] WHITE HOUSE BRIEFING ROOM, REMARKS BY PRESIDENT BIDEN AND ATTORNEY GENERAL GARLAND ON GUN CRIME PREVENTION STRATEGY (June 23, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/.

[17] DEPARTMENT OF JUSTICE, ATTORNEY GENERAL MERRICK B. GARLAND STATEMENT ON FBI QUARTERLY UNIFORM CRIME REPORT (June 10, 2024), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-fbis-quarterly-uniform-crime-report.

[18] *See* Shaila Dewan and Robert Gebeloff, *How Gun Violence Spread Across One American City*, N.Y. TIMES (May 20, 2024), https://www.nytimes.com/2024/05/20/us/gun-violence-shootings-columbus-ohio.html; Soumya Karlamangla, *This Is How Close We Live to Gun Violence*, N.Y. TIMES (May 29, 2024), https://www.nytimes.com/2024/05/29/us/pandemic-gun-violence.html (mapping where and how the number of fatal shootings has grown since 2020).

[19] CENTER FOR DISEASE CONTROL, U.S. OVERDOSE DEATHS DECREASE IN 2023, FIRST TIME SINCE 2018 (2024), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240515.htm#:~:text=Provisional%20data%20from%20CDC's%20National,111%2C029%20deaths%20estimated%20in%202022; *see also* CENTER FOR DISEASE CONTROL, PROVISIONAL DRUG OVERDOSE DEATH COUNTS, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (showing that the United States experienced more than 100,000 overdose deaths per year for the last three years).

[20] NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL INSTITUTES OF HEALTH, *More Than 321,000 U.S. Children Lost a Parent to Drug Overdose from 2011 to 2021* (May 8, 2024), https://nida.nih.gov/news-events/news-releases/2024/05/more-than-321000-us-children-lost-a-parent-to-drug-overdose-from-2011-to-2021#:~:text=An%20estimated%20321%2C566%20children%20in,to%2063%20children%20per%20100%2C000.

c. Burden on the Courts and Victims and Difficulty of Applying the Amendment Retroactively

Retroactive application of all three of these amendments would pose a significant burden on courts and litigants, and in many cases victims, especially when combined with the significant burden imposed by the Commission's decisions last cycle to make the criminal history amendments retroactive and to expand the availability of compassionate release. Courts, United States Attorneys' Offices, Federal Defenders and defense attorneys, U.S. Probation Offices, and other litigants (for example, victims' representatives who must also be included where appropriate) are already devoting significant resources to evaluating and adjudicating retroactivity motions and compassionate release motions while operating under significant budgetary constraints.[21] Indeed, in FY 2024, the Department's budget was $816 million (or 2%) less than what the Department operated on last year ($37.5 billion in FY23). As it relates to U.S. Attorneys' Offices, the enacted budget was 0.8% less than the enacted FY 2023 budget and was $206 million less than what the offices need to maintain FY 2023 level services.

The Commission's own *Retroactivity Impact Analysis* underscores the potential burdens. The Commission's analysis provides an estimate of the *maximum* number of individuals who may be eligible for a reduction if each of the amendments were made retroactive, while acknowledging substantial uncertainty about the number of individuals who would ultimately benefit from retroactive application.[22] For example, the Commission estimates that approximately 1,971 persons in BOP custody could have been sentenced based on an acquitted federal count but also notes that Commission staff "are unable to determine whether and to what extent the courts may have relied upon any of the offense conduct related to the charge or charges for which the individual was acquitted in determining the guideline range; therefore, staff cannot estimate what portion of approximately 1,971 persons might benefit from retroactive application of the amendment."[23]

The Commission also estimates that 1,452 individuals could be eligible for retroactivity because they received an enhancement for altered or obliterated serial numbers (§2K2.1(b)(4)(B)), and 538 could be eligible because they were sentenced under the enhanced base offense levels at §2D1.1(a)(1)-(4), but not convicted of an offense carrying a mandatory minimum term of imprisonment of at least 20 years.[24] An additional 102 could benefit should the amendment on grouping be made retroactive (to which we do not object).

In total, the Commission's *Retroactivity Impact Analysis* estimates that as many as 4,063 defendants could be eligible for an adjustment if all four amendments are made retroactive. And, given past experience, many more incarcerated individuals will file even if they are not eligible. Although this number is lower than the estimated 18,767 defendants eligible to seek a modification of sentence following the 2023 amendments on status points and zero criminal

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[21] EAGLES, *supra* note 9 ("[T]he Commission should remember that anytime an amendment is made retroactive, there is a lot of extra work for many people in the justice system and that many defendants who are not eligible file these motions anyway.").
[22] RETROACTIVITY IMPACT ANALYSIS, *supra* note 12, at 6-7, 11, 14, 18, 21.
[23] *Id*. at 7.
[24] *Id*.

history points (11,495 and 7,272, respectively),[25] federal courts are *already* addressing 5,473 motions for a modification of sentence following last year's retroactive amendments on status points, and another 4,057 motions for a modification of sentence following the amendment on zero criminal history points.[26] In addition, the Commission reports that 603 defendants have moved for a reduction in sentence for extraordinary and compelling reasons in only the first three months of the 2024 Fiscal Year.[27] The latter estimate, in the Department's experience, may be conservative.[28] Neither the Executive Branch nor the Judicial Branch has unlimited resources, and delays in prosecuting and adjudicating other cases will necessarily result.

We applaud the dedicated and extensive work of the United States Attorney community, probation officers, BOP staff, defense attorneys, and in some cases victims, to provide courts the information needed to evaluate current retroactivity and compassionate-release motions in a principled and disciplined way. Their hard work furthers the cause of justice and ensures relief for eligible defendants while maintaining public safety. But adding retroactivity motions based on the amendments concerning acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenders would impose a significant burden on the criminal justice system. If the Commission disagrees with our assessment, we note that retroactivity would produce a corresponding strain on reentry programs and services, which help people successfully return to their communities after incarceration, which also raises concerns.[29] Research studies indicate, among other things, that successful reentry requires advanced planning and tailoring of programs and services to the needs of the individual, and that cognitive behavioral therapy should be made available to nearly all.[30] If retroactivity is rushed, many defendants would be denied the benefit of proper reentry services and step-down transitioning to the community, unnecessarily undermining public safety. Thus, if the Commission decides to apply these

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[25] U.S. SENT'G COMM'N, RETROACTIVITY IMPACT ANALYSIS OF PARTS A AND B OF THE 2023 CRIMINAL HISTORY AMENDMENT 9, 17 (predicting that 11,495 offenders will be eligible to seek a modification as a result of the amendment on status points, and 7,272 offenders will be eligible to seek a modification as a result of the amendment on zero points), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.

[26] U.S. SENT'G COMM'N, PART A OF THE 2023 CRIMINAL HISTORY AMENDMENT, RETROACTIVITY DATA REPORT tbl. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202405-CH-Retro-Part-A.pdf (5,473 motions received as of May 1, 2024); PART B OF THE 2023 CRIMINAL HISTORY AMENDMENT, RETROACTIVITY DATA REPORT, tbl. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202405-CH-Retro-Part-B.pdf (4,057 motions as of May 1, 2024).

[27] U.S. SENT'G COMM'N, FY 2024 FIRST QUARTERLY DATA REPORT ON COMPASSIONATE RELEASE MOTIONS tbl. 2(2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY24Q1-Compassionate-Release.pdf.

[28] For example, prosecutors report that, within the Eastern District of Pennsylvania alone, 51 compassionate release motions were filed during the last three months of 2023.

[29] OFFICE OF JUSTICE PROGRAMS, REENTRY, SPECIAL FEATURE (2024) ("Reentry programs give people the support they need to successfully return to their communities after incarceration and can greatly improve public safety. These programs can be delivered in a correctional institution or in the community upon release, but effective reentry planning should start long before release."), https://ojp.gov/feature/reentry/overview.

[30] *Five Things About Reentry*, NATIONAL INSTITUTE OF JUSTICE (Apr. 26, 2023), https://nij.ojp.gov/topics/articles/five-things-about-reentry (noting that programs and services should be tailored to the unique needs and risk factors of an individual, to the extent possible; that support services should be holistic in nature; that cognitive behavioral therapy benefits all facets of reentry-preparation and post-release programs; that community supervision works best when it includes robust support functions; and finally the need to employ more nuanced measures of recidivism that present the individual as a whole).

amendments retroactively, we recommend that it delay implementation for some reasonable period to allow BOP and Probation to make necessary preparations to ensure all defendants receive the services they need.

The Commission has previously disfavored retroactive application of amendments that would require additional fact-finding, particularly when the pertinent factors were not considered during the original sentencing. As then-Commissioner Howell stated when voting against retroactive application of one part of a guideline amendment in 2010, "time-consuming and administratively difficult-to-apply factors" not considered during the original sentencing would be challenging for courts to evaluate and would likely lead to hearings and litigation.[31] This year's amendments on acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenders involve just such inquiries. Courts would need to consider multiple novel legal principles to determine first which defendants are eligible, and then, which should receive a sentence reduction. Unlike other amendments in the Commission's recent history, the amendments on acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenders involve evidence-based determinations, and their application would require additional judicial fact-finding.[32]

As discussed in more detail below, for acquitted conduct, a reviewing court would need to determine whether a defendant's sentence was based on conduct for which the defendant was criminally charged and acquitted in federal court, and then further determine whether that conduct also establishes, in whole or in part, an offense of conviction. For many cases, that process would require the court to make *new* factual findings long after the original sentencing, possibly on a cold trial transcript and without the benefit of having presided over the trial or at the original sentencing. For altered or obliterated serial numbers, a reviewing court would need to determine whether a serial number was modified such that the original information is rendered illegible or unrecognizable to the naked eye. Information with that level of detail is not necessarily included in the Presentence Investigation Report ("PSR"), as such level of detail was not required for applying this guideline provision in several circuits. And in many cases, that information will be sought after the subject firearm has been destroyed or returned. For eligible drug defendants previously sentenced under §2D1.1(a)(1)-(a)(4), additional fact-finding would likely be necessary as well, as the district court would be required to determine the newly applicable base offense level under §2D1.1(a)(5) based on the attributable drug quantity—where previously that offense level would have been calculated based only on death or serious bodily injury and certain prior convictions.[33] The fact-finding that would be required if these amendments were made retroactive, in combination with the large number of potentially eligible defendants, would impose significant burdens on the courts.

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[31] *Public Meeting*, *supra* note 4, 19:1-12 (statement of Comm'r Beryl Howell) ("These are new factors . . . that were not formerly considered by judges as part of the original guideline calculations, and consideration now, if we were to consider making that [part] of the amendment retroactive, would likely require courts to engage in new fact-finding with the concomitant need for hearings . . . And this process to my mind would just be administratively burdensome to the point of impracticality.").

[32] *See* Public Comment submitted by Charles Williams, District Judge of Northern Iowa, to U.S. Sent'g Comm'n (June 5, 2024) ("[T]he difficulty of applying the acquitted conduct and altered serial number amendments retroactively cannot be overstated.").

[33] §2D1.1(a)(1)-(4).

II. Detailed Comments on Retroactivity for Amendment on Acquitted Conduct

The amendment on acquitted conduct excludes from the definition of relevant conduct under §1B1.3 "conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction."[34] The amendment, however, acknowledges the court's authority to consider acquitted conduct under 18 U.S.C. § 3661.[35] The Department opposes retroactive application of this amendment. In our view, applying the amendment retroactively will impose significant burdens on courts and the criminal justice system as they seek to apply the change to closed cases. It will also result in litigation as courts attempt to parse acquitted conduct from (a) conduct that also formed the basis for a conviction, which remains relevant conduct under the guidelines as amended; and (b) information about the defendant's background, character, and conduct, which may be considered under 18 U.S.C. § 3661.

In particular, applying this amendment retroactively would require a district court to review the substantive evidence at the defendant's past trial to determine whether the movant is even eligible for an adjustment. Courts will have to engage in a complex and fact-dependent analysis for each case to determine whether a defendant was "criminally charged and acquitted" of specific conduct in federal court; how to disentangle such "acquitted" conduct from uncharged conduct or conduct that was not offered in evidence at trial at all; *and then* whether that "acquitted" conduct "also establishes, in whole or in part, the instant offense of conviction" and may be appropriately considered as relevant conduct.[36] Lastly, courts would have to consider whether the "acquitted" conduct represents conduct of the defendant that is permissibly considered under 18 U.S.C. § 3661. Although the Department appreciates that the final amendments promulgated by the Commission include a narrowed definition of acquitted conduct,[37] the application of that standard nonetheless raises novel issues that will need to be litigated and decided.

The Commission has already acknowledged the administrability concerns that the amendment presents, even when applied *prospectively*. In the Reasons for Amendment, the Commission explained that, to lessen workability issues and "ensure that courts may continue to appropriately sentence defendants for conduct that establishes counts of conviction," rather than define "the specific boundaries of 'acquitted conduct' and 'convicted conduct,'" the Commission "determined that the court that presided over the proceeding will be best positioned to determine which conduct can be properly considered as part of relevant conduct based on the individual

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[34] U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 4 (Apr. 30, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

[35] *Id.* at 5 ("Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661.").

[36] *Id*.

[37] *Compare id*. at 4, *with* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY 51 (December 22, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20231222_fr-proposed-amdts.pdf ("Option 1 (Acquitted conduct excluded from guideline range)… 'Acquitted conduct' means conduct (i.e., any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.").

facts in those cases."[38] The Commission also included a similar note in the new Application Note 10 to §1B1.3.[39]

The Department agrees that a judge who recently presided over a trial is best situated to distinguish "acquitted" from "convicted" conduct at sentencing, and thus to apply the amendment coherently and fairly. Although jury verdicts are sometimes inscrutable, the judge who presided over a trial is likely to have some insight as to why a jury returned a partial acquittal and to understand what conduct the jury found unproven. But when the amendment is applied retroactively, that critical feature of the amendment does not necessarily operate as the Commission intended. Instead, the "court that presided" over the original proceeding may not be the same court reviewing a retroactivity motion, especially for older cases. Even if the court remains the same, the judge's memory of the trial evidence will necessarily have faded, and the judge will need to undertake the same time-consuming and cumbersome review.

Determining, on a cold trial record, what specific "conduct" establishes acquitted and convicted counts will be challenging in many cases. Indeed, the acquitted-conduct amendment is significantly more difficult to apply than previous amendments because it will require a reviewing court to make *new* findings of fact and conclusions of law that were never discussed at the original sentencing. Such a complex and time-consuming evaluation will require not only a review of the sentencing documents (which could include a request to the court for disclosure of documents under seal), but also the charging documents, trial transcripts, and exhibits, to understand what evidence or conduct "establishe[d]" each count. Trials that lasted for multiple days or weeks, as well as multi-defendant or complex cases, will present additional operational and workability burdens. And for older cases, of which there may be a large number,[40] transcripts, exhibits, and rulings on motions may be difficult to obtain, complicating the analysis. These burdens will not fall on judges alone. Each motion for retroactive guidelines relief requires careful consideration by the defendant (and defense attorney) filing, the government responding, the probation officer reviewing, the BOP gathering and contributing records, and the court ultimately evaluating and deciding the appropriateness of a reduction for each individual defendant.[41]

For these reasons, the acquitted conduct amendment is unlike other amendments that the Commission has applied retroactively in its recent history. In voting for retroactive application of the drug amendments in 2010, for example, then-Commissioner Fredrich referenced the Commission's understanding "that the vast majority" of retroactivity motions "can be handled on

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[38] AMENDMENTS TO THE SENTENCING GUIDELINES SUBMITTED TO CONGRESS, *supra* note 34, at 2.
[39] *Id.* ("There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.").
[40] U.S. SENT'G COMM'N, QUICK FACTS, INDIVIDUALS IN THE FEDERAL BUREAU OF PRISONS (2024) ("the average guideline minimum for individuals in federal prison was 169 months. The average length of imprisonment imposed was 149 months."), https://www.ussc.gov/research/quick-facts/individuals-federal-bureau-prisons.
[41] *See also* EAGLES, *supra* note 9 (noting that "[c]ourts receive no additional probation staff or law clerk assistance to divide the wheat from the chaff."); Public Comment of Chief Probation Officer Warren Little, Eastern District of Kentucky (June 5, 2024) (stating that, "[i]f the acquitted conduct amendment is made retroactive[,] it will require more extensive work from the Probation Office than past retroactive changes," at a time when Probation faces difficulties from "understaffing").

the papers, without the need for hearings or the presence of the defendant."[42] At the same hearing, then-Commissioner Jackson noted that "the federal officials who testified at our hearing about their experience with having administered the applications for retroactive penalty reductions before, after the crack cocaine guideline was reduced in 2007, said that these guideline changes, if made retroactive[,] would not be particularly burdensome."[43] By contrast, when then-Commissioner Howell voted against retroactive application of part of the crack cocaine amendments to implement the Fair Sentencing Act in 2010, she stressed that the amendment involved "new factors . . . that were not formerly considered by judges as part of the original guideline calculations," potentially "requir[ing] courts to engage in new fact-finding with the concomitant need for hearings."[44] Retroactive application of the acquitted-conduct amendment would require similar and even more difficult fact-finding.

Additionally, retroactive application could place added burdens on crime victims. Cases in which defendants were convicted on some counts and acquitted on others may present complex factual and legal questions regarding how to apply the Commission's definition of acquitted conduct, including whether courts may continue to rely on portions of a previous victim statement. The court deciding the sentence-reduction motion also may have to consider how adjudication of the motion and potential adjustment of the sentence will affect victims' rights to "notice," "to not be excluded from any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding," and to be "reasonably heard" at any such "public proceeding."[45] Resolving those questions and conducting any further sentencing proceedings may retraumatize victims who testified at trial or provided statements during the original sentencing and relied on the sentencing court's determinations. For example, consider a defendant who was charged with both child sex trafficking and production of Child Sexual Abuse Material (CSAM), and was convicted following trial of production of CSAM but acquitted of the sex-trafficking count.[46] Questions would arise over whether, in any sentencing-reduction proceedings, the victim should be asked to provide new testimony in order to distinguish the harm from the CSAM from the sex trafficking.

As we noted during the March 2024 public hearing, juries generally do not acquit defendants of conduct, but rather of charges. Specific acts or omissions will often "establish[], in whole or in part" both an acquitted count, and a count for which the defendant was convicted. Although we accept that the Commission has made changes to the guidelines to address acquitted conduct going forward, we urge the Commission to avoid this murky area going backwards in time.

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[42] *Public Meeting*, *supra* note 4, at 32:11-14 (statement of Dabney Friedrich, Comm'r).
[43] *Id.* at 14:4-10 (statement of Ketanji Brown Jackson, Comm'r).
[44] *Id.* at 19:1-12 (statement of Beryl Howell, Comm'r).
[45] Crime Victim's Rights Act, 18 U.S.C. § 3771(a).
[46] Victims Advisory Group, Comment on Proposed Amendments to Sentencing Guidelines (Feb. 22, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=309.

III. Detailed Comments on Retroactivity for Amendment on Altered or Obliterated Serial Numbers

The second recently promulgated amendment concerns the four-level enhancement in firearms cases for trafficking or possession of a firearm that "had an altered or obliterated serial number."[47] The Commission amended the relevant language to limit the enhancement's application to "any firearm [that] had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye."[48]

We appreciate that, in promulgating this amendment, the Commission sought to "resolve the circuit split" as to how to define "altered or obliterated" and to "ensure uniform application" of this guideline.[49] The Commission, however, should not retroactively apply this amendment, which adds new terms replacing the existing "altered-or-obliterated" language.

To begin with, applying the change retroactively will impose a significant burden. As noted above, the Commission estimates that up to 1,452 offenders would be eligible to file a motion for a reduced sentence as a result of receiving an enhancement under §2K2.1(b)(4)(B) for an altered or obliterated serial number.[50] In cases where the movant makes an initial showing that the amendment may be applicable, a reviewing court would then need to determine whether a serial number was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. But only two circuits used this naked-eye test before the amendment. Because this test was not the law in all circuits, the information will not necessarily be in the PSR, and the court will most likely be required to conduct a factual inquiry. As the Commission's *Retroactivity Impact Analysis* explains, "the Commission does not collect information on why the enhancement at §2K2.1(b)(4)(B) was applied and, therefore, cannot determine in which of the 1,452 cases the serial number might not have been illegible or unrecognizable to the unaided eye."[51]

A factual inquiry would involve locating the gun, or photographs of the gun (to the extent that photographs are sufficient), and analyzing those materials, years after sentencing. The gun, or photos of the gun, may not exist years later. Guns are typically destroyed after sentencing and, if they are kept, they are often kept only for a period of a year and a day after the sentence is final (when the period for collaterally attacking the sentence expires). In the case of a stolen gun, an attempt may have been made to return the weapon to the rightful owner. Or, agents may have used physical or chemical means to restore an obliterated serial number from a firearm.

Another hurdle is that the evidence now required may never have been made part of the record—and may thus be unavailable in sentencing-reduction litigation in some circuits. For example, the Eleventh Circuit has held that, in considering motions under § 3582(c)(2), district

[47] USSG § 2K2.1(b)(4)(B)(i) (2021).
[48] AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 34, at 20.
[49] *Id.* at 18.
[50] RETROACTIVITY IMPACT ANALYSIS, *supra* note 12, at 12.
[51] *Id*. at 11.

courts "should not consider any evidence or materials beyond those that were before [them] at the time of the original sentencing proceeding."[52] Consistent with that understanding, in recent litigation involving the zero-point-offender provisions of Amendment 821, the government has sought new factual findings based only on the existing record.

Here, if the government is required to show that the serial number is rendered illegible or unrecognizable, such evidence would not necessarily have been included in the PSR in at least the Fourth, Fifth, and Eleventh Circuits, because such evidence was not required to support the enhancement's application in those jurisdictions. The result could very well be a difficult and unsuccessful effort by the prosecutor to track down evidence; a bar on evidence that was not previously put on the record because it was not required at the time; and the movant-defendant's receiving a windfall through retroactive relief because the government cannot prove that the firearm meets a test announced long after sentencing. In our view, a reduced sentence for an amendment applied retroactively should be reserved for defendants who do not satisfy the Commission's newly issued substantive criteria, not the happenstance of physical-evidence availability.

Finally, as noted above, resources are not infinite. Shifting resources from "combat[ting] the epidemic of gun violence and other violent crime,"[53] to having federal prosecutors re-analyze old cases makes our communities less safe, undermining public safety. In our view, it would be a poor public policy choice to promulgate a rule that would permit judges to return dangerous criminals to our communities, the vast majority of whom are recidivists,[54] because the government cannot re-locate newly relevant evidence years after their convictions.

IV. Detailed Comments on Retroactivity for Amendment on Enhanced Penalties for Drug Offenders / §2D1.1

The Department also urges the Commission not to make retroactive the amendment to §2D1.1(a) regarding Enhanced Penalties for Drug Offenders. As noted in the Reason for Amendment sent to Congress, this amendment is intended to "clarify the Commission's original intent that the enhanced base offense levels apply because the statutory elements have been established and the defendant was convicted under the enhanced penalty provision provided in sections 841(b) or 960(b)."[55] The Commission promulgated this amendment in response to "public comment and testimony that it was unclear whether the Commission intended for §§2D1.1(a)(1)–(a)(4) to apply only when the defendant was convicted of one of these crimes or whenever a defendant meets the applicable requirements based on relevant conduct."[56]

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[52] *United States v. Hamilton*, 715 F.3d 328, 340 (11th Cir. 2013).
[53] REMARKS BY PRESIDENT BIDEN AND ATTORNEY GENERAL GARLAND ON GUN CRIME PREVENTION STRATEGY, *supra* note 16.
[54] WHAT DO FIREARMS OFFENSES REALLY LOOK LIKE?, *supra* note 14, at 11.
[55] AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 34, at 29.
[56] *Id*.

Applying the changes retroactively may disrupt numerous sentences imposed following charging decisions premised upon prior interpretations of the guidelines. Yet, these cases all necessarily involved a victim who suffered serious bodily injury or death. For eligible drug defendants, if the defendant was not in fact charged and convicted of the statutory offense carrying the mandatory minimum term (of at least 20 years), and if the parties did not stipulate to the death or serious bodily injury, the defendant's guideline range would drop dramatically, and the new applicable guideline range would be calculated as if no victim suffered death or serious bodily injury, even though the original sentencing court found that the defendant was responsible for a death or serious bodily injury to a victim. The fact that the defendant could be sentenced as if no death or serious bodily injury occurred could be very upsetting to the family of the victim in and of itself. And even if the court ultimately considers the victim in evaluating the § 3553 factors, it may be traumatic on the family to revisit these difficult issues.

Making this amendment retroactive, in short, has the potential to allow certain defendants to be sentenced without regard to the death or serious bodily injury that resulted from their drug trafficking, and to provide a significant number of defendants with a substantial and unwarranted sentencing-reduction windfall. Given the serious potential consequences and the challenges arising from applying the amendment retroactively, the Department urges the Commission not to do so.

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Burden on the courts. The amended version of §2D1.1(a)(1)-(4) clarifies how these provisions are linked to certain mandatory minimum sentences. In many instances, applying the amendment to §2D1.1(a)(1)-(4) retroactively may be a straightforward exercise that courts would be a capable of performing based on sentencing and charging documents.

Even when that is the case, however, courts would still have to apply a different guideline provision to those defendants who are eligible for resentencing. And that process will create significant administrative burdens and potentially lead to disparate results. Specifically, if the amendments are applied retroactively, defendants who are no longer eligible for sentencing under death-resulting or serious-bodily-injury guideline provisions will need to be sentenced based upon the drug quantity attributable to them under §2D1.1(a)(5). Although some PSRs may contain drug-quantity calculations, others will likely require additional fact-finding to determine the quantity of drugs attributable to the defendant. Such determinations may require additional judicial fact-finding about events that occurred over a decade ago.

Making those determinations in a case that was prosecuted in the past raises significant challenges. As noted above, the law in some jurisdictions may limit the ability of district courts to take or consider new evidence in a sentence-reduction proceeding. And even where no such legal impediment exists, exhibits and other information that would have been available at the time of the sentencing may no longer be available. For example, evidence may have been destroyed. Investigating agents may be long retired. Memories will have faded. As a result, some defendants may receive an additional sentencing windfall because the existing record may not contain sufficient evidence to determine—and the government may no longer have sufficient evidence to demonstrate—the drug quantity that would have been appropriately attributable to

the defendant. In such cases, the defendant would then receive two windfalls. Not only would the death-resulting or serious-bodily-injury guideline no longer apply, but the offender also would be held accountable for a drug quantity that was far lower than the one that would have been provable at the time of sentencing. Such a result would be deeply troubling—including for the surviving family or friends of victims of the defendants' drug trafficking.

Magnitude of the Change. The potential implications of retroactivity on defendants who were subject to the provisions of §2D1.1(a)(1)-(4) may be substantial in some cases, generating a significant unwarranted sentencing reduction for some defendants and creating substantial sentencing disparities based upon prosecutors' prior charging decisions. Sentences could also be affected by factors having little or nothing to do with the original sentencing process or the appropriateness of the original sentence, such as the recency of the conviction, which in turn may affect the availability of relevant evidence, including laboratory and toxicology reports, and the availability of witnesses. Although several circuits had held that §2D1.1(a)(1)-(4) applied only when a defendant had been charged and convicted of a statutory death-resulting offense,[57] clear case law on that point did not exist throughout the country.[58] As a result, prosecutors in some districts who could have charged a mandatory minimum sentence chose to forego doing so based upon an understanding that the provisions of §2D1.1(a)(1)-(4) would apply. In some instances, prosecutors entered into a plea agreement in which they chose to forego a 20-year mandatory minimum sentence based upon an understanding that §2D1.1(a)(2), for example, would apply and that the defendant's base offense level would be 38.

If the amendment to §2D1.1(a) is made retroactive, the defendants in such cases would no longer be eligible to be sentenced under §2D1.1(a)(2), but rather under the drug quantity table pursuant to §2D1.1(a)(5). For a defendant who distributed a relatively small quantity of fentanyl that proved to be lethal or for whom the government can no longer prove a significant drug quantity, the effect of the change would be dramatic. For example, the base offense level for a defendant who distributed less than four grams of fentanyl that resulted in a death or serious bodily injury would go from 38 to 12—meaning that, for a defendant in criminal history category I, the applicable guideline range would drop from 235-293 months to 10-16 months.[59] Such a result would send a disturbing message to the friends and family members of the victim whose life was cut short or adversely affected as a result of the defendant's conduct.

In the examples set forth above, the retroactive application of the amendment would provide significant potential sentencing reductions to defendants who already benefited from a prosecutor's decision to forego seeking the highest available mandatory minimum sentence. Retroactive application of this amendment thus would send a message to prosecutors and victims that they cannot rely upon the finality of sentences that are imposed under the guidelines. By

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[57] *See United States v. Lawler*, 818 F.3d 281, 283-285 (7th Cir. 2016); *United States v. Greenough*, 669 F.3d 567, 573-76 (5th Cir. 2012); *United States v. Rebmann*, 321 F.3d 540, 543- (6th Cir. 2003). Dicta in another circuit expresses the same view. *See United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d Cir. 2001).

[58] *See, e.g.*, *United States v. Shah*, 453 F.3d 520, 524 (D.C. Cir. 2006) (finding no plain error in applying §2D.1.1(a)(2) without charging death-results element when plea agreement and government proffer stated that defendant was accountable for the death); *United States v. Rodriguez*, 279 F.3d 947, 950-51 (11th Cir. 2002) (upholding sentencing court finding of death resulting under preponderance standard and rejecting *Apprendi* claim because sentence did not exceed 20-year maximum under 21 U.S.C. § 841(b)(1)(C)).

[59] *See* U.S.S.G. §2D1.1(c)(14).

reducing the sentences only for defendants who already benefited from prosecutors' decisions to take a measured charging approach, applying this amendment retroactively may serve to encourage prosecutors to seek more mandatory minimum sentences in the future because such sentences are more likely to provide finality and closure for the victims and their families.

Public Safety. Retroactive application of this amendment would also discourage respect for the law and would detract from Congress's purposes in enacting and amending the Controlled Substances Act: to protect the public by deterring would-be drug traffickers. The need to deter drug traffickers has become ever more pressing in recent years, as the number of children aged 12-19 suffering overdose deaths has tripled since 2019.[60] At the same time, as noted above, more than 300,000 children lost a parent due to a drug overdose between 2011 and 2021.[61] Reducing the sentences for offenders whose drug trafficking caused such deaths—and were either proven to cause such deaths or admitted by the defendant to have caused such deaths – would undermine, rather than promote, deterrence.

Purpose. Because the purpose of the amendment is to clarify a perceived ambiguity in the interpretation of the guidelines, it is far preferable for all participants in the sentencing system to move forward with the same understanding of the law, rather than imposing that interpretation on past sentencings. As noted above, applying this clarifying amendment retroactively would be disruptive to the status of many significant cases that were charged and resolved based upon a different understanding of the law, which the Commission has now reformulated. That is particularly true in cases where prosecutors could have sought mandatory minimum sentences or statutory sentencing enhancements but chose not to do so in reasonable reliance on their understanding of the law and how it would apply in these very serious cases.

In addition, making the amendment retroactive would run contrary to one of the Commission's duties under 28 U.S.C. § 994(f): namely, the requirement that the guidelines it promulgates "shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." For example, if the amendment is applied retroactively, a defendant who was charged with the 20-year mandatory minimum for death resulting, and then sentenced to a 20-year term, would not be eligible for sentencing relief. However, a similarly situated defendant who was sentenced under §2D1.1(a)(2) as part of a plea agreement where a prosecutor chose to dismiss a 20-year mandatory minimum count and rely instead on the advisory guidelines could potentially receive a substantial sentencing reduction, with the new guideline calculation based primarily on the now-provable drug amount.

Retroactive application of this amendment, and the potential windfall it would provide to certain defendants but not others, would undermine public confidence in the rule of law. Prosecutors make charging decisions and enter into plea agreements based upon their reasonable understanding of how the law applies to a particular case at that time. As prosecutors pursue a

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[60] CENTERS FOR DISEASE CONTROL AND PREVENTION, DRUG OVERDOSE DEATHS AMONG PERSONS AGED 10–19 YEARS — UNITED STATES, JULY 2019–DECEMBER 2021 (Dec. 16, 2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7150a2.htm; *see also* Jenna Portnoy and Dan Keating, *Fentanyl is Fueling a Record Number of Youth Drug Deaths*, WASH. POST (May 22, 2024), https://www.washingtonpost.com/dc-md-va/2024/05/22/fentanyl-youth-overdoses-increase/.

[61] *More Than 321,000 U.S. Children Lost a Parent to Drug Overdose from 2011 to 2021*, *supra* note 20.

criminal case, they also must consult with victims and provide them with information about potential charges, plea agreements, and sentencing recommendations, among other requirements. As part of that effort, prosecutors seek to ensure that victims' families understand how the law applies to the case and that the families' views have been considered and communicated in the process. Retroactive application of §2D1.1(a)(1)-(4) would upend the reliance that prosecutors and victims rightly have placed on how the law applies and send a message to these victims that their losses did not matter. It would also undermine any sense of finality or closure that the defendant's sentencing may have provided regarding the loss of their loved ones.

