United States Sentencing Commission

2023-2024 Amendment Cycle

Reply 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 REPLY 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?

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

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Chair: Heather Williams Phone: 916.498.5700

July 22, 2024

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

Re: Defender Reply Comment on Retroactivity of Certain 2024 Amendments

Dear Judge Reeves:

Thank you for the opportunity to provide comment and witness testimony on the retroactivity of certain 2024 guideline amendments. This letter provides the Federal Public and Community Defenders' reply to some of the issues raised in written comments and at the retroactivity hearing.

This reply is limited to four topics: (1) the misinterpretation of data in the Commission's impact analysis related to the Acquitted Conduct amendment (below); (2) the relationship between the finality of sentences and deterrence, and principles that may limit retroactivity (page 3); (3) the argument that eligible individuals sentenced under the enhanced drug base offense levels will potentially receive two "windfalls" (page 6); and (4) the need for a diversity of crime victim perspectives (page 8).

I. Data Related to the Acquitted Conduct Amendment

Referencing table 4 of the Commission's Impact Analysis,[1] some commenters have maintained that a significant percentage of individuals

[1] *See* USSC, *Retroactivity Impact Analysis of Certain 2024 Amendments* 10–11 & tbl. 4 (May 17, 2024).

eligible for reduction if the Acquitted Conduct amendment is made retroactive were convicted of violent offenses.[2]

There are two flaws with this argument. *First*, table 4 provides data for most of the 13,500 incarcerated individuals who were convicted after trial.[3] Of course, the vast majority of those individuals were not acquitted of one or more charges and would not be eligible for a reduction.[4] It is impossible to know, from the data provided for the larger group, the offense type for the much smaller group of individuals who were acquitted of at least one offense.

Second, and more fundamentally, even if the statistics in table 4 provided a meaningful indicator of characteristics for this much smaller group, we understand that the "type of crime for the instant offense" listed in the table is based on the primary sentencing guideline, not on the statute of conviction. Because of the Manual's many cross-references, prior to this amendment, individuals could be sentenced under a primary guideline for an acquitted offense. Indeed, for individuals who would be eligible for a reduction, it's very possible that the most serious offense types listed in the table (*e.g.*, murder) are *acquitted* offenses, not convicted offenses. For individuals who were *convicted* of a serious offense, but *acquitted* of something more minor, their guideline calculation would have been driven by the convicted crime, not the acquitted one, and thus they would be ineligible for a reduction.

Moreover, there are mechanisms built into the retroactivity statute, the Commission's policy statement, and § 3553(a) to ensure that people who

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[2] *See*, *e.g.*, Letter from Honorable Edmond E. Chang on behalf of the Criminal Law Committee to the U.S. Sent'g Comm at 6 (June 21, 2024) (claiming nearly 50% of people who would be eligible for a retroactive sentence reduction under this amendment were convicted of violent offenses); Letter from Mary Graw Leary on behalf of the Victims Advisory Group to the U.S. Sent'g Comm at 6 (June 21, 2024).

[3] Commission staff estimated that only 1,971 people incarcerated in the BOP (as of January 2024) were acquitted of one or more charges against them. *See* Impact Analysis, *supra* note 1, at 7.

[4] *See id.*

pose a threat to public safety do not receive relief.[5] This means that a favorable retroactivity decision "does not entitle a [movant] to a reduced term of imprisonment as a matter of right."[6] Judges are more than capable of weighing all the appropriate factors—including, among others, the individual's history, the circumstances of the offense, and the need to protect the public—to decide whether to reduce the sentence, and the extent of any reduction.

II. Finality, Deterrence, and Limiting Principles

CLC and DOJ suggest, in their comments, that retroactivity undermines finality and erodes deterrence.[7] Both CLC and Commissioner Boom pointed out that of the approximately 800 amendments the Commission has promulgated since its inception, only 30 have been made retroactive. Relatedly, Commissioner Boom asked what, if any, limiting principles ought to be applied in this context.

First, on the relationship between finality and deterrence: Defenders can find no obvious, empirical support for the oft-cited notion—generally linked to a habeas case about the finality of criminal *convictions*—that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[8] At the specific individual level, the Commission's own research

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[5] *See* 18 U.S.C. §§ 3582(c)(2) (providing that the court *may* reduce the term of imprisonment only after considering the § 3553(a) factors) and 3553(a) (describing factors to consider in imposing sentence, including, *inter alia*, the nature of the offense, the history of the person being sentenced, and the need to deter criminal conduct and protect the public); USSG §1B1.10 comment. (n. 1(B)(ii)) (requiring courts to consider the "nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment" in deciding both whether to reduce the sentence and the extent of any reduction).

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

[7] *See* Letter from Judge Chang, *supra* note 2, at 3; Letter from Scott Meisler on behalf of DOJ to the U.S. Sent'g Comm at 2–3 (June 21, 2024).

[8] *Teague v. Lane*, 489 U.S. 288, 309 (1989). The Court in *Teague*, and others who have repeated *Teague*'s warning, generally do not provide empirical support from research studies that would justify the purported correlation between finality and deterrence. Significant scholarship typically fails to mention any role for the "finality" of sentences in deterrence theory or in practice. *See generally, e.g.*, Daniel

reveals no specific deterrence threat to retroactivity.[9] At the general population level, effective deterrence requires a connection between the perception of the penalty and one's behavior.[10] But individuals who commit crime are often unaware of, and often underestimate, specific sanctions.[11] Further, it's unlikely that they are even aware of the remote possibility that a retroactive federal sentencing guideline reduction might one day apply to them, or that such a remote possibility would ever influence their decision-making such that they would discount the perceived severity of any potential sentence.[12] Parole has been a longstanding practice, yet we are not aware of any critical studies showing that the possibility of discretionary early release through parole undermines the goal of deterrence.[13] Finally, because most crimes do not result in arrest and most people who commit crimes do not

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S. Nagin et al., *Deterrence, Choice, and Crime, in* 23 Advances in Criminological Theory 3 (2018); Travis C. Pratt et al., *The Empirical Status of Deterrence Theory: A Meta-Analysis, in* Taking Stock: The Status of Criminological Theory 367 (Francis T. Cullen et al., eds., 2008).

[9] *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).

[10] *See* Valerie Wright, The Sentencing Project, Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment 3 (2010).

[11] *Id.*; *see also* Robert Apel, *Sanctions, Perceptions, and Crime*, 5 Annu. Rev. Criminol. 205, 207–09 (2022) (citing empirical studies showing that individuals often underestimate the maximum sentences for various categories of crimes); Dep't of Just., Nat'l Inst. of Just., Five Things About Deterrence 1 (2016) ("Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because [people] know little about the sanctions for specific crimes.").

[12] *See* Wright, *supra* note 10, at 3.