From our review of prior amendments that have been made retroactive, only Amendment 591 is somewhat analogous. That amendment addressed the question of whether the enhancements under §2D1.2 (applying to drug offenses occurring near protected locations or involving underage or pregnant individuals) were applicable to drug prosecutions under § 841 or only when the defendant was prosecuted under other specific statutory provisions. Although the Commission applied that provision retroactively, the effect of the decision in many cases was to reduce defendants' sentences by only one or two levels.[62] Moreover, the triggering statutory offenses carried mandatory minimum sentences of one year.[63] In this case, the stakes are much more substantial. As noted above, retroactive application of these provisions may result in dramatic reductions in some defendants' offense levels and would completely remove the victim's death from consideration in the guidelines calculations.

To the extent that the guideline amendment was motivated by concern about the length of sentences for death- or serious-bodily-injury resulting offenses when mandatory minimums did not apply, the Commission's own data do not suggest a need for retroactivity. Nearly 47 percent of defendants sentenced under §2D1.1(a)(1)-(4) received a sentence *below* the applicable guideline range.[64] In other words, in the absence of mandatory minimum sentences, district judges already used their authority to make adjustments when they deemed it appropriate. Requiring judges to revisit these decisions and to conduct further judicial fact-finding to calculate the relevant drug quantity would create a substantial burden that undermines the finality of sentences without significantly furthering the amendment's purpose.

Finally, the Department notes that the amendment specifically states that the parties may stipulate to the application of §2D1.1(a)(1)-(4). As several witnesses at the Commission's hearing on this amendment discussed, this has been an accepted practice in some districts for quite some time. Should this amendment be made retroactive, the Commission should make clear that any sentence that was based upon a stipulation regarding the application of §2D1.1(a)(1)-(4) is not entitled to resentencing.

V. Detailed Comments on Retroactivity for Amendment on Grouping

The Commission amended the grouping rules under §3D1.2(c) to resolve a difference among the courts of appeals concerning whether a count under § 922(g) should group with a drug trafficking count where the defendant also has a separate count under § 924(c). Generally,

[62] *See* U.S.S.G. §2D1.1.2(a)(1)-(2).
[63] *See* 21 U.S.C. §§ 859-861.
[64] RETROACTIVITY IMPACT ANALYSIS, *supra* note 12, at 21 tbl. 3.

§3D1.2 permits grouping of closely related counts of conviction, including "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts."[65] In contrast with other circuits, the Seventh Circuit held that §2K2.4 did not permit grouping of felon-in-possession and drug-trafficking counts when the defendant is also convicted of a count under § 924(c).[66] In its "Reason for Amendment" the Commission explains that it has resolved the spit in favor of the majority rule in the Sixth, Eighth, and Eleventh Circuits.[67]

The Department did not oppose this amendment during the regular amendment cycle, and we do not oppose it being made retroactive. Several considerations inform that view.

First, applying the clarified grouping rule retroactively should not present administrability concerns. As we understand it, the process will involve recalculating the final guideline range to apply the clarified rule on grouping. That process should require little or no additional fact-finding and can likely be accomplished using information available on the face of sentencing documents. Accordingly, the process should not impose an undue burden on the courts, nor on the resources of the Executive Branch. Moreover, the Commission has provided an impact analysis showing that a maximum of only 102 defendants nationwide would be eligible for a reduction if the amendment is made to apply retroactively. And given the prevalence of downward variances in the districts that would be most affected,[68] as well as the existing limitations on the extent of the sentencing reduction authorized by the guidelines,[69] there is reason to believe that the number could be even lower.

Second, any public-safety concerns arising from the characteristics of affected defendants (individuals who used or possessed guns in connection with serious crimes) are allayed by the anticipated magnitude of the change. As we understand it, in many cases the amendment will result in only a single offense-level reduction—a relatively small change. That was the case, for

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[65] USSG §3D1.2(c) (2023).

[66] AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 34, at 21 ("The Sixth, Eighth, and Eleventh Circuits have held that such counts can group together under §3D1.2(c) because the felon-in-possession convictions and drug trafficking convictions each include conduct that is treated as specific offense characteristics in the other offense, even if those specific offense characteristics do not apply due to §2K2.4. By contrast, the Seventh Circuit has held that felon-in-possession and drug trafficking counts do not group under these circumstances because the grouping rules apply only after the offense level for each count has been determined and "by virtue of §2K2.4, [the counts] did not operate as specific offense characteristics of each other, and the enhancements in §§2D1.1(b)(1) and 2K2.1(b)(6)(B) did not apply.") (citations omitted), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

[67] *Id*.

[68] For example, in the two districts with the highest number of cases according to the Commission's *Retroactivity Impact Analysis*, district courts imposed downward-variant sentences in more than 50 percent of cases sentenced during Fiscal Year 2023. *See* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2023, CENTRAL DISTRICT OF ILLINOIS tbl. 8 (53.4 percent), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/ilc23.pdf; U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2023, NORTHERN DISTRICT OF ILLINOIS tbl. 8 (55.4 percent), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/iln23.pdf.

[69] U.S.S.G. §1B1.10(b)(2) ("Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.").

example, in *United States v. Sinclair*,[70] the Seventh Circuit decision that adopted the interpretation of the grouping rules abrogated in the Commission's amendment.

Third, we agree that a basic guidelines provision such as this grouping rule should be applied evenly, uniformly, and should not depend on the defendant's geography. The Commission's *Retroactivity Impact Analysis* shows that 38 of the 102 potentially eligible defendants were sentenced in only three districts: the Central District of Illinois, Northern District of Illinois, and Northern District of Indiana.[71] These districts will be most burdened by the change, but that fact underscores that guideline ranges were not being calculated the same way across different judicial districts. Making this amendment retroactive would therefore be consistent with the Commission's duty to promulgate guidelines that provide "certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities."[72]

VI. Operational and Reentry Concerns

It is also critical to consider the effects of retroactive application of the amendments on the ability of BOP and the Probation Office to properly prepare offenders for reentry into the community. Generally, BOP starts planning for release 180 days in advance.[73] Transition planning includes securing beds in residential reentry centers and providing other programs that require space, resources, re-computation of release dates, and coordination with Probation. It also involves working with Probation to develop release and supervision plans. As noted above, if the Commission disagrees with our assessment of retroactivity and decides to apply these amendments retroactively, we recommend that it delay implementation by several months, a period that will (among other things) allow both BOP and Probation to make the necessary adjustments and preparations to ensure that all offenders receive the reentry and supervision services that they need and so that the reentry proceeds in an orderly and effective way.

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For all the reasons discussed above, retroactive application of the amendments concerning acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenders would not be in the interest of public safety or justice. The Department therefore opposes retroactive application of those three amendments. We do not, however, oppose retroactive application of the amendment on grouping.

We appreciate the opportunity to provide the Commission with our views.

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[70] 770 F.3d 1148, 1153 (7th Cir. 2014) (inapplicability of grouping rule resulted in an offense level of 17, not 16).
[71] RETROACTIVITY IMPACT ANALYSIS, *supra* note 12, at 15.
[72] 28 U.S.C. § 994(f).
[73] *Public Hearing on Retroactivity of 2014 Drug Amendment*, *supra* note 11, at 121:15-19 (statement of Charles Samuels, Director of the United States Federal Bureau of Prisons).

Sincerely,

/s/ Scott Meisler
Scott Meisler, Deputy Chief, Appellate Section
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
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June 21, 2024

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 Comment on Possible Retroactive Application of Amendment 1, Part A of Amendment 3, Part B of Amendment 3, and Part D of Amendment 5

Dear Judge Reeves:

The Federal Public and Community Defenders appreciate the opportunity to share our perspective on the retroactivity of certain 2024 guideline amendments. For the reasons that follow, we strongly support retroactive application of the four amendments that reduce the sentencing guideline range for some individuals. These include:

- The Acquitted Conduct Amendment (sec. II, pp. 6–12);
- Part A of the Circuit Conflicts Amendment (§2K2.1(b)(4)(B) enhancement) (sec. III, pp. 12–14);
- Part B of the Circuit Conflicts Amendment (Grouping: §2K2.4, application note 4) (sec. IV, pp. 15–17); and
- Part D of the Miscellaneous Amendment (§2D1.1(a)(1)–(4) enhanced base offense levels) (sec. V, pp. 17–18).

I. Introduction

The Commission has identified three primary factors it considers when determining whether a guideline amendment should apply retroactively: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range; and (3) the feasibility of applying the amendment

retroactively.[1] The Commission has also weighed the purposes of sentencing set forth in the Sentencing Reform Act of 1984—including fairness, proportionality, and the need to reduce unwarranted disparities;[2] the need to reduce BOP overcrowding and the financial costs of incarceration;[3] and public safety concerns,[4] among other factors, when making retroactivity determinations. These factors favor retroactivity for each amendment.

These four amendments promote certainty and fairness and reduce unwarranted disparities in sentencing. The Commission's Enabling Statute sets forth, in *two distinct places*, its obligation to ensure "certainty and fairness in sentencing" and to "reduc[e] unwarranted sentencing disparities."[5] Additionally, the Acquitted Conduct Amendment promotes respect for the law—another goal of sentencing—by honoring the jury's verdict of acquittal.[6] These key policy considerations, which warranted

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[1] *See* USSG §1B1.10 comment. (background).

[2] *See*, *e.g.*, *id.* ("The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified individuals."); Transcript of Public Meeting before the U.S. Sent'g Comm, Washington, D.C., at 24 (June 30, 2011) (Comm. Howell) ("June 2011 Comm Meeting Tr.") ("Among the purposes of sentencing that we must try to achieve are fairness, proportionality, and avoiding unwarranted disparities. And to my mind, retroactive application of Parts A and C of our guidelines—FSA guideline amendment helps to achieve those purposes of the Sentencing Reform Act." (cleaned up)).

[3] *See*, *e.g.*, Transcript of Public Meeting before the U.S. Sent'g Comm, Washington, D.C., at 13 (Aug. 24, 2023) (Chair Reeves) ("Aug. 2023 Comm Meeting Tr."); June 2011 Comm Meeting Tr., at 23–24 (Comm. Howell).

[4] *See, e.g.*, June 2011 Comm Meeting Tr., at 33 (Comm. Friedrich); Transcript of Public Meeting before the U.S. Sent'g Comm, Washington, D.C., at 23–24 (Dec. 11, 2007) (Comm. Howell) ("Dec. 2007 Comm Meeting Tr.").

[5] *See* 28 U.S.C. § 994(f); *see also id.* § 991(b)(1)(B).

[6] *See* USSC, *Amendments to the Sentencing Guidelines and Reasons for Amendment* 1 (Apr. 30, 2024) ("*2024 Amendments and RFAs*") ("This amendment seeks to promote respect for the law by addressing some of the concerns that numerous commenters have raised about acquitted-conduct sentencing, including

prospective application of the amendments, equally justify their retroactive application to individuals who have already been sentenced.[7]

The impact of making each amendment retroactive would be significant. Although the Commission was unable to estimate the extent of the sentence reductions if any of the four amendments were made retroactive, Defenders expect the magnitude of the change to the guidelines to be well beyond the six-month threshold for each amendment, as explained below.[8] And fundamentally, the Commission's impact report shows that, despite being facially neutral, the sentencing policies that were amended have disparately harmed persons of color.[9] Thus, the communities most affected by draconian criminal justice treatment also stand to benefit most from a vote to make each amendment retroactive. As Commissioner Gleeson observed last year during the vote on retroactivity of Parts A and B of Amendment 821 (the 2023 Criminal History Amendment), remedying overly punitive sentencing policies and practices that have a disproportionate effect on Black and Brown people implicates fundamental fairness concerns within the sentencing guidelines and the criminal justice system, more broadly.[10]

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those involving the 'perceived fairness' of the criminal justice system."); 18 U.S.C. § 3553(a)(2)(A).

[7] *See* USSG Supp. to App. C., Amend. 825, Reason for Amendment 261 (Nov. 1, 2023) ("The Commission determined that the policy reasons underlying the prospective application of the amendment apply with equal force to individuals who are already sentenced.").

[8] *See* USSG §1B1.10 comment. (background) (quoting S. Rep. 225, 98th Cong., 1st Sess. 180 (1983)) ("The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months.").

[9] *See* USSC, *Retroactivity Impact Analysis of Certain 2024 Amendments* 9, 13, 16, 20 (2024) ("*2024 Retroactivity Impact Analysis*").

[10] *See* Aug. 2023 Comm Meeting Tr. at 48–49; *see also* Transcript of Public Hearing before the U.S. Sent'g Comm, Washington, D.C., at 176–77 (July 19, 2023) (Attorney Price) ("July 2023 Comm. Hearing Tr.") ("The disparate impact of status points and the treatment of zero point offends fundamental justice and fairness . . . . The Commission's retroactivity analysis has exposed a somewhat hidden issue in terms of disparity. It's no less egregious because it's hidden, and a hidden disparity is still a disparity and now in plain sight it should be addressed.").

Retroactivity would not overburden courts, probation officers, or the attorneys involved. These stakeholders now have experience with multiple retroactivity projects, the most recent of which is currently underway and, from the perspective of the Defender community, is running smoothly and efficiently. Many district courts issued standing orders appointing the Federal Defenders to represent individuals filing Amendment 821 retroactivity motions, as well as disclosure orders and other protocols to ease any administrative burden.[11] CJA panel attorneys have been appointed in cases where Defenders identified a conflict, or to help ease the workload in busier districts. In those cases, Defender offices have worked closely and cooperatively with the panel to provide the necessary resources and training to aid in the effective handling of these motions.[12] Many times, defense counsel and U.S. Attorneys have been able to reach consensus on relief without the need for litigation.

Likewise, the Commission heard testimony at last year's retroactivity hearing confirming that everyone involved is equipped to handle these motions, and will work collaboratively to do so.[13] While courts would likely

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[11] In March 2024, Northern District of Ohio Judge Benita Pearson participated in a Federal Judicial Center webinar where she discussed the systems in place in her district to handle motions for retroactive application of Amendment 821. She admitted she was initially opposed to retroactivity but was fully "on board now" given how smoothly the process has been running. She noted that two general orders issued by the Chief Judge—one establishing a disclosure procedure for sentencing records and a second establishing a protocol for defense counsel and prosecutors to work through motions, including *pro se* motions–have contributed to the collaborative and efficient handling of retroactivity cases there. A recording of this webinar, entitled "*Court Web: Hot Topics in Federal Sentencing*," can be accessed through FJC.dcn.

[12] For instance, the Federal Defenders in the Northern District of Ohio provided a Zoom training, which was recorded and uploaded to their YouTube channel, for panel attorneys representing individuals filing motions for retroactivity under Amendment 821. *See* Fed. Public Defender for the N.D. Ohio, *Amendment 821 Reduction Motion Training*, YouTube (Feb. 27, 2024).

[13] AFPD Sapna Mirchandani testified that the procedures in place in the District of Maryland to manage prior retroactivity projects improved with each retroactive amendment cycle—from Amendment 706, to 750, to 782. *See* July 2023 Comm. Hearing Tr. at 57 (AFPD Mirchandani). The attorneys there work collaboratively with probation and the court to efficiently manage the influx of motions, many of which are decided on the papers with the help of a one-page memo

have to engage in some factual determinations—particularly for the Acquitted Conduct and Part A of the Circuit Conflicts Amendments—the number of potentially eligible individuals for all four amendments combined, is smaller and more manageable than in many past retroactivity projects, including Amendment 821.[14] And DOJ's speculation that over 85,000 people—or roughly half of the BOP population—would file motions for retroactive relief under Amendment 821,[15] has not come to pass and seems highly unlikely given the data in the Commission's "Retroactivity Reports on Parts A and B of the 2023 Criminal History Amendment."[16] Thus, courts would not be overwhelmed by a surfeit of filings by ineligible people.

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prepared for the court. *See id.* at 39, 57, 78. In his testimony on behalf of TIAG, Judge Ralph Erickson echoed those sentiments from his perspective as a busy trial judge during multiple prior retroactivity periods. *See id.* at 103–04. Likewise, POAG representative, Josh Lauria, testified about the "substantial amount of collaboration" that occurs in the Middle District of Florida between the parties, probation, and the court to ensure proper protocols are in place so that the retroactivity process runs seamlessly. *Id.* at 118. For Amendment 782, meetings occurred between all the key stakeholders to generate lists of eligible individuals. *See id.* at 122. Then, the court issued an omnibus order "that's easy . . . to operate under" providing "protocols and expectations" and "allow[ing] [the stakeholders] to share information," including presentence reports. *Id.* Probation set aside certain days each month to focus on retroactivity cases and their office had contacts at the Defender Office and the U.S. Attorney's Office with whom they could discuss more complex cases, oftentimes building consensus among these groups. *See id.* at 123–24. Even DOJ's witness, Kevin Ritz, who opposed retroactivity, described feeling "proud" of how his office handled past retroactivity projects despite the increased workload, saying: "We did what it took." *Id.* at 20, 21.

[14] *Compare 2024 Retroactivity Impact Analysis*, at 21 (estimating that a maximum of 4,063 people would be eligible for relief if all four amendments were made retroactive) *with* USSC, *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* 31 (2023) (estimating that 18,767 people would be eligible for relief if Parts A and B of the 2023 Criminal History Amendment were made retroactive).

[15] *See* Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm at 4 (June 22, 2023).

[16] As of March 31, 2024, courts had decided only around 5,473 motions for retroactive application of Part A, and courts had decided only around 4,057 motions for retroactive application of Part B. For both parts, over half of those motions have been granted. *See* USSC, *Part A of the 2023 Criminal History Amendment*

Finally, any administrative burden to applying these amendments retroactively would be outweighed by the potential for cost-savings and to alleviate BOP overcapacity problems.[17] And, as the Commission has previously recognized, retroactivity will not threaten community safety because a reduction in sentence is not automatic for eligible individuals: "[P]ublic safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction."[18] What's more, the Commission's retroactivity and recidivism studies indicate that individuals who are released early as a result of retroactive application of guideline amendments are no more likely to recidivate than those released on their originally-anticipated release date.[19]

II. Acquitted Conduct

Purpose. Dayonta McClinton is currently serving a 19-year prison sentence for a robbery he committed when he was just 17 years old. His guideline-advised sentence *more than tripled*, cross-referencing a jury-

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Retroactivity Data Report tbl. 1 (2024); USSC, *Part B of the 2023 Criminal History Amendment Retroactivity Data Report* tbl. 1 (2024).

[17] The BOP's cost to incarcerate one individual per year ranges from a low of around $30,000 (for minimum security designation centers) to a high of around $70,000 (for medical centers). *See* U.S. Dep't of Just., Fed. Bureau of Prisons, *FY 2024 Performance Budget Congressional Submission* 2 (last visited June 6, 2024) (these numbers were estimated from the bar chart on page 2). BOP is estimated to be operating at 10% overcapacity, *see id.* at 7, with correctional officer staffing levels 40% below what's needed to safely manage institutions. *See The Nation's Correctional Staffing Crisis: Assessing the Toll on Correctional Officers and Incarcerated Persons, Hearing Before the Subcommittee on Criminal Justice and Counterterrorism*, *Senate*, 118 Cong. 2 (2024) (statement of Brandy Moore White, Nat. Pres. of Council of Prison Locals).

[18] USSG Supp. to App. C., Amend. 825, Reason for Amendment 262 (Nov. 1, 2023); *see also* §1B1.10 comment. (n.1(B)(ii)).

[19] *See* USSC, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* 6, 11, 27 (2020); USSC, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* 3, 7, 14 (2018); USSC, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* 3, 15 (2014).

acquitted murder. In denying his petition for certiorari last year, several Supreme Court Justices urged this Sentencing Commission to "resolve questions around acquitted-conduct sentencing in the coming year."[20] The Commission responded by adopting the Acquitted Conduct Amendment, referencing Mr. McClinton's case throughout its Reason for Amendment. The irony is, if this Commission does *not* make this amendment retroactive, Mr. McClinton will be denied the opportunity for justice that his case helped achieve for others.

The Acquitted Conduct Amendment was motivated by fundamental and systemic fairness concerns like those animating the decisions to make Amendments 782 ("Drugs Minus Two"), 750 (Parts A and C) ("Fair Sentencing Act"), and 706 ("Crack Minus Two") retroactive.[21] It aims to "promote respect for the law" by addressing both the perceived and actual injustice of increasing a person's sentence based on conduct a jury decided was not proven beyond a reasonable doubt.[22] Acknowledging that acquitted-conduct sentencing "has been a persistent concern for many within the criminal justice system and the subject of robust debate over the past several years," the Commission sought, through this amendment, to preserve and strengthen the historic role of the jury and the presumption of innocence by according special weight to acquittals at sentencing on a partial conviction.[23]

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[20] *McClinton v. United States*, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., statement respecting denial of cert.); *see also id.* (Kavanaugh, Gorsuch, Barrett, JJ., statement respecting denial of cert.) ("It is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct.").

[21] While the need to correct a fundamental and systemic unfairness within the criminal justice system is not a prerequisite to retroactivity, it is a factor the Commission and stakeholders have cited in the past, when discussing the "purpose" for the amendment, to support retroactivity. *See, e.g.*, Transcript of Public Hearing before the U.S. Sent'g Comm, Washington, D.C., at 41–43, 45–46 (June 10, 2014) (Comm. Pryor); June 2011 Comm Meeting Tr. at 13, 17 (Comm. Jackson); Transcript of Public Hearing before the U.S. Sent'g Comm, Washington, D.C., at 15, 16, 20, 26, 30, 36 (Nov. 13, 2007) (Judge Walton) ("Nov. 2007 Comm Hearing Tr.").

[22] *See 2024 Amendments and RFAs*, at 1.

[23] *See id.* The amendment also provides greater certainty for the individual being sentenced, *see, e.g.*, Fed. Defender Comments on the U.S. Sent'g Comm's 2024 Proposed Amendments, Acquitted Conduct (Proposal 3), at 15 (Feb. 22, 2024) ("2024

In 2007, when discussing the crack-powder cocaine sentencing disparity, then-Commissioner Beryl Howell emphasized that the drug guideline's treatment of crack cocaine invited disrespect for the criminal legal system and retroactivity of Amendment 706 was necessitated by the need to enhance the public's perception that the justice system is, in fact, just.[24] The same is true today of acquitted-conduct sentencing, and the Acquitted Conduct Amendment.

The Commission has repeatedly recognized since at least 1992—when it first published a proposed amendment to limit or eliminate acquitted-conduct sentencing—that basing a person's sentence on conduct of which a jury found him "not guilty" is inherently unfair, in derogation of our jury-trial system and the right to both certain and proportional punishment.[25] And just today, the Supreme Court, *once again*, emphasized the critical role juries have played since the founding in "ensuring that the punishments courts issue are not the result of a judicial inquisition but are premised on laws adopted by the people's elected representatives and facts found by members

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Defender Acquitted Conduct Comment") ("From the sentenced individual's perspective, far from promoting certainty in sentencing, the court's ability to ignore the jury's verdict obfuscates the expected punishment, depriving the individual of adequate notice as to the possible sentence."), and more proportional punishment—sentencing will now better fit the *convicted crime*, not a crime the jury found was not proven beyond a reasonable doubt. *See* 28 U.S.C. § 994(l) (instructing the Commission to ensure that the guidelines reflect the appropriateness of imposing an incremental penalty for each offense when a person is "convicted of" multiple offenses).

[24] *See* Dec. 2007 Comm Meeting Tr., at 20–21 (Comm. Howell) ("When [Judge Reggie Walton] told us that the unfairness of our drug laws has had a [corrosive] impact on the respect many of our citizens have about the general fairness of our nation's criminal justice system, I think that can't be [overstated]. I was a prosecutor, as well, and this [corrosive] effect of the perception that our criminal justice system is unfair has a totally adverse effect on our criminal justice system and our ability to enforce our criminal laws. It affects the willingness of witnesses to come forward to cooperate and help the government in investigating crime. It has an effect on juries and whether or not they think that the system in which they're participating is fair, and it has an adverse effect on the overall ability of law enforcement officers at all levels, federal, state and local, to combat crime.").

[25] *See* 88 Fed. Reg. 7180, 7224–7225 (2023); 62 Fed. Reg. 152, 161–62 (1997); 58 Fed. Reg. 67522, 67541 (1993); 57 Fed. Reg. 62832, 62382, 62848 (1992).

of the community."[26] And so it held, the Fifth and Sixth Amendments require a unanimous jury to decide beyond a reasonable doubt that a person's past offenses were committed on separate occasions for the Armed Career Criminal Act to apply.[27]

In the words of former Criminal Law Committee (CLC) Chair Judge Reggie Walton when he testified in support of retroactivity of Amendment 706:

> [I]f the reason for the change . . . was to address what was perceived to be a real and fundamental problem in the fairness of the sentencing guidelines, I just don't see how, in good faith, one can say that just because someone was sentenced on October 30th, that they get a certain sentence, whereas someone who's sentenced on November 1st receives a different sentence . . . . I just think that that's a fundamentally unsound position for the court to take because we're in the business of trying to do justice and I think if we're going to do justice, that means not just justice in the future, but rectifying injustices that occurred in the past.[28]

Impact. While a relatively small number of individuals would be impacted by retroactivity of this amendment,[29] many of those impacted would see a dramatic change in their guideline range. Because courts have relied on acquitted conduct to apply specific offense characteristic enhancements and upward adjustments of at least (but often much more than) two levels, base

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[26] *Erlinger v. United States*, 602 U.S. ---, No. 23-370, Slip. Op. at 8 (June 21, 2024) (cleaned up).

[27] *See id.* at 26.

[28] Nov. 2007 Comm Hearing Tr., at 16–17.

[29] The Commission estimates that 1,971 currently-incarcerated people were acquitted after trial of one or more charges against them. *See 2024 Retroactivity Impact Analysis*, at 7. However, this number is likely overinclusive as not everyone's guidelines are affected by acquitted conduct and, in some of the cases that are affected, judges likely varied to a sentence within what the guideline range would've been without the acquitted conduct based on a policy disagreement with acquitted-conduct sentencing.

offense level enhancements, and cross-references to guidelines covering far more serious conduct, Defenders expect that the magnitude of the change in the guideline range for eligible individuals would be far from minor.[30] Indeed, the average sentence imposed on persons incarcerated after a conviction at trial is 294 months, with over 60% of these individuals being sentenced within their guideline range.[31]

A review of four acquitted-conduct sentencing cases in which the Supreme Court denied certiorari last summer—*McClinton*, *Luczak*, *Shaw*, and *Karr*—shows that some of the people impacted by this amendment stand to gain back years, if not decades, of liberty if this change is made retroactive.[32] The cases Defenders described in our comment on the 2024

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[30] *See* S. Rep. 225, 98th Cong., 1st Sess. 180 (1983) (noting that the Committee does not expect the Commission to make retroactive only minor downward adjustments). In 2022, the Commission conducted a special coding project to study the impact of Senate bill S. 601, the Prohibiting Punishment of Acquitted Conduct Act of 2021, if enacted. *See generally* USSC, *Impact Analysis of S. 601, the Prohibiting Punishment of Acquitted Conduct Act of 2021* (Aug. 4, 2022). The Commission found some cases (it did not specify how many) where it appeared that acquitted conduct was the basis for a two-level specific offense characteristic enhancement, which often results in an approximate 25% increase in the sentencing range. *See id.* But because acquitted conduct has also been used to establish the base offense level, some individuals in other cases were subject to "a more substantial increase." *Id*. The Commission observed that courts could have used the acquitted conduct to impose upward variances in other cases. *See id.* In fiscal year 2021, the average imprisonment length for people convicted after trial who had at least one charge acquitted was 136 months. *See id.* Using a 25% increase in sentencing range based on acquitted conduct as a (hypothetical) lower bound and a 50% increase in that range based on acquitted conduct as an (hypothetical) upward bound, the Commission opined that, at the lower bound, the average length of imprisonment without acquitted conduct would have been 109 months and, at the upward bound, the average length of imprisonment without acquitted conduct would have been 91 months. *See id.* These differences—27 months at the low end and 45 months at the high end—are quite substantial. *See also* Congressional Budget Office, *Cost Estimate: H.R. 5430, Prohibiting Punishment of Acquitted Conduct* 3 (Feb. 29, 2024) (estimating that a House bill to prohibit acquitted-conduct sentencing would reduce sentences by approximately 30 months on average and would reduce time served by about 750 person-years over the 2024–2034 period).

[31] *See 2024 Retroactivity Impact Analysis*, at 9–10 & tbl. 3.

[32] Dayonta McClinton argued to the Supreme Court that the sentencing court more than tripled his robbery sentence—from a range of 57 to 71 months to a sentence of 228 months—for murdering his best friend, despite the jury's acquittal

Acquitted Conduct Proposed Amendment reveal equally significant sentence increases attributable to acquitted conduct.[33] And Jessie Ailsworth, who testified at the Commission in March as a person impacted by acquitted-conduct sentencing, was sentenced to 30 years in prison based almost exclusively on acquitted conduct.[34] Moreover, the Commission's demographic data reveal that 47.5% of people currently incarcerated following a conviction at trial are Black and 22.5% are Hispanic.[35] Thus, the communities that would reap the biggest benefit of making retroactive this fundamental change to the guidelines regime are those historically disadvantaged within our criminal legal system.

Administrability. In many cases, this amendment would not be difficult to administer retroactively. Because there was a trial, there will be motions *in limine*, trial transcripts, jury instructions, verdict and special verdict forms, and other trial records to help determine the basis for the partial acquittal. Although acquitted conduct has been included within the relevant conduct rule's operation until now, defense attorneys have often objected to its use at sentencing—identifying its impact on the guideline range—to preserve constitutional and policy-based challenges. A careful review of the PSR and the objections to the PSR in these cases will aid in

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on the murder charge. *See* Petition for Writ of Certiorari at 3–4, *McClinton v. United States*, No. 21-1557 (June 10, 2022). The sentencing court increased Thomas Luczak's base offense level from 33 to 43 for a murder that the government failed to prove beyond a reasonable doubt based on the jury's special verdict of acquittal on first-degree murder accusation in a RICO case. *See United States v. Bravo*, 26 F.4th 387, 398 (7th Cir. 2022). A jury convicted Marquis Shaw of selling modest amounts of crack cocaine and acquitted him of a multi-kilogram drug trafficking conspiracy and murder charges, but the court sentenced Mr. Shaw to 35 years in prison based primarily on the acquitted charges. *See* Petition for Writ of Certiorari at 6–11, 37–38, *Shaw v. United States*, No. 22-118 (Aug. 1, 2022). Gary Karr's sentence was increased by more than 30 years because of a cross-reference in the robbery guideline to the murder guideline despite the jury's special finding that his conduct did not lead to the death of another person. *See* Petition for Writ of Certiorari at 2–3, *Karr v. United States*, No. 22-5354 (Aug. 10, 2022).

[33] *See* 2024 Defender Acquitted Conduct Comment, at 7–9 nn.25–30.

[34] *See id.* at 19; *see also* Letter from Jessie Ailsworth to the U.S. Sent'g Comm at 1 (Mar. 6, 2024).

[35] *See 2024 Retroactivity Impact Analysis*, at 9 & tbl. 2.

applying the amendment to people already sentenced. In many cases, the attorneys who handled the trial, sentencing, and/or appeal will be available to either consult with the attorney handling the retroactivity motion or to accept appointment to seek retroactive application of the amendment for their former clients. There will be additional factfinding required in some instances, but because of the small number of cases where this amendment is implicated,[36] this work would not unduly burden courts.

Lastly, Defenders acknowledge there may be some cases presenting thorny questions about what's included in the Commission's definition of "acquitted conduct" and the overlapping conduct exception—a topic of much debate at the hearings on this amendment. But courts will need to wrestle with these issues prospectively anyway. Retroactivity would give them an earlier opportunity to consider the implications of, and better plan for, this change to the relevant conduct rule in a variety of different contexts.

III. Circuit Conflicts, Part A: Serial Number Enhancement

Purpose. Part A of the Circuit Conflicts Amendment addresses the meaning of the word "altered" in the 4-level enhancement at §2K2.1(b)(4)(B). The amendment resolved a circuit conflict, and as the Commission noted, it aimed to promote "uniform application" of the guideline.[37] The Commission should make this amendment retroactive to rectify past unwarranted disparity in applying the enhancement.[38] Prior to this amendment, at least three circuits held, based on the guideline text, that alteration or defacement of a serial number—even if the serial number was still legible—merited application of the serious 4-level enhancement. As such, an individual who

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[36] Very few cases reach trial in federal court and, of those that do, even fewer result in a partial acquittal. In fiscal year 2021, only 157 people were sentenced following a trial in which they were acquitted of at least one charge. This represents just 0.3% of all individuals sentences in fiscal year 2021. The Commission determined that, "[w]ithout question" courts did not often use the conduct underlying an acquittal to impose sentence. *See Impact Analysis of S. 601*.