[13] Research on the deterrent value on the back end (meaning reoffending after serving a prison sentence) for determinant versus indeterminate sentencing systems indicates no consistent differences for those released early or not. *See, e.g.*, David Marble, *The Impact of Discretionary Release on Offender Recidivism*, 3 Corrections 1, 11 (2018); Yan Zhang et al., *Indeterminate and Determinate Sentencing Systems: A State-Specific Analysis of Their Effects on Recidivism*, 60 Crime & Delinquency 693, 709–11 (2014).

believe they will be caught, few individuals are incentivized by tough sentencing laws and policies.[14]

Second, on the idea that the Commission has historically applied a presumption against retroactivity because only 30 of 800 amendments have been made retroactive: we do not know how many of those 800 amendments *could have* been made retroactive. Retroactivity applies only to amendments that lower the guideline range.[15] And many—if not most—of the amendments passed over the years have *increased* ranges.[16] Others have had no impact on guideline ranges.[17] Thus, the 800 denominator tells us nothing.

Third, on the question of what limiting principles should guide this Commission: the Commission should be guided by 28 U.S.C. § 994(u) and its policy statement at §1B1.10. Neither sets forth a presumption against retroactivity, nor do they warn that retroactivity is the exception, not the rule. Section 994(u) gives the Commission broad discretion to determine the circumstances under which ameliorative amendments will be made retroactive and the permitted extent of any reduction. Section 1B1.10 establishes three primary factors to weigh in determining retroactivity: purpose, magnitude, and administrability.[18] Defenders articulated in our original comment the reasons why these three factors favor retroactivity for all four amendments.

The Commission is not confined by any additional limiting principles that may appear to have been placed on retroactivity by prior

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[14] *See* Wright, *supra* note 10, at 2.

[15] *See* 28 U.S.C. § 994(u).

[16] *See, e.g.*, Fed. Defender Comments on the U.S. Sent'g Comm's Proposed 2024–2025 Priorities, at 4–6 (July 15, 2024) (discussing the guideline "factor creep" over the years that has led to elevated base offense levels, increased SOC enhancements, and an overall ballooning of guideline sentence lengths).

[17] *See, e.g.*, USSG Supp. to App. C, Amend. 821, part C (revising commentary to §4A1.3 to include sentences resulting from marijuana possession as an example of when a criminal history downward departure may be warranted).

[18] Section §1B1.10's background commentary also suggests the Commission should consider whether the reduced range is sufficient to achieve the purposes of sentencing.

Commissioners. And even if this Commission feels duty-bound to heed the remarks of former Commissioners, the one that appears time and again throughout the years in retroactivity hearing transcripts is this: Amendments that redress a fundamental unfairness in our criminal legal system are those most deserving of retroactive treatment.[19] It would be difficult, indeed, to square this admonition with a decision not to make the Acquitted Conduct amendment retroactive.

III. Enhanced Drug Base Offense Level "Windfalls"

DOJ testimony regarding retroactivity of the Enhanced Drug Base Offense Levels amendment characterized individuals who would be eligible for a reduction as having received a "windfall" from prosecutors who decided not to pursue mandatory minimums in cases involving a death or serious bodily injury. The idea was that a favorable retroactivity decision could provide these individuals yet another "windfall."

This "windfall" idea misapprehends the nature of many of the cases that the underlying amendment impacts. The problem Defenders identified last year was *not* that individuals were getting these enhanced base offense levels (BOLs) although they had not been charged with the "death or serious bodily injury" enhancement. Indeed, in the cases we are aware of, the individuals *were* charged and convicted under the "death or serious bodily injury" enhancement. We were concerned about individuals who were getting these enhanced BOLs although there was no § 851 information filed in the case.[20] And we were especially concerned about the level 43 BOL: the Commission created this level for those subject to mandatory life sentences—based on the combination of a "death or serious bodily injury" enhancement and a § 851 information.[21] But in some cases, although the government had not filed a § 851 information (presumably because mandatory life was not warranted), the guidelines were misinterpreted to call for a life sentence.

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[19] *See* Fed. Defender Comments on the U.S. Sent'g Comm's Request for Comment on Possible Retroactive Application of Certain 2024 Guideline Amendments, at 7 n.21 (June 21, 2024).

[20] *See* Fed. Defender Comments on the U.S. Sent'g Comm's 2023–2024 Proposed Priorities, at 14–16 (Aug. 1, 2023).

[21] *See id.* at 15.

Thus, there is little—if any—danger that individuals originally subjected to a BOL of 43 or 38 will drop to something much lower, like 12, as was discussed at the hearing. As Vice Chair Laura Mate observed, the offense level decrease will be far less substantial. They will generally drop from level 43 to 38 (and will generally still be subject to a mandatory minimum of 20 years), or from level 30 to 26.[22]

To be sure, in districts that were misapplying the enhanced base offense levels, there could be cases like the one described in Commissioner Candice Wong's hypothetical—where the parties disagreed about whether the accused's conduct actually caused a death or injury and the dispute was resolved in the government's favor by the court at sentencing, rather than by a jury at a trial.[23] But when this happened, the highest possible base offense levels were applied without the fundamental procedural protections of our jury trial system, although the Commission never intended those base offense levels to be applied to cases where the individual hadn't been convicted under the "death or serious bodily injury" statutory enhancement. One might reasonably question whether, in such a case, it was the *government* that received the windfall.

Windfalls aside, much like the Acquitted Conduct amendment, this amendment remedies an injustice that led to extreme punishments for insufficiently-proven drug crimes or prior convictions. And while public health experts suggest a variety of ways to address our nation's debilitating opioid overdose crisis, absent are calls for more punishment; indeed, the calls are often in the opposite direction—prevention, education, better treatment, social investment in at-risk communities, harm reduction, and less criminalization.[24]

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[22] *See* §§ 841(b)(1)(A), (B), (C) (mandatory minimum 20 years where "death or serious bodily injury" resulted from the offense) and 841(b)(1)(E).

[23] DOJ identified two analogous cases in its original comment on retroactivity. *See* Letter from Scott Meisler, *supra* note 7, at 14 n.58.

[24] *See generally, e.g.*, Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 Utah L. Rev. 833 (2019) (discussing policy reasons not to "draw on the arsenal of carceral and punitive tools" to address the drug overdose crisis); *see also* Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. Times (May 25, 2018).

IV. Other Victim Perspectives

Defenders appreciate that some crime victims experience dismay to learn that someone who victimized them may have a chance at a sentence reduction. However, victims are not monolithic. Nor are their experiences of victimization uniform or unbending. Undoubtedly, some victims would be fine to learn that someone who harmed them in the past, who no longer presents a danger to the public, may be eligible for more lenient treatment down the road. Some would even welcome that news.

Take, for instance, the perspective of Peter Brunn—a father who lost his daughter Elisif to the disease of addiction after his daughter's friend Sean, an unhoused individual also struggling with addiction, mailed her a lethal dose of drugs. Peter established a relationship with Sean after Elisif's accidental overdose death and has spoken out publicly against draconian drug-induced homicide laws.