[37] *2024 Amendments and RFAs*, at 18 ("By employing the 'unaided eye' test for legibility, the amendment also seeks to resolve the circuit split and ensure uniform application.").

[38] *See* 28 U.S.C. § 991(b)(1)(B) (requiring the Commission to establish sentencing policies that are fair and avoid unwarranted disparities).

possessed a firearm with one serial number defaced, even if accidental or done by someone else, would receive this enhancement, regardless of whether that serial number was still legible. This amendment changed that, establishing the "unaided eye" test to better effectuate the stated policy goal of traceability.[39]

Impact. While the overall number of persons potentially eligible for a reduction in sentence is relatively low, retroactivity would offer a meaningful impact at the individual level. The impact report did not estimate the average sentence reduction for those individuals who received this enhancement, but application of this 4-level enhancement results in a significant increase in the advisory guideline range. Even at the lowest end of the sentencing table, it can result in an increase of 10 months, and at the higher end of the sentencing table it can result in an increase of 10 years or more. And the data show that individuals who receive this enhancement largely do not fall at the lower end of the table. For individuals sentenced under primary guideline §2K2.1 from fiscal years 2019 to 2023 who received a (b)(4)(B) enhancement, 82% were in criminal history category II or higher, while 63% were assessed a base offense level of 18 or higher. The median base offense level for this group was 20, while the median criminal history category was IV. For such an individual, the 4-level (b)(4)(B) enhancement would add 27 months at the low end and 33 months at the high end to their advisory guideline range.[40]

Further, retroactivity would be one step toward ameliorating unwarranted racial disparity. The strict liability (b)(4) enhancements, like much of the firearms guideline, have been applied disproportionately to Black

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[39] Because the §2K2.1(b)(4)(A) and (b)(4)(B)(i) enhancements lack both a mens rea requirement and an empirical basis, we continue to encourage the Commission to revisit them in the future. *See* Statement of Deirdre von Dornum on behalf of Fed. Defenders to the U.S. Sent'g Comm. on Proposal 4: Circuit Conflicts, at A-7–A-12 (Feb. 27, 2024) ("2024 von Dornum Statement"); Fed. Defender Comments on the U.S. Sent'g Comm's 2023 Proposed Amendments, Firearms Offenses, at 21–27 (Mar. 14, 2023) ("2023 Defender Firearm Comments").

[40] The data used for these analyses were extracted from the Commission's "Individual Datafiles" for fiscal years 2019—2023.

individuals,[41] who also receive longer sentences overall than their white counterparts subject to the same enhancement.[42] Accordingly, the Commission's impact report shows that 56% of the individuals potentially eligible for a reduction are Black, and 19% are Hispanic.[43] Thus, retroactivity would have a meaningful impact on sentence length for eligible individuals, particularly eligible Black individuals who received the enhancement.

Administrability. This amendment involves a low number of cases, with the impact report estimating only 1,452 eligible individuals at the outer bound.[44] The Northern District of Texas, the district with the highest number of eligible cases, only has 67 potentially eligible sentenced individuals.[45] Thus, the burden of increased case volume on the courts will be low. And while retroactive application would involve a fact-specific determination, it is a simple one given the bright-line nature of the "unaided eye" test. Additionally, as discussed in our Introduction, most districts now have systems in place to handle reduction in sentence motions after Amendment 821, often allowing the parties to reach stipulations when possible. And to the extent a factual determination cannot be resolved by the parties, judges are well-equipped to make that call. The court simply must determine whether the defaced serial number was legible to the unaided eye, which it should be able to do in most cases based on the factual record, PSR, and photos or exhibits in the case. While this will require some factfinding, as Judge Walton testified in 2007, we should not refuse to rectify unfairness in the sentencing process simply because "we're going to be . . . worked to a greater extent."[46]

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[41] *See* 2024 von Dornum Statement at A-13–A-15; 2023 Defender Firearm Comments at 23.

[42] *See* 2024 von Dornum Statement at A-15 (of people sentenced in fiscal years 2018 to 2022 who received the altered or obliterated serial number enhancement, Black individuals received a sentence that was, on average, 9 months longer than white individuals who received the enhancement).

[43] *See 2024 Retroactivity Impact Analysis*, at 13.

[44] *See id.* at 11.

[45] *See id.* at 12.

[46] Nov. 2007 Comm Hearing Tr., at 16–17.

IV. Circuit Conflicts, Part B: Grouping and §2K2.4

Purpose. Part B of the Circuit Conflicts Amendment clarifies the grouping rules in drug cases involving a § 922(g) and § 924(c) conviction, thus ensuring uniform application of the guidelines and avoiding unwarranted sentencing disparities. The amendment responds to the Seventh Circuit's opinion in *United States v. Sinclair*, 770 F.3d 1148 (7th Cir. 2014), which, in contrast to every other circuit to address the issue, precluded drug counts from grouping with § 922(g) counts when a § 924(c) count is also scored. *Sinclair* created an unwarranted disparity based on geography and made some individuals' sentences needlessly harsh—certainly, sentences imposed in the Seventh Circuit, but potentially also elsewhere given that district courts in circuits that have not addressed this issue may have relied upon *Sinclair*. The Commission has made clarifying amendments retroactive before,[47] and it should do so here, as a matter of basic fairness and to further the penological goals of just punishment and reducing unwarranted disparities.[48]

Impact. Part B's grouping issue arises in cases involving a § 924(c) count, which is among the federal criminal code's harshest provisions since it requires a mandatory minimum sentence imposed consecutive to all other sentences regardless of factors that may warrant more lenient treatment. Thus, individuals who would benefit from retroactivity of Part B are necessarily serving lengthy, mandatory prison sentences. The Commission's impact report reveals the average sentence for this group to be 257 months.[49]

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[47] *See* USSG, App. C, Amend. 433 (Nov. 1, 1991) (amendment making various "clarif[ying]" amendments to the career offender definitions); USSG, App. C, Amend. 454 (Nov. 1, 1992) ("clarify[ying] the circumstances in which the vulnerable victim adjustment is intended to be applied" by noting that "a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank"); USSG, App. C, Amend. 591 (Nov. 1, 2000) (clarifying that the appropriate chapter two guideline is determined with reference to the statute of conviction, not relevant conduct, to resolve a circuit split); USSC, App. C, Amend. 599 (Nov. 1, 2000) (clarifying various matters, including resolving a circuit split on when it would be appropriate to apply a specific offense characteristic related to a weapon where there was an accompanying § 924(c) count).

[48] *See* 18 U.S.C. § 3553(a)(2)(A), (a)(6); 28 U.S.C. §§ 991(b)(1)(A)–(B), 994(f).

[49] *See 2024 Retroactivity Impact Analysis*, at 17, tbl. 3.

Reducing the total sentence could make the difference on whether an individual will be able to see a son or daughter graduate, or a mother before she dies, or get a job.[50] Also, the potentially impacted cases are not evenly distributed: the vast majority involve Black men, with a high concentration in Illinois.[51] Thus, retroactivity could have a measurable impact on certain segments of the population by enabling these men to come home sooner and meaningfully contribute to their families and communities.

Administrability. This amendment will be especially easy to apply retroactively. The number of individuals who would be impacted by retroactivity is, at most, 102.[52] And it will be simple to determine which of these individuals are eligible for relief. The Commission's recent data report might be read to suggest that, in individual cases, this could be difficult to sort out: "some cases may require additional fact-finding if it is not clear whether the drug trafficking count and the count under 18 U.S.C. § 924(c) are related to one another."[53] But we are talking here only about cases that simultaneously involve: (1) a drug-trafficking count, (2) a prohibited firearm count, (3) and a count of possessing a firearm in furtherance of the *underlying* drug-trafficking offense for which the person is also being sentenced.[54] Thus, in most potentially impacted cases—perhaps *all* of them—the existence of the third offense will *conclusively establish* that the drug-

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[50] *See, e.g.*, *United States v. Faison*, No. GJH-19-27, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020) ("The difference between ten and fifteen years may determine whether a parent sees his young child graduate from high school; the difference between ten and fifteen months may determine whether a son sees his sick parent before that parent passes away; the difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family. Thus, it is crucial that judges give careful consideration to every minute that is added to a defendant's sentence. Liberty is the norm; every moment of incarceration should be justified.").

[51] *See 2024 Retroactivity Impact Analysis*, at 15–16. Cases out of the Northern District of Indiana and Eastern District of Wisconsin are relevant to the geographic point, given their proximity to Chicago.

[52] *See id.* at 16, tbl. 2.

[53] *Id.* at 6.

[54] *See* USSG §2K2.4, comment. (n. 4) (covering only the relationship between § 924(c) and the offense "underlying" the § 924(c) offense).

trafficking and firearm offenses are related; the gravamen of § 924(c) is the relationship between these offenses. It is conceivable that there are cases among the 102 in which the §2K2.1 offense is related to a firearm that is not the same firearm that was possessed in connection with the drug count. But in these cases (if they exist within the 102-case total), Defenders expect the PSR to clarify the matter.

V. Miscellaneous Amendment, Part D: Enhanced Drug Base Offense Levels

Purpose. The purpose of Part D of the Miscellaneous Amendment is to clarify when §2D1.1(a)(1)–(4)'s enhanced base offense levels apply, thus ensuring uniform application of the guidelines and preventing unwarranted sentencing disparities resulting from some courts' misreading of these provisions. To effectuate "the Commission's original intent," the amendment makes clear that the enhanced base offense levels at §2D1.1(a)(1)–(4) "are based on the offense of conviction, not relevant conduct," unless the parties stipulate otherwise.[55] Therefore, the amendment's purpose supports retroactivity to redress the disparity caused by some courts' overbroad application of the enhancements, and to ensure greater certainty and fairness in sentencing. Individuals whose sentences were improperly enhanced should be given the chance to have their sentences corrected.

Impact. For individuals impacted by Part D, the change in the applicable guideline range would likely be significant. The base offense levels at §2D1.1(a)(1)–(4) are set high—at 43, 38, 30, and 26. Some of these offense levels can lead to guideline ranges including life and 360–life.[56] Indeed, the average sentence imposed for those who are potentially eligible is 252 months.[57] And retroactivity could help to alleviate some of the well-documented demographic disparities in federal drug sentencing.[58] Thirty-

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[55] *2024 Amendments and RFAs*, at 28–29.

[56] *See* USSG, ch. 5, pt. A (Sentencing Table).

[57] *See 2024 Amendments and RFAs*, at 21, tbl. 3.

[58] *See* USSC, *Demographic Differences in Federal Sentencing* 27–28 & tbl. 6 (Nov. 2023) (finding that for federal drug trafficking offenses in fiscal years 2017 to 2021: (1) Black and Hispanic men were less likely than white men to receive a

eight percent of those potentially eligible for a reduction are Black and 31% are Hispanic.[59]

Administrability. Retroactive application of this amendment would be manageable given the limited number of potentially eligible people combined with the easy determination of eligibility. At most, 538 individuals are estimated to be serving prison sentences under the enhanced base offense levels at §2D1.1(a)(1)–(4).[60] Each district has no more than 36 individuals who may qualify, and the majority have under 20.[61] Determining eligibility for this small pool would be straightforward for litigants and courts. The inquiry requires identifying the offense of conviction and if that offense is not one that should have triggered the enhanced base offense levels, determining whether the parties stipulated to a qualifying offense or the enhanced base offense level itself. In most cases, that stipulation language will be written into the plea agreement and, thus, readily available to the parties and court.

VI. Conclusion

Purpose, impact, and administrability considerations support making retroactive each of the aforementioned amendments. More, applying them retroactively would promote certainty, fairness, proportionality, and respect for the law while reducing unwarranted geographical and racial sentencing disparities. Doing so would not threaten public safety; to the contrary, unnecessarily lengthy punishment jeopardizes community safety and stability given the harsh realities of federal prison conditions and the isolation and antisocial relationships prisons can foster.[62]

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probation-only sentence; and (2) Black and Hispanic women were less likely to receive a probation-only sentence compared to white women).

[59] *See 2024 Retroactivity Impact Analysis*, at 20, tbl. 2.

[60] *See id.* at 17–18.

[61] *See id.* at 19, tbl 1.

[62] *See, e.g.*, One Voice United, *Blue Ribbon Commission Report* 2 (2022) ("Those who have studied the origins of mass incarceration understand that a series of policy choices designed to get 'tough on crime' led to this moment. Those policy choices had no basis in research and were propelled by racist narratives equating Blackness with criminality. After years of this failed experiment, studies consistently show that American-style incarceration does not deliver public safety. As counterintuitive

Although the number of people potentially impacted by these changes is not huge, the magnitude of the change in their guideline ranges would be substantial. Given what courts have learned over the last six months while implementing Amendment 825,[63] combined with the manageable number of expected filings, there's simply no reason not to make these fundamental sentencing policies retroactive.

as it may seem, reducing prison populations can both increase public safety and decrease harms experienced by officers, incarcerated people, and all of their families and communities."); M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 Denv. L. Rev. 151, 156 (2019) ("[B]ecause adult brains change in response to environmental stimuli, prison conditions can be understood to directly 'rewire' the brains of incarcerated people, often in ways that are ruinous and that frustrate rehabilitative and even deterrent goals."); Todd R. Clear, Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse 93–120 & tbl. 5.1 (2007) (discussing empirical studies demonstrating that high incarceration rates affecting impoverished communities contribute to the very problems policymakers intend incarceration to solve: prison disrupts family and social bonds, deprives families of emotional and financial support, threatens the economic and political infrastructure of already-struggling neighborhoods, increases crime by unsupervised youth, widens racial disparities, and diminishes life chances for youth with a parent in the system); USSC, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 19 (1996) (describing criminogenic effects of imprisonment, including "contact with [people convicted of more serious offenses], disruption of legal employment, and weakening of family ties").

[63] Amendment 825 made Parts A and B of Amendment 821 (the 2023 Criminal History Amendment) retroactive.

Very truly yours,

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PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

June 21, 2024

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
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RE: Practitioners Advisory Group Comment on the Retroactivity of the Acquitted Conduct Amendment; Parts A and B of the Circuit Conflicts Amendment; and Part D of the Miscellaneous Amendment

Dear Judge Reeves:

The Practitioners Advisory Group (PAG) recommends that the acquitted conduct amendment; Parts A and B of the circuit conflicts amendment; and Part D of the miscellaneous amendment apply retroactively. Defendants sentenced under older versions of these guidelines should benefit from these potential reductions because when guidelines like these are amended to promote fundamental principles of fairness, the length of sentence should not be dictated by the timing of sentencing.

In determining whether an amendment should be included in the list of covered amendments that apply retroactively, the Commission considers: "the purpose of the amendment; the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under [§1B1.10(b)(1)]."[1] Ultimately, "[t]he listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing. . ."[2] The PAG contends that these factors weigh in favor of retroactive application of all four amendments.

At the outset, one issue applies equally to all four amendments: "the difficulty of applying the amendment retroactively to determine an amended guideline range."[3] The PAG understands that

[1] §1B1.10. cmt. background.

[2] *Id.*

[3] *Id.*

identifying eligible defendants and determining the impact of an amended guideline burdens judges, court staff, probation officers, prosecutors and defense counsel. In the PAG's experience, however, there is now a well-developed system in place to address issues of retroactivity, based on previous retroactively applied amendments. For example, PAG members report that over the past year, in districts where defense counsel were reappointed to represent defendants who were eligible for lower sentences based on the 2023 criminal history amendment, the resentencing process worked smoothly.

The PAG also notes that for last year's status points amendment, 54.6% of motions for retroactive application of the amendment were granted, and that the average sentence reduction was 10 months.[4] Similarly, 52.8% of motions for retroactive application of the zero-point offender amendment were granted, and the average sentence reduction was 13 months.[5] This data, which involved much larger numbers of potentially eligible defendants, reflects that a majority of motions were granted and that the resulting sentence reductions were significant. The PAG submits that these 2024 amendments, for which far fewer defendants will be eligible, will result in similar or greater sentence reductions for those eligible defendants whose motions are granted.

Part I of this letter addresses the acquitted conduct amendment; Part II considers Parts A & B of the circuit conflicts amendment and Part D of the miscellaneous amendment.

I. Acquitted Conduct Amendment

This amendment revises the text of and commentary to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) and the commentary to §6A1.3 (Resolution of Disputed Factors (Policy Statement)) "to exclude acquitted conduct from the scope of relevant conduct used in calculating a sentencing range under the federal guidelines."[6] Acquitted conduct is defined as "conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction."[7]

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[4] *See* U.S. Sent'g Comm'n, Part A of the 2023 Criminal History Amendment Retroactivity Data Report, Tables 1 and 8 (May 2024), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202405-CH-Retro-Part-A.pdf.

[5] *See* U.S. Sent'g Comm'n, Part B of the 2023 Criminal History Amendment Retroactivity Data Report, Tables 1 and 8 (May 2024), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202405-CH-Retro-Part-B.pdf.

[6] U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines* ("2024 Amendments") at 1 (Apr. 30, 2024), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

[7] §1B1.3(c), 2024 Amendments at 3-4.

A. The Purpose of the Amendment

In determining whether retroactivity comports with the purpose of an amendment, the Commission generally considers whether the amendment is designed to address issues of fairness. If so, the Commission has tended to apply an amendment retroactively. If the primary purpose of the amendment is to address another issue, such as the simplification of an administrative task, the Commission has tended to deny retroactivity.

The purpose behind the acquitted conduct amendment weighs heavily in favor of retroactivity. "[T]he use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence raises important questions that go to the fairness and perceived fairness of the criminal justice system."[8] Specifically, the use of acquitted conduct at sentencing deters defendants with strong cases from proceeding to trial, erodes the public's perception regarding the legitimacy of the criminal justice system, and undermines the jury's historical role as "representative of the community" whose verdict is traditionally treated as inviolate.[9]

The Commission promulgated this amendment "to promote respect for the law by addressing some of the concerns that numerous commenters have raised about acquitted-conduct sentencing, including those involving the 'perceived fairness' of the criminal justice system."[10] This includes concerns related to undermining the role of the jury, eroding the jury-trial right, and enlarging "the already formidable power of the government."[11]

While retroactive application of this amendment cannot remedy cases where defendants were deterred from proceeding to trial, it can play an important role in preserving the sanctity of the jury's verdict and instilling confidence in the criminal justice system. By allowing defendants to be resentenced when their sentences were calculated and increased based on conduct for which they were acquitted, retroactivity will recoup some of the "formidable power" of the government and properly restore some of that power to the jury.

This amendment is centered on fairness - fairness to the individual defendant who obtained an acquittal, fairness to those who served as jurors and rendered the verdict, and fairness in the public's perception of the criminal justice system. It is the prototypical fairness amendment, designed to fulfill the Commission's statutory obligation to promote respect for the law. As such, it deserves retroactive application.

B. The Magnitude of the Change in the Guideline Range

"The Commission has not included in [§1B1.10] amendments that generally reduce the maximum of the guideline range by less than six months."[12] The Commission cannot estimate

[8] *McClinton v. United States,* 600 U.S. __, 143 S.Ct. 2400, 2401 (2023) (Mem.) (Sotomayor, J., statement respecting the denial of certiorari) (citations omitted).

[9] *See id*. at 2402-2403.

[10] 2024 Amendments at 1 (citing *McClinton*, 143 S.Ct. at 2401).

[11] *Id*.

[12] §1B1.10 cmt. background.

the extent of the reduction that eligible defendants may receive if this amendment applies retroactively.[13] The PAG's review of caselaw suggests that the magnitude of potential changes to sentences based on acquitted conduct is significant and far exceeds the 6 month threshold for retroactivity.

For example, in *McClinton,* the defendant's guideline range for the count of conviction was 5 to 6 years, but he was sentenced to 19 years after the sentencing court relied on acquitted conduct.[14] In another case, defendants were convicted of distributing small amounts of crack cocaine, and acquitted of conspiring to distribute drugs. Based on the counts of conviction, the guideline ranges fell between 27 and 71 months, but the sentencing court relied on the acquitted conspiracy count to sentence these defendants to substantially higher sentences of 180, 194 and 225 months.[15] In a similar case, a defendant was acquitted of drug trafficking and racketeering conspiracies and convicted of three counts of distributing a total of 5 grams of crack cocaine. The guideline range for the distribution counts was 51 to 63 months, but relying on the conspiracy conduct, the defendant was sentenced to 192 months.[16] "In a constitutional system that relies upon the jury as the great bulwark of [our] civil and political liberties . . . it is hard to describe [this] sentence as anything other than a perverse result."[17] The use of acquitted conduct creates a "forum in which the prosecutor asks the judge to multiply a defendant's sentence many times over based on conduct for which the defendant was just acquitted by the jury."[18]

Although the Commission is unable to estimate the average potential reduction for a defendant whose sentence relied upon acquitted conduct for purposes of determining the guideline range, these cases suggest that the magnitude of the change in the guideline range is substantial and warrants retroactive application of this amendment.

C. The Difficulty of Determining and Applying the Amended Guideline Range

This factor has two components: (1) the difficulty of determining the amended guideline range, which implicates for whom and how the amended guideline range is calculated; and (2) the difficulty of applying the amended guideline range, which implicates the number of defendants who may be eligible for a reduction. There will be some challenges in determining the amended

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[13] *See* U.S. Sent'g Comm'n, *Retroactivity Impact Analysis of Certain 2024 Amendments* ("2024 Retroactivity Analysis") at 7 (May 17, 2024), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2024-amendments/2024_Amdts-Retro.pdf.

[14] *See McClinton*, 143 S.Ct. at 2401.

[15] *See Jones v. United States,* 135 S.Ct. at 8, 9 (2014) (Mem.) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

[16] *See United States v. Bell,* 808 F. 3d 926, 929 (D.C. Cir. 2015) (Mem.) (Millett, J., concurring in the denial of reh'g en banc).

[17] *Id*. (citations omitted).

[18] *Id*. at 932 (citation omitted).

guideline range, with the first being identifying eligible defendants. Like many challenges, however, this one is surmountable and worthwhile. Cases where a jury both convicted and acquitted a defendant will be memorable to the defense attorney and the prosecutor. If retroactivity is recommended, these attorneys will readily bring these noteworthy cases to the attention of the district courts. Court clerks and probation officers also will be able to identify cases where a defendant went to trial and was convicted on some counts and acquitted on others. And, compared with other amendments, defendants who were acquitted of counts at trial will be able to more easily identify whether they are eligible for relief.

Once eligible defendants are identified, some examination of the record will be necessary to assess the impact of the use of acquitted conduct. This will likely consist of examining jury verdict forms, Presentence Investigation Reports ("PSRs"), sentencing transcripts, and other documents related to sentencing. In the end, district courts, with the input of counsel, will be in a good position to determine what the guideline range would have been absent any consideration of acquitted conduct.

Identifying eligible cases will be practicable because there is a limited group of defendants who fit the exacting criteria for a potential sentence reduction. There are approximately 1,971 individuals currently incarcerated who were acquitted at trial of one or more charges.[19] This is far fewer than the over 25,000 cases that our system effectively handled with the retroactive application of the crack cocaine guideline amendment.[20]

Providing fair treatment to some of the approximately 2,000 individuals who may be serving lengthy sentences due to the use of acquitted conduct is a worthwhile endeavor, and justice, no matter how the concept is defined, requires no less. Again, this is a matter of systemic fairness, promoting respect for the law, and instilling confidence in the criminal justice system.

> [W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands? Especially when the cost of correction is so small? A remand for sentencing, after all, doesn't require that a defendant be released or retried but simply allows the district court to exercise its authority to impose a legally permissible sentence.[21]

The PAG believes that the work to correct sentences increased by acquitted conduct will be equally shared by the defense bar, prosecutors, probation and the courts, thereby minimizing any undue impact on any single constituency. And the effort will pay dividends, not only to the defendants and their families who are directly impacted by these changes, but also to the jurors

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[19] *See* 2024 Retroactivity Analysis at 7.

[20] *See* U.S. Sent'g Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report*, Table 1 (June 2011 Data), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf.

[21] *United States v. Sabillon-Umana,* 772 F. 3d 1328, 1333-34 (10th Cir. 2014).

who decided these cases, and to our society, which must believe in the fairness and integrity of our system of justice.

II. Parts A & B of the Circuit Conflicts Amendment and Part D of the Miscellaneous Amendment

All of the factors that the Commission considers in determining whether to list an amendment for retroactive application support listing in §1B1.10(d) Parts A & B of the circuit conflicts amendment and Part D of the miscellaneous amendment.

A. Part A of the Circuit Conflicts Amendment

Part A of the circuit conflicts amendment addresses the 4-level enhancement at §2K2.1(b)(4)(B) that applies when a firearm has an "altered or obliterated" serial number. The amendment resolves a circuit split by limiting the application of this enhancement to cases where "any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye."[22] Prior to this amendment, some circuits applied this enhancement when a serial number was "less legible," but still discernable to the naked eye.[23]

The Commission estimates that 1,452 currently incarcerated defendants received an enhancement under §2K2.1(b)(4)(B). The data does not reflect how many of these cases involved a "less legible" serial number rather than a serial number that was illegible or unrecognizable to the naked eye. Thus, the number of individuals who may be eligible for a sentence reduction if this amendment applies retroactively is some portion of these 1,452 individuals.[24] The PAG further notes that approximately 225 of these 1,452 cases were in the Second and Sixth Circuits, where the "naked eye" test was used.[25] As a result, these 225 cases presumably used the standard contained in this amendment, so the "outer number" of defendants that may be eligible for a sentence reduction if this amendment is retroactively applied may be 1,227.

B. Part B of the Circuit Conflicts Amendment

Part B of the circuit conflicts amendment addresses the grouping rules under §3D1.2(c) where there is a firearms count under 18 U.S.C. § 922(g), a drug trafficking count, and a separate count under 18 U.S.C. § 924(c). The amendment adds subparagraph (B) to the Commentary to §2K2.4, which directs that where "two or more counts would otherwise group under [§3D1.2(c)], the counts are to be grouped together . . . despite the non-applicability of certain enhancements

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[22] §2K2.1(b)(4)(B), 2024 Amendments at 20-21.

[23] *See* 2024 Amendments at 18 (comparing "naked eye" test used in the Sixth and Second Circuits with the "less legible" approach followed by the Fourth, Fifth and Eleventh Circuits).

[24] *See* 2024 Retroactivity Analysis at 11.

[25] *See id*. at 11-12, Table 1.

under Application Note 4(A)."[26] This amendment adopts the approach of a majority of circuits that have considered this issue, with the Seventh Circuit being the only outlier.[27]

The Commission estimates that if Part B applies retroactively, there are 102 currently incarcerated defendants who were convicted of violating these statutes "and where more than one multiple count computation unit was applied to the combined offense level under §3D1.4."[28] This is the "outer bound" of the number of individuals who may be eligible to seek a sentence reduction if this amendment applies retroactively. Since it appears that the only circuit that does not group firearms and drug trafficking offenses is the Seventh Circuit, it is likely that only the 43 cases in that circuit may be eligible for a sentence reduction.[29]

C. Part D of the Miscellaneous Amendment

Part D of the miscellaneous amendment clarifies the Commission's intent that the enhanced base offense levels at §§2D1.1(a)(1)-(4) apply only when the statutory elements of offenses under 21 U.S.C. §§ 841 & 960 have been met.[30] These statutes encompass drug trafficking offenses "for defendants whose instant offense resulted in death or serious bodily injury and crimes with mandatory minimum penalties for defendants with the combination of both an offense resulting in death or serious bodily injury and prior convictions for certain specified offenses."[31]

The Commission estimates that there are currently 538 incarcerated individuals who were sentenced based on the enhanced offense levels pursuant to §§2D1.1(a)(1)-(4).[32] Further information is required to determine how many of these defendants were sentenced under §§2D1.1(a)(1)-(4) based on relevant conduct.[33] It appears that if this amendment applies retroactively, it would impact no more than 538 defendants.

D. Retroactive Application of These Amendments is Supported by the Factors that the Commission Must Consider

All three of these amendments promote fairness, and the PAG estimates that if they are applied retroactively, eligible defendants will benefit from substantial sentence reductions. Importantly, the retroactive application of these amendments will not unduly burden the courts and other

[26] §2K2.4 cmt. 4(B), 2024 Amendments at 23.

[27] *See* 2024 Amendments at 19 (noting that the Sixth, Eighth and Eleventh Circuits permit grouping of these drug trafficking and firearms counts while the Seventh Circuit does not).

[28] 2024 Retroactivity Analysis at 14.

[29] *See id*. at 14-15, Table 1.

[30] *See* 2024 Amendments at 28-29.

[31] *Id*. at 28.

[32] *See* 2024 Retroactivity Analysis at 17.

[33] *See id*. at 18.

criminal justice system stakeholders. Thus, all of the factors that the Commission must consider compel retroactive application of these amendments.

1. *The Purpose of these Amendments*

These amendments promote fairness by ensuring consistency in how these guidelines are applied.

Currently, with respect to Part A of the circuit conflicts amendment, a defendant in the Fourth, Fifth or Eleventh Circuits is subject to a 4-level enhancement under §2K2.1(b)(4)(B)(i) where the serial number of a firearm may be scratched but remains legible. In contrast, a defendant in the Second and Sixth Circuits would not receive this enhancement. A 4-level disparity in offense level creates a significant difference in the final guideline calculation between two similarly situated defendants.

For example, a Fourth Circuit defendant who pleads guilty to one count of 18 U.S.C. § 922(g)(1) and receives only the enhancement for the obliterated serial number will have an offense level of at least 15, after acceptance of responsibility.[34] The same defendant in the Second Circuit would have an offense level of 12.[35] Even in Criminal History Category ("CHC") I, the difference between the bottom of the guideline range in level 12 versus level 15 is 8 months, and in CHC VI, there is an 11 month difference between the bottom of the applicable guideline ranges. This discrepancy is unfairly driven by geography.

Further, as the PAG explained in its February 2024 letter commenting on this proposed amendment, there is no principled reason for these two defendants to have such a wide disparity in their applicable guideline ranges. Applying the serial number enhancement

> where the slightest scratch results in a defendant receiving a 4 level increase, even where the serial number can be deciphered . . . creates an absurd result, particularly if the defendant was not the person who scratched or defaced the firearm. If a serial number cannot be deciphered, there is arguably a purpose in more severely punishing a defendant for possessing a firearm that is more difficult to trace. But that rationale does not apply where the serial number is decipherable and can be traced.[36]

Similarly, Part B of the circuit conflicts amendment promotes consistency by addressing a disparity that has arisen in the grouping rules for drug trafficking and firearms offenses. In the Seventh Circuit, where drug trafficking and firearms offenses are not grouped, this

[34] The base offense level would be 14, and the 4-level enhancement results in an offense level of 18. After a 3-level reduction for acceptance of responsibility, the total offense level is 15. *See* §2K2.1(a)(6); §2K2.1(b)(4)(B)(i); and §3E1.1(a) & (b).

[35] The base offense level would be 14, and after a 2-level reduction for acceptance of responsibility, the total offense level would be 12. *See* §2K2.1(a)(6) & §3E1.1(a).

[36] *See* PAG Letter to the U.S. Sent'g Comm'n at 19 (Feb. 22, 2024) ("PAG 2024 Letter"), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=237.

> results in a higher offense level because the combined offense level is calculated by imposing an increase according to the table in §3D1.4. Since drug trafficking and firearms offenses are often charged together precisely because these offenses are closely related, not grouping these counts together "will mean a higher offense level which will often lead to a longer sentence."[37]

As the PAG previously noted,

> "Convictions on multiple counts should not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines." Convictions for drug trafficking, felon in possession and using or possessing a firearm in furtherance of drug trafficking are separate offenses, but "they do not 'represent additional conduct that is not otherwise accounted for by the guidelines.'"[38]

Thus, defendants in the Seventh Circuit are subject to higher penalties than similarly situated defendants in other parts of the country. This is unjust, and Part B of the circuit conflicts amendment is an attempt to resolve this disparity.

Finally, Part D of the miscellaneous amendment attempts to rectify an inconsistency in the application of the enhanced base offense levels in §§2D1.1(a)(1)-(4), which apply in drug trafficking cases where death or serious bodily injury occurred as a result of the offense. This amendment "clarifies that the alternative enhanced base offense levels at §2D1.1 [] are based on the offense of conviction, not relevant conduct."[39]

In practice, courts have applied the enhanced base offense levels using relevant conduct, in cases where the elements of death or serious bodily injury were not established. "Given the significant increase that results from these higher offense levels, [] these enhanced sentences should only be imposed in those limited cases where there is sufficient proof that the statutory elements for enhancement are met."[40]

2. *The Magnitude of the Change in the Guideline Range*

The PAG's initial analysis of the potential sentence reductions available to defendants who may be eligible for retroactive application of these amendments is, conservatively, greater than the 6 month minimum that the Commission typically requires.[41] Due to the nature of these

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[37] *See* PAG 2024 Letter at 21 (quoting *United States v. Sinclair*, 770 F.3d 1148, 1159 (7th Cir. 2014) (Williams J. & Posner, J., dissenting from decision not to hear case en banc).