In Peter's words:

> I fundamentally believe homicide charges around drug distribution misplaces blame: the disease is the culprit in almost all cases, not the provider. Sean, and so many like him, are more often than not fully victims themselves, not perpetrators. The Seans of the world need—and benefit from—treatment, not shame and blame. Yes, everyone needs to be held accountable for his or her actions, even with addiction at play, but the action Sean ought to have been held accountable for . . . was illegal distribution through the mail, and certainly not murder. Sean has so much to offer as a citizen, not despite what he has been through, but because of what he has been through.[25]

There are others out there like Peter. Indeed, it appears there's an entire national network of crime survivors who advocate for public safety

[25] Lindsay LaSalle, Drug Pol'y Alliance, An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws are Counterproductive and Inhumane 37 (2017).

policies that rely less on incarceration.[26] It is important that this Commission hear their voices, and consider their perspectives, too.

As always, the Federal Public and Community Defenders appreciate the Commission's consideration of our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

Leslie Scott
Sentencing Resource Counsel
Federal Public and Community Defenders

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Scott A.C. Meisler, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

[26] *See* Alliance for Safety and Justice, Crime Survivors for Safety and Justice, https://cssj.org/ (last visited July 21, 2024).

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

July 22, 2024
United States Sentencing Commission
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RE: Inapplicability of Retroactivity of 2024 Amendments - Response to Hearing

Dear Chair Reeves and Members of the Commission:

The Victims Advisory Group (VAG) thanks the Commission for the opportunity to reply to some of the comments raised during the Commission's July 15, 2024 hearing on retroactivity of the 2024 amendments.

General Comments Applicable to All Amendments

1. The Retroactivity Process is Distinct from the Amendment Process and Precludes Retroactive Application of All the Amendments.

During the Commission's retroactivity hearing, some witnesses suggested two flawed arguments, not based in the Rules or law, about the retroactivity process. These arguments are incorrect and fail to refute the views of every judge who commented on retroactivity. Presumably to circumvent the Commission's established retroactivity framework, some witnesses incorrectly suggested that the question of retroactivity was the same as the question of whether to adopt an amendment. In so doing, these witnesses never addressed the process of

retroactivity that the Commission has laid out and the fact that every judge and the Committee on Criminal Law of the Judicial Conference have raised the alarm of applying these amendments retroactively as not consistent with the established framework. The Commission should reject both arguments by these witnesses as incorrect.

Put simply, the question of whether to adopt an amendment is entirely different than whether to apply it retroactively and when the correct retroactivity framework is utilized, it is clear these amendments do not fall within the exception to the prospective application of an amendment. The Commission has made its decision about these amendments and adopted them. That substantive decision follows Rule 1.2(a) and 4.1 of the Rules of Practice and Procedure. Because the Commission's purpose is to "assure the meeting of the purposes of sentencing"[1] the Commission established two separate processes for the substantive analysis of the merits of an amendment and for the procedural analysis of retroactivity.

If they were the same analysis, then the Guidelines would allow courts to simply reduce sentences based on amendments. However, the Guidelines explicitly do not allow that and USSG §1B1.10 only allows a court to do so if the Commission has identified it as applying retroactively *based on different factors*. An amendment may be the correct substantive change to the Guidelines, but applying it retroactively may not be the correct outcome as that will undermine the sentencing system, cause collateral consequences, and lack protection from unanticipated problems. That is why the Commission has a separate procedure for retroactivity in Rule of Practice and Procedure 4.1A and the Guideline § 1B1.10 (background).

[1] 28 U.S.C. § 991(b)(1)(A). Those purposes are (A)to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B)to afford adequate deterrence to criminal conduct; (C)to protect the public from further crimes of the defendant; and (D)to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. 3553(a)(2).

The Commission has been clear, and no witness has refuted that: "Generally, promulgated **amendments will be given prospective application only**."[2] Because retroactivity is the exception, and because the retroactivity question is *different* than the substantive question, the Commission requires *different* information. Hence, the Commission requires staff prepare a "retroactivity impact analysis of the amendment"[3] which is information not necessary in the substantive discussion of the amendment, but critical in analyzing retroactivity.

This distinct analysis is also reflected in the facts the Commission must consider in determining retroactivity. While there seemed to be some confusion at the hearing as some witnesses suggested factors they would *like* the Commission to consider, the Commission has also been transparent about what it will consider.[4] Those factors, again, are *different* than what it considered when it discussed the amendments content because the analysis is *different*.

Consequently, based on the Commission's *own statistics*, as of 2020 the Commission had only made approximately 30 amendments retroactive out of 800.[5] That is not by mistake.

This is the framework. Despite implying other considerations, no witness during the course of the hearing disagreed that such are the explicit rules of the Commission or refuted the above parameters. Some instead argued that, because they agreed with the substance of the amendment, the amendment should be made retroactive. In other words, they essentially proposed to do away with Rule 4.1A and 1B1.10's factors. However, that framework does exist,

[2] U.S. SENT'G COMM'N, *Rules of Practice and Procedure*, Rule 4.1A (2016)(emphasis added).
[3] U.S. SENT'G COMM'N, *Rules of Practice and Procedure*, Rule 4.1A(2) (2016).
[4] The only factors the Commission has listed are: [1] the purpose of the amendment, [2] the magnitude of the change in the guideline range made by the amendment, and [3] the difficulty of applying the amendment retroactively to determine an amended guideline range. The Commission also included that retroactivity must achieve the purposes of sentencing. U.S.S.G. §1B1.10 (backg'd).
[5] 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).

and the system relies on it for consistency, finality, and the achievement of the purposes of sentencing. *Every judge* who submitted comments and the Committee on Criminal Law of the Judicial Conference sounded the alarm that to ignore these principles would be improper and have cascading effects across the country. A sampling is below:

> 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.
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> * * *
>
> 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.[6]
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> * * *
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> 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.[7]

As further evidence of this framework and the lack of information or reason to overcome the preference for prospective application, Rule 4.1A(2) requires an impact analysis on which the Commission must base its analysis of the factors. For each of the amendments, the Impact Analysis states that it "cannot determine" who would benefit or what the change in the sentence

[6] Comments of the Committee on Criminal Law of the Judicial Conference of the United States (June 21, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 (emphasis added).
[7] Comments of District Judge Charles Williams (June 5, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 (emphasis added).

would be.[8] Therefore, the Commission has no basis to make any of the amendments retroactive. No witness contradicted the fact that the data is simply not available for the Commission to analyze the necessary factors regarding retroactivity, let alone decide to make them retroactive.

In its written comment, the VAG outlined the Rules' preference against retroactive application, the absence of data to overcome that preference, and how the required factors do not support the exceptional remedy of retroactivity. The VAG would urge the Commission not to accept the invitation of these witnesses to both ignore the transparent procedure the Commission has in its Policy Statement and Rules and conflate the adoption of the substantive amendment with the decision to apply it retroactively.

2. All Stakeholders Who Actually Must Address All the Motions That Will Be Filed Oppose Retroactivity Due to the Extraordinary Burden It Would Create.

The Commission received many comments and heard testimony about the overwhelming challenge of applying these amendments retroactively. These comments came from two categories of sources. The first group were those stakeholders who actually have to deal with *all the motions* that will be filed and includes Probation Officers, Judges, and the Department of Justice. *All these groups* stated unequivocally that retroactive application of nearly all the amendments will be extraordinarily challenging to a system already over stretched by prior retroactive amendments.[9] The *only* stakeholders who claimed the amendments were not too difficult to apply were groups who only represent *a fraction* of the cases. Even the Federal Defenders who claimed this, acknowledged in the hearing that each office is different and there

[8] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Certain 2024 Amendments (May 17, 2024) at 7 (Acquitted Conduct); at 11 (Part A Circuit Conflicts); 18 (Part D Miscellaneous Amendments).
[9] The Probation Officers Advisory Group (POAG) did state that retroactive application of three of the four amendments would be debilitating. Submitted Comments of POAG (June 21, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024.

is not uniformity in a streamlined or efficient process across the offices or districts. Furthermore, the stakeholders who must address *all the cases* also unanimously noted that the estimates of who is eligible for a reduction are flawed and do not reflect the actual workload they will incur because these estimates largely underrepresent all who will apply for a change in their sentence.

This devastating effect on the court system is not a matter of opinion. The Department of Justice identified over 10,000 cases it is addressing currently, noting further retroactive amendments will be a "significant burden" on the criminal justice system as a whole and will strain an already stretched reentry system.[10] One judge who submitted comment noted his workload has increased by 25% due to retroactive amendments.[11] The POAG described the swelling workload as "debilitating."[12] The VAG urges the Commission to accept these representations from the group of professionals who actually know the full weight of retroactivity.

Every judge who submitted commentary and the Committee on Criminal Law for the Judicial Conference unanimously voiced the workload is overwhelming. District Court Judge Willian Shubb stated this would create "a procedural nightmare" for the courts.[13] The VAG would direct the Commission to the submission of Chief Judge Catherine C. Eagles who describes the exhaustive amount of work "for many people in the justice system" that such motions require for both claims with merit and the many meritless claims that are filed.[14] She

[10] Department of Justice Submission at 6 (June 21, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024.
[11] Comments of Judge Joe Anderson (June 5, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .
[12] Comments of the Probation Officers Advisory Group at 9 (June 21, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .
[13] Comments of District Judge William Shubb (June 9, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .
[14] Comments of Chief Judge Catherine C. Eagles at 1-2 (May 20, 2024) available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .

further underscores the effect on this on the entire business of the court, noting that "this delays judges, probation officers, prosecutors, and criminal defense attorneys from reaching other matters."[15] Additionally, the Committee of Criminal law stated 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.[16]

Specifically regarding the underestimation of the number of motions expected, most of which are not seen by practitioners or the Defenders, Chief Judge Stephen R. Clark noted "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 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."[17]

The Commission must address the difficulty in applying the amendments retroactively as it is among the factors required to be considered. The best sources of information in evaluating that are not attorneys who handle a fraction of the cases. The best sources of information are those in the system who feel the actual strain of all the motions filed. Those constituents have unanimously argued against retroactivity. The VAG has previously outlined the strain on victims of these motions. In light of these comments from other stakeholders, the VAG also

[15] Comments of Chief Judge Catherine C. Eagles at 2 (May 20, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .
[16] Comments of the Committee on Criminal Law of the Judicial Conference of the United States (June 21, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 (emphasis added).
[17] Comments of Chief Judge Stephen R. Clark at 3 (June 24, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .

urges proactive application because retroactive application will negatively affect current victims in current cases due to an overburdened court system.

3. Public Trust in the Criminal Justice System Will Be Undermined by Retroactive Application of these Amendments.

At the hearing, those who represent offenders (Federal Defenders, the defense attorney witness from the TIAG, and the Practitioners) made arguments about undermining trust in the system that were incomplete and should be rejected. For example, the TIAG argued at the hearing and closes its written submission regarding acquitted conduct discussing how retroactivity would be fair for, "Indian defendants in particular."[18] That view is focused entirely on the defendants in the tribal courts and the Native American victims' interests are totally ignored. Some VAG members work with victims in tribal jurisdictions and note that they are among the most underserved anywhere in our country. To undo the lawful sentence imposed by the court will break the promise of fundamental justice that the law has made to crime victims. Trust in the system is not furthered by undoing the law, but rather by enforcing it. The only value enforced by retroactive application is unprincipled leniency, not justice or any of the purposes of sentencing.

This view that retroactivity undermines trust in the court system was again echoed by every judge who submitted public comment and, as has been mentioned, the Criminal Law Committee. As Chief Judge Eagles noted, "constant revisions to sentences undermines public trust and confidence in the justice system."[19]

[18] Comments of the Tribal Issues Advisory Group at 3 (June 21, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .
[19] Comments of Chief Judge Catherine Eagles at 1 (May 20, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .

4. Arguments That Retroactivity Does Not Affect Recidivism are Incorrect and Misplaced.

During the hearing, retroactivity proponents made the misleading and misplaced argument that the amendments should be retroactive because recidivism rates for beneficiaries of retroactive release are similar to other offenders. That argument is misleading because recidivism is not a factor for the Commission to consider and even if it were, it cuts against applying these amendments retroactively. First, this argument fails to note the very high recidivism rates for the offenders affected by these amendments. The Acquitted Conduct amendment would benefit extremely violent offenders with high recidivism rates. Among the top 4 groups of offenders who will benefit, firearm offenders have the highest recidivism rate of over 70% followed by robbers at over 63%.[20] Offenders released following a sentence for violent crime "were more likely to be rearrested than non-violent offenders" at a rate of 59.9% compared to an also high 48.2%.[21] Similarly, the obliterated serial number offenders are exclusively firearm offenders and as such, over 70% will likely be rearrested.[22] Secondly, the argument fails to consider the public safety consequence. Not only will these offenders likely recidivate, but they will also do so earlier than they may have if released on time. As such, quantitatively more people will be victimized by them, thus undermining public safety which is one of the purposes of sentencing.

Specific Responses to Claims Made Regarding Specific Amendments

Overall, the VAG refers to its prior submission regarding retroactivity. It notes that not one witness who supports retroactivity offered a counterargument at the hearing to the fact that (a) the Rules assume prospective application of amendments; (b) the Impact Analysis does not

[20] United States Sentencing Comm'n, Recidivism of Federal Offenders Released in 2010 (2021).
[21] United States Sentencing Comm'n, Recidivism of Federal Offenders Released in 2010 (2021).
[22] United States Sentencing Comm'n, Recidivism of Federal Offenders Released in 2010 (2021).

provide the information usually necessary for the Commission to apply the required factors to even consider retroactivity; (c) the amendments will benefit the most violent of offenders with the highest recidivism rates; and (d) that at least two amendments will require hearings with the protections of 18 U.S.C. § 3771. A such, the VAG underscores there is no path to justify retroactivity. However, the VAG did want to respond to a few specific arguments made that were incorrect.