[38] *See* PAG 2024 Letter at 21 (quoting *Sinclair*, 770 F.3d at 1160) (quoting U.S.S.G. Ch. 3, pt. D, introductory cmt.).

[39] 2024 Amendments at 28.

[40] PAG 2024 Letter at 23.

[41] The Commission does not list in §1B1.10 "amendments that generally reduce the maximum of the guideline range by less than six months." §1B1.10 cmt. background.

amendments and the sentencing data that the Commission collects, the Commission cannot estimate the magnitude of any potential reduction for defendants who may be eligible for a reduced sentence if these amendments apply retroactively.[42] The PAG's preliminary analysis suggests that these amendments could result in substantial sentence reductions for eligible defendants if these amendments are listed in §1B1.10(d).

Consider an example of how Part A of the circuit conflicts amendment might apply in a typical case. Commission data for Fiscal Year 2023 shows that the largest percentage of cases where §2K2.1 applied involved prohibited persons under §2K2.1(a)(6).[43] The corresponding base offense level is 14. If no other specific characteristics apply and a defendant is in CHC I, with a 2-level reduction for acceptance, the total offense level is 12, and the guideline range is 10-16 months. If the 4-level enhancement for an altered or obliterated serial number applies, with a 3-level reduction for acceptance, the total offense level is 15, and results in a guideline range of 18-24 months. This guideline range is 8 months higher than if the enhancement did not apply.

In addition, in Fiscal Year 2021, the average sentence length for prohibited persons sentenced under §2K2.1 was 45 months, and the average sentence length where the firearm was stolen or had an altered/obliterated serial number was 55 months, a difference of 10 months.[44] The PAG submits that this 8-10 month difference is a conservative estimate of the sentence reduction that may be available to defendants whose guideline ranges were increased because of the standard that was used to apply the serial number enhancement.

With respect to Part B of the circuit conflicts amendment, these are cases where defendants are convicted of drug trafficking, felon in possession, and use of a firearm in furtherance of drug trafficking, and a mandatory minimum 5 year consecutive sentence must be imposed. Because the offense levels for these grouped counts of convictions are high, even small offense level reductions will lower a defendant's guideline range by many months. A starting point is the 5 years for a conviction under 18 U.S.C. § 924(c), which must be consecutive to any other sentence imposed for the drug trafficking and felon in possession counts. Assuming a *de minimis* sentence of 12 months on the drug trafficking and felon in possession counts, that amounts to a total 72 month sentence. This is not inconsistent with the average sentence in 18 U.S.C. § 924(c) cases; in Fiscal Year 2023, the average sentence in these cases was 80 months.[45]

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[42] *See generally* 2024 Retroactivity Analysis.

[43] U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics Guideline Calculated Based Fiscal Year 2023* at 130-131 (reflecting that 28% of cases involving §2K2.1 applied §2K2.1(a)(6)(A) with a base offense level of 14; the next highest percentage of cases, 24.9%, applied §2K2.1(a)(4)(A), with a base offense level of 20), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch2_Guideline_FY23.pdf.

[44] *See* U.S. Sent'g Comm'n, *What do Federal Firearms Offenses Really Look Like?* at 26 (July 2022), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf.

[45] *See* U.S. Sent'g Comm'n, *Interactive Data Analyzer* (filtered by Sentencing Outcomes, fiscal year and guideline §2K2.4), available at: https://ida.ussc.gov/analytics/saw.dll?Dashboard.

80 months falls within offense levels 20-28 in the Sentencing Table, and even a 1-level reduction in CHC VI, level 20 results in a 7 month reduction in the guideline range.[46] Based on this "back of the envelope" analysis, it appears that there will be a reduction of at least 6 months or more in cases where a defendant's drug trafficking and firearms counts of conviction were not initially grouped.

Part D of the miscellaneous amendment involves drug trafficking cases where the enhanced base offense levels range from level 26 to level 43. Like the grouping amendment discussed above, this amendment involves guideline ranges that are at the highest end of the Sentencing Table and that result in lengthy sentences. At CHC I, level 26 the guideline range is 63-78 months. Factoring in a 3-level reduction for acceptance results in an offense level of 23, with a corresponding guideline range of 46-57 months. A 1-level reduction reduces the guideline range by 5 months, while a 2-level reduction reduces the guideline range by 9 months.[47] These very conservative estimates support the view that retroactive application of Part D of the miscellaneous amendment will result in sentence reductions of greater than 6 months for eligible defendants.

3. *The Difficulty of Applying the Amended Guideline Retroactively*

As noted at the outset of this letter, applying these three amendments retroactively will require additional fact-finding in order to identify those defendants who may be eligible for sentence reductions. That said, the PAG believes that this will not unduly burden the court system for a number of reasons.

First, compared to previous amendments that were applied retroactively, including those from the 2023 criminal history amendment, there are far fewer defendants who are potentially eligible for sentence reductions under these three amendments. It appears that there are approximately 2,000 potentially eligible defendants whose records would have to be reviewed.

Second, as noted above, there is now a system in place to analyze and process cases based on retroactivity. In most districts across the country, federal defenders and CJA counsel are reappointed to handle potentially eligible defendants' cases, and in many districts, these motions do not even require a hearing. While the PAG recognizes that courts are required to address these additional filings, the involvement of defense counsel ensures that there is a good-faith basis for the filing of sentence-reduction motions. And, in PAG members' experience, motions for retroactive application of the 2023 criminal history amendment were processed efficiently.

Third, the PAG believes that the additional fact-finding necessary in these cases will not be excessively time-consuming or difficult. For Part A of the circuit conflicts amendment, the basis for the 4-level enhancement for an altered or obliterated serial number should be readily apparent either in the guideline calculation in the PSR or the transcript of the sentencing hearing. The same is true for Part B of the circuit conflicts amendment, where the PSR or sentencing transcript should reflect how the grouping rules were, or were not, applied to the drug trafficking and firearm counts of conviction. And for Part D of miscellaneous amendment, whether a

[46] *Compare* CHC VI, level 20 (70-87 months) *with* CHC VI, level 19 (63-78 months).

[47] *Compare* CHC I, level 22 (41-51 months) *with* CHC I, level 21 (37-46 months).

sentencing court relied on relevant conduct in order to determine the base offense level under §2D1.1 should be clear from the sentencing transcript.

For all of these reasons, the PAG submits that applying these three amendments retroactively will not result in excessive burden to the court system.

III. Conclusion

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

Respectfully submitted,

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PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

June 21, 2024

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

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (the Commission) regarding whether certain 2024 guideline amendments should be included in the Guidelines Manual as an amendment that may be applied retroactively to previously sentenced defendants.

Acquitted Conduct Amendment

The amendment relating to acquitted conduct provides that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction. However, courts may still consider acquitted conduct under 18 U.S.C. § 3661.

POAG is unanimous in its recommendation that the amendment for acquitted conduct should not be made retroactive to previously sentenced defendants. Unlike other retroactive amendments, this is a uniquely complicated retroactivity consideration because it impacts relevant conduct, which is a core aspect of every single criminal case and is given consideration even at the pretrial stage of the process. When deciding whether to plead guilty or take a matter to trial, defendants were advised that an acquittal on a count does not have an impact on the determination of relevant conduct. That pivotal decision would have been based upon how relevant conduct was structured at the time. Consider a defendant who entered a guilty plea ten years ago based upon the fact that the sentencing structure at the time allowed for acquitted conduct to be included as relevant conduct at sentencing. That defendant may have proceeded to trial had they had the ability to predict that the acquitted conduct amendment would be enacted and then also made retroactive. Yet, a defendant who did take their case to trial potentially benefits from that decision. Making the acquitted conduct amendment retroactive effectively creates a system where previously sentenced

defendants who pled guilty and took responsibility for their offense have to accept the finality of their sentence, while those who took their case to trial have an opportunity to have the sentence reassessed and potentially reduced.

Relevant conduct is unique to prior retroactive amendments given its core role in determining the advisory guideline imprisonment range. Acts that constitute relevant conduct and the timespan of those acts are relevant in determining the offense level computations, the criminal history computations, and the special conditions of supervision. According to USSG §1B1.10, a retroactive amendment does not constitute a full resentencing under 18 U.S.C. § 3582(c). This guideline further directs that the Court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline applications unaffected. However, because relevant conduct is all encompassing, a retroactive amendment to what can be considered relevant conduct has such a broad impact that it effectively resembles a full resentencing. When the facts that constitute relevant conduct are amended, there is a ripple effect and the computations under Chapters 2 and 3 would need to be reassessed. Under Chapter 4, there would potentially be a new lookback period for the purpose of criminal history scoring, and whether prior state convictions constitute relevant conduct and/or predicate offenses would also need to be reassessed.

Such a retroactive amendment regarding what constitutes relevant conduct also raises the question of who suffered a harm, who suffered a loss, and whether they would continue to constitute a victim of relevant conduct. The Commission's Retroactivity Impact Analysis at Table 4 reflects that there are 13,487 incarcerated individuals who were convicted at trial. Approximately 7,000 of these cases – more than half - likely have victims, including murder, sexual abuse, fraud, assault, kidnapping, individual rights, and racketeering offenses. Thus, there will potentially be a large number of cases in which the Court will need to determine the extent to which the acquitted conduct involved the victim. Victim based enhancements, such as loss, substantial financial hardship, and causing serious bodily injury, would need to be reassessed, resulting in potential eligibility for retroactive application of the Adjustment for Certain Zero-Point Offenders under USSG §4C1.1. POAG also has concerns related to unintended consequences associated with the retroactive application of this amendment, such as challenges to special conditions imposed based on acquitted conduct and challenges to restitution orders, including complex issues such as how to address restitution that has already been paid to individuals who may no longer be considered victims.

A particularly significant concern is first how to identify which cases are impacted and then determine to what extent a court may have relied upon acquitted conduct at sentencing. The indication that there are 1,971 potential cases does not represent the number of cases impacted – it is an estimate based upon a ten percent sampling of cases. As a result, each district would first need to review trial cases to truly determine the complete list of which cases may be impacted before they can commence any retroactive analysis. It is also unclear how cases where acquitted conduct for one defendant was used as relevant conduct for another defendant would be identified.

The Commission noted in the Retroactivity Impact Analysis of Certain 2024 Amendments "[s]taff are unable to determine whether and to what extent the courts may have relied upon any of the offense conduct related to the charge or charges for which the individual was acquitted in determining the guideline range; therefore, staff cannot estimate what portion of approximately 1,971 persons might benefit from retroactive application of the amendment." In each of those

cases, acquitted conduct may or may not have had an ultimate impact on the sentence imposed. For instance, acquitted conduct could have impacted the guideline range and the Court gave it full consideration, the acquitted conduct could have impacted the guideline range but the Court gave it reduced consideration, or the acquitted conduct could have impacted the guideline range and it was considered an aggravating factor at sentencing. On the other hand, the acquitted conduct may not have impacted the guideline range and was used as an aggravating factor, the acquitted conduct may have impacted the guidelines and the Court gave it full consideration, or the acquitted conduct may not have impacted the guidelines but the Court imposed a lesser sentence for other reasons.

As a result, in order to assess for retroactive impact, probation officers, stakeholders, and judges will have to engage in additional fact-findings to parse out conduct underlying acquitted charges from conduct underlying the counts of conviction. If the acquitted conduct amendment is made retroactive, a significant part of the process would be to determine the impact and weight of the acquitted conduct that was given by the original sentencing judge. Unlike other retroactive amendments, those relevant details would not necessarily be discernable from routine records, such as the plea agreement, the presentence report, or the Judgment and Commitment order. In fact, proper due diligence would require the time and resources to review the sentencing transcript as part of the retroactive process. Adding another layer of complexity is the fact that the original sentencing judge could not have foreseen the need for such a specific and detailed record related to the weight and impact of acquitted conduct on both the guideline findings and the ultimate sentence imposed. The record the Court made at sentencing was informed by the process in effect at the time of the hearing. As such, it will be difficult, if not impossible, to ascertain the weight of the acquitted conduct that the original judge took into consideration in determining the final sentence. Conducting a resentencing analysis with insufficient information in nearly 2,000 federal cases would result in a significantly complicated retroactive process.

A sincere concern is that retroactive application would place a significant burden on the limited resources of the federal judiciary. While the Commission approximated under 2,000 individuals being eligible to seek a reduction of sentence, as evidenced by other prior retroactive amendments, exponentially more defendants will seek a reduction of sentence, including *pro se* defendants for whom the government may have dismissed counts or who were acquitted in state court for similar charges. This may also include defendants whose co-defendants were acquitted on some of the counts, but it was included as relevant conduct for their case as part of a jointly undertaken offense, and defendants seeking to have their sentence reduced based upon uncharged and dismissed counts. While those defendants may not be eligible for consideration, time and resources are allocated to vetting those cases, potentially appointing counsel and scheduling proceedings, and the Court making a finding on the matter. The focus on retroactive cases diverts resources from the current cases being processed in the judiciary.

According to USSG §1B1.10, as part of any retroactive amendment, it is necessary that the Court determine if the retroactive amendment had the effect of lowering the guideline range. Adding to the difficulty in approximating the number of persons who may potentially benefit from the amendment is that cases where the guideline range was impacted by acquitted conduct may have already been afforded a downward variance, and cases where the guideline range was not impacted by acquitted conduct may have received an upward variance. In the latter situation, the Court may not be inclined to reduce the sentence originally imposed. However, the entire case needs to be reassessed before those determinations can be made.

POAG is also concerned with the difficulties that would be encountered with "overlapping" conduct. One such example was if a defendant, in a multiple-count Indictment, was found guilty of a Conspiracy to Distribute a Controlled Substance charge but acquitted of the substantive Distribution of a Controlled Substance charge. While the amendment to USSG §1B1.3, comment n.10), was intended to address that issue, it is a new provision for the Court's consideration. Addressing new provisions often present first impression issues that are best addressed using the new criteria on current cases, rather than applying that new criteria to cases that have already been finalized.

And finally, a relevant consideration in determining whether an amendment should be made retroactive is whether and to what extent the amendment seeks to reduce disparity. Under these circumstances, a retroactive acquitted conduct amendment would be uniquely futile given that 18 U.S.C. § 3661 allows for the continued consideration of acquitted conduct for those sentenced after the amendment is enacted. Regardless of the Guideline Manual that was in effect at the time the defendant was sentenced and regardless if the amendment is made retroactive, acquitted conduct remains a relevant statutory factor the Court may consider at the time of sentencing. Therefore, this amendment does not raise concerns related to disparity or unfairness between defendants sentenced before and defendants sentenced after the amendment to relevant conduct under USSG §1B1.3. For all of the above reasons, POAG recommends that the acquitted conduct amendment not be made retroactive to previously sentenced defendants.

Part A of Circuit Conflicts Amendment Related to Application of USSG §2K2.1(b)(4)(B)

Overall, POAG's consensus does not favor retroactivity regarding the enhancement at USSG §2K2.1(b)(4)(B). Circuit case law in the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits seemingly favors the adoption of a standard test (i.e., the "naked eye" exam); however, these Circuits have varying levels of determination based on the extent of illegibility. In turn, such a test is difficult to apply and would need to be reassessed in each Circuit.[1] For those Circuits that are not operating under that standard, there is more of an impact. As noted above, new provisions present first impression issues that POAG believes are best addressed applying to current cases, rather than applying that new criteria to cases that have already been finalized.

There is a concern about relitigating the circumstances of the offense based upon an amended criteria and the availability of evidence. In the preparation of the presentence report, depending on the Circuit, the probation officer may rely on an agreed upon Statement of Facts proffer. There are other Districts in which the probation officer may have to investigate the facts of the case independently and require source material or physical evidence to support a preponderance standard. In both circumstances, POAG has concerns about the availability of evidence (i.e., discovery material or the actual firearm) where the standard for the enhancement has changed or the details necessary for the analysis may not have been a consideration at that time.

[1] POAG identified this as an additional concern. With this standard test, there exists a level of subjectivity using the "naked eye" analysis. Therefore, the person [judge] who made that determination at the time of sentencing may not be the same person at the time of resentencing. Also, if the probation office or federal defender's office is tasked with a retroactive assessment, it seems infeasible for them to successfully engage in this "naked eye" analysis, if it is the Judge's determination that is dispositive of the issue.

The presentence investigation report adopted by the court may contain limited information regarding the weapon for a variety of reasons. The extent of the amount of detail regarding the obliteration would have been informed by the criteria at the time the case was sentenced and varied by circuit. For example, the parties may have had a stipulation to the enhancement as part of a plea agreement, but did not include specific details they relied on to support the adjustment. In order to give this enhancement reconsideration, the evidence would be subject to re-review, despite the stipulation. However, the evidence or other discovery material that was initially secured may not have been retained. This would create a circumstance in which the government would be limited in their ability to meet the burden of proof for the fact finder at the time of resentencing largely because the retroactive amendment changed the criteria after the matter had been investigated and sentenced. In those circumstances, the probation office would not be able to reinvestigate the agreed upon conduct and the Court would be in a difficult position to make a finding based upon evidence that is no longer available.

Another concern, which may prove to be problematic, is the process in which the determination is made for cases where there may be an issue with evidence. Of initial concern is the likelihood that the original evidence on this issue may no longer be available. It could very well be that officers, parties, and Judges are trying to make "naked eye" assessments on images of firearms rather than on the firearms themselves. In some instances, they may not even have that, but they are rather operating from a written report about the firearm itself or transcripts from hearings about the firearm. During this reevaluation, the initial assessment is made by the probation officer; however, the attorneys are rightfully then afforded the opportunity to refute the findings. Once the probation officer provides a justification of their analysis, the court ultimately decides the appropriateness of the adjustment. In a situation such as this, the inspection of the potentially limited evidence, relies on a multilayer process, by the "naked eye" of several individuals, which may in some situations, only be resolved through an additional court proceeding, such as an evidentiary hearing.

As of May 2024, there were 18,823 incarcerated individuals who were sentenced under §2K2.1 and of that number, an estimated 1,452 for which the enhancement at USSG §2K2.1(b)(4)(B) was applied. Since the Commission does not collect information on why the enhancement at §2K2.1(b)(4)(B) was applied, and it is not known if the serial number might not have been illegible or unrecognizable to the unaided eye, a case-by-case effort by each district is needed to determine if any individual in this group would be eligible for retroactive application of Part A of the amendment. There is a disparity and, in some situations, a wide range difference between districts as to the number of potentially eligible cases (i.e., 67 in Northern Texas, 43 in Eastern Pennsylvania, and 10 in District of Columbia). The level of staffing in each district varies greatly and tasking an officer or officers to handle retroactivity matters continues to detract from handling current cases, ultimately impacting the resources of the federal judiciary.

For all these reasons, POAG is not in favor of making this amendment retroactively applicable.

Part B of Circuit Conflicts Amendment Related to Application of USSG §2K2.4, Application Note 4 (Grouping)

This amendment resolves the circuit conflict regarding the grouping provisions under USSG §3D1.2(c) in cases where the defendant had a firearms count under 18 U.S.C. § 922(g), a drug trafficking count, and a count under 18 U.S.C. §924(c) that was related to the drug trafficking count.

Of the amendments being analyzed for retroactivity, POAG believes this would be the easiest one to address, as all of the information needed would already be contained within the presentence report and only a reconfiguration of the offense level guidelines would be necessary. Furthermore, POAG believes that the impact of making the amendment retroactive would be more minimal (for those who are eligible) and would likely primarily impact the Seventh Circuit due to the 2014 appellate decision in *United States v. Sinclair*, 770 F.3d 1148, 1157-58 (7th Cir. 2014). With the exception of the Seventh Circuit, all of the other members of POAG remarked that their districts and circuits already calculated the guidelines as the proposed amendment details; therefore, the impact of retroactivity would be minimal.

One of the main concerns POAG identified is that, while the Commission has identified a mere 102 cases which would need to be reviewed, prior retroactive amendments have already established that a much greater number of inmates will file for consideration. The proposed amendment only applies to those who have a unique combination of convictions for drug trafficking offenses (various Title 21 offenses), felon in possession of a firearm (18 U.S.C. § 922(g)), and possession of a firearm in connection with a drug trafficking offense (18 U.S.C. § 924(c)). While this combination of three counts of conviction only occurred 102 times, countless other inmates are in custody for one or more of those offenses, as these are very common federal offenses. As seen in previous rounds of retroactivity, inmates who do not meet eligibility criteria often apply and, in this case, many more inmates could mistakenly believe they would qualify. As the retroactivity analysis indicates in other sections, there are nearly 20,000 inmates in the Bureau of Prisons who were sentenced under USSG §2K2.1 and nearly 64,000 who were sentenced for drug trafficking. That is potentially more than half of the Bureau of Prisons population (reported to be 137,967 for initially sentenced federal offenders). As such, the pool of ineligible applicants could be immense. It is a concern that there could be much more work extended in denying the ineligible applicants versus actually granting eligible motions for retroactivity. Further, fewer than the 102 identified would likely be eligible given that approximately 48% of the cases impacted were sentenced below the guideline range. After all considerations, this amendment would not impact a significant number of cases. On the other hand, the courts may be flooded with motions, requiring the U.S. Attorney's Office, Federal Defender's Office, the U.S. Probation Office, and the Courts to expend valuable and already burdened resources on a limited number of cases and result in a minimum impact.

Further, guideline amendments function similar to case law, which regularly creates precedent regarding guideline applications that are not subject to retroactivity. Even though case law precedent may correct or change how the guidelines are computed, cases already decided are deemed final. In this circumstance, the retroactive amendment would likely result in a difference

of one or two offense levels for most cases. POAG does not suggest that minor guideline changes are insignificant as any reduction in sentence is significant to incarcerated individuals and their families. However, after weighing all of the above noted factors, the POAG voted to recommend that this amendment not be made retroactive to previously sentenced defendants.

Part D of the Miscellaneous Amendment Related to Enhanced Penalties for Drug Offenders

Part D of the miscellaneous amendment revises USSG §§2D1.1(a)(1)–(4) (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to reflect that the base offense levels in those provisions apply only when the individual is convicted of an offense under 21 U.S.C. §§ 841(b) or 960(b) to which the applicable enhanced statutory mandatory minimum term of imprisonment applies, or when the parties have stipulated to: (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level.

POAG near unanimously agreed that this amendment should be made retroactive. The main reason for POAG's vote is that such a change could result in a substantial reduction to an eligible individual's guideline range. For example, if an individual received a higher base offense level (BOL) under USSG §§2D1.1(a)(1)–(4) solely as a result of relevant conduct, absent a conviction for either of the above two statutes or a stipulation in the plea agreement as to the computations, and the defendant had distributed only a small amount of fentanyl during the course of the offense, this would have a drastic impact on the guideline calculations and likely significantly reduce the defendant's exposure to imprisonment. For instance, if the defendant was charged with a 21 U.S.C. § 841(b)(1)(C) offense that caused a death, and they are only accountable for a few grams of fentanyl, their base offense level would be 38. However, if they pleaded to the lesser included offense of distribution without the element of having caused the death, and the evidence shows the fentanyl they distributed was in fact the cause, they would have a base offense level of 12. This amendment would also address the large disparity amongst districts and circuits that were otherwise handling the guideline calculations of such cases differently.

As previously stated in POAG's other responses regarding retroactivity, there are concerns about the unintended consequences of changes being implemented after cases have been resolved. The charging decisions and the parties' stipulations were informed based upon how they understood the guidelines to work at the time. Despite that, we do not have any concerns with this specific potential retroactive application because POAG believes that the assessment process to determine an individual's eligibility would be more straightforward with regard to this specific issue. Some of the documents that would be considered as part of the analysis would include the Presentence Report and the plea agreement, and, in some infrequent circumstances, the sentencing transcript, all of which should clearly reflect the charge(s) of conviction and/or the parties' specific stipulations that may have had an impact on the guideline calculations for these types of cases.

During the discussion regarding the retroactive application of this amendment, POAG members raised concerns about the unintended impact this amendment could have on victims and their family members. A defendant's reduced/potentially reduced sentence could seemingly minimize the impact of the victim's death or serious bodily injury and diminish the sense of justice for the victim and their family members. In recognition of this concern, POAG believes the actual harm caused by the defendant could be fully addressed in the presentence report and considered for sentencing purposes and could be captured by the Judge's discretion and consideration within a resentencing process.

Another concern that was raised about the retroactive application of this amendment is the anticipated number of defendants who are likely to seek a reduction under this amendment. The Commission estimates there is a maximum of 538 defendants in the BOP who would be eligible to seek a modification under this amendment. However, there are currently over 64,500 defendants in the BOP who have been convicted of a drug trafficking offense. And, based on prior experience with retroactivity amendments, POAG knows that many of those defendants, although ineligible, will seek a reduction. However, drug trafficking offenses resulting in death or serious bodily injury are rare and, as noted above, determining a defendant's eligibility for a reduction under this amendment should be straightforward. Further, it is noted that the Commission's data regarding the number of defendants who may be eligible for a reduction under this amendment appears to be an accurate estimate and does not have the limitations that have been noted for the other proposed retroactive amendments. After consideration of all these aspects, POAG recommends the retroactive application of this amendment.

General Retroactivity Considerations

In addition to the issues outlined for each of the amendments considered for retroactivity, this section addresses broader issues related to these amendments being made retroactive, including the practical implications of implementation. POAG is concerned that, much like Amendment 821 and prior retroactive amendments, the number of defendants who are eligible is likely much larger than the 4,063 anticipated by the Commission. The Commission should also consider the total number of motions the Courts will receive by defendants who simply apply for retroactive relief, though they may not be eligible, as historically, the Courts receive an influx of such motions. Such motions, although fruitless, add to the already substantial task of researching, analyzing, and responding to each motion filed by eligible defendants.

Further, POAG members shared instances from the Amendment 821 retroactivity experience in which minor impacts to the imposed sentence could have unintended consequences for inmates in the Bureau of Prisons, such as making them ineligible for programming and changing their good conduct time credits (sometimes resulting in a computation that resulted in a longer, rather than shorter, sentence). For some, their BOP classification was impacted, depending on what facts the BOP relied on in determining their designation. Also, some were working toward completing vocational programming or participating in the residential drug abuse treatment program and were unable to complete the programs they had long been working toward. Also, the release planning phase of incarceration is intended to build in the type of stability that puts incarcerated individuals

in the best position to succeed. At times, when a sentence is amended to time served due to a retroactive amendment, there is no longer an opportunity to conduct release planning, which can lead to individuals being released without a suitable residence, not enough time to obtain their documents, secure employment, or otherwise develop a release plan.

POAG would like to further note that courts and stakeholders are still navigating their way through Amendment 821 motions. Having to address four potential amendments retroactively, while continuing to address Amendment 821 motions, the increased number of compassionate release motions, maintaining current workloads and dockets, and monitoring for *ex post facto* impact related to newly enacted enhancements presents a strain on judicial resources. These types of workload swells in the judiciary are difficult to staff and manage, as the workload increases are temporary yet require specialized skill. Some districts have expressed concerns that a retroactive sentencing process at this time would be debilitating based on their current workload levels. Although workload concerns alone should not be a deciding factor for retroactivity application, they should, nonetheless, be taken into consideration, as it impacts other areas of the judicial process and could cause delays for other pressing matters, including sentencing hearings, trials, and civil issues.

Another aspect to consider is whether the potential impacted cases were sentenced pre- or post-*Booker*. Application of 18 U.S.C. § 3553(a) factors has and continues to evolve, and is weighed more heavily now at the time of sentencing. The task of determining the Court's original sentencing rationale could be daunting, as hearing transcripts would need to be requested and reviewed, and the information required may not be part of the record. If the Court had already considered 18 U.S.C. § 3553(a) factors, retroactivity might not make a substantial difference.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group
June 2024

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

June 21, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Retroactive Application of the Acquitted Conduct Amendment, Parts A and B of the Circuit Conflicts Amendment, and Part D of the Miscellaneous Amendment.

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the USSC's Call for Comment. After discussion and deliberation, a majority of TIAG favors retroactive application of the acquitted conduct amendment as well as Parts A and B of the circuit conflicts amendment. TIAG takes no position regarding the retroactive application of Part D of the miscellaneous amendment.

In our discussions, TIAG considered the traditional factors the Commission must consider in making retroactivity determinations: (1) the purpose of the amendment; (2) the magnitude of the amendment; and (3) the difficulty of applying the amendment retroactively to determine an amended guideline range. Each of the retroactivity proposals is discussed below in turn.

1. Retroactivity of the Acquitted Conduct Amendment

TIAG supports the retroactive application of the acquitted conduct amendment both because of its importance to Native American defendants and because we believe it can be administered without undue burden to the courts or other relevant actors. As TIAG noted in its February 20, 2024, letter to the

Commission regarding the then-Proposed Amendments to the Federal Sentencing Guidelines, the use of acquitted conduct in sentencing is a source of surprise, confusion, and concern among Native American defendants and their families. United States Sentencing Commission, 2024 Proposed Amendment No. 3, Public Comment 272, *available at* https://tinyurl.com/3wunwwyw.

Part II.B, Table 4 of the Commission's retroactivity analysis indicates that individuals convicted of violent offenses account for more than one quarter of the individuals incarcerated in the Bureau of Prisons after being convicted at trial. However, in 2023, violent offenses comprised less than five percent of all crimes prosecuted by the federal government. U.S. Courts, Federal Judicial Caseload Statistics, Table D-3 (March 31, 2023), *available at* https://tinyurl.com/bdd776xf. Moreover, data provided by the United States Courts shows that federal indictments charging serious violent offenses, in particular murder and assault, are disproportionately concentrated in districts with Indian Country jurisdiction. *Id.*

This data regarding the prosecution of violent crimes and the rate at which such crimes are resolved through trial accords with our general intuition that cases involving Native American defendants proceed to trial with greater frequency than cases involving non-Native defendants. This higher trial rate consequently makes them disproportionately susceptible to the kinds of "split verdicts" that can lead to acquitted conduct sentencing.

In our collective experience, we have observed that violent offenses are particularly susceptible to trials that proceed not because of a disagreement between the parties about whether a particular act occurred, or even when the defendant committed a particular act, but rather because of a disagreement about the degree of culpability associated with an act. For example, parties may agree that a defendant committed a certain act, but they may disagree about whether the act was intentional or reckless, or whether it occurred with or without premeditation. Parties may disagree about the number of victims involved, the degree of injury that resulted from an action, or whether an act was committed in self-defense. Each of these conflicts lends itself to trials at which some or all of the core conduct is undisputed and is therefore disproportionately likely to result in acquittals on some, but not all, of the charged conduct.

A defendant who exercises his right to trial to dispute only part of the conduct with which he is charged and who is acquitted of all or part of the conduct that he disputes, but who is then sentenced for the entirety of the

charged conduct is likely to question the fundamental fairness of the judicial system in which he finds himself. For those affected by acquitted conduct sentencing, retroactive application of this rule would help restore trust in the fairness of the system.

The Commission's retroactivity analysis suggests that number of individuals affected by the amendment is relatively small, which limits the administrative burden of processing requests for retroactive sentence reductions. Ascertaining whether a particular individual is or is not plausibly eligible for a sentence reduction is relatively straightforward. In many cases, an individual's lack of eligibility will be apparent from a cursory review of the public docket, for example because he or she did not go to trial, or because he or she was not acquitted of any counts. The ready ascertainability of plausibly eligible defendants will limit the burden placed on judges and probation officers of retroactive application of the amendment and allow them to concentrate efforts on the relatively small number of individuals who are truly eligible.

In conclusion, TIAG believes that the acquitted conduct amendment can be retroactively applied with relative administrative ease and that its purpose is consistent with fair and equitable treatment of all defendants, but of Indian defendants in particular. For these reasons, the Commission should make the amendment regarding acquitted conduct retroactively appliable.

2. Retroactivity of Part A of the Circuit Conflicts

TIAG supports retroactive application of Part A of the circuit conflicts amendment as consistent with the underlying goals of the United States Sentencing Guidelines in ensuring that similarly situated individuals who engage in similar conduct receive similar sentences. TIAG also believes that while retroactive application of this amendment may require review of facts beyond those contained in the presentence report, the relatively small number of individuals affected by retroactive application of this Amendment, as reflected in Part II.C, Table 1 of the Commission's retroactivity analysis, will greatly ease the administrative burden of application.

The 4-level change occasioned by the retroactive application of this amendment qualifies as significant in magnitude. Indeed, it is larger than the effect of either Part of Amendment 821 that the Commission voted to make retroactive in 2023. In addition, while the retroactivity did not include Native American defendants as a separate category in its racial analysis, TIAG notes

the general racial disparities among individuals affected by this enhancement, as reflected in Part II.C., Table 2.