1. The Purposes of the Amendments Do Not Lend Themselves to Retroactivity.

The purpose of the amendment is a factor to consider, but it does not support retroactivity based on the Commission's own statements regarding the purposes of these amendments. At the hearing retroactivity proponents suggested, without support, possible purposes of the amendments other than those stated by the Commission. The Commission itself stated the purposes. That is what is binding on the Commission's analysis, and it was not to rectify an inequity or unfairness. For two of them there was no reference to fairness in the purpose of the amendment. The Commission has stated the purpose for the amendment addressing obliterated firearms was to "address[] [a] circuit conflict[]."[23] Similarly, the stated purpose of the amendment for enhanced penalties for drug offenders was "clarification."[24] As all the judges who submitted comment have pointed out, when the purpose is technical and not to correct a fundamental unfairness or inequity in the Guidelines, the amendment should not be retroactive and to do otherwise undermines the system. While witnesses may try to argue to the Commission these are such amendments, that is belied by the Commission/s own statements and test. Therefore, the amendments should not be retroactive.

[23] "Reader Friendly" Adopted Amendments, at 18 (April 30, 2024).
[24] "Reader Friendly" Adopted Amendments, at 28 (April 30, 2024).

The purpose behind the Acquitted Conduct amendment is arguably more mixed but still does not support retroactivity. The Commission has stated that its purpose was to respond to the "robust debate" about the applicability of acquitted conduct and to promote respect for the rule of law.[25] The first purpose does not solely implicate fundamental fairness because it concedes this is an issue of considerable debate among scholars and justices. Therefore, it is not similar to correcting a fundamental inequity such as previous amendments regarding crack and powder cocaine. Regarding its second reason, respect for the rule of law, as discussed at the hearing the rule of law will not be respected by retroactive application, but undermined.

As the VAG pointed out at the hearing, a judge can consider acquitted conduct under 18 U.S.C. § 3661 and can consider uncharged or dismissed conduct in sentencing. Therefore, its consideration of acquitted conduct cannot be considered fundamentally inequitable or unfair. However, the POAG has pointed out an unintended consequence of retroactive application which speaks to creating a fundamental unfairness: stripping victims of their status, protection, and restitution. Specifically, the POAG noted,

> 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

[25] "Reader Friendly" Adopted Amendments, at 1 (April 30, 2024).

> orders, including complex issues such as how to address restitution that has already been paid to individuals who may no longer be considered victims.[26]

Such a result would seriously undermine the rule of law. Not only have victim survivors been identified as such and given protection from offenders or restitution for their experienced harms, they have been told that the sentence pronounced was final. To now strip victim survivors of those outcomes years after a sentencing would seriously undermine the public's perception of the criminal justice system and the rule of law. Not one proponent of retroactivity responded to this crucial effect of retroactive application. As such, the Commission should note that at best the rule of law reason for the amendments is mixed, and, therefore, does not favor a retroactive application.

In the words of Chief Judge Clark,

> 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.[27]

2. Retroactive Application of the Miscellaneous Amendment Regarding Enhanced Penalties for Drug Trafficker Would Cause Unspeakable Trauma to Victims or Deceased Victims' Families.

Those who suggest this clarifying amendment be applied retroactively never addressed its effect on victims and their families. Namely, that effect would be to have a judge make a finding that an offender caused the death of a person, and then have the sentence changed as though that harm – a death - never occurred. They also never addressed the new sentencing disparity that

[26] Comments of the Probation Officers Advisory Group at 9 (June 21, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 (emphasis added).
[27] Comments of Chief Judge Clark at 2 (June 24, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .

would be created by retroactive application – where defendants who negotiated an outcome based on what occurred would have a longer sentence than those who did not, but caused the exact same harm.

The only group of stakeholders that did not oppose retroactivity of this amendment, but recognized victims, was the POAG. However, they failed to consider an important factor. They recognized that reducing a 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. However, POAG responds to this by asserting that "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."[28] This position assumes that the victim will be notified of the potential change in sentence and given an opportunity to respond. But she will not. Even if the victim participated in the original sentencing, all parties (including the victim) were probably contemplating a different guidelines range at that time and so the victim was not addressing or responding to what the actual sentence could end up being if retroactive. Thus, victims will be so profoundly retraumatized by retroactive application of this amendments, it should be rejected.

Conclusion

The VAG is grateful for the opportunity to respond to some of the issues raised during the hearing on retroactivity. It fully incorporates its earlier written comments as well as these responses. After the hearing and a lack of adequate response to the VAG's objection to retroactivity, the Commission is urged to listen to all its fellow judges and those stakeholders who will address all the possible motions filed and not apply any of these amendments retroactively.

[28] Comments of the Probation Officers Advisory Group at 8 (June 21, 2024), available at https://www.ussc.gov/policymaking/public-comment/public-comment-june-21-2024 .

Respectfully yours,

The Victims Advisory Group
Mary Graw Leary
Chair

cc: Advisory Group Members

July 22, 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 of 2024 Amendments

Dear Judge Reeves,

FAMM[1] thanks you for the opportunity to provide additional comment on retroactivity. We write to address concerns raised by several commenters, including the Committee on Criminal Law of the Judicial Conference of the United States (CLC), the Criminal Division of the Department of Justice (DOJ), and others. In their comments each opposes retroactivity of several of the amendments, and all urge that the Commission not make the acquitted conduct amendment retroactive. We address the arguments as they apply to the acquitted conduct amendment, but expect the concerns are not supported as to the other amendments.[2]

1. Recent Retroactivity Decisions are Not Emblematic of a Trend

In its comment to the Commission on retroactivity of the 2024 amendments, the CLC expresses fears about the "cumulative effect on the system of what may be seen as a trend toward applying amendments retroactively, even when the amendment does not rectify a fundamental inequity or unfairness."[3] The DOJ similarly cautions "that the Commission has leaned into retroactivity for recent amendments, [but] we believe there are compelling reasons not to continue that trend with the acquitted-conduct amendment."[4]

These characterizations should not affect the Commission's decision. The Commission's actions in this and the last amendment cycle to make certain amendments retroactive – whether or not a "trend" – are the products of an agency hard at work following years of inaction.

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[1] FAMM wishes to acknowledge and thank our summer legal intern, Maya Lilly, for her contributions to this letter.
[2] As in our initial letter, we leave administrability arguments to practitioners whose experience with litigating retroactivity motions will help the Commission address ease of application concerns.
[3] *See* Letter from Edmond E. Chang, Chair, Comm. on Crim. Law of the Jud. Conf. of the United States, to Hon. Carlton W. Reeves, Chair at 3 (June 21, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf#page=88.
[4] *See* Eric G. Olshan, Statement on Retroactivity of Acquitted-Conduct Amendment at 2 (July 15, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240715/Olshan.pdf.

Chair Reeves opened the first meeting of the new Commission by remarking on the sheer amount of work that awaited the commissioners following *years* without a quorum:

> As everyone is fully aware, after four years there is a backlog of policy work awaiting us . . . . The 2022-2023 amendment cycle is already somewhat abbreviated because by statute, we must submit amendments to Congress for review no later than May 1, 2023. Our year-long amendment cycle is down to just over six months. Nevertheless, we are committed to meeting our deadlines with the focus in this amendment cycle on the most urgent policy concerns.[5]

Over two amendment cycles (or one-and-one-half using the Chair's math), this Commission worked diligently to promulgate new guidelines and review a variety of existing ones, following years when no Commission was in place. It should not come as a surprise to the public, that in undertaking its statutory duty to periodically review and revise the guidelines,[6] the Commission found disturbing evidence of ones that warranted correction and when called for, retroactivity. Some of the changes the Commission made were quite overdue.[7]

The CLC also points to the fact that historically, retroactivity has been rarely invoked, and cited a Commission finding that, "as of 2020, the Commission had given retroactive effect *only* to 30 of its over 800 amendments."[8] It bears pointing out that the denominator in this statement is inaccurate. Though the Commission has not provided a count of prior amendments that could have been considered for retroactivity, it is safe to say that the vast majority of those 800 guideline amendments did *not* reduce sentences for defendants going forward.

Indeed, for many years, the Commission weathered justifiable criticism about its "upward ratchet" approach to amendments. One long-time observer, a former U.S. Attorney and Special Counsel to the Commission, noted when writing in 2012 about the end of mandatory guidelines that:

> [t]he post-*Booker* system does not solve the biggest problem with the pre-*Booker* system – that its architecture and institutional arrangements predisposed the Commission's rule-

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[5] *See Public Meeting on Proposed Priorities of the United States Sentencing Commission, Oct. 28, 2022, Before the U.S. Sent'g Comm'n* at 5–6 (statement of Carlton W. Reeves, Chair), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20221028/20221028_transcript.pdf.

[6] *See* 28 U.S.C. § 994(o).

[7] For example, the first Commission explored whether and how to distinguish people with zero criminal history points who were included with those with one criminal history point in CHC I. *See* Memorandum from Jay Meyer to Phyllis Newton (Nov. 20, 1990), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/111990_Cat0_VII.pdf; *see also* Statement of Steven Salky, Chairperson of the ABA Comm. on the U.S. Sent'g Guidelines, Before the U.S. Sent'g Comm'n Concerning Proposed 1992 Amendments at 15–18 (Feb. 25, 1992) (testifying about, *inter alia*, proposal to create a new Criminal History Category for zero-point defendants), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/199203/199203_PCpt4.pdf.

[8] *See* Letter from Edmond E. Chang to Hon. Carlton W. Reeves *supra* note 2, at 4, n. 8 (emphasis in original).

> making process to become a one-way upward ratchet which raised sentences often and lowered them virtually never."[9]

CLC's characterization of a trend in retroactivity is misguided, given how few amendments have lowered guidelines.

2. A Finding of Fundamental Inequity or Unfairness is Not a Prerequisite to Retroactivity

As we have explained before, the Commission historically has made prior retroactivity decisions without an explicit finding that fundamental fairness requires them.[10] From the earliest days of the Commission, retroactivity decisions were either unexplained, or were adopted for a variety of reasons, including disparity concerns. For example, Amendment 488, enacted on November 1, 1993, adjusted guidelines governing LSD offenses to address the overbearing impact of carrier weight.[11] The Commission explained that

> because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission determined that basing offense levels on the entire weight of the LSD and the carrier medium produced unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights.[12]

The Commission voted to make that amendment retroactive on July 25, 1993.[13] Fundamental fairness was not cited for this early decision, or for most that followed.

Moreover, absent a commonly accepted definition of "fundamental fairness" as it applies to retroactivity, the Commission should not use the value as a screen to limit which amendments that lower sentences should be made retroactive. Historically, while fundamental fairness was discussed with respect to "crack minus two"[14] and Fair Sentencing Act retroactivity,[15] those occasions are the exceptions rather than the rule.

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[9] *See* Frank O. Bowman III., *Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 Fed.Sent.R. No. 5, 1, 1-2 (2012), https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1467&context=facpubs.

[10] *See* Witness Statement of Mary Price, Gen. Couns., FAMM, Before the United States Sent'g Comm'n at 1–6 (July 10, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230719/FAMM.pdf.

[11] *See* U.S. SENT'G COMM'N, 1993 *Annual Report* at 8 (1993), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1993/1993%20Annual%20Report.pdf.

[12] *Id.*

[13] *See* U.S. SENT'G COMM'N, *Minutes from Public Meeting* (July 27, 1993), https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-july-27-1993.

[14] *See Meeting on Retroactivity, Dec. 11, 2007, Before the U.S. Sent'g Comm'n*, passim, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20071211/20071211_Transcript.pdf.

[15] U.S. SENT'G COMM'N, PUBLIC MEETING MINUTES at pp. 3–4, 8 (June 30, 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting_Minutes.pdf.

For example, the largest retroactivity decision in Commission history made Amendment 782, which reduced all drug offense levels by two, retroactive.[16] The Reason for Amendment identified federal prison overcapacity and the fact that setting the drug guideline range above the mandatory minimum was no longer necessary.[17] In her remarks at the public hearing concerning drugs-minus-two retroactivity, then-Commissioner Ketanji Brown Jackson expressed skepticism that fundamental fairness is a prerequisite to retroactivity.[18] Nonetheless, in the drugs-minus-two decision as in others, the Commission found that retroactivity was called for in light of the purposes, magnitude, and ease of application and as the best means to express its conclusion that the now-discarded guideline failed to meet the purposes of punishment.

3. Making the Acquitted Conduct Amendment Retroactive Advances Fundamental Fairness and Bolsters, Rather Than Undermines, Public Confidence in the Sentencing Guidelines

This is not to say that fundamental fairness is not important, or, that it is not present in this instance. Certainly, anyone whose sentence was increased by acquitted conduct would join us in disputing the CLC's position that retroactivity does not address fairness. Each of them would argue persuasively that being sentenced for a crime for which they had been found not guilty was fundamentally unjust. One person who had been sentenced pursuant to acquitted conduct said they felt "betrayed" by the justice system. Another said he had been "stripped" of his constitutional rights. A loved one explained that acquitted conduct sentencing made the right to a jury trial "worthless."[19]

We can think of few practices in federal guideline sentencing that more dramatically exhibits outright inequity and injustice than acquitted conduct sentencing. It strikes at the heart of individual's constitutional right to be tried by a jury.

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[16] *Compare* U.S. SENT'G COMM'N, *Final Crack Retroactivity Data Report: Fair Sentencing Act* at Tbl.1 (Dec. 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf, *and* U.S. SENT'G COMM'N, *Preliminary Crack Cocaine Retroactivity Data Report* at Tbl 1 (June 2011), 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; *with* U.S. SENT'G COMM'N, *2014 Drug Guidelines Amendment Retroactivity Data Report*. at Tbl.1 (May 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf.