For these reasons, TIAG supports retroactive application of Part A of the circuit conflicts amendment

3. Retroactivity of Part B of the Circuit Conflicts.

TIAG supports retroactive application of Part B of the circuit conflicts amendment for reasons similar to those that it supports Part A of the circuit conflict amendment. The disparate treatment of individuals sentenced within the Seventh Circuit—the lone outlier in adopting an interpretation of the grouping rules that this amendment alters—is not based in empirical evidence or justified by disparate conduct.

The retroactivity analysis prepared by the Commission shows that the geographic distribution of individuals affected by the amendment is heavily concentrated in a few districts within the Seventh Circuit. Part II.C, Table 1. It also appears a substantial majority of affected individuals are Black. Part II.C, Table 2.

Given the small number of individuals affected, the administrative burden of retroactive application appears to be small. It also appears likely that eligibility for retroactive application of the amendment can be determined on the basis of review of the PSR alone, which further limits the administrative burden and weighs in favor of retroactive application.

For this reason, TIAG supports retroactive application of Part B of the circuit conflicts amendment.

* * *

Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As always, we look forward to working continuing our collaboration in the future.

Sincerely yours,

/s/ Ralph R. Erickson

Ralph R. Erickson, Chair

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

June 21, 2024

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Inapplicability of Retroactivity of 2024 Amendments

Dear Chair Reeves and Members of the Commission:

The Victims Advisory Group (VAG) thanks the Commission for the opportunity to comment upon the retroactivity of four recent amendments to the Sentencing Guidelines. The VAG opposes the retroactive application of all four amendments, specifically addressing below our opposition to the retroactive application of the amendments to §1B1.3, §2K2.1, and §2D1.1.

Per the Commission's Rules of Practice and Procedure, a strong presumption exists against the retroactive application of amendments, allowing an exception for retroactive application only after the Commission has had the opportunity to gather complete data allowing it to assess specific factors including the magnitude of the change in sentences and the difficulty of such an application. Because there is literally no adequate data to make this assessment, the Commission simply cannot allow retroactive application. Such an action would be baseless and seriously compromise the credibility of this body.

Furthermore, even if the Commission were to entertain considering retroactivity without any supportive data, such an application would not satisfy the factors to be considered by the Commission as it would be too difficult to administer, violates the purpose of sentencing, risks public safety, and importantly violates federal law regarding crime victims. For these reasons retroactive application is baseless and inappropriate.

Regarding the remaining amendment, the VAG finds retroactivity suffers from the same flaw of a lack of data and, therefore, should also not be applied retroactively. But the VAG focuses its comments on the aforementioned amendments because the flaws are most egregious regarding those and the VAG offered limited comment on the proposal to §2K2.4.

I. The Relevant Conduct Amendment Cannot Be Applied Retroactively As No Data Has Been Generated to apply to the Relevant Factors as Required to Overcome a Presumption Against Retroactivity, It Violates the Purposes of Sentencing, and It Violates Federal Law

A. Lack of Basis

The entire analysis of retroactivity begins with the presumption that any amendments to the Guidelines are presumed to not be retroactive. The Rules of Practice and Procedure are explicit on this point, "Generally, promulgated amendments will be given prospective application only."[1] Although the law and Guidelines do afford the Commission the ability to make an amendment retroactive, it can only do so after gathering complete data to allow it to assess specific factors including the magnitude of the change and the difficulty in applying the amendment.[2] Simply put, the data in the May 17, 2024, Memorandum to the Commission regarding Retroactivity Impact Analysis of Certain 2024 Amendments (hereinafter, Impact

[1] U.S. SENT'G COMM'N, *Rules of Practice and Procedure*, Rule 4.1A (2016).
[2] Id; USSG §1B1.10, comment. (backg'd); 28 U.S.C. §994(u).

Analysis) is woefully inadequate, providing no basis to take the unusual step of making the amendment retroactive.[3] This, combined with the chaos that such retroactivity will cause the courts and the trauma it will cause victim survivors of crime and their families, precludes any retroactive application.

The language in the Rules of Practice and Procedure against retroactivity is consistent with the broader presumption against retroactivity throughout the law. Courts have articulated this strong disfavor because retroactivity risks unfairness and it reopens sentences – in this case sentences for largely violent crimes – which have long been final.

> [R]etroactive lawmaking (whether by legislation or regulation) typically risks unfairness. . . . [Retroactively applied statutes and regulations] frequently upset settled expectations by imposing burdens and disabilities with respect to completed transactions and actions. . . .And they may undermine rule-of-law values that enable people to know what the law is, and to have confidence about the legal consequences of their actions.[4]

The Commission has also long affirmed this and stated that retroactivity is the exception to the rule, not the norm, "because the finality of judgments is an important principle in our judicial system, and we require good reasons to disturb final judgments."[5]

Procedurally, the Commission cannot overcome this implicit presumption against retroactivity. In deciding on retroactivity, the Commission must consider certain factors

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[3] To be clear, the VAG does not criticize the effort to obtain data or the authors of the Impact Analysis. Rather, the VAG assumes the data cannot be obtained. But the lack of that data precludes application of the relevant factors and also speaks to the difficulty in applying the amendment retroactively at all.

[4] *City of N.Y. v. Permanent Mission of India*, 618 F.3d 172, 195 (2d Cir. 2010); *Deal v. Coleman*, 751 S.E.2d 337, 342 (Ga. 2013) ("Generally speaking, the retroactive application of statutes has long been disfavored in the law, even if it is not always forbidden."). *See also Landgraf v. USI Film Products*, 511 U.S. 244, ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine older than our Republic."); Id. at 265 ("[T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'") (quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990) (Scalia, J. concurring)). Additionally, "prospectively remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations." Id., 511 US at 272-73.

[5] *Sent'g Comm'n Public Meeting on June 30, 2011,* 22:15-21 (Statement of Comm'r Beryl Howell), U.S. Sentencing Commission Public Meeting Transcript (June 30, 2011); USSG §1B1.10, comment. (backg'd).

including the magnitude of the change and the difficulty to administer the amendment.[6] Here, the Impact Analysis offers no ability to measure these. The Impact Analysis' findings are not based on a collection of offenders who went to trial, were acquitted of at least one count, and convicted of others. Rather, they are based on a "random sample of 13,500 persons currently incarcerated in the BOP who were convicted after trial."[7] While it estimates 1,971 inmates might be eligible for retroactive application, it does not study this group. Rather, all of the data (geographic, demographic, and instant crime) provided is not based on a group whom might be eligible for the sentencing reduction, but based on a random sampling of 13,500 inmates who went to trial.[8] In other words, all of the tables that are supposed to aid the Commission in understanding the required facts are based on the general inmate population in the BOP who went to trial. That information has little to no relation to the population of expected petitioners who were convicted but also acquitted of at least one count. Consequently, "[s]taff are unable to determine whether and to what extent the courts may have relied upon any of the offense conduct related to the charge or charges for which the individual was acquitted in determining the guideline range; therefore **staff cannot estimate what portion of approximately 1,971 persons might benefit from retroactive application."**[9]

If the Commission cannot determine <u>any</u> information about those offenders who will be affected by retroactivity, it cannot possibly or credibly assess the factors it is required to consider or have a basis to overcome the presumption. Because the data provided is about a random

[6] USSG §1B1.10, comment. (backg'd).
[7] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 7.
[8] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 7-11 Tables 1-4 ("[Th]e following tables provide information about the 13,500 persons currently incarcerated in the BOP who were convicted after trial.")
[9] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 7 (emphasis added).

collection of 13,500 offenders who were convicted after trial (not who also had an acquitted charge), the Commission's Impact Analysis simply has no information about the magnitude of the change retroactivity will cause or the difficulty in applying these amendments retroactively. The Commission's Impact Analysis provides no information as to the actual type of offender with an acquitted charge whose sentence would be reduced, how many offenders would have a reduced sentence, how violent or dangerous the offenders are or may be, the impact on public safety, or the impact on the purposes of sentencing. Without that crucial information, there is no basis for the Commission to make these 2024 *prospective* Guideline Amendments retroactive.

This matters to victim survivors. Crime victims and their surviving relatives hold reasonable expectations in the law that an offender sentenced will serve the sentence imposed. Re-sentencing offenders is traumatizing for crime victims. Lowering or changing offender sentences after they have become final undermines crime victims', and the public's, expectation of the law. Knowing of this victim trauma caused and of the public expectation in sentencing, if the Commission were to make these 2024 Amendments retroactive without a demonstrable analytical basis, the Commission will send a harmful message to victims and to the public and will delegitimize the Commission's long history of acting upon sound data and analysis.

B. Even if the Commission Were to Rely on the Inadequate Data, Retroactivity is Still Improper Based on the Factors the Commission Must Consider and Impact and Scope of Harm Victims will Endure

The Commission must consider several factors when deciding whether an amendment should be listed among the few which are permitted to be retroactive. These include the magnitude of the change in the Guideline range, the difficulty in applying the amendment

retroactively to determine an amended range, and the purpose of the amendment.[10] Additionally, the Commission must determine that a reduced range is sufficient to serve the purposes of sentencing which include: deterrence, incapacitation, just punishment, and rehabilitation.[11] These are impossible to do without any sense of which offenders will benefit from retroactive application of these 2024 Guideline Amendments. It is also impossible to measure the impact on victims or the public without knowing who the actual victim survivors are or the nature of the crimes themselves. Nonetheless, even accepting the figures in the Impact Analysis, they still fail to support retroactivity and retroactive application should not apply.

1. Magnitude of the Change

If the Commission were to rely on the Impact Analysis, the evidence that does exist weighs against retroactivity. While it is impossible to assess the change in sentencing range without being able to identify the offenders and their current ranges, it is possible to glean some information about the magnitude of harm that will be caused. The Impact Analysis lists 15 types of crime for the instant offense of the offenders who have been convicted after trial. Twelve of them directly involve victims and victim survivors. The top ten are extremely serious offenses constituting 95% of the convictions.[12] Such convictions include murder, robbery, sexual abuse, firearms offenses and child pornography.[13]

These violent offenses do not lend themselves to retroactive application. If that were not reason enough, the top three offenses are the ones most significantly plaguing our neighborhoods: drug trafficking, murder, and firearms. The law is clear that victims of crime

[10] USSG §1B1.10, comment. (backg'd).
[11] USSG Ch.1, Pt. A 1.2.
[12] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 10, table 4.
[13] Id.

include not only individuals directly harmed by offenses, but family members and communities plagued by crime, including narcotics and gun violence.[14] These types of offenses – ones that are dangerous and have victims - are not the type of crimes favored by retroactivity. In 2011, then-Commissioner (now United States Supreme Court Justice) Brown Jackson noted this very point, stating in a public meeting regarding retroactivity that, "in each case a federal judge must determine the appropriateness of a sentence reduction for that particular defendant, adjusting the sentence only if warranted and if the risk to public safety is minimal."[15] The Commission's Impact Analysis shows that Public Safety risk is not minimal.

The fact that the offenders who may benefit from retroactivity pose such a risk to the public is a significant factor against making these amendments retroactive.[16] The Commission would literally be decreasing public safety in a specific way by making this provision retroactive. Regarding drug trafficking, the DEA noted in the most recent National Threat Assessment that American communities are currently experiencing "the most dangerous and deadly drug crisis the United States has ever faced. These synthetic drugs, such as fentanyl and methamphetamine, are responsible for nearly all of the fatal drug poisonings in our nation."[17] 38,000 Americans died from a fentanyl overdose in the first 6 months of 2023 and federal cases involving fentanyl

[14] 18 U.S.C. § 3771(e)(2)(A) ("The term "crime-victim" means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia.")
[15] *Sentencing Commission Public Meeting on June 30, 2011,* 14:11-18 (Statement of Commissioner Ketanji Brown Jackson on retroactivity of the amendments to implement the 2010 Fair Sentencing Act), available at https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.
[16] Public safety is an ongoing consideration of the Commission and courts as appropriate sentences must impose a sentence that protects the public. 18 U.S.C. § 3553(a).
[17] National Drug Threat Assessment 2024, Drug Enforcement Administration, Letter from the Administrator (May 2024).

have increased 244.7% since 2019.[18] The economic impact of drug trafficking is $193 billion.[19] Nearly 108,000 American died of a drug overdose death in 2022, with the deaths disproportionally affecting African Americans in low income urban communities.[20] Each of these victims, not to mention the millions addicted to fentanyl who have not died, each of their family members, and each of their neighborhoods is struggling with this crisis. The Commission's Impact Analysis estimates 35% of those who may benefit from a retroactive application have a federal court conviction for drug trafficking. [21] These offenders are particularly dangerous as the Commission's own data found that of those offenders, 30% of fentanyl traffickers and 31.1% of methamphetamine traffickers also were sentenced for weapons possession.[22] In the midst of this public health epidemic it would be unconscionable to retroactively apply the 2024 Guidelines Amendment to the benefit of the very people causing this plague on our communities, particularly when most of these defendants are sentenced outside the sentencing range with over one third below the sentencing range and 38-40% of them receiving a downward variance.[23]

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[18] Id. at 1; QuickFacts, Fentanyl Trafficking, United States Sent'g Comm'n, available at https://www.ussc.gov/research/quick-facts/fentanyl-trafficking#:~:text=82.1%25%20of%20individuals%20sentenced%20for,86.4%25%20were%20United%20States%20citizens.

[19] Addiction and Substance Misuse Reports, Office of the Surgeon General, available at https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/index.html

[20] Gondré-Lewis, Marjorie C et al. "The Opioid Epidemic: a Crisis Disproportionately Impacting Black Americans and Urban Communities." *Journal of racial and ethnic health disparities* vol. 10,4 (2023): 2039-2053. doi:10.1007/s40615-022-01384-6

[21] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 10, Table 4.

[22] QuickFacts, Fentanyl Trafficking, United States Sent'g Comm'n, available at https://www.ussc.gov/research/quick-facts/fentanyl-trafficking#:~:text=82.1%25%20of%20individuals%20sentenced%20for,86.4%25%20were%20United%20States%20citizens; QuickFacts Methamphetamine Trafficking Offenses, United States Sent'g Comm'n, available at https://www.ussc.gov/research/quick-facts/methamphetamine-trafficking.

[23] QuickFacts, Fentanyl Trafficking, United States Sent'g Comm'n, available at https://www.ussc.gov/research/quick-facts/fentanyl-trafficking#:~:text=82.1%25%20of%20individuals%20sentenced%20for,86.4%25%20were%20United%20States%

The same could be said of firearm offenses. Gun violence is the second epidemic of crime currently hurting our communities. In 2023, 18,854 people were killed by firearms and over 36,000 people injured.[24] Additionally, illegally trafficked firearms play a significant role in other crimes. "[T]rafficked firearms were … used in aggravated assaults in nearly 19% of cases, homicide in approximately 11% of cases, and attempted homicide in more than 9% of cases. The recipients or end users of the trafficked firearms tended to be previously convicted felons (60%) and young adults aged 25 to 34 (48%)."[25] Furthermore, gun violence historically disproportionately affects racial and ethnic minorities.[26]

Even if one were to exclude drug trafficking from the assessment of harm, the next largest group of offenders who would benefit from retroactivity would be murderers.[27] These are not simply people accused of murder. These are people who have had all the due process benefits of trial and were convicted of murder. Needless to say, the level of danger to the community and the surviving family members is significant.

Although the law is clear that drug trafficking is not a victimless crime, even excluding drug traffickers from the analysis, 50.5% of the offenders who will likely benefit from this retroactivity have committed crimes directly against other people including murder, robbery, and

20citizens; QuickFacts Methamphetamine Trafficking Offenses, United States Sent'g Comm'n, available at https://www.ussc.gov/research/quick-facts/methamphetamine-trafficking.

[24] Gun Violence Archive, available at https://www.gunviolencearchive.org/

[25] National Firearms Commerce and Trafficking Assessment – Volume Three, Part IV at 5 (2024), available at https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-firearms-trafficking.

[26] Gun Violence Disproportionately and Overwhelmingly Hurts Communities of Color, Center for American Progress (June 20, 2022) (noting that "gun violence has a disproportionate impact on racial and ethnic minorities and is highly concentrated in a relatively small number of neighborhoods that have historically been under resourced and racially segregated.")

[27] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 10.

sexual abuse.[28] In short, the offenders who will benefit most from this retroactive application are among the most violent in the federal prison system. As such, the magnitude of harm that retroactivity would cause precludes applying it to these offenses.

2. Difficulty in Administration

Secondly, the application of this amendment retroactively would be so difficult to administer, it is nearly impossible. The Commission's own staff in its Impact Analysis states it is "unable to determine whether and to what extent courts may have relied upon any of the offense characteristics related to the charge for which an individual was acquitted in determining the Guideline range."[29] Such a narrow piece of information cannot be gleaned from the trial record. Rather, the Commission's staff notes that for this amendment "courts may need to perform additional fact-finding to determine the amended guideline range."[30] For courts to go back to assess their sentencing calculation to determine whether in calculating the offender's sentence it considered conduct for which he was charged and acquitted, but said conduct did not establish in part the instant offense, is nearly impossible. Particularly because courts were both allowed to consider such conduct in calculating the range and are still allowed to consider it in the ultimate sentence.[31] Such an endeavor would require fact finding hearings, reviews of transcripts, recollection of credibility determinations, oral and written arguments, and hearings.

[28] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 10, Table 4.
[29] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 7.
[30] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 10.
[31] 18 U.S.C. § 3661.

Moreover, it is unlikely that such affected their sentence as nearly one-third of such defendants were sentenced below the guideline range [32]

Not only would this be burdensome to the court system, but it would also **require public hearings**, which then will **require federally guaranteed crime victim rights** allowing the victims the right to be present and to be heard in such proceedings. This is distinct from the issue of whether a retroactive application of a Guideline is a resentencing. This would cause a separate hearing that squarely falls within the Crime Victims' Rights Act. Federal law requires courts to honor a victim's "right to reasonable, accurate, and timely notice of <u>any public court proceeding</u>…, <u>involving **the crime** or of **any release**</u>…of the accused."[33] This would be a necessary court proceeding "**involving the crime**" and possibly the offender's "release." Similarly, a victim would also then have the right "not to be excluded from any such public court proceeding,"[34] and since the proceeding is in regard to the crime and might consider the release of the offender, "the right to be reasonably heard."[35] In addition to the re-traumatization such an experience will cause victims and families of murdered people, which will be discussed below, this will greatly increase the difficulty in administering this amendment as each motion will likely require new factual hearings.

3. <u>Purpose of the Amendment</u>

The Commission must also consider the purpose of the amendment. This acquitted conduct amendment is resolving a split among legal actors. As the Commission itself noted, whether acquitted conduct should be treated like uncharged, dismissed, or other relevant conduct

[32] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 10, table 3.
[33] 18 U.S.C. § 3771(a)(2) (emphasis added).
[34] 18 U.S.C. § 3771(a)(3).
[35] 18 U.S.C. § 3771(a)(4).

is a matter of "robust debate" over the last several years.[36] This is not a question of correcting a systemic problem which all agree to be a matter of fairness.[37]

In 2023, the Supreme Court declined a petition addressing this issue, with justices asserting different opinions as to the propriety of including such conduct within the label of Relevant Conduct for purposes of determining the Guideline range or simply including it as a matter of sentencing under 18 U.S.C. 3661.[38] They openly discussed that historically judges can consider all forms of relevant conduct in sentencing and the reality that an acquittal can have many different meanings to include merely that the burden of proof is not met.[39] Current Supreme Court precedent holds "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[40] While the Commission notes two bills are pending in Congress addressing this issue, neither has been passed and one has not moved from Committee. 18 U.S.C. § 3661 currently reads "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[41] While the Commission was encouraged by some Supreme Court Justices (who

[36] United States Sent'g Comm'n, 2024 Amendments to the Sentencing Guidelines 1 (April 30, 2024).
[37] When such is the case, the Commission has not elected to act retroactively. In 2010 then-Commissioner Brown Jackson noted that while voting against retroactivity of the recency amendment. *Sent'g Comm'n Public Meeting on June 30, 2011*, 13:5-9. (Statement of Comm'r Ketanji Brown Jackson) ("[T]he recency amendment was not intended to address the same types of fairness issues involved in the circumstances where retroactivity typically has been adopted in the past.").
[38] McClinton v. U.S., 143 S.Ct. 2400, 2401 (Sotomayor, J., Statement Regarding Denial of Certiorari), 2403 (Alito, J. concur) (2023).
[39] McClinton v. U.S., 143 S.Ct. 2400, 2402 (Sotomayor, J., Statement Regarding Denial of Certiorari), 2404, 2406 (Alito, J. concur) (2023).
[40] *United States v. Watts*, 519 U.S. 148, 157 (1997).
[41] 18 U.S.C. § 3661

explicitly cautioned against reading into their denial of certiorari)[42] and some United States Senators to pass the 2024 Acquitted Conduct Amendment, the Amendment itself still recognizes a trial court's authority under 18 U.S.C. § 3661.[43] Therefore, this change in policy does not demand retroactive application. This is especially true when the application is extremely difficult and the magnitude is impossible to measure.

4. Policy Considerations

In addition to the above factors, the Commission noted that "[t]he decision to list an amendment as retroactively applicable to a previously sentenced, imprisoned individual in §1B1.10(d) (covered Amendments) 'reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing…."[44] These purposes include deterrence, incapacitation, just punishment and, rehabilitation.[45] Without the Impact Analysis being able to show that a reduced guideline range sufficiently achieves the purposes of sentencing, the Commission simply cannot make this finding, without which the Commission should not make the amendment retroactive.

Furthermore, the data that is available suggests the sentencing purposes will not be served by retroactive application. The Impact Analysis shows that as cases where the Acquitted Conduct Amendment may be applied retroactively, the current sentences were 63% within range

[42] McClinton v. U.S., 143 S.Ct. 2400, 2403 (Sotomayor, J., Statement Regarding Denial of Certiorari), 2403 (Kavanaugh, J., Statement Regarding Denial of Certiorari), 2403, 2406 (Alito, J. concur) ("no one should misinterpret my colleagues' statements as an effort to persuade the Sentencing Commission to alter its longstanding decision that acquitted conduct may be taken into account at sentencing) (2023).
[43] United States Sent'g Comm'n, 2024 Amendments to the Sentencing Guidelines Commentary, 6A1.3 (April 30, 2024). (Commentary) ("nothing in the Guidelines Manual abrogates a court's authority under U.S.C. 3661.").
[44] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 5 (citing USSG §1B1.10, comment (back'd)).
[45] USSG Ch.1, Pt. A 1.2.

and 32.5% below range.[46] Furthermore, the vast practice of judges when it comes to drug trafficking offenses is to sentence not only below the sentencing range, but below the mandatory minimum sentence. The Commission's own data shows that 62.1% of drug trafficking offenders were convicted of a crime carrying a mandatory minimum penalty, yet "53.5% were relieved of that penalty."[47] To further reduce these sentences may undermine the sentencing purposes of deterrence, necessary incapacitation, and just and rehabilitative sentences. Without knowing the new range, it is impossible to resolutely determine these issues.

C. Continued Re-traumatization of Victims and Murder Victims' Families

Retroactive application will negatively affect victims, survivors, and victims' families both substantively and procedurally. Substantively, the retroactive application of an amendment for this group of offenders without the factual basis to justify this exceptional action is an affront to victim survivors.

The fact that each offender to whom a retroactive application of the Acquitted Conduct Amendment would apply was convicted at trial is relevant. The Impact Analysis estimates that 50% of these offenders were convicted of crimes, often violent, against a person. The trial experience is traumatizing not only for victims, but for their families. Victims and their families then experienced a sentencing. In that courtroom they were told of the final sentence, which in 33% of the cases was below the Guideline range. [48] Retroactive application of this Acquitted

[46] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 10, Table 3.
[47] QuickFacts Drug Trafficking Offenses, United States Sent'g Comm'n, available at https://www.ussc.gov/research/quick-facts/drug-trafficking.
[48] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 10, Table 3.

Conduct amendment, without data to support it, is contrary to the dignity, respect and sensitivity with which crime victims are to be treated.

The law provides victim survivors the "***right*** to be treated with fairness and with respect for the victim's dignity."[49] The Commission will further compound the harm caused to victims if the group of offenders it expects to benefit from retroactive application are particularly violent offenders who harmed actual victims, 33% of whom have already been sentenced below the Guideline range and 12% of whom have murdered at least one other person. This is particularly concerning when it contravenes the previous position of the Commission to respect "honesty in sentencing"[50] and finality of sentencing.[51]

The Commission in the past has reserved retroactive application of the Guidelines for the rarest of circumstances. It did so in part because it recognized "the finality of judgments is an important principle in our judicial system, and we require good reasons to disturb final judgments."[52] Finality of judgments not only is important as a matter of criminal justice. It is critical to the victim survivor experience of the criminal justice system. Disregard of that without a basis is of deep concern to the VAG.

Procedurally, this is also harmful to victim survivors. The Impact Analysis again suggests that a retroactive application is not a resentencing.[53] As discussed above, the VAG

[49] 18 U.S.C. § 3771(8).
[50] USSG Ch1, Pt.A.1.3 (noting that with the Sentencing Reform Act "Congress first sought honesty in sentencing….").
[51] *Sent'g Comm'n Public Meeting on June 30, 2011,* 3:12-17 (Statement of Chair Patti Saris); *Sent'g Comm'n Public Meeting on June 30, 2011,* 22:15-21 (Statement of Comm'r Beryl Howell), U.S. Sentencing Commission Public Meeting Transcript (June 30, 2011).
[52] *Sent'g Comm'n Public Meeting on June 30, 2011,* 22:15-21 (Statement of Comm'r Beryl Howell), U.S. Sentencing Commission Public Meeting Transcript (June 30, 2011).
[53] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 4.

notes that the additional evidentiary hearings necessary so make these events a hearing discussing the crime itself and possibly release. As such, hearings must take place if findings about the crime and sentence will be made.

However, some will refute this, and defendants will move for this reduction in sentence seeking to circumvent the Crime Victims' Rights Act by labelling the necessary public hearings something else. This is an affront to federally guaranteed rights of victim survivors and their families. Regardless of the label, the result could significantly and substantively change the sentences – and, therefore, these are events that involve victim survivors. To the victims of robbery, family members of murder victims, child sexual abuse material victims, and others, it certain feels like a resentencing, Federal law confers to victims the right "to be reasonably heard at any public proceeding in the district court involving *release*, plea, *sentencing*, or any parole proceeding."[54] The CVRA established "substantive and procedural rights, including the right to notice of proceedings, presence, right to be heard, notice of release or escape, restitution, speedy trial, and safety for victims of crime."[55] Victim survivors deserve notice of these motions and their full rights recognized. These rights are completely circumvented through this process and such measures are unjust particularly when so many of these offenders committed crimes involving victims.

II. Part A of Circuit Conflict Amendments (Relating to the Enhancement at §2K2.1(b)(4)(B))

The focus of the VAG's comment on the retroactivity is devoted primarily to Acquitted Conduct because that amendment is completely lacking in data to allow the Commission to

[54] 18 U.S.C. § 3771(4) (emphasis added).
[55] Hon. Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, And Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L.R. 581, 583 (2005).

consider the factors necessary to apply retroactivity, and it poses significant risks to public safety. For this Part A amendment, many of the same arguments apply. Here to a lesser degree the data is inadequate, with staff noting it "cannot determine in which of the 1,452 cases the serial number might not have been illegible or unrecognizable to the unaided eye."[56] As with acquitted conduct, the inability to identify more clearly potential offenders challenges the Commissions ability to apply its factors including the magnitude of the change. Additionally, even if the information did apply, the VAG incorporates its argument *supra* in Section I.B.1 regarding the public safety concerns of this amendment.

However, of specific concern to the VAG is reality that each of these cases will require a very fact specific inquiry into the serial numbers on the firearms. Presumably this will involve retrieving the piece of evidence and the Judge making a factual finding about the legibility of the number, assuming the firearm is available. Given the intensity of this review and the litigation surrounding it, this seems to fail the factor concerning the difficulty to apply the Guideline. This combined with the fact that this amendment also was not addressing a structural unfairness but a distinction between circuits, indicates this is not an amendment appropriate for retroactive application.

III. Part D of the Miscellaneous Amendment (Relating to Enhanced Penalties for Drug Offenders

Similar to the previous amendment, any considered retroactive application of the amendment regarding §2D1.1 suffers from many of the same issues as those regarding acquitted conduct. The VAG has focused on the acquitted conduct amendment because the concerns about the basis for retroactivity are most egregious with that amendment. However, the concerns are

[56] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 11.

also apparent to different degrees regarding §2D1.1 and the VAG – particularly because of the impact this amendment will have on victims and many families of deceased victims – incorporates many of the same objections above and also opposes a retroactive application to this amendment.

While the Impact Analysis has been able to more closely identify offenders sentenced using this provision and the outer bounds of that cohort, the Commission continues to lack the data needed to measure the other factors. What is known about this group of potential recipients of the benefit of retroactivity and the nature of the amendment itself does not overcome the presumption against retroactivity. The Commission is "unable to estimate the extent of any sentence reduction in those cases."[57] As with all the amendments without this critical information, the Commission cannot obtain the necessary data to assess the factors it is required to review.

Given the particular nature of this amendment, an amendment addressing situations in which a person was seriously injured or killed as a result of the offender's action, even information that is known weighs heavily against retroactive application. Regarding the magnitude of change in the sentencing range, that cannot be determined. The data provided does afford the Commission information on the magnitude of harm caused by retroactivity, and it is significant. Those who would benefit from this amendment appear to have been sentenced because they caused death or serious bodily injury to another and, in the case of §2D1.1(a)(1)(A), they have a prior conviction for a serious drug or violent felony. Such offenders, the vast majority of whom have pled guilty, pose a serious threat to public safety. The

[57] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 21.

VAG specifically incorporates its arguments regarding the impact of drug trafficking in Part I (B) (1) and (4) of this document to make the same points.[58] Furthermore, because almost half (46.9%) of these individuals have already received sentences below the sentencing range, notwithstanding their substantial role in the epidemic of drug deaths plaguing our communities, to further lower these sentences retroactively would cause great harm.

Of deep concern to the VAG, however, is the extraordinary re-traumatization retroactive application would cause these unique victims and surviving family members. Here, the VAG incorporates its argument in Section I(C) of this document, but underscores the grievous effect of changing a final sentence in these particular cases.[59] The amendment affects a unique group of victims – those seriously injured and those who were killed or lost a family member due to the offenders' actions.

If the Commission values finality of sentencing, a concept embedded in the presumption against retroactivity, it must recognize its importance regarding these victims. Nowhere else is it more compelling. As stated *supra*, these victims and family members have been informed of a final sentence, a long valued aspect of our justice system and one of the main bedrocks of the creating of the Commission under the Sentencing Reform Act.[60] To now apply an amendment that is presumed to be prospective retroactively to an offender who was given a legal sentence and caused the serious injury or the death of another, flies in the face of all the rights afforded to victims and their family members. This is particularly true when offenders will seek to do so without even notice and a hearing for these victims and their families. Victim rights, most

[58] *Supra*, at pp. 7-10; 13-14.
[59] *Supra*, at pp. 14-16.
[60] USSG Ch1, Pt.A.1.3 (noting that with the Sentencing Reform Act "Congress first sought honesty in sentencing….").

notably the right to dignity, should not be circumvented in such a way and the VAG opposes retroactivity of this amendment.

IV. Remaining Amendment

All the proposed amendments suffer to varying degrees from a lack of data. In each of them, staff notes it is "unable to estimate the extent of any sentence reduction."[61] This would seem to preclude the Commission from being able to adequately measure the propriety of retroactivity. However, for the remaining amendment, §2K2.4, the VAG offered little or no comment on the amendment's substance and, therefore, takes no further position on its retroactivity.

Conclusion

For the foregoing reasons the VAG opposes a retroactive application of these amendments.

Respectfully yours,

The Victims Advisory Group
Mary Graw Leary
Chair

cc: Advisory Group Members

[61] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 21.

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Chester Cadbi

Topics:

Acquitted Conduct (Amendment #1)

Comments:

I run an organization that helps people incarcerated by providing a support system to those in need. My organization supports making this law retroactive.

Submitted on: June 21, 2024

June 21, 2024

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

Re: Comments Supporting Retroactivity 0f 2024 Amendments

Dear Judge Reeves,

FAMM supports retroactivity of all 2024 guideline amendments that will reduce calculated guidelines and result in lower sentences. We focus this letter on Amendment 1 that ends the inclusion of acquitted conduct as relevant conduct. This reform has long been a priority for FAMM and our members.

FAMM is grateful to the Commission for curtailing the use of acquitted conduct as relevant conduct when calculating a guideline range. Ending the practice will benefit many people going forward, enhance public confidence in the guidelines, and help bolster the integrity and fairness of our criminal justice system. Retroactivity is called for in light of the relevant considerations – purpose, magnitude, and administrability – outlined in USSG §1B1.10.

I. Retroactivity is Warranted in Light of the Relevant Considerations.

Section 1B1.10 directs the Commission to consider "the purposes of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively . . . ."[1] These considerations support retroactivity of Amendment 1.

A. The Purpose of the Amendment Supports Retroactivity.

Relevant conduct, which is used when calculating a federal sentencing guideline range, will no longer include federal acquitted conduct, except when, in the view of the sentencing court, that conduct also establishes the instant offense of conviction.

The Commission opened its rationale for the amendment by stating that acquitted conduct has been a "persistent concern for many within the criminal justice system and the subject of robust

[1] USSG §1B1.10, comments. (backg'd).

debate over the last several years."[2] The Commission explained that its amendment addressing those concerns "seeks to promote respect for the law, which is a statutory obligation of the Commission."[3] The Commission illustrated its stance on acquitted conduct by referring to statements from Supreme Court Justices, bills introduced in Congress, and prohibitions in a number of states.

FAMM agrees that the amendment will enhance stakeholder confidence in the federal sentencing guideline system. It will also increase public trust in and respect for the law. Ordinary people take it as an article of faith that juries have the final word on innocence, guilt and, by extension, the consequences when a person has done something for which they merit punishment.[4] Jurors who learn their verdicts of not guilty have little or no impact on the outcome at sentencing express disbelief and frustration.[5] And, FAMM members who have been harmed by acquitted conduct, have told us of their dismay in learning that it is a feature of federal guideline sentencing.

- Raul Villarreal felt "devastated and betrayed by the justice system" because he was treated as "'guilty' when [he] was declared 'not guilty' in a public trial by a jury of [his] peers."
- Davon Kemp called the system "foul for stripping me of my right to a jury trial."
- Mr. Kemp's mother described herself as "shocked" at the enhancement her son received based on acquitted conduct and said it made his right to a trial "worthless."[6]
- Allen Peithman described the "horror" he and his mother felt when they "learned that even though we had proven our innocence, having stood before a jury of our peers, faced judgment, and been cleared of all the conduct we maintain[ed] our innocence of, it simply didn't matter."[7]

Our criminal justice system holds the immense power to deprive the governed of liberty. Its legitimacy depends on the trust of the people. As bond for that trust, the system provides significant procedural protections against the misuse of punishment. One of those is the right to trial by jury. Acquitted conduct is an abuse of trust that goes to the heart of the system.

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[2] U.S. Sentencing Comm'n, Amendments to the Guidelines at 1 (Apr. 30, 2024).
[3] U.S. Sentencing Comm'n, Amendments to the Guidelines at 1 (citing 28 U.S.C. §§ 994(a)(2); 991(b)(1)(A) & (B); 18 U.S.C. § 3553(a)(2)) (Apr. 30, 2024),
[4] *McClinton v. United States*, No. 21-1557, 600 U.S. ____ (2023) (Sotomayor, J.) *denial of certiorari* at 4.
[5] *See e.g.*, *McClinton v. United States*, No. 21-1557, Brief of 17 Former Federal Judges as Amicus Curiae in Support of Petitioner, at 15 (Aug. 10, 2023) (quoting letter from juror angered on learning that the defendant they had acquitted was nonetheless sentenced on the acquitted charge).
[6] Letter to Hon. Carlton W. Reeves from Mary Price and Shanna Rifkin at 10 (Feb. 22, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=376.
[7] Statement of Mr. Allen Peithman Before the United States Sentencing Comm'n, Hearing on 2023-2024 Proposed Amendment on Acquitted Conduct at 1 (March 6-7, 2024) (Peithman Statement); https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/peithman.pdf.

The use of acquitted conduct did not simply undermine confidence in the fairness of the criminal justice system, it weaponized charging. Prosecutors could and did lard indictments, confident that the hapless defendant who elected to go to trial and prevailed on some but not all charges, would not benefit from acquittal. The government knew it could extract more punishment, by way of an increased guideline range, than the jury verdict called for.[8] The practice also sent people acquitted of crimes, very likely including people factually innocent of those crimes,[9] to prison where hundreds likely remain.[10] As Judge Patricia Millett testified, now is the time for the Commission to "ensure that the Sentencing Guidelines will no longer deprive a defendant of liberty based on alleged conduct that a jury found he did not commit."[11] The Commission has answered that call for people facing juries starting in November.

By ending the use of acquitted conduct, the Commission has done crucial work toward restoring public trust in the legitimacy of the trial system. But that work will not be complete without retroactivity. The Commission must now finish the job of restoring confidence in the system, by giving everyone whose guidelines were increased a chance to regain the liberty they were wrongfully deprived of. Retroactivity is necessary to ensure that the promise of Amendment 1 is fully realized – to promote respect for and confidence in the law.

B. The Magnitude in the Change to the Guideline Range Supports Retroactivity.

When Congress empowered the Commission to make retroactive a reduced guideline change, it explained that "the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the [amended] guidelines."[12] Consequently, amendments that would reduce the maximum of the calculated guideline range by less than six months are not included in USSG §1B1.10.[13]

Commission research staff were unable to conduct their usual data analysis that could have helped the Commissioners evaluate the magnitude of the change to a class of people whose

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[8] *McClinton v. United States*, No. 21-1557, Brief of National Ass'n of Federal Public Defenders and FAMM at 7-8 (July 14, 2022).
[9] Letter to Honorable Carlton W. Reeves from Sen. Dick Durbin, *et al*. at 5 (March 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=14; *see also* Letter from Jonathan J. Wroblewski to Hon. Carlton W. Reeves at 14 (Feb. 15, 2023) (explaining that jury decisions are often opaque with respect to the underlying reasons for acquittal), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=47.
[10] Memorandum to Chair Reeves from Office of Research and Data, U.S. Sentencing Comm'n, at 7.
[11] Patricia A. Millett, Written Testimony for the Public Hearing on the Proposed Acquitted-Conduct Amendment to the Federal Sentencing Guidelines at 1 (Feb. 27, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/millett.pdf.
[12] USSG §1B1.10, comments. (backg'd), quoting S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).
[13] USSG §1B1.10, comments. (backg'd).

guideline range was increased by acquitted conduct. That should not prevent the Commission from granting retroactivity.

First, it is very likely that the maximum range for all or nearly all eligible individuals will exceed six months. The *average* sentence for all people with counts of acquittal serving sentences imposed following trial is a whopping *294 months*. From individual cases and personal accounts it is clear that acquitted conduct routinely and dramatically increased the sentence imposed, likely due to the operation of relevant conduct rather than the court's exercise of discretion under 18 U.S.C. § 3553(a).

- In 2015, Vincent Asaro was tried and acquitted of robbery and murder, allegedly committed decades earlier. Two years later, he pled guilty to different charges before the judge who had presided over his trial in 2015. The guideline range for the 2017 conviction was 33 to 41 months. The government argued that the judge should consider the acquitted conduct and cited *Watts* "for the proposition that basically the Court is not bound by the jury's verdict." The judge sentenced Mr. Asaro to 96 months, relying on her notes and recollections from the trial and stating her firm conviction that the government had proven the robbery and murder charges, notwithstanding the jury's verdict. The delta separating Mr. Asaro's calculated guideline range and sentence was more than four and a half years, lapping the 42-month top of the calculated guideline range.[14]
- The jury in Gregory Bell's case found him guilty of three crack cocaine distribution charges and not guilty on 10 additional charges that included narcotics and racketeering counts. Bell's guideline range for the counts of conviction was 51 – 63 months. The court used acquitted conduct to add 129 months, imposing a sentence of 192 months in prison. His sentence represented a 300 percent increase over the top of the guideline range for his conviction.[15]
- The government charged Erick Osby with seven counts, five addressing possession with intent to distribute drugs and two of possessing a firearm in furtherance of drug trafficking. Following trial, the jury convicted Mr. Osby of two drug counts and acquitted him of the other five charges. The guidelines for the two counts of conviction called for a sentence of 24 to 30 months in prison. Relying on acquitted conduct, the court recalculated the range to 87-108 months, more than three times the guideline range for the conviction. Sentencing Mr. Osby to 87 months, the judge said with respect to *Watts v. United States*, "If the Supreme Court tells me they have changed that law at some point in the future, that's fine, and that's what I'll do."[16]
- Dayonta McClinton was sentenced to 228 months, three times longer than the guideline sentence of 57-71 based on his count of conviction for robbery. The judge enhanced his sentence based on the murder of which he had been acquitted.[17]

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[14] *Asaro v. United States*, No. 18-48, *Petition for Certiorari* at 3-5 (July 22, 2019).
[15] *United States v. Bell*, 808 F.3d 926, 929 (Millett concurring in denial of rehearing en banc) (Dec. 22, 2015).
[16] *Osby v. United States*, No. 19-4789, *Petition for Certiorari* at 4-7 (June 1, 2021).
[17] *McClinton v. United States*, No. 21-1557, *Petition for Certiorari* at 3-4 (March 15, 2022).

At its hearing on the proposed amendment, the Commission heard directly from two people whose sentences had been increased by the use of acquitted conduct. Allen Peithman explained that he and his mother were both harmed by the practice. The guideline range for the counts on which his mother was found guilty called for probation; she received instead more than five years. Mr. Peithman was sentenced to ten years, although the top of the guideline range for his conviction was 36 months.[18] Jesse Ailsworth told of the toll his 30-year sentence took on him and his family. That term, 25 years longer than any codefendants, flew in the face of the jury's decision to acquit him on more than two dozen charges *and* the jury's special verdict limiting his conduct to the sale of 38 grams of crack cocaine.[19]

For guideline retroactivity purposes, magnitude is measured in time. These cases and accounts clearly demonstrate that acquitted conduct sentencing had a significant impact on the length of the imposed sentence, well beyond the Commission's six month cut-off for retroactivity. They meet the magnitude threshold.

The damage that has been done to our system of justice should also be accounted for in magnitude. The constitutional guarantee of the right to be found not guilty by a jury of one's peers was set aside *by operation of law* in hundreds of federal cases. Ending that practice is no small correction. Instead, the amendment this Commission has made is aimed at enhancing trust in the fairness of our sentencing system. That trust was broken every time a defendant discovered that they were to be sentenced for conduct the jury found them not guilty of. Denying retroactivity because we cannot locate with certainty whether enough people were sentenced to enough time would miss the important principle the Commission has elevated. Healing the damage done by decades of acquitted conduct sentencing will not be complete if the Commission declines to ensure that the people whose sentences compelled this amendment are left to serve them. The Commission's clear commitment to justice and fairness compels retroactivity.

C. Retroactivity is Warranted in Light of the Ease of Administrability.

FAMM will defer to defense practitioners on the question of the burden of administering retroactivity for people serving sentences enhanced by acquitted conduct. It appears from the staff analysis that a relatively small number of individuals will be eligible for retroactivity, though perhaps some number may apply who believe they are eligible, but in fact are not because of overlapping conduct. It is possible in some cases that the court exercised its discretion under 18 U.S.C. § 3553(a) to vary upward based on the acquitted conduct. It is likely, according to the staff, that some courts may need to conduct additional fact-finding to determine if

[18] Peithman Statement at 1-2.
[19] Statement of Jesse Ailsworth before the United States Sentencing Commission at 1 – 2 (March 6, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/ailsworth.pdf; *see also* Federal and Public Community Defenders Comment on Acquitted Conduct (Proposal 3) at 19 (Feb. 22, 2024) https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=47.

acquitted conduct had an impact on the sentence and whether it might overlapped and served to prove other counts of conviction.

That work, while additional, should be welcomed by a judiciary that embraces the Commission's commitment to secure the trust and respect of the public in the administration of sentencing justice.

II. Conclusion

Dayonta McClinton is the man whose petition for certiorari moved Justice Sotomayor to call on the Commission to revisit the rule requiring the use of acquitted conduct. He is not due to be released until the Fall of 2032.[20] He is 26 years old.

Mr. McClinton deserves to be more than a poster child. Acquitted conduct sentencing is a stain on the federal sentencing system. Enabling people whose incarceration was lengthened by the practice to seek a sentence reduction is necessary to fully cure the damage done to them and to restore the reputation of the justice system. FAMM calls on the Commission to ensure that everyone serving a sentenced enhanced by acquitted conduct has the chance to experience the justice this remarkable and long-overdue amendment promises future defendants.

Thank you for considering our comments.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

[20] Bureau of Prisons Inmate Locator, https://www.bop.gov/inmateloc/ (visited June 20, 2024).

fwd.us

June 21, 2024

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

Re: Retroactive Application of the Acquitted Conduct, Circuit Conflicts, and Miscellaneous Amendments

Dear Judge Reeves:

FWD.us is a bipartisan advocacy organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, FWD.us is committed to ending mass incarceration, eliminating racial disparities, expanding opportunities for people and families impacted by the criminal justice system, and data-driven approaches to advancing public safety.

These commitments led FWD.us to support the Sentencing Commission's adoption of the Acquitted Conduct Amendment in February of this year.[1] For the same reasons, we now write to urge the Commission to exercise its authority under 28 U.S.C. § 994(u) to apply the Acquitted Conduct Amendment, Part A of the Circuit Conflicts Amendment ("Altered Serial Number Amendment"), Part B of the Circuit Conflicts Amendment ("Firearms-Related Grouping Amendment") and Part D of the Miscellaneous Amendments (collectively, the "2024 Retroactive Amendments") retroactively. Retroactive application of these amendments:

- Impacts a relatively small number of cases and follows on the federal courts' successful recent implementation of larger retroactive changes;
- Will not compromise public safety; and
- Represents a principled application of the Commission's authority.

We commend the Commission's continued commitment to advancing fairness and consistency in federal sentencing and reassessing sentencing policy in light of new data. The Acquitted Conduct Amendment will ensure that people are not unfairly punished for charges that result in an acquittal, while the Altered Serial Number Amendment, the Firearms-Related Grouping

[1] The adopted amendments may be found here: U.S. Sentencing Commission [hereinafter "U.S.S.C."], *Amendments to the Sentencing Guidelines*, April 30, 2024, [hereinafter "2024 Amendments"], https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf

Amendment, and Part D of the Miscellaneous Amendment will further the fair and more uniform application of the Guidelines. While these amendments are relatively technical and smaller in scale compared to other recent Guideline changes, together they promote basic fairness in the criminal justice system and resolve inconsistencies in the application of the Guidelines. Retroactive application of the 2024 Retroactive Amendments will further the Commission's central mission of establishing "sound and equitable sentencing policies"[2] and advance public safety.

1. **The Courts' Experience with Prior Amendments Provides Clear Precedent for the Successful Retroactive Application of the 2024 Retroactive Amendments**

The 2024 Retroactive Amendments represent important advances in federal sentencing policy. The Acquitted Conduct Amendment removes acquitted conduct from the scope of relevant conduct that is used by courts to determine a person's sentence range (unless such conduct also establishes the instant offense of conviction). The Altered Serial Number Amendment resolves circuit courts' conflicting interpretation of the word "altered" in the 4-level enhancement under §2K2.1(b)(4)(B) for a firearm that has an altered or obliterated serial number. Similarly, the Firearms-Related Grouping Amendment resolves a circuit court split by clarifying that firearm offenses under 18 U.S.C. § 922(g) can be grouped with drug trafficking charges even in cases where a person is facing a separate count for the use of a firearm in furtherance of a drug crime under 18 U.S.C. § 924(c). Lastly, Part D of the Miscellaneous Amendments clarifies that the base offense levels in §2D1.1(a)(1)–(4) only apply when a person has been convicted of a drug offense under 21 U.S.C. §§ 841(b) or 960(b) to which the applicable enhanced statutory mandatory minimum term of imprisonment applies, or the parties otherwise stipulate.[3] These amendments will promote a standardized application of the Guidelines and boost the perception of fairness in the criminal justice system.

In reaching its decision on whether to apply amendments retroactively, the Commission must consider, among other things, "the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range."[4] Federal courts' experience in successfully implementing previous retroactive amendments that are much larger in scope and magnitude than the amendments currently under consideration makes clear that courts are well equipped to apply the 2024 Retroactive Amendments retroactively.

For instance, in April 2014, the Commission adopted the Drugs Minus Two Amendment that reduced the base offense level derived from the Drug Quantity Table for all drug quantities across all drug types.[5] Three months later, the Commission voted unanimously to make the

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[2] *See* U.S.S.C., *Overview of the United States Sentencing Commission,* https://www.ussc.gov/sites/default/files/pdf/about/overview/2023_About-Us-Trifold.pdf
[3] 2024 Amendments
[4] *See* USSG §1B1.1, *Background*, https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?app_gl_id=%C2%A71B1.10 .
[5] *See* U.S.S.C., *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, *passim* (2020) [hereinafter "*DMTA Recidivism Report*"],

amendment retroactive, allowing incarcerated people to file, and courts to consider, sentence reduction motions beginning in November of that year.[6] According to the Commission's data, as of July 2020, federal courts had granted 30,852 of 50,676 retroactivity motions —significantly more than the number expected for the Acquitted Conduct, Part A and Part B of the Circuit Conflicts, and Part D of the Miscellaneous Amendments combined. On average, people received sentence reductions of 25 months (17.2% average reduction) under the retroactive application of the Drugs Minus Two Amendment.[7]

The Drugs Minus Two Amendment followed on the heels of two other successfully implemented retroactive Guidelines amendments: the Crack Minus Two Amendment[8] and the FSA Guideline Amendment.[9] In the three years after the Crack Minus Two Amendment became effective, the courts granted 16,511 of 25,736 motions for retroactive sentence reductions, resulting in an approximately 20% average sentence reduction in successful motions.[10] Similarly, in the years following the adoption of the FSA Guideline Amendment, courts granted 7,748 of the 13,990 retroactivity motions, resulting in an average sentence reduction of 30 months (19.9% average reduction).[11]

More recently, the Commission voted in August of 2023 to make Parts A and B of the 2023 Criminal History Amendment retroactive starting on February 1, 2024. Implementation is well underway. The Commission's impact analysis of the retroactive application of the Criminal History Amendment estimated that 11,495 people in federal prison would be eligible to seek a sentence modification under the Status Point Amendment (Part A) and 7,272 people under the Zero-Point Amendment (Part B). According to most recent data from the Commission, courts have decided just over 9,500 motions as of March 31, 2024, granting half of them.[12] A total of

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https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

[6] The effective date of any resulting reduction in sentence was delayed until November of the following year. *Id.*, p. 1.

[7] *Id.*, p. 5. This average sentence was reduced from 146 months to 121 months. *Id.*

[8] The Crack Minus Two Amendment resulted in a two-level reduction in the base offense levels derived from the Drug Quantity Table for each quantity of crack cocaine. U.S.S.C., *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, p. 1 (2014) [hereinafter "*CMTA Recidivism Report*], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[9] *See* U.S.S.C., *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment*, p. 1 (2018) [hereinafter "*FSAA Recidivism Report*"], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf. The FSA Guideline Amendment incorporated the reduced statutory sentences for crack cocaine offenses in the Fair Sentencing Act of 2010. *Id.* at p. 1. While Congress did not make the statutory sentence reductions retroactive, the Commission nevertheless gave the corresponding Guidelines amendment retroactive effect. *Id.*

[10] *CMTA Recidivism Report*, p. 2.

[11] *FSAA Recidivism Report*, pp. 2-3.

[12] *See* U.S.S.C., *Part A of the 2023 Criminal History Amendment Retroactivity Data Report*, p.4 (2024); https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202405-CH-Retro-Part-A.pdf ; U.S.S.C., *Part B of the 2023 Criminal History Amendment Retroactivity Data Report* ,p. 4 (2024),

5,131 people have received reduced sentences pursuant to Parts A and B, with average reductions in incarceration of 10 months for Part A and 13 months for Part B.[13]

The federal courts' recent experience shows that courts are well equipped to apply changes to the Guidelines retroactively without massive disruptions to the operations of the federal court system or significant litigation. And unlike the retroactive application of the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments, the current amendments under consideration for retroactivity are projected to be smaller in scope and impact. According to the Commission, a maximum of 4,000 people currently incarcerated in federal prison may be eligible to file a motion for a sentence modification were the Commission to apply all four amendments retroactively:

- **Acquitted Conduct Amendment:** an estimated 1,971 people currently incarcerated in federal prisons were acquitted of one or more charges and may benefit from retroactive application.
- **Part A of the Circuit Conflicts Amendment**: 1,452 people in federal prisons received the §2K2.1(b)(4)(B) enhancement and may be eligible for retroactive application.
- **Part B of the Circuit Conflicts Amendmen**t: 102 people may be eligible for retroactive application of Part B of the Circuit Conflicts Amendment.
- **Part D of Amendment 5:** 538 people currently incarcerated in federal prison may be eligible for retroactive application of Part D of Amendment 5.

While courts may need to do additional fact-finding to determine a person's eligibility for resentencing in some cases, the they are well-equipped to carry out a retroactive application of the 2024 Retroactive Amendments without creating additional burdens on the larger federal court system because the impact is projected to be smaller in magnitude than previous amendments.

2. Retroactive Application Will Not Compromise Public Safety

Again, the courts' experience with the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments provides the clearest support for the retroactive application of the Altered Serial Number Amendment, the Firearms-Related Grouping Amendment, and Part D of the Miscellaneous Amendments. In each case, the Commission evaluated whether the retroactive application of the changes to the Guidelines impacted recidivism, and in each case, the Commission reached the same conclusion: there was no statistically significant difference

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202405-CH-Retro-Part-B.pdf

[13] *Id.*

between the recidivism rates of people who received a sentence reduction and those who had served their full sentence before the changes became effective:[14]

- **Drug Minus Two Amendment** – The Commission found no statistically significant difference in the recidivism rates of people who were released an estimated average of 37 months early through the retroactive application of the Drugs Minus Two Amendment (27.9%) and people who served their full sentences and were released prior to the amendment (30.5%).[15]

- **Crack Minus Two Amendment** – The Commission found that the recidivism rate for people who received an average retroactive sentence reduction of approximately 20% was similar to the rate for people who had been released before the adoption of the Crack Minus Two Amendment. Indeed, as with the Drug Minus Two Amendment, the recidivism rate was actually lower (43.3%) for the retroactivity cohort than for the control group (47.8%).[16]

- **FSA Guideline Amendment** – The Commission reached a similar conclusion in its study of the retroactive application of the FSA Guideline Amendment, finding that recidivism rates were "virtually identical" for people who received retroactive sentence reductions averaging 30 months compared to people who had served their full sentences before the amendment took effect.[17]

These studies are in line with a growing body of research showing that the marginal benefit of lengthier sentences is minimal at best—and counterproductive at worst. Traditionally, proponents of longer sentences have relied on three theoretical public safety justifications: general deterrence (preventing crime by instilling fear of punishment in the general population), specific deterrence (deterring an individual from committing further future crime through the imposition of punishment), and incapacitation (keeping people in custody to prevent them from committing offenses in the community).[18] Here, general deterrence is not a consideration, as the Commission has already adopted the 2024 Retroactive Amendments prospectively. The studies cited above also show that prior retroactive sentence reductions have not resulted in any decrease in specific deterrence, as recidivism rates for people released early were the same or lower than for those released after serving their full original sentences.[19]

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[14] *DMTA Recidivism Report*, p. 1. The average expected sentence reductions under the Status Points Amendment and the Zero-Point Amendment—14 months and 15 months, respectively—are shorter than the reductions under the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments.
[15] *Id.* at p. 6. It is also worth noting that the study found that one-third of the recidivism, for both the study group and the control group, was attributable to court or supervision violations. *Id.*
[16] *CMTA Recidivism Report*, p. 3.
[17] *FSAA Recidivism Report*, p. 3.
[18] *See* Laura Bennett and Felicity Rose, Center for Just Journalism and FWD.us, "Deterrence and Incapacitation: A Quick Review of the Research," https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research.
[19] The Commission has also released studies on sentence length and recidivism that purport to show that longer sentences have a specific deterrent effect and are associated with lower recidivism. Those studies,

Moreover, deterrence is not applicable to cases involving acquitted conduct because a person's conduct did not meet the constitutional standard for guilt. Punishing someone for a crime for which they have not been found guilty not only undermines the basic notion of fairness in the criminal justice system but cannot be justified on the grounds of deterrence or incapacitation.

Recent literature also strongly calls into question the viability of incapacitation as a public safety strategy. Drug trafficking and sale offenses, for instance, are subject to the replacement effect—that is, while specific individuals may not commit a further crime while in prison, the volume of drug trafficking is unlikely to decline overall.[20] Similarly, an extensive study of the age-crime curve suggests that individuals age out of criminal behavior over time, meaning the marginal value of incarceration also declines over time.[21] Indeed, a recent study by the Council on Criminal Justice of the public safety impact of shortening lengthy prison terms in Illinois found that 1) "modest reductions in the length of long prison stays would likely result in relatively few additional arrests," and 2) "the additional arrests likely to result from reductions in time served would constitute a virtually undetectable increase in the annual volume of arrests in the state."[22]

Research across the field shows that any contested and minimal benefits of increased sentence lengths, and incarceration generally, are far outweighed by the harms to individuals, communities, and public safety as a whole. All of the available data suggests that retroactive application of the 2024 Retroactive Amendments will not have a negative effect on recidivism rates or public safety. Moreover, using acquitted conduct to enhance a person's sentence ignores the basic principles within our criminal justice system that promise that a person cannot be punished by the state unless they have been given due process and duly convicted.

3. Applying the Amendments Retroactively Furthers the Commission's Commitment to Principled Policymaking

A few years ago, Columbia University's Square One Project reintroduced the concept of "parsimony" as a framework and guiding principle to interrogate our country's criminal justice policy decisions, including incarceration. This framework calls us to examine whether the imposition of state power through criminal justice policies and practices is "reasonably necessary to accomplish a legitimate social purpose."[23] Undergirding the parsimony principle is the premise that "the state is entitled to deprive its citizens of liberty only when that deprivation

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however, were based on artificially constructed matched cohorts rather than the stronger quasi-experimental design of the retroactivity studies cited above.

[20] Mark A.R. Kleiman, *Toward (More Nearly) Optimal Sentencing for Drug Offenders, 3* Crim & Public Policy 3 (2006).

[21] Michael Rocque, Chad Posick, and Justin Hoyle, *Age and Crime*. (2015) In The Encyclopedia of Crime and Punishment, W.G. Jennings (Ed.). https://doi.org/10.1002/9781118519639.wbecpx275

[22] Avinash Bhati, *The Public Safety Impact of Shortening Lengthy Prison Terms* (2023), https://councilоncj.foleon.com/tfls/long-sentences-by-the-numbers/the-public-safety-impact-of-shortening-lengthy-prison-terms.

[23] Daryl Atkinson and Jeremy Travis, The Power of Parsimony, 2021, https://squareonejustice.org/wp-content/uploads/2021/05/CJLJ8747-Square-One-Parsimony-Report-WEB-210524.pdf

is reasonably necessary to serve a legitimate social purpose. Any liberty deprivation beyond that minimum is gratuitous and constitutes state cruelty."[24] The goal of the criminal justice system under the principle of parsimony would be to impose "the least restrictive intervention to achieve societal goals."[25]

The parsimony principle provides both a metric for evaluating the Commission's policy decisions and an important framework for organizing future efforts. The Commission limited the scope of judges' ability to consider acquitted conduct "to promote respect for the law" and to address concerns about the fairness of punishing a person for conduct that a judge or jury has determined did not meet the constitutional standard for guilt.[26] Considering acquitted conduct during sentencing results in extremely lengthy and gratuitous sentences that do not serve a legitimate social purpose. The parsimony principle makes it a moral imperative to apply the Acquitted Conduct amendment retroactively and allow people who were punished for a crime they were acquitted of the opportunity to seek a modified sentence.

Furthermore, as highlighted in the previous section, the Commission's own studies of retroactive applications of Guidelines changes found no difference in the recidivism rates of people released early from the retroactive application of Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments and people who served their full sentence. These findings combined with the growing and robust body of research showing that lengthy sentences do not advance public safety make clear that current sentencing practices neither serve the underlying purposes of punishment nor promote safety, and therefore, the amended Guidelines must be adopted retroactively in alignment with the data.

We urge the Commission to apply the Acquitted Conduct Amendment, the Altered Serial Number Amendment, the Firearms-Related Grouping Amendment, and Part D of the Miscellaneous Amendments retroactively and continue to reevaluate the basic assumptions underlying the Guidelines given the growing research that longer sentences do not advance public safety.

Sincerely,

Scott D. Levy
Chief Policy Counsel
FWD.us

[24] Jeremy Travis and Bruce Western, ed., Parsimony and Other Radical Ideas About Justice, p. 3-4 (2023).
[25] *Id.*
[26] *2024 Amendments,* p.1

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Islam

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Acquitted conduct needs to be more retroactive, there uses for this bill that work to further enslave those incarcerated or facing crimes. A jury's verdict should always and more often reflect the final decision that is made from the justices.

Submitted on: May 9, 2024

June 20, 2024

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 to the Sentencing Guidelines

Dear Judge Reeves:

The National Association of Defense Lawyers (NACDL) respectfully submits the following comments on whether recently promulgated amendments should be included in the Guidelines Manual as changes that may be applied retroactively to previously sentenced defendants. These comments address Amendment 1 (relating to acquitted conduct). NACDL also supports retroactivity for Parts A and B of Amendment 3 and Part D of Amendment 5 and adopts the comments of the Federal Defenders on those amendments.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

NACDL supports retroactive application of the Sentencing Guideline amendment to Section 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), which is being amended to exclude certain acquitted conduct from the scope of relevant conduct used in calculating an individual's guideline range.[1] With retroactivity, nearly two thousand people may be eligible for release or sentence reductions over the next several years. Without it, these same people may continue to serve terms of imprisonment for conduct they were acquitted of at trial—

[1] *See* U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines, 89 Fed. Reg. 36853 (May 3, 2024).

at great cost to themselves, their families and communities, the prisons that house them, and the integrity of the criminal justice system.

The Commission has set forth its policy statement regarding retroactive application of amendments in Section 1B1.10 of the Guidelines. Among the key factors to consider when determining whether this amendment shall be retroactive are the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively.[2] NACDL supports retroactive application because it would help correct a serious miscarriage of justice, will have a significant impact on affected persons, will not be burdensome to apply, and will help to redress unfair racial disparities in federal sentencing.

The use of acquitted conduct in sentencing is a glaring injustice in federal sentencing. It offends procedural rights, undermines the constitutional rights to due process and trial by jury, and is disrespectful to the esteemed role that jury trials and jury service have within American jurisprudence. It also undermines the legitimacy of and public respect for the criminal legal system.[3]

Unsurprisingly, acquitted conduct sentencing has been roundly and consistently criticized by NACDL, numerous other advocacy groups, many Members of Congress, several U.S. Supreme Court Justices, and the many lawyers and impacted people that the Sentencing Commission has heard from in written and oral testimony. It is clear now that the Commission itself agrees, as evidenced by the fact that the acquitted conduct amendment received top billing in the Commission's press statement announcing the final proposed changes for this Guideline amendments cycle.[4] In the press release, Chair Reeves called the change "an important step to protect the credibility of our courts and criminal justice system."[5] NACDL strongly agrees.

Making this change retroactive would, to a significant extent, correct this injustice for those who are still incarcerated and were sentenced based on acquitted conduct. It would also help to achieve the Chair's and the Commission's goal of protecting the credibility of the courts and justice system, by righting a now-acknowledged wrong.

Retroactive application of the amended Section 1B1.10 Guideline is also warranted because acquitted conduct often has a significant impact on sentences in the cases where it is considered as relevant conduct. In considering the possible impact of a Senate bill that would limit the use of acquitted conduct in sentencing in a similar, but arguably slightly more

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[2] *See* U.S. Sent'g Comm'n, Guidelines Manual § 1B1.10 (2023).
[3] *See generally* NACDL, Comments to the U.S. Sent'g Comm'n re: Proposed Priorities for the 2023-2024 Amendment Cycle (Aug. 1, 2023), *available at* https://www.nacdl.org/Document/CommentUSSCPriorities2024AmendmentCycle-08012023; NACDL, Comments to the U.S. Sent'g Comm'n re: Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary (Mar. 14, 2023), *available at* https://www.nacdl.org/Document/CommentsUSSCProposedAmendments-03142023.
[4] U.S. Sent'g Comm'n, News Release, "Commission Votes Unanimously to Pass Package of Reforms Including Limit on Use of Acquitted Conduct in Sentencing Guidelines" (Apr. 17, 2024), https://www.ussc.gov/about/news/press-releases/april-17-2024.
[5] *Id.*

significant way than the Commission's proposed Guideline amendment, the Sentencing Commission's Office of Research and Data has suggested that acquitted conduct may increase a sentence by 25% to 50%.[6] A Congressional Budget Office analysis of a very similar House of Representatives bill estimated that acquitted conduct adds an average of 30 months to sentences when it is imposed.[7]

While acknowledging that these estimates are necessarily imprecise, it is worth noting that anecdotal evidence also supports the notion that acquitted conduct—when imposed—has a major impact on sentence length. Indeed, a brief review of just a few of the most recent, highest-profile cases indicates that, in many cases, the impact of acquitted conduct in sentencing is even greater.