[17] *See* U.S. SENT'G COMM'N, *Amendment to the Sentencing Guidelines* at 1 (Reader-Friendly Version) (July 18, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782_0.pdf.

[18] *See Public Hearing on Retroactivity of 2014 Drug Amendment, June 10, 2024, Before the U.S. Sent'g Comm'n* at 252–53, https://www.ussc.gov/sites/default/files/transcript_1.pdf (asking "We've heard a lot about fairness, the moral imperative, et cetera, et cetera. And, I have to say that I saw that very clearly in the crack cocaine retroactivity. Here it's not as clear. And I'm wondering is crack retroactivity a different animal or not?").

[19] *See* Brief for Nat'l Ass'n of Fed. Defs. and FAMM as Amici Curiae Supporting Petitioner at 19, *McClinton v. United States*, 143 S.Ct. 2400 (No. 21-1557), https://www.supremecourt.gov/DocketPDF/21/21-1557/230055/20220714103728274_Brief.pdf.

The CLC is also concerned that making this amendment retroactive, combined with other retroactivity decisions, could undermine public trust in the sentencing guidelines.[20] Should this trend continue, the CLC letter warned, "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."[21]

To the contrary, as the Commission pointed out in its Reason for Amendment, the opposite is true. "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.'"[22]

Of course, commissioners heard from witnesses at the public hearing on acquitted conduct. Allen Peithman explained his disillusionment:

> Acquitted conduct sentencing is the worst kept secret in the American Judicial system. As I am speaking we have people in prison serving time for crimes they proved they are innocent of. Imagine yourself in their position now, imagine how lost and disillusioned in the promise of democracy and the law that they feel.[23]

Jesse Ailsworth recounted at the same hearing:

> When people hear what happened to me, they can hardly believe it or understand it. I've learned a lot over the last three decades. I've grown and changed, learned about myself and others. I've learned accountability, which was hard. I learned responsibility, which took some time. But the hardest lesson I've learned is the lesson I learned at sentencing. Because the guidelines allow sentences based on acquitted conduct, trials are all or nothing. Not guilty verdicts are meaningless at sentencing if you have even one guilty verdict. In a system based on justice and fairness, where is the fairness in that?[24]

Justice Sonia Sotomayor discussed the problems with the perception of fairness that acquitted conduct sentencing raised in her statement addressing the denial of certiorari in *McClinton*.[25]

Correcting this and other inequities in the system will not, as feared by the CLC, undermine public confidence in the system or promote a perception of the guidelines as fundamentally

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[20] *See* Letter from Edmond E. Chang to Hon. Carlton W. Reeves at 3, *supra* note 2.
[21] *Id.*
[22] *See* U.S. SENT'G COMM'N, *Amendments to the Sentencing Guidelines* at 1 (Apr. 30, 2024) (citing *McClinton v. United States*., 143 S. Ct. 2400, 2402–03 (Sotomayor, J., Statement respecting the denial of certiorari), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.
[23] *Public Hearing on 2023-2024 Proposed Amendments, Proposed Amendment on Acquitted Conduct Before the U.S. Sent'g Comm'n* (Panel VII Formerly Incarcerated Individuals' and Family Members' Perspective) (statement of Allen Peithman) at 2 (Mar. 6, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/peithman.pdf.
[24] *Id.* (statement of Jessie Ailsworth) at 3, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/ailsworth.pdf.
[25] *McClinton,* 143 S. Ct. at 2401 (Sotomayor, J., Statement respecting the denial of certiorari).

unfair.[26] Instead, public confidence will increase because a system that recognizes disparity, unfairness, and inequity caused by guidelines has acted to correct the practice going forward while ensuring those serving such sentences have an opportunity to be considered for a reduction.

Rather than damage the public's trust in the system, retroactivity fosters confidence in a Commission that exercises vigilance and takes corrective action when necessary to counter disparity and amend for everyone guidelines that no longer meet the purposes of punishment.

4. Making the Acquitted Conduct Amendment Retroactive Will Not Undermine Finality

The CLC letter erroneously conflates deterrence and finality in explaining that retroactivity undermines both core principles of sentencing. Citing *Teague v. Lane*, the DOJ letter warns that "without finality, the criminal law is deprived of much of its deterrent effect."[27]

The reliance on *Teague* for this principle is puzzling. *Teague* concerned *federal* habeas jurisdiction over the continued constitutionality of *state* convictions when a new rule of federal constitutional procedure was declared. The statute at issue, 28 U.S.C. § 2254, is highly deferential to state concerns about finality and is crafted to avoid interfering with state conduct of criminal law and procedure.[28] The statute recognizes that a federal court's grant of habeas corpus to a state prisoner based on a violation of the U.S. Constitution implicates important federalism concerns and ensures that the state court's judgment – as to the federal constitutional law clearly established at the time of the state court proceeding – is final.[29] The Court held that a new rule of constitutional procedure is only retroactive if the Court declares it to be retroactive.[30]

Of course, retroactivity under 18 U.S.C. § 3582(c)(2) is an entirely different matter than § 2254 retroactivity. Section 3582(c)(2) addresses a congressionally recognized exception to finality. It does not implicate the federalism concerns that *Teague* finality protects. Federal law has its own finality restriction in § 3582(c). The exceptions to finality, for extraordinary and compelling reasons, § 3559 cases, and guideline retroactivity are laid out clearly.[31]

Congress recognized that, at times, guideline amendments would lower sentences and gave the U.S. Sentencing Commission its blessing to use its judgment whether to make those changes retroactive. Far from being a threat to finality, (c)(2) is an exception to ensure that overly harsh

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[26] *See* Letter from Edmond E. Chang to Hon. Carlton W. Reeves at 3, *supra* note 2.
[27] Letter from Scott Meisler, U.S. Dept. of Just., Deputy Chief, App. Section Crim. Div. to Hon. Carlton W. Reeves, Chair at 2, n. 8 (citing *Teague v. Lane*, 489 U.S. 288, 309 (1989)).
[28] *See, e.g.*, H.R. Rep. 104-23 at 9–10 ("[reforming the habeas statutes] will [] help avoid potentially burdensome and protracted inquiries as to whether state remedies have been exhausted, in cases in which it is easier and quicker to reach a negative determination of the merits of a petition. This amendment does not undermine the policy of comity to state courts that underlies the exhaustion requirement…").
[29] *See* 28 U.S.C. § 2254 (d)(1).
[30] *Teague*, 489 U.S. at 308.
[31] *See* 18 U.S.C. § 3582 (c)(1) and (2).

guidelines or those that no longer serve the purposes of punishment do not continue to harm people serving sentences enhanced by them.[32] It is difficult to imagine how this exercise of retroactivity upsets the deterrent effect of the law in place at the time of the offense. This is particularly the case with acquitted conduct retroactivity. It is hard to imagine that people committing crimes are telling themselves that future commissions will lower the guideline and that they will benefit at some future time when they are serving their sentence. That seems a remote possibility.