For example, in the well-known case *Jones v. United States*, a group of defendants were charged with federal drug conspiracy and distribution, RICO conspiracy, firearms offenses, and crimes under D.C. law.[8] After an 8-month trial, a jury acquitted three defendants on all charges except distributing small quantities of crack cocaine. However, based on acquitted conduct, these defendants received sentences that were many times more than their Guidelines range sentences:

Defendant	Guideline Range	Sentence Imposed
Antwuan Ball	51-71 months	225 months
Desmond Thurston	27-33 months	194 months
Joseph Jones	33-41 months	180 months[9]

These sentences are not a mere 25-50% greater—they are many times greater than the sentences that would have been imposed had acquitted conduct not been considered.

In a more recent case before the U.S. Supreme Court, Erick Osby faced 7 charges based on guns and drugs that were found after searches of a hotel room where he stayed and a car

[6] *See* Letter from Glenn R. Schmitt, Director, U.S. Sent'g Comm'n Office of Research and Data, to Jon Sperl, Budget Analyst, Congressional Budget Office, re: S. 601, the Prohibiting Punishment of Acquitted Conduct Act of 2021 (Aug. 4, 2022) (suggesting this increase as a likely "lower and upper bound of sorts") [hereinafter, "Schmitt Letter on Impact"]. The Office also acknowledges that cases where acquitted conduct is considered by a judge in sentencing is relatively rare within the federal system, and that it is difficult to determine the exact impact it has as far as the additional months or years in an average affected sentence. *See id.*

[7] Congressional Budget Office, Cost Estimate, H.R. 5430, Prohibiting Punishment of Acquitted Conduct (Feb. 29, 2024).

[8] Petition for a writ of certiorari, at 3, *Jones v. United States*, 135 S. Ct. 8, 9 (2014).

[9] *Id.* at 5. It is also worth noting that the jury foreperson wrote in a letter, "It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty." *Id.* at 4 (internal citation omitted).

where he was a passenger.[10] Osby was convicted on just two and acquitted on five of those charges. Based on these two convictions, his Guidelines range was 24-30 months. But, at sentencing, the judge considered conduct from his acquitted counts and increased his offense level by 12.[11] He was sentenced to 87 months, nearly triple the high end of his sentencing range if acquitted conduct had not been considered.[12]

These cases indicate that acquitted conduct has a major impact on cases where it is considered in sentencing. Retroactive application of the Guideline amendment is warranted to address this injustice.

Additionally, retroactive application will not impose a significant burden on the courts. With few exceptions, the consideration of acquitted conduct in sentencing only occurs in the relatively rare instance where a defendant in federal court goes to trial on multiple charges and is convicted on one or more of those counts and acquitted on one or more of those counts. To begin, less than 3% of federal convictions are the result of trials and, of those fewer than 2,000 cases per year, only a small portion also include an acquittal as well as a conviction. For 2021, the Sentencing Commission found that only 157 cases went to trial and included both a conviction and an acquittal.[13] But, as small as this number is compared to the roughly 60,000 persons sentenced in federal court each year, it is not even likely that all 157 of these cases involved acquitted conduct sentencing—it merely means that these are the only cases that *could* have.

Similarly, in its Retroactivity Analysis of this Guideline Amendment, the Commission estimated that 1,971 persons currently in BOP custody were acquitted of one or more of the charges against them.[14] On its own, this is a tiny fraction of the over 140,000 people currently in federal prison.[15] But, even that 1,971 number is likely a significant overstatement of the number of possible cases involving acquitted conduct sentencing, because acquitted conduct is not considered in sentencing for every split verdict. Thus, the number of currently incarcerated people impacted by this change is even less than the already relatively small number the Commission cites.

In addition to the very small number of potential cases, retroactive application of this amendment will not be burdensome on the courts or difficult to apply. Any information required for sentencing or resentencing should already be in the record for any eligible cases. Applying

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[10] Petition for Writ of Certiorari, *Osby v. United States*, No. 20-1693 (denied Oct. 4, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-1693/180707/20210601193931887_210601%20osby%20FILE.pdf.
[11] *Id.*
[12] *Id.* at 7.
[13] *See* Schmitt Letter on Impact, *supra* n.6.
[14] U.S. Sent'g Comm'n, Memorandum re: Retroactivity Impact Analysis of Certain 2024 Amendments, at 7 (May 17, 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2024-amendments/2024_Amdts-Retro.pdf [hereinafter "2024 Retroactivity Analysis"].
[15] *See* Fed. Bureau of Prisons, Population Statistics, https://www.bop.gov/mobile/about/population_statistics.jsp (last accessed June 10, 2024) (showing 144,527 persons in BOP custody).

the amended Guideline is merely a matter of considering that same information while not considering the previously considered acquitted conduct. Because the amendment doesn't require considering new information, it only requires excluding the consideration of certain information, no additional and potentially burdensome factfinding or evidentiary hearing should be needed. Past instances of retroactive guideline application included greater numbers and complexity and did not cause undo difficulties.[16]

Despite the relatively small number of cases, retroactive application of this amended Guideline will also help somewhat in ameliorating the significant racial disparities in sentencing. The Commission is well aware of these disparities and, thankfully, devotes significant resources to documenting and publicizing them.[17] The Commission's Retroactivity Impact Analysis shows that of the roughly 13,488 persons currently incarcerated after a trial, 47.5% are Black, despite being only 12.4% of the U.S. population.[18] Thus, retroactive application may help in ameliorating the unjust racial disparities in federal sentencing.

Because retroactive application of the acquitted conduct amendment would help to correct a grave injustice, will have significant impact on the prison sentences of those impacted, and would not be unduly burdensome, NACDL strongly urges the Sentencing Commission to apply this amendment retroactively.

Respectfully Submitted,

JaneAnne Murray
Co-Chair, NACDL Sentencing Committee

Nathan Pysno
Director, NACDL Economic Crime & Procedural Justice

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[16] In the unlikely event that review of this small number of cases is more cumbersome than anticipated, cases could initially be reviewed by staff attorneys within a district court or other lawyers, as was done for reviewing retroactive claims under *Johnson v. United States*, 576 U.S. 591 (2015) (finding the Armed Career Criminal Act's "residual clause" unconstitutional) and *Welch v. United States*, 578 U.S. 120 (2016) (finding *Johnson* to be a substantive rule change and therefore retroactive). *See* Caryn Davis, Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782, 10 Fed. Cts. L. Rev. 39, 71, 74 (2018).

[17] *E.g.*, U.S. Sent'g Comm'n, Demographic Differences in Federal Sentencing, at 4 (Nov. 2023) (noting, for example, that Black males receive sentences 13.4% longer and Hispanic males 11.2% longer than white males).

[18] *See* 2024 Retroactivity Analysis, *supra* n.14, at 9. For population statistics, see U.S. Census Bureau, Race and Ethnicity in the United States: 2010 Census and 2020 Census, https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html (last accessed June 12, 2024).

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Ohio Children of Incarerated Parents Initaitive

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Acquitted Conduct should never be considered at all in sentencing guidelines. It is a form of double jeopardy and ignores the previous verdict of the court process.

Submitted on: May 3, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Virginia Commonwealth University Muslim Student Association

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Retroactively applying the elimination of acquitted conduct in sentencing is essential for justice and fairness, ensuring that individuals are only punished for crimes for which they have been convicted. This change would enhance public confidence in the judicial system by ensuring consistency and fairness in sentencing, aligning U.S. practices with international norms and demonstrating a commitment to just principles. Furthermore, it supports the rehabilitation and social reintegration of individuals by potentially reducing excessive prison terms, fostering community safety, and promoting social cohesion. Therefore, retroactivity not only corrects past disparities but also strengthens the integrity and perceived legitimacy of the legal system.

Submitted on: May 9, 2024

MICHAEL S. CARONA
SHERIFF, ORANGE COUNTY SHERIFF'S DEPARTMENT (RETIRED)

Judge Carlton W Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

June 16, 2024

Response to the Commission's Request for Comment on the Possible Retroactive Application of Amendment 1 – USSG Section 1B1.3 Excluding Acquitted Conduct from Relevant Conduct Used in Calculating an Individual's Guideline Range

"A single death is a tragedy; a million deaths is a statistic."[1]

Dear Judge Reeves,

First and foremost, I want to commend you and your fellow commissioners for having the wisdom and courage to unanimously decide to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under Federal guidelines. Your quote in the *April 17, 2024*, Commission press release, "Not guilty means not guilty," perfectly states why the draconian process of acquitted conduct sentencing needed to be abolished.

In the Commission's request for commentary on *Amendment 1-Prohibiting Acquitted Conduct Sentencing*, input is requested concerning (a) "the magnitude of the change in the guideline range made by the amendment" and (b) "the difficulty of applying the amendment retroactively."

I will address both requests utilizing the data from Commission staff in their *May 17, 2024*, *Retroactivity Impact Analysis of Certain 2024 Amendments*.

The Commission should make *Amendment 1* retroactive.

The magnitude of the change in the guideline range made by the amendment.

While I recognize that the Commission must analyze the data to determine the magnitude of any change to the sentencing guidelines, it seems necessary to reflect on the quote loosely attributed to Joseph Stalin: " A single death is a tragedy; a million deaths a statistic."[2]

If the Commission chose *NOT* to make *Amendment 1* retroactive and one person were to suffer an extended time in federal prison, that would be a *tragedy;* however, if thousands of individuals were to suffer spending additional time in federal prison because their sentences were enhanced as a result of their acquitted conduct, that might be viewed as simply a statistic that could be easily ignored.

[1] Attributed to Soviet leader Joseph Stalin, potentially from a 1947 Washington Post article. Quoteinvestigator.com, May 21, 2010.
[2] Ibid.

Nothing could be further from the truth. As you beautifully stated, “Not guilty means not guilty.” The corollary also holds: " Equal justice means equal justice.” Because of the Commission’s well-reasoned decision, future criminal defendants will no longer have to suffer sentencing enhancements for their acquitted conduct. Leaving the burden of an enhanced prison sentence for criminal defendants currently serving in the BOP because the Commission chooses *not* to make *Amendment 1* retroactive is not only inequitable but also unjust.

Commission Staff’s Data Analysis

The Commission staff did a commendable job of providing the commissioners with valuable data to assess the magnitude of the impact of making *Amendment 1* retroactive.

Their decision to analyze a 10% random sample of the 13,500 individuals incarcerated in the Federal Bureau of Prisons convicted *after trial* is highly appropriate. Utilizing the random sample size that they chose creates a confidence level of 95% with a margin of error of .84%, so the commissioners have excellent data upon which to make a decision. Their estimate that approximately 1,971 individuals incarcerated in the Federal Bureau of Prisons were acquitted of one or more charges is also statistically supportable.

While I am confident their statistics are correct, the problem lies herein – these are just statistics. I encourage the commissioners to examine this data further than just numbers and recognize that all of these individuals are somebody’s son or daughter, husband or wife, father or mother, or, in essence, somebody’s family member or friend. As human beings, somewhere to someone, they have value. However, more important than the humanity issue and of most significant importance to the commissioners, *ALL* of these individuals may be serving an extended sentence in federal prison for crimes for which they were found *not guilty*.

The Commission is trying to resolve this issue through *Amendment 1*, and the injustice created by acquitted conduct sentencing can only be fully realized by making this amendment ***retroactive***.

To further illustrate the humanity issue embedded in the need for retroactivity, I would like to use my journey through the federal criminal justice system, and the impact that acquitted conduct sentencing had on my life. I shared a portion of this with you in my *March 8, 2023*[3]*,* letter in support of your then-proposed amendment to prohibit acquitted conduct sentencing.

> In 2007, as the Sheriff of Orange County, I was a defendant in federal court. The charges against me included *three Honest Services Mail Fraud counts, one Conspiracy to Commit Honest Services Mail Fraud count (including 64 overt acts), and two counts of Obstruction of Justice*.[4] After my trial, the jury ***ACQUITTED*** me of *every* charge against me except *one count* of obstruction of justice.[5]

[3] United States Sentencing Commission, Public Comment from March 14, 2023. Proposed Amendment No. 8 – Acquitted Conduct. Michael S. Carona, Sheriff (Retired) [1495].
[4] *United States v. Michael S Carona*, Case Number SA CR 06-224.
[5] January 16, 2009, *Jury Acquits Ex-Sheriff of All but One Count*, NBC News.com.

> Despite being acquitted of ***all*** but the single charge, the trial court judge utilized my acquitted conduct for Honest Services Mail Fraud and substantially enhanced my sentence to *5 ½ years* in federal prison.
>
> My attorneys filed numerous appeals regarding the single count of conviction and the acquitted conduct sentencing. The acquitted conduct sentencing appeals culminated in a 2255 appeal in the Ninth Circuit.
>
> Despite having been ***acquitted*** of Honest Services Mail Fraud and despite the Supreme Court's ruling in ***Skilling***[6] limiting the use of Honest Services Mail Fraud, the Ninth Circuit chose to deny my appeal.
>
> They opined, "*Because the district court did not clearly err in finding that bribery was one of the crimes being* ***investigated****, it was appropriate to sentence Carona accordingly*." "*The* ***investigation*** *was looking into possible bribery. Whether Carona* ***actually committed*** *or* ***was convicted of bribery is immaterial***.[7] [Emphasis added]

Having served in law enforcement for over 30 years, nearly 20 of those as a law enforcement executive, I was profoundly shocked and appalled. Despite enduring a grueling 2½-month trial and being acquitted of all but one charge, I was still sentenced for my acquitted conduct. The federal criminal justice system's approval of this outrageous practice was massively confusing and deeply disappointing. Acquitted conduct sentencing unjustly took away significant portions of my life and deprived me of irreplaceable moments with my family and friends.

This personal account underscores the humanity issue that cannot be ignored in the Commission's decision to make *Amendment 1* retroactive. Here and now, the commissioners have the ability to prevent the type of losses that occurred in my life from happening to any and/or all of the 1,971 individuals who are in the Federal Bureau of Prisons, in part or in whole, having been sentenced for their acquitted conduct.

The magnitude of the change made by this amendment may be equal to or less than that of 1,971 individuals. Of the entire population of the Federal Bureau of Prisons (156,532), these 1,971 individuals comprise 1.26% (.0126). While this is statistically insignificant, the magnitude of the change made by this amendment, I can assure you, will be incalculable in the lives of those who will benefit from your decision.

Difficulty of Applying the Amendment Retroactively

Sadly, the federal sentencing process is very complex and, as a result of that complexity, also time-consuming. Assuming that all 1,971 persons currently incarcerated in the Federal Bureau of Prisons seek a modification of their sentence under 18 U.S.C 3582 (c) (2), additional court time will be required for the sentencing courts to reassess the sentences of these individuals.

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[6] *Skilling v. United States*, 561 U.S. 358 (2010); *Black v. United State*s, 561 U.S. 465 (2010); *Weyhrauch v. United States*, No. 08-1196, 561 (2010).

[7] *United States v. Carona*, Ninth Circuit Court of Appeals, No. 13-55597.

Arguably, all federal sentencing decisions are difficult. The time and energy the sentencing court requires to justify utilizing a defendant's acquitted conduct to enhance their sentences is enormous. Given that the trial court will no longer have to create a lengthy narrative describing why it believes the acquitted conduct applies either to a preponderance of the evidence or to a clear and convincing standard, undoing the acquitted conduct portion of the sentences should be extraordinarily less time-consuming.

While some difficulty will occur in applying *Amendment 1* retroactively, it will pale compared to the difficulty required to justify an acquitted conduct sentencing enhancement. The court in each of these 1,971 individuals was more than willing to expend the time to justify a sentence enhancement, and equal justice dictates that, at the very least, a similar investment of time is appropriate to eliminate that enhancement.

Prospectively, it is essential to note that given the Commission's decision to prohibit acquitted conduct from being used in sentencing calculations, trial courts will no longer have to justify why a defendant's acquitted conduct should be utilized to enhance their sentence. This will undoubtedly save significant judicial resources.

Respectfully submitted,

Michael S. Carona
Sheriff, Orange County Sheriff's Department (*retired*)

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Susan Conforti, Jewish

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Please make the ruling retroactive. Thank you.

Submitted on: May 2, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

James Craven, Lawyer

Topics:

Acquitted Conduct (Amendment #1)

Comments:

By all means, please make it retroactive ! I am a 50 year ALI member, and a permanent member of the Judicial Conference of the Fourth Circuit. Thanks, James B. Craven III

Submitted on: May 2, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Issa Ghannoum, Army Servicememeber

Topics:

Acquitted Conduct (Amendment #1)

Comments:

As an Army servicemember dedicated to upholding justice and the values of our nation, I firmly believe that retroactively applying the elimination of acquitted conduct in sentencing is crucial for ensuring fairness and maintaining the integrity of our legal system. Ensuring that individuals are only punished for crimes for which they have been duly convicted is a fundamental principle of justice, aligning with both domestic values and international norms. This change would not only correct past injustices by eliminating disparities in sentencing, but also bolster public confidence in the judicial system. It supports the rehabilitation and social reintegration of individuals, enhancing community safety and promoting social cohesion. As someone who serves to protect the principles our country stands on, I see the retroactive application as vital to strengthening the credibility and legitimacy of our justice system, embodying the fairness we strive to represent.

Submitted on: May 9, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Warren Little, Kentucky, Eastern

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Speaking as a Chief of a medium sized District, I believe retroactivity of the guidelines should be the exception, not the rule, every year. If the acquitted conduct amendment is made retroactive it will require more extensive work from the Probation Office than past retroactive changes. It will NOT be as easy and relatively clean cut as the zero point and status point changes. You combine this difficulty with the understaffing ALL of probation is facing, and you have a recipe for disaster and Court gridlock. So, I implore the Commission to avoid making the amendments retroactive, specifically the acquitted conduct amendment. Instead, use your efforts to clear up the career offender guidelines as it relates to the categorical and modified categorical approach. Thank you

Submitted on: June 5, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Murray Miron, Software engineer, legal hobbyist

Topics:

Acquitted Conduct (Amendment #1)

Firearms Enhancement for Altered/Obliterated Serial Number (Amendment #3A)

Firearms Grouping Rules (Amendment #3B)

Enhanced Drug Penalties for Death/Serious Bodily Injury (Amendment #5D)

Comments:

It should be noted that this is my first comment on a Federal Register proposal, and that I have not reviewed the text in entirety. Despite these limitations, I'm comfortable making the following comment: if the amount of manpower required to make rules appropriately retroactive is feasible, and doing so is also fiscally viable, then any modifications to governing law or policy should always be made retroactive. I'm unable to imagine any circumstances that would make this a poor rule of thumb.

Submitted on: May 17, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Angela Moore, Attorney at law

Topics:

Acquitted Conduct (Amendment #1)

Firearms Grouping Rules (Amendment #3B)

Enhanced Drug Penalties for Death/Serious Bodily Injury (Amendment #5D)

Comments:

The Courts are trying to obliterate inmates' attempts to obtain their freedom, which is NOT giving effect to the USSC amendments and the First Step Act.

A clear statement of the amendments intent and their purpose must be stated to guide the court's hands.

Submitted on: May 21, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Jaime Muse, Arizona

Topics:

Acquitted Conduct (Amendment #1)

Firearms Enhancement for Altered/Obliterated Serial Number (Amendment #3A)

Firearms Grouping Rules (Amendment #3B)

Enhanced Drug Penalties for Death/Serious Bodily Injury (Amendment #5D)

Comments:

My only concern with making these retroactive is probation and the courts ability to address the massive number of cases that are going to be submitted for sentence adjustment. If it is decided that these will be retroactive, we need a plan to address how cases will be handled so the court system and probation is capable of managing them.

Submitted on: June 13, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Miloslava Plachkinova, Kennesaw State University

Topics:

Acquitted Conduct (Amendment #1)

Comments:

I agree with the proposed changes on acquitted conduct. If someone has been criminally charged and acquitted in federal court, I see no reason to punish them further. While my research on federal sentencing revealed that certain individual factors are typically taken into consideration when determining a sentence, including acquittal history would not benefit the sentencing process for several reasons. First, if judges take into account acquittal history, it is more likely that this factor would have a negative effect and lead to harsher sentences. Minorities and individuals with lower socioeconomic status are already at a disadvantage during sentencing and I would be concerned to include acquittal as an additional sentencing consideration. Second, using acquittal data to inform future sentences would undermine the judicial process and put an unnecessary burden on defendants. Additionally, it can stigmatize them and decrease their trust in the criminal justice system.
Thus, I support the proposed change to remove any mentions of acquittal history during sentencing.

Submitted on: June 12, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Cynthia Reyes, Texas, Southern

Topics:

Firearms Enhancement for Altered/Obliterated Serial Number (Amendment #3A)

Firearms Grouping Rules (Amendment #3B)

Comments:

At 2K2.1, comment. (n.10), the prior conviction should not have to be computable for it to count. If we have the supporting documentation that a defendant has a felony conviction, then the mere fact they have that prior felony conviction should suffice for the enhancement to apply at (a)(1), (2), or (3). They are considered prohibited from carrying weapons for a reason.

Submitted on: June 11, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Dawn Taylor, Laced In Grace LLC

Topics:

Acquitted Conduct (Amendment #1)

Firearms Enhancement for Altered/Obliterated Serial Number (Amendment #3A)

Firearms Grouping Rules (Amendment #3B)

Enhanced Drug Penalties for Death/Serious Bodily Injury (Amendment #5D)

Comments:

One person should not fall under the possibility of missing crucial sentencing amendments simply because of the timeline of their offense. I encourage and believe in retroactivity of any approved amendments. It's the just and right thing to do.

Submitted on: May 24, 2024

From: ~^! ARBAUGH, ~^!JAMES DANIEL
Subject: [External] ***Request to Staff*** ARBAUGH, JAMES, [redacted]
Date: Tuesday, May 21, 2024 6:48:12 AM

To:
Inmate Work Assignment: FPI ASMBL 1

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sentencing Commission:

I want to recommend that all of the issues which could result in less incarceration which are under consideration be made retroactive. Not making changes retroactive is an attack of the "perceived fairness" of the judicial system.

I feel particularly strong that Section 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to exclude acquitted conduct from the scope of relevant conduct should be made retroactive. The use of acquitted conduct at sentencing is an unconstitutional undermining of the role of the jury and diminishes "the public's perception that justice is being done..." One of the considerations on making changes retroactive is the expected court load. In the matter of acquitted conduct, a very small percentage of federal defendants go to trial. An even smaller number are acquitted. The people effected and the expected number of defendants who qualify are minimal. Please make these changes retroactive.

Respectfully submitted,
James Arbaugh

From: ~^! BARBIERI, ~^!FREDERIK
Subject: [External] ***Request to Staff*** BARBIERI, FREDERIK, [redacted]
Date: Saturday, June 1, 2024 6:04:53 PM

To: sentencing commission
Inmate Work Assignment: yard even

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sentencing Commission Members

I would like to comment that I was enhanced under the section 2k2.1(b)(4)(B), and I would like an opportunity to review the application of this enhancement. It is a great opportunity and only becoming retroactive that will give to me and others the chance to review and correct any mistakes caused by the Circuit courts conflicts and different opinions. Nevertheless I have been waiting this opportunity for 6 and half long years this is a miracle that, if we can comeback and have this issue reviewed.
Truly yours Barbieri [redacted]

From: ~^! BARTUNEK, ~^!GREGORY
Subject: [External] ***Request to Staff*** BARTUNEK, GREGORY, [redacted]
Date: Sunday, June 16, 2024 2:34:15 PM

To: Commissoin
Inmate Work Assignment: T-Ord

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing to you in support of making the amendment to Guidelines 1B1.3 and 6A1.3, prohibiting the use of "Acquitted Conduct" in calculating the Guidelines Offense Level, retroactive. Making these changes retroactive is supported by 1B1.10.

For decades, jurists have questioned using uncharged, dismissed, or acquitted conduct in sentencing, because doing so violates due process and the right to a jury trial. See "McClinton v. United States" 143 S. Ct. 2400 (2023) (collecting cases where many state and federal judges have questioned the practice of using such conduct in sentencing).

This will only affect a small amount of offenders (0.4%). This is most likely why the Supreme Court has not bothered to address this issue in the past. But for those offenders for which it does affect, the reduction of their offense level and resulting sentence can be significant. See, e.g., 2G2.2(b)(5), which adds 5 levels to the offense level.

Finally, since these individuals can be easily identified using court records, i.e., Indictment, PSR, Sentencing Documents, it will not be difficult to apply these changes retroactively.

I commend the Commission for taking this first step to correct this injustice in sentencing that has "gone on long enough." "Jones v. United States" 547 US 948, 949 (2014). But much work needs to be done.

Unfortunately, these changes will not help me, because the 2G2.2(b)(5) enhancement applied in my case was based on dismissed charges, not acquitted charges. I hope the Commission and Supreme Court will recognize that the logic in not considering not using acquitted conduct in sentencing equally applies to uncharged and dismissed conduct, because it is forbidden by our very Constitution. See Article III, Section 2, Clause 3, which states in part, "the trial of all crimes shall be by jury." In all three cases, the "crime" based on this past conduct was never proven beyond a reasonable doubt by a jury trial.

Punishing individuals, as in my case, for a past crime for which they were never found guilty by a jury trial is a gross miscarriage of justice. And, I hope in the near future all uncharged, dismissed, and acquitted conduct will be forbidden to be used in sentencing, period.

Thank you.

Sincerely,

Gregory Bartunek

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Brianna Blackwell-Miller

Topics:

Acquitted Conduct (Amendment #1)

Comments:

I am writing to urge the US Sentencing Commission to make the change to acquitted conduct retroactive. More often than not, changes in laws are enacted because society recognizes its past errors and seeks to correct them. The only way to truly meet that end is by making these changes retroactive so that those who have been unjustly punished under old laws have the opportunity to reclaim their lives and contribute positively to their families, and to society. This fosters a sense of hope and belief in rehabilitation over punishment. It sends a message that everyone is treated fairly under the law, regardless of when their offenses occurred. It is not solely about correcting past mistakes, it is also about creating a more equitable future for everyone.

Submitted on: May 17, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Nicole Boyle

Topics:

Acquitted Conduct (Amendment #1)

Comments:

I support the acquitted conduct (amendment #1) being retroactive. The 5th amendment to the United States Constitution states "No person shall not be deprived of life, liberty, or property, without due process of law" and the 6th amendment guarantees the right to a trial by a jury of peers. The use of acquitted conduct to enhance sentencing guidelines violates the defendants rights afforded them by the United States Constitution. A jury of peers selected by both prosecution and defense counsel weighed the evidence presented to them at trial, subsequently voting to acquit the defendant of the charged. Being able to sentence based on charges the defendant was found not guilty of is tantamount to reversing the not guilty verdict by the jury. The ability of a judge to overstep a juries verdict and mandate sentencing based on acquitted charges defeats the purpose of due process and a right to a jury trial. A defendant has the right to choose to face a jury trial or bench trial, should a defendant choose a bench trial, the judge has the ability to not only find the defendant guilty of all charges, but to sentence based on those convictions. Removing the juries decision from sentencing is similar to double jeopardy, due to a jury acquitting charges, and the defendant being sentenced for those very crimes. Those that are affected both in the past and in the future should be able to have their cases revisited and their sentences reviewed and adjusted appropriately. They should not be serving additional sentences for charges they were not convicted of. Vote affirmative to allowing acquitted conduct (amendment #1) to be retroactive allowing everyone affected by unjust sentencing guidelines to be afforded the ability to have their sentencing reviewed so that they can have appropriate sentences for the crimes they were convicted of assessed and implemented. Thank you.

Submitted on: May 26, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

James Brooks

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Dear U.S. Sentencing Commission,

I am writing in support of retroactive application of the recently adopted amendments to the U.S. Sentencing Guidelines concerning acquitted conduct. Applying this amendment retroactively is critical to ensure current inmates are judged solely for the crimes they were convicted of rather than the conduct for which they were acquitted. Indeed, a jury of those individuals' peers expressly decided that they were not guilty of these crimes, so there is no sound reason for such conduct to be considered in sentencing. Additionally, as the Commission's Office of Research and Data and Office of General Counsel recently found, the retroactive application of the acquitted conduct amendment would apply to a very small percentage of the current prison population and therefore would be easily implemented in courts across the country. I feel very strongly that this amendment should apply to all incarcerated persons retroactively and I urge the Sentencing Commission to make that decision. Thank you f
or reviewing my submission.

Submitted on: June 12, 2024

May 19, 2024

United States Sentencing Commission
Washington, D.C.

Ref: Acquitted Conduct Amendment with Retro Activation

Please accept and consider my full and undivided support for the Sentence Commissions Retro Activation of the November 1, 2024 change relating the courts use of Trial and Jury Induced Acquitted Offenses toward sentencing. Actions such as this have gone on for way too long by the courts when when a defendant wins he or she loses. What a system and what a lesson those such as me have learned about what defendants have to encounter additionally from electing to go to trial. Everything is so stacked against defendants and this is a terrific step to reduce the odds of getting a sentence that is unfair and unfounded.

Mark my support for the amendment change to include becoming Retroactive relating to Acquitted Offenses or Actions.

Thank you

Daniel Brown

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Samantha Burleigh, My loved one is effected by injustice of acquitted conduct

Topics:

Acquitted Conduct (Amendment #1)

Comments:

To the Honorable Members of the Commission,
I would like to extend my heartfelt gratitude for your attention to the critical issues surrounding acquitted conduct and sentencing. Your efforts in addressing these injustices are commendable and have brought renewed hope to many.
However, I must express that our work is only half done. My loved one has been severely affected by the consequences of acquitted conduct, turning our lives into an incredibly horrific nightmare. We have closely followed the cases of Osby, McClinton, and several others through the Supreme Court, and it was profoundly disappointing when they were not granted writs of certiorari last year.
The commission's recent actions have breathed new life into our hopes that these wrongs can be corrected. Nevertheless, true justice will only be achieved if these changes are applied retroactively. It is crucial that we do not leave behind those who have already suffered under these unfair practices. The individuals affected by acquitted conduct in sentencing have endured enough, often facing stacked sentences with little hope of relief.
My loved one is among those still fighting for justice, and we will continue this fight with renewed hope thanks to your recent amendments. However, the job remains unfinished until all affected individuals are granted the fairness they deserve.
Thank you for your time and consideration. Your ongoing efforts to rectify the injustices of acquitted conduct are deeply appreciated, and I urge you to extend these reforms retroactively to ensure comprehensive justice for all.

Sincerely,
Samantha

Submitted on: May 19, 2024

-----Original Message-----
From: tony clark
Sent: Monday, May 6, 2024 9:20 AM
Subject: Aquitted conduct

CAUTION - EXTERNAL:

I am a strong supporter for the elimination of the Aquitted conduct rule. It never should have been allowed and should be banished retroactively Sent from my iPhone I CAUTION - EXTERNAL EMAIL: This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.

From: ~^! DAY, ~^!CHANDRIQUE
Subject: [External] ***Request to Staff*** DAY, CHANDRIQUE, [redacted]
Date: Friday, May 31, 2024 9:34:05 AM

To:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I think that part (A) of Amendment 3 (relating to 2K2.1(b)(4)(B) enhancement), should be listed in 1B1.10(D) as an amendment that may be applied retroactively because the change of law should apply to everybody that has been affected by the previous law. It is only fair that it be made avaliable to previously sentenced defendants because they deserve the chance to have they sentenced rduced and be able to come home to their familes sooner. If the Commission does make the amendments retroactive it shouldnt put any limitations on how much the sentences may be reduced and allow the defendants to be sentenced within their new guidelines.

United States Sentencing
Commission.
One Columbus Circle, N.E., Suite
2.500
Washington, D.C.
20002 - 8002.

Michael Freeman [redacted]

Dear Sentencing Commission.

I Michael Freeman am writing towards Retroativity Relating to Acquitted Conduct.

I believe Retroativity for Acquitted Conduct Shuld be made, because no one That The Court Used Acquitted Conduct on got a fair Sentenced! I myself got a life Sentenced Just because My Judge believe I did The Crime. Before I got Sentenced I have no Criminal history, I Should have not gotten a life Sentenced.

However if you Make Acquitted Conduct Retroativite I would get a fair Sentenced. Thank You!

Please I Would love for you Sentencing Commissioners to take your time a read This Article Miss. Easha Anand Wrote about Acquitted Conduct When She Were Working for The Wall Street Jaurnal:

Thank Your for your time

Yours
Michael Freeman

November 26, 2008
Michael Freeman
[redacted]

Dear Mr. Freeman,

Thank you again for your time and generosity. I have not yet managed to get in touch with either Stephanie or Hyacinth, but I really appreciate your making their phone numbers available. I'm attaching a copy of the article as it stands right now.

Please keep in mind that my editors will most likely make it shorter and take out parts of it before it goes into the newspaper. Also, please keep in mind that the article is supposed to be balanced. It is supposed to show both your side and the side of the prosecutors. As we talked about, the side of the prosecutors is weaker, but it is still represented.

Thanks again for all your help. Keep the faith, and call me if I can ever do anything for you. My cell #, again, is [redacted]u have any questions.

Best,
Easha Anand
The Wall Street Journal
[redacted]

SENTENCE
By EASHA ANAND [redacted]

Like many of his peers at the Allenwood Penitentiary in White Deer, PA, 39-year-old Michael Freeman insists he's innocent of the crimes for which he was sentenced. But in Mr. Freeman's case, a jury agreed.

Five years and six months ago, a jury found Mr. Freeman guilty of robbery and possessing a firearm. But they acquitted him of two murders. Mr. Freeman was ecstatic: He would do his time, which he figured would amount to about a decade, and was already making plans for his release, like cooking curry goat for his two children and taking them to Disney World. He high-fived the courtroom's U.S. marshal, who told him, "You're good now!"

Back in his cell in the Metropolitan Correctional Center, Mr. Freeman shouted the good news into the vents, which allowed inmates in the floor above to hear him. They passed the word up, and up again.

Five years and two months ago, a judge sentenced Mr. Freeman to life in prison, the sentence for murder, a sentence that was affirmed upon repeal. Mr. Freeman wretched when he heard the judge's ruling. He managed to choke out the news days later to his brother, but couldn't bring himself to tell his mother. Mr. Freeman still hasn't told his 16-year-old son that he's doing life.

Sentencing defendants based on something a jury acquitted them of is not only legal, but in certain cases required, thanks to federal sentencing guidelines issued in 1987. Prosecutors say the system maintains judges' discretion. Defense attorneys argue that undermines the right to a trial by jury, and they're hoping that recent changes to the legal landscape will help them make their case.

A trilogy of rulings over the past 18 months have curbed the influence of the 1987 guidelines. In the wake of major changes to how the guidelines are used and applied, some advocates hope to float a new argument against acquitted conduct sentencing.

At the heart of the logic for acquitted conduct sentencing is a difference in the burden of proof at trial and at sentencing. At trial, the oft-cited "beyond a reasonable doubt" standard applies: Jurors can only convict if they see no plausible scenario in which the defendant is innocent. At sentencing, the standard is "preponderance of the evidence," meaning a sentencing judge only has to believe that one scenario is more likely than another.

Many cases have less than the slam-dunk evidence needed to convince a jury but more than the fractional advantage needed to add on years at sentencing. That gap explains why, for instance, OJ Simpson could be acquitted of criminal charges, but still have to pay damages at a civil trial, where the burden of proof is lower.

Nobody knows how prevalent this type of sentencing is, says Doug Berman, a law professor at Ohio State University. On his blog, Mr. Berman posts examples of such cases: In US v. Zuni, a defendant was convicted of kidnapping and sentenced for sexual assault. In US v. Ball, a conviction for a $600 drug deal led to a life sentence for murder.

Mr. Berman says that indicting a defendant on many counts is common, meaning that split verdicts--where jurors find a defendant guilty of some charges, but not others--are correspondingly common. But such cases aren't documented, and it's not clear how the impact of acquitted conduct sentencing would be tracked: For every case that goes to trial, there may be dozens where a prosecutor can drive a harder bargain because of acquitted conduct sentencing.

But in a half dozen off-the-record conversations, prosecutors and judges indicated that acquitted conduct is used in sentencing not to correct jury trials, but to inject shades of grey into what is often a black-and-white process.

"It is a much more nuanced issue than the people who are complaining about acquitted conduct are indicating," said Richard Chema, a prosecutor in Ohio.

One judge, who asked to remain anonymous so his remarks could not be construed as bias, said he tried two cases where defendants were convicted of drug possession. The first defendant was, by all accounts, an upstanding citizen on whom investigations had turned up no dirt; the second had narrowly evaded over a dozen charges related to dealing large amounts of crack.

"Sentencing parity, in that instance, would have been unfair and inconsistent," the judge said. "Should I pretend that I did not see or hear anything that was presented at the trial?"

Often, what a judge sees and what a jury sees differ, as appeared to be the case in Mr. Freeman's trial. When the jury foreman announced Mr. Freeman's acquittal, both Mr. Freeman and his lawyer, John Kaley, were surprised and pleased. Later, Mr. Kaley came to visit Mr. Freeman in jail, his usually impeccably knotted tie loosened.

"Now I believe in God," Mr. Kaley said, leaning back in his seat. "People are calling me left and right to congratulate me, you know."

"Send me some of that money," Mr. Freeman joked.

But the judge, Loretta Preska, who declined to be interviewed for the article, appeared surprised as well. In federal jurisprudence, there is a doctrine called the felony murder rule. It states that if someone dies during a felony, anyone responsible for the felony is also responsible for the murder. The jury found that Mr. Freeman participated in a robbery and that he brought a gun to the scene of the crime.

"The jury found him not guilty on [murder]," Mr. Kaley countered, according to the sentencing transcript.

"He participated in a robbery and possessed the firearm that was used to kill both of them during the robbery," Ms. Preska said. "What else is there?"

Asking the judge to ignore what seemed like a contradiction, some argue, is unfair. Defense lawyers, though, say there's a reason that the Constitution allows non-lawyers to serve as jurors. Judges, like other members of the legal system, become jaded after seeing too many cases.

"The fact of the matter is that most people who are prosecuted in federal court, and in state court, for crime X are in fact guilty of crime X," Norman Trabulus, the lawyer who represented Mr. Freeman on appeal, wrote in an e-mail. "But the fact is there are also atypical cases."

For years, defense attorneys argued against acquitted conduct sentencing on the grounds that it was unconstitutional, undermining jury trials and faith in the law. At least some judges appeared to be sympathetic: "This is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts night say, 'Acquittal first, sentence afterwards.'" wrote the Second Circuit in one case. But that court, like others across the country, had no choice to concede that acquitted conduct sentencing was legal.

Defense attorneys say there's a new argument to be made in light of legal developments since 2005. Before 1987, judges were free to issue sentences for any reason or for no reason at all. In 1987, the US Sentencing Commission issued sentencing guidelines that were supposed to spell out--in 800 pages of detail--exactly how each sentence should be calculated.

But in 2005, the Supreme Court changed its stance on sentencing. It said that the sentencing guidelines were only advisory, and not mandatory. It also said that any sentence, whether based on the guidelines or not, had to be deemed reasonable by the judge. Three other cases decided last year--Rita v. US, Gall v. US and Kimbrough v. US--emphasized that the guiding principle behind sentences should be what Congress intended.

Now, the Sixth Circuit Court is scheduled to weigh in on a novel argument, put forward by Mr. Berman and the attorneys for Roger White. The lawyers in White are arguing that acquitted conduct sentencing was never in line with the bill passed by Congress authorizing the guidelines.

Representing the paradigm shift from constitutional to policy objections is John Steer, one of the original members of the U.S. Sentencing Commission, which promulgated the 1987 guidelines. For years a supporter of acquitted conduct sentencing, Steers recently wrote a much buzzed about article in Champion, a magazine for defense lawyers, explaining that he'd changed his mind.

Mr. Steers said he still thinks there are good reasons to use acquitted conduct. Unlike many factors considered at sentencing, acquitted charges have already met one burden of proof, as they were included in an indictment. But the goal of the guidelines, Steers said, was to bring transparency to sentencing. Since so many judges have qualms about acquitted sentencing, they ignore the issue by declaring that the charges in question don't meet the "preponderance of evidence" test.

"No state sentencing system includes acquitted conduct, and that is because it has become highly discretionary and variable," said Mr. Steers, who has left the USSC. "One worries that including it in the guidelines has become just a word game."

On that last point, at least, Mr. Steer and Mr. Freeman are in agreement. Separated from family and friends, Mr. Freeman's Jamaican patois has given way to American vernacular. For the price of a pack of stamps, he's gotten tattoos on his biceps, and the scars at his wrists from the night of the robbery have healed into puckers. Mr. Freeman spends much of his time these days in the law library, trying to make sense of his case.

"It's like a game, this whole thing," Mr. Freeman said. "Like a game where the rules keep changing."

May 9-2024

US Sentencing Commission
Attn: Public Affairs Issues for Comment on Retroactivity
Washington, DC

[redacted]

Hello Commission:

My name is Frank Good and I am an inmate. I am submitting this letter in hopes it will aid in the commission and the Congress to agree that making Acquitted Conduct Retroactive is the only action that can be taken to promote trust to anyone involved or have a friend in any way having connections to the legal system. Redefining Relevant Conduct is well overdue. When the government makes a claim about a person and they are indicted for such the label of Relevant Conduct for the indictment stays with them throughout the legal process. At the point of being acquitted the Relevant Claim must be removed. In addition the sentencing acknowledgment in some form which stems from the jury's decision of not guilty needs to stand for not guilty.

Sentencing Commissioner Judge Carlton W. Reeves said "By enshrining the basic fact within the federal sentencing guidelines, the Commission is taking an important step to protect the credibility of our courts and criminal justice system." I applauded his comment but must disagree that the Commission is taking a step to install credibility within the courts and criminal system. Throughout all the negative news presented daily this action will only strengthen the courts and criminal system. Stop penalizing the innocent and convict only the guilty. Return to the decision of defendants that they have a chance for fairness if they elect to enter into a courtroom fighting for their freedom. Not everyone is guilty of everything. The government already far exceeds the limits of claiming conspiracy toward incidental contact. Let's provide support for the jury's decision that is the way system was intended.

Thank you,

Frank Good

From: ~^! HARLING, ~^!BRIAN ROBERT
Subject: [External] ***Request to Staff*** HARLING, BRIAN, [redacted]
Date: Tuesday, May 28, 2024 2:19:21 PM

To:
Inmate Work Assignment: rec spec

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

924 (c)(ii) should not be put in a specific category when grouped together, and should be considered for a sentence reduction.

From: ~^! HOLLEY, ~^!JAMES CECIL JR
Subject: [External] ***Request to Staff*** HOLLEY, JAMES, [redacted]
Date: Monday, May 20, 2024 2:05:19 PM

To: USSC
Inmate Work Assignment: NA

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Commenting towards retroactivity of grouping of firearms.
I do believe the counts should be grouped together if it lessens the time an inmate recieves for a firearm offense for one gun and with 2 seperate sentences for 922g and 924c. And yes it should be applied retroactively.

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Alexia Jones

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Making criminal reform laws retroactive is essential for achieving true justice and societal progress. Outdated laws have resulted in harsher sentences, tearing families apart and perpetuating cycles of poverty and incarceration. Retroactivity offers a chance to right these wrongs and rectify past injustices.

By applying reforms retroactively, it acknowledges the evolving understanding of justice and fairness. It's a declaration that our society recognizes its past errors and is committed to correcting them. Those who have been unjustly punished under old laws deserve the opportunity to reclaim their lives, rejoin their communities, and contribute positively to society.

Moreover, retroactivity fosters trust in the legal system. It sends a powerful message that the law is not stagnant but adaptable, capable of reflecting contemporary values and knowledge. This fosters a sense of hope and belief in rehabilitation over punishment, ultimately leading to safer and more cohesive communities.

In essence, retroactive criminal reform is not merely about correcting past mistakes but about building a more just and equitable future for all. It's a crucial step towards a society where everyone is treated fairly under the law, regardless of when their offenses occurred.

Submitted on: May 10, 2024

Ronald Jones Jr.
[redacted]
FCI Terminal Island
P.O. Box 3007
San Pedro, CA 90733

June 5, 2024

UNITED STATES SENTENCING COMMISSION
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Attn: Public Affairs for Comment on Retroactivity

To the United States Sentencing Commission:

My name is Ronald Jones Junior and I am a prisoner at FCI Terminal Island. I write to support the retroactivity of the application of the four amendments under current consideration. I believe I would be affected if the amendments were made retroactive and allow me to argue my incorrect sentence in my case (20498-SHM, W.D. Tenn, 2004 & 2012).

My case went to trial and the jury found me guilty of Count 2, possession of methamphetamines, but there was no finding of the amount of drugs. The government failed to prove by a preponderance of the evidence. The district court, however, adopted the "facts" in a presentence investigative report without an adequate evidentiary basis with sufficient indicia of reliability, and I believe committed clear error in doing so, because it relied on a 1998 drug conviction. It also found that I had a leadership role, another fact not found by the jury in my trial. The district court should not have adopted this "fact" as true. I was resentenced in 2012 to 360 months.

This unlawful sentence stemmed from the 2004 indictment of Counts 1&2 charged by the Western District of Tennessee. The application of career offender and leadership role was based on acquitted conduct, which is error.

The jury was not instructed or asked to determine whether my offense resulted in "death" and returned no special finding on the issue or on the amount of drugs involved. The conviction that the jury actually returned carred a statutory maximum penalty of ten (10) years, not thirty (30) years. Therefore, this sentence violated my constitutional rights as set forth in Apprendi. Being denied relief of all retroactive benefits stemming from the 2-point reduction of 2014, the FSA in 2018, and the acquitted conduct amendment (USSG 1B1.3), the juvenile sentence elimination the proposed Guideline amendments of Nov 2024 should be retroactive.

Jones Ronald Jr.
Ronald Jones Jr.

To: U.S. Sentencing Commission

Hello,
I'm writing you today on behalf of the public a simple and short answer.
The Public petitions: YES to make the change to Acquitted Conduct Retroactive, the change to juvenile sentences that eliminates adding 2 points for probe incarcerations of more than 60 days, Depart Downward based on age, 2K2.1 (b)(4)B)(i), USSG 2K2.4; all Retroactive.

Not guilty means Not guilty; Yesterday, Today, and Tomorrow.

No one should suffer for something they did Not do, even if it's been years.
Those already sentenced should receive relief from the injustice that's been done to them.
The Public agrees to make the changes Retroactive for all.

Respectfully signed, Sherry Joseph [redacted] Date: 05.10.2024

Dear Legislators,

I am writing to express my strong support for the proposed Guideline amendments in the Firearms Grouping Rules (Amendment #3B) be applied retroactively.

These guideline change is a critical step towards a fairer and more equitable justice system. Mandatory minimums have often led to disproportionately harsh sentences, particularly affecting marginalized communities such as those suffering from substance use disorder. By making these changes retroactive, we acknowledge that people can and do change, and we offer them a chance to reintegrate into society and lead productive lives.

Please apply these changes to all individuals and families that have been negatively impacted and help bring hope and mercy to those already currently experiencing these effects.

Below I have included the letter to the judge at the time of my sisters sentencing of 10 and 5 years to be served consecutively due to current guidelines. If you have time to read it I think it bares relevant to more individuals impacted by this guideline than just my sister.

Thank you for your time and consideration in this matter.

Sincerely,
R. Miguel Magallanez
Jeffersonville, IN

Dear Judge James R. Sweeney II,

I've been putting this off for far too long, struggling with what to say in this letter. I understand that there is no escaping the consequences of the actions Juliann chose. What I would like to convey is that there is much more to the story of who she is than the poor choices she has made in life. My hope is that when you look at Juliann, you don't see a criminal mastermind, someone striving to be Pablo Escobar, but that you see a person—a sister, a daughter, a mother—who has walked through a tremendous amount of trauma, turning to drugs and never been able to escape the grips of addiction. Whose decision-making was, at least in part, significantly affected by long-term drug use.
I am Juliann's older brother by nine years. We share the same father but have different mothers. We come from a long line of addicts: our paternal grandfather, our father, her mother, multiple aunts and uncles on both sides of her family, along with myself and our older brother as well. I often compare it to families that have generations of lawyers or doctors or engineers because Grandpa was a doctor, Dad was a doctor, and their uncle, too. We all just went into the family business.
I lived with Juliann, my dad, and his wife for a number of years when she and I were young. I was around the age of 15 when I realized that the constant poverty, disconnected power, eviction notices to two adults working full-time with never a dollar to spare had some other issues going on. I vividly remember my dad kiting checks with my paper route money, along with the multitude of excuses why the food was short, the phone was off, or the power was down once again. Our bedrooms were across the hall from each other upstairs, and there were many nights that I would

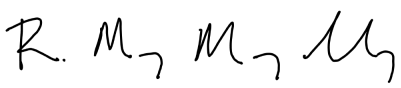
have to bring Juliann into my room to sleep because it sounded like a war zone with the yelling, the screaming, and the banging coming from the floor below. Later in life, we tried to make jokes about the plywood in the table where the glass used to be, about the pictures that covered all the holes in the walls, and all the other chaos that occurred in the house.

I left Juliann there after high school, and four years later, my dad passed away as a direct result of the disease of addiction. During those four years, I picked up an addiction of my own to opiates, using intravenous heroin on a daily basis. Over the next few years while struggling with my own addiction, I knew that things weren't good for Juliann, but I didn't possess the ability to do anything about it.

On November 15, 2003, with the help of a 12-step program, I found recovery. Over the next few years, I struggled to put my life back together, enrolled in college, and moved forward with my life. I had contact with Juliann via phone and a visit here and there, and although she had some troubles, I hoped that she would be okay.

As she got older, I began to see the same signs that I saw in my father and her mother that I practiced myself for so many years, and I did what I could, offering support, offering her to come to Louisville, Kentucky, where I was living, to try and get her life together. I knew that she was in the grips of addiction. When she went to prison, we spoke on the phone often because I knew that she was abstinent from drugs. During that time, I visited her monthly, and we had long conversations about what would be necessary in order for her to sustain recovery in her life, but she returned to the same environment that she had left from and made the mistake that I see so many addicts make over and over—not prioritizing her recovery—and she soon returned to active drug use. I didn't see it. I didn't need to. I could just tell by the sound of her voice. I made a decision around that time to tell her that I could no longer have contact with her until she was ready to enter treatment.

Sincerely,



R. Miguel Magallanez

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Isaac Mattson

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Dear U.S. Sentencing Commission,

My name is Isaac Mattson. I am a concerned citizen who would like to speak up on a subject important to me. I am writing in support of retroactive application of the recently adopted amendments to the U.S. Sentencing Guidelines concerning acquitted conduct. Applying this amendment retroactively is critical to ensure current inmates are judged solely for the crimes they were convicted of rather than the conduct for which they were acquitted. Indeed, a jury of those individuals' peers expressly decided that they were not guilty of these crimes, so there is no sound reason for such conduct to be considered in sentencing. Additionally, as the Commission's Office of Research and Data and Office of General Counsel recently found, the retroactive application of the acquitted conduct amendment would apply to a very small percentage of the current prison population and therefore would be easily implemented in courts across the country. I feel very strongly that this amendment should apply to all incarcerated persons retroactively and I urge the Sentencing Commission to make that decision. Thank you for reviewing my submission.

Submitted on: May 23, 2024

From: ~^! PARKER, ~^!DEREK JOSEPH
Subject: [External] ***Request to Staff*** PARKER, DEREK, [redacted]
Date: Tuesday, June 11, 2024 2:34:24 PM

To: Honerable Judge Reeves
Inmate Work Assignment: food service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Your Honor,
Hi I hope you are well. I saw the thing about taking 5 minutes to make the guidelines better. Here's my comment and 2 cents, Ill try to make it fast.

Okay so I had commented on the proposed amendment for the enhanced offense levels of 2d1.1 a1-a4. the guidelines concerning the death results enhancement. The proposed amendment portion said "The Commission has heard concerns that it is not clear whether the enhanced offense levels apply only when the def. was convicted under USC 841 or USC 960 because each stat. element was established or whether they apply whether the def. meets applicable requirements...."
the Commission provided two options- and it looks like they went with option one as they should have as it was in line with the statute everything that comes with it-- like the line of stare decisis that defined the requirements of the "results from" language of the death results provision.,due process, separation of powers and all that. Basically what many circuits were doing was weaponizing the guidelines to circumvent the statute. Allowing prosecutors in my circuit and others to get around Burrage,Apprendi, and Alleyne. SO even if you weren't guilty of the death results provision by the supreme courts interpretation of Congresses intent- you could be charged with the death results guideline although you were by law innocent of it.
This was very bad. This happened to me and as a former drug addict, first time offender, I was given 20 years in prison for something i found out was not my fault. That i got heroin (that i also used) for someone and they mixed a bunch of drugs together and died. The case law Burrage should have prevented that but the wording allowed prosecutors and judges to get around it.
It seems that you are going with option one but honestly it still is vague. The only way i knew for sure that option 1 was picked because it finally mentioned the statute in the revised(planned) guideline provision. That and the death results language was scratched altogether from the guideline so i guess therefore it would have to fall in line with the requirements of the statute. It would have been better to word it as it was presented in the proposed amendments. It was more clear. But anyway thankfully you went with option one and that will help to make things right.
As this case involves me i was pretty well versed in the language and law surrounding this enhancement. So I have seen many injustices done involving this enhancement. Not only mine where I was not guilty of that provision and had the proof to show it but also others, mainly black people who seem to only have been charged with the death results provision because they were black. I say this because helping people with these cases, it sure did seem like there were conspiracies or multiple people involved but yet it was always the black guy charged with the death even though the drugs passed many hands along the way.
This is why its so important that option 1 is put into effect, to prevent vindictive or racist drug agents ,prosecutors, or Judges from applying the death results provision where they feel like it and not in line with the actual law surrounding it.
I believe in Justice still, I believe in America and the constitution, and although i got railroaded, (even the "victim"s

mother in my case feels the same way and is now a friend) I still love my country and I want to see things get made right. SO that first time offenders like me, non violent drug offenders, like me and many others do not get convicted of laws they did not violate.
Thank you,
May the Holy One, Blessed is He, Bless you now and always
Derek Parker

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Justin Rizzo-Weaver

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Public Comment Submission
U.S. Sentencing Commission
1100 H Street NW, Suite 1000
Washington, D.C. 20005

Dear Honorable Members of the U.S. Sentencing Commission:

I am writing to express my strong support for making the recent amendment that bans the use of acquitted conduct in calculating guideline sentences retroactive. This change is not only a testament to the integrity of our criminal justice system but also a vital step toward rectifying past injustices that have unfairly impacted many lives.

The principle that "Not guilty means not guilty," as eloquently stated by Judge Carlton Reeves, should be retroactively applied to ensure that all individuals are treated fairly under the law. It is imperative that this principle govern all sentencing, past and present, to maintain the credibility and trust in our judicial process.

Research consistently shows that the use of acquitted conduct in sentencing undermines the fundamental tenets of justice and disproportionately affects minority communities. A study by the Sentencing Project highlights that such practices contribute to significant racial disparities within our criminal justice system, which erodes public confidence in its fairness and effectiveness.

Allowing those already sentenced under the old guideline that included acquitted conduct to request sentence reductions would not only correct a grave injustice but also align with bipartisan efforts to reform sentencing practices and enhance judicial discretion.

As the Commission considers this important decision, I urge you to reflect on the values that our justice system is built upon—fairness, equity, and respect for the rule of law. Making the ban on acquitted conduct retroactive is not merely a procedural update; it is a restoration of justice and a reaffirmation of our commitment to the principles of due process and equal protection under the law.

Thank you for considering my views on this critical issue. I look forward to your decision to uphold the highest standards of justice and fairness by making this change retroactive.

Sincerely,

Justin Rizzo-Weaver
[redacted]

Submitted on: May 3, 2024

May 13, 2024

United States Sent. Commission
One Columbus Circle
NE, Suite 2-500
Washington DC 20002-8002
Ref: Comment on Sentence Retroactivity for Acquitted Conduct (USSG 1B1.3)

Dear Sent. Commission;

When reading the details of the current open forum request for comments I am overwhelmingly anxious to submit my vote for the Retro activation of the amendment Nov. 2024. When reading a concern of the commission relating to worrying that the amendment might crowd the courts for the less than 250 inmates that this change might affect I was alarmed. To know there are over 600 active judges and over 200 on part time status this amount of freedom greatly overcomes the courts added small percentage of cases. The system seems even when altering for the betterment of the fairness to the public is presented, method to drag the change down is thrown in to make the changes appear the system is being changed. Understanding that when a jury collaborates to acquit a defendant's offenses and then court has what is termed as relevant conduct based on preponderance of conduct I was not shocked to learn of another way to incarcerate a defendant. This has gone on too long and I hope the commission and congress realize that those inmates incarcerated and all who have suffered from this disadvantage need a beacon of change to be applicable to them. This has been severe unjustness, the amendment should be made Retroactive through a complete shutout in votes by Congress as well.

It was documented that SCOTUS has around 13 cases that are pending review and decision that all relate to Acquitted Conduct. It appears they are waiting for a ruling which might also be for a Retroactive change as they would support the changes as well.

This victory for the defendant is actually a restoration of the intended process of innocence or guilt surrounding the jury's impartial decisions regarding innocent defendants being victimized by the system to set examples awarded by extended and enhanced sentences.

Please submit my comment to make Retroactive the Acquitted Conduct Amendment.

Thank you for this forum and change,

Ronald Saunders

Ronald Saunders

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Madeline Scarp

Topics:

Acquitted Conduct (Amendment #1)

Firearms Enhancement for Altered/Obliterated Serial Number (Amendment #3A)

Firearms Grouping Rules (Amendment #3B)

Enhanced Drug Penalties for Death/Serious Bodily Injury (Amendment #5D)

Comments:

Not guilty means not guilty! The amendments relating to acquitted conduct should absolutely be applied retroactively.

The other amendments should also be considered for retroactive application.

Submitted on: May 17, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Gina Silva

Topics:

Acquitted Conduct (Amendment #1)

Comments:

I believe it should include in the Guidelines Manual as changes that may be applied retroactively to previously sentenced defendants to any or all of the following amendments: Amendment 1; Part A of Amendment 3; Part B of Amendment 3; and Part D of Amendment 5.
I believe it will be a small step to reforming a very flawed judicial system.

Submitted on: May 27, 2024

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Ilihia Sonognini

Topics:

Acquitted Conduct (Amendment #1)

Comments:

I am writing to urge the US Sentencing Commission to make the change to acquitted conduct retroactive. More often than not, changes in laws are enacted because society recognizes its past errors and seeks to correct them. The only way to truly meet that end is by making these changes retroactive so that those who have been unjustly punished under old laws have the opportunity to reclaim their lives and contribute positively to their families, and to society. This fosters a sense of hope and belief in rehabilitation over punishment. It sends a message that everyone is treated fairly under the law, regardless of when their offenses occurred. It is not solely about correcting past mistakes, it is also about creating a more equitable future for everyone.

Submitted on: May 13, 2024

From: ~^! STEVENS, ~^!RALPH ANDREW
Subject: [External] ***Request to Staff*** STEVENS, RALPH, [redacted]
Date: Sunday, May 26, 2024 7:34:18 PM

To:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To whom it may concern:

I am an inmate in BOP custody who Amendment 3 would affect if applied retroactively. I feel that retroactively removing/reducing the dual application of enhancements, punishments would be more fair; better reflecting the no double jeopardy enshrined in our nation's constitution. It would allow me to get home to my family some small bit sooner, as well.

Thank you,
Ralph Stevens

May 19, 2024.

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs issues for comment on retroactivity.

Dear Commission:

I am writing to urge Congress to make the acquitted conduct amendment retroactive, ensuring that justice is served for individuals like Marcus Roosevelt Taylor, whose Constitutional Rights have been violated by being sentenced based on charges for which they were aquitted, by a federal jury. MRT.

In or about fiscal year 2023, the Pew Research Center analysis revealed that only 0.4% of defendants in federal criminal cases went to trial and were acquitted while 1.9% were found guilty at trial. A staggering 89.5% of defendants pleaded guilty, and 8.2% had their cases dismissed, highlighting that the overwhelming majority of cases did not go to trial. These statistics underscore the rarity of acquitals in federal courts, and the profound importance of respecting those acquittals when they do occur.

As Commission Chair Judge Carlton W. Reeves aptly stated: "Not guilty means not guilty. By enshrining this basic fact within the federal sentencing guidelines, the Commission is taking an important step to protect the credibility of our Courts and criminal justice system."

Making the acquitted conduct amendment retroactive would ensure that this principle is upheld in all relevant cases, restoring faith in the integrity of our judicial system.

It is clear that by sentencing an individual who exercised their right to a trial and was acquitted of certain charges,

only to punish one by enhancing a sentence on acquitted charges violates an individuals Constitutional Rights. Specifically:

1. Fifth Amendment Due Process Clause: Sentencing an individual based on charges for which they were acquitted undermines the presumption of innocence and violates Due Process.

2. Sixth Amendment Right to a Jury trial: The Sixth Amendment gurantees the right to a fair trial by Jury. By incorporating acquitted conduct into sentencing, the Court would effectively disregard the Jury's verdict, thus nullyfying the Jury's role and verdict.

The April 17, 2024, Amendments for Acquitted Conduct in the United States Sentencing guidelines aim to correct such injustices by affirming that "Not guilty" should mean precisely that in the context of sentencing. Therefore, making those amendments retroactive is imperative to rectify past sentencing errors and uphold the fundamental rights guaranteed by the Constitution. And would not overburden the Courts.

Although, I still maintain my innocence in my case and diligently working to prove such. I respectfully urge Congress to act swiftly in making the acquitted conduct amendments retroactive. This change is crucial for maintaining the integrity of our Judicial system and ensuring that all individuals are sentenced fairly and justly, in accordance with the principles of Due Process, the Constitution, and the right to a Jury trial and it's verdict.

Sincerly,

Marcus Roosevelt Taylor, [redacted]

[redacted]

From: ~^! TOXEY, ~^!MAURICE DWIGHT
Subject: [External] ***Request to Staff*** TOXEY, MAURICE, [redacted]
Date: Wednesday, May 22, 2024 7:04:25 AM

To: bop
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

i think the enhancements for drug offenders should be passed retroactivily,it is not right to enhance peoplke for charges they have already did time for..reducing sentences,is a must,ireally apprecite these laws passing,it gives me hope that i will be wit my family soon,and ican show my son,that im achange man and i can live a positive and normal life and ill never leave him for this long again.so please pass tese laws and take the drug enhancements off!Thank you..

From: ~^! VALDEZ, ~^!SANTIAGO
Subject: [External] ***Request to Staff*** VALDEZ, SANTIAGO, [redacted]
Date: Tuesday, May 21, 2024 1:05:24 PM

To: U.S Sentencing Commison
Inmate Work Assignment: Food Warehouse

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

i will like to commment on the ongoing amendements to the sentencing guidelines as a Drug offender i believe that section of the amendment be made retroactively in wich it will impact drug offenders and even myself i appreciate that the commison has look into that and hope that in the future consider amending the carrer offender guidelines wich is a big burden for alot if prisoners like me. thank you and God Bless You.

*

May 8, 2024

United States Sentencing Commission
Attn: Public Affairs for Comment on Retroactivity
Washington DC

Dear Commissioner;

Thank you for allowing me to express my opinions and concerns relating to the discussions to Acquitted Conduct and it's decision for Retroactivity. Upon reading the discussion's provided through legal counsel newsletters and such this decision should be a an easy decision and without question it should be made Retroactive. Fully understanding some concerns from previous amendments becoming Retroactive where inflation for example is the basis this is about Truths. When a defendant is found Innocent and thus "Acquitted" for actions of which the jury standards are of the utmost strongest standards, their verdict should be acknowledged as such "Not Guilty". What the legal system has been able to do for years is to skim off the top in a manner of words, in to give defendants extra sentencing periods that really should challenge the mind when viewing for it within a Common Sense Foundation.

When a defendant is given these extended points for example the points are not consistent at the top end in comparison to the front end points, and this results is inflated sentences. As an example if a person gets 15 points or levels and receives a 2 point reduction for something, that actual percentage of reduction is far less than when a person who has 34 points or levels and receives a 2 point/level reduction. So these points or levels which are added generally called enhancement's, and enhance each sentence in negative proportion adding larger totals of incarceration.

The DOJ and others who would oppose the Retroactivity of Acquitted Conduct probably have no idea what it is like to go to trial where anyone with a pulse knows the odds are so stacked against them but inside feel the court and the government are deep down fair. Then when it is over and you have even a small victory of Acquitted Offenses to your credit, then to have it swept under the rug because of convictions and long sentences are the impetus believed to rehabilitation by the DOJ is a lack of justice.

My wish is for the Commission and Congress to agree that Acquitted Offenses must be Retroactive. I appreciate the opportunity to share my views.

Mark Wilson - [redacted]

Public Comment - Issue for Comment on Retroactivity of 2024 Amendments

Submitter:

Tyler Wilson May. 23, 2024

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Dear U.S. Sentencing Commission,

I am writing in support of retroactive application of the recently adopted amendments to the U.S. Sentencing Guidelines concerning acquitted conduct. Applying this amendment retroactively is critical to ensure current inmates are judged solely for the crimes they were convicted of rather than the conduct for which they were acquitted. Indeed, a jury of those individuals' peers expressly decided that they were not guilty of these crimes, so there is no sound reason for such conduct to be considered in sentencing. Additionally, as the Commission's Office of Research and Data and Office of General Counsel recently found, the retroactive application of the acquitted conduct amendment would apply to a very small percentage of the current prison population and therefore would be easily implemented in courts across the country. I feel very strongly that this amendment should apply to all incarcerated persons retroactively and I urge the Sentencing Commission to make that decision. Thank you for reviewing my submission.

Submitted on: May 23, 2024

UNITED STATES SENTENCING COMMISSION
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