Finally, the Probation Officers' Advisory Group[33] and the CLC's concerns about unwarranted disparity between individuals who went to trial and were sentenced for their acquitted conduct and who later benefit from retroactivity, and those defendants who pled guilty to conduct that they *might* have been acquitted of, and are sentenced on those guilty counts, and on uncharged or dismissed conduct, misses the point. People who go to trial do so to *contest* their guilt and, having been found not guilty, rely on the system to punish them fairly. Acquitted conduct robs them of their reliance on the jury trial system. People who plead guilty on the other hand, are well aware that the counts of conviction will result in a sentence, perhaps mitigated in part by acceptance of responsibility. That their bargain nonetheless also exposes them to sentencing on the dismissed or uncharged conduct is a stain on our system. Manipulation in this way by prosecutors is an odious practice but one that does not justify keeping people incarcerated for crimes they were found to have not committed. Going forward, we hope that the elimination of acquitted conduct will encourage more individuals to seek trial by jury and benefit from acquittal. And, that the Commission will take another look at so-called "real offense" sentencing.

5. Conclusion

FAMM urges the Commission to make the amendment ending the use of acquitted conduct in guideline calculation retroactive. Thank you for your work in this area and for our attention to our comments.

Sincerely,

Mary Price

Shanna Rifkin

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[32] *See* 28 U.S.C. § 994(u).

[33] *See* Letter from Probation Officers Advisory Group to Hon. Carlton W. Reeves, Chair at 1 (June 21, 2024) (discussing the plight of a defendant who "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."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf#page=155.

Public Comment - Reply Comment on Retroactivity of Certain 2024 Amendments

Submitter:

First-Network

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:

First of I would like to comment on the statement of not making retroactive on the Amendment #5D due to victims reopening trauma. What about the trauma induced on the people penalized for an enhancement that does not pertain to them? What about the people serving a mandatory minimum for the same as if they harmed someone but did not. If more resources were spent on troubled adolescents to prevent this pandemic for drugs. Being as harm reduction areas have now been created for addicts to feel its OK to continue to use. How does this make it any different for the government to say its OK to create a safe place for an addict to overdose? We are giving addicts things like clean syringes and environments to use illegal drugs but penalizing those who provide the drugs? I find this contradicting. As for Amendment #3B adding an enhancement to someone who carried a firearm during a drug crime is considered violent crime why? A person is sentenced to a mandatory minimum because it states this so said violent crime but did not cause harm to anyone. By adding an enhancement and stacking mandatory minimums is not helping correct the issue just filling up the prisons, creating more trauma and preventing troubled individuals from receiving the help needed to become a law abiding citizen. People change if given the right guidance and they should not be punished for long periods of unnecessary lengthy time but given more opportunity to better oneself to prevent recidivism. My statement here towards the victims being affected, we are all victims of something and deserve a healing chance.

Submitted on: July 17, 2024

Earlier this week, I attended the Commission's hearing on retroactivity of the recently promulgated guideline amendments and also read the comments submitted to the Commission on whether to apply the amendments retroactively. In response, I wrote the essay below and published it on our Federal Sentencing Reporter Substack (sentencing.substack.com). I am submitting the essay as reply comment on the off chance you may find the thoughts of some value.

-Jonathan J. Wroblewski

Is it Time for the U.S. Sentencing Commission to Issue a Detailed, Written, and Reasoned Opinion on When it Applies Guideline Amendments Retroactively?

July 17, 2024

Earlier this week, the U.S. Sentencing Commission held a public hearing to receive testimony from invited witnesses on whether to apply retroactively guideline amendments promulgated in April related to acquitted conduct, firearms, and drug offenses. The Sentencing Reform Act gives the Commission the responsibility, when it reduces the term of imprisonment recommended in the guideline applicable to a particular offense or category of offenses, to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). In other words, the Commission must decide whether to apply guidelines that reduce imprisonment terms retroactively.

Since 1989, the Commission has indicated that "[a]mong the factors" it considers in making retroactivity decisions are "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." These are the criteria the Commission has publicly identified – in the Background Commentary to §1B1.10 of the Guidelines – for its retroactivity decisions.

These factors must have seemed quite sensible to the Commission when it first added them to the Guidelines Manual, for they are not unlike the standards the U.S. Supreme Court set forth in *Linkletter v. Walker*, 381 U.S. 618, 622-24 (1965) and *Stovall v. Denno*, 388 U.S. 293, 297 (1967) for determining retroactivity of new rules of criminal procedure. In *Linkletter*, the Court faced the question of whether *Mapp v. Ohio*, which made the exclusionary rule for illegal searches and seizures applicable to the States, should be applied retroactively to cases on collateral review. The Court determined that retroactivity of *Mapp* should be determined by examining the purpose of the exclusionary rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the exclusionary rule. 381 U.S. at 636-640. The Commission's retroactivity factors are echoes of the Court's in that era.

But the *Linkletter* standard was quickly and roundly criticized, both in the academy and in the Supreme Court itself, for being overly opaque and for not leading to consistent outcomes. Justice Harlan repeatedly criticized the standard in various concurring and dissenting opinions. *See, e.g., Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and

dissenting in part); *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting). The standard led to a hodgepodge of disparate treatment. Before too long, the Supreme Court changed course.

In *Griffith v. Kentucky,* 479 U.S. 314 (1987), the Court rejected as unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced and adopted the first part of the retroactivity approach advocated by Justice Harlan. Later, in *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that new rules should receive very limited retroactivity in cases on collateral review. In those instances, the Court held, a new rule applies retroactively only if (1) the rule is substantive and not procedural or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

Whether you agree or disagree with the Court's decisions in *Linkletter, Griffith*, and *Teague*, the Supreme Court should be commended for having directly wrestled with – in its written and reasoned opinions – how and why new rules should be applied retroactively. It laid out the factors, certainly, just as the Commission has. But then, the Court grappled openly with how to apply them. For example, in its inquiry into how the purpose of a new rule plays into the retroactivity decision, the Court weighed whether and to what degree the new rule was an effort to ensure "the fairness of the trial – the very integrity of the fact-finding process." *Linkletter*, 381 U.S. at 628 n.13, 639 & n.20 (1965).

The Court also continued to openly wrestle with how the interests of finality are to be weighed in determining whether a new rule should be applied retroactively and when those interests are outweighed by, for example, a new "substantive" or "watershed procedural" rule. For example, in *Montgomery v. Louisiana*, Justice Kennedy reasoned for the Court that "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. [Citations omitted.] It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." 577 U.S. 190, 203 (2016). And in *Edwards v. Vannoy*, Justice Kavanaugh, writing for the Court, concluded that decades of experiences applying the *Teague* standard must lead to the conclusion that "no new rules of criminal procedure can satisfy the watershed exception." 593 U.S. 255, 271 (2021).

The Commission has not done similar work explaining how the factors it considers in deciding retroactivity are measured and assessed against one another – and against other factors – in particular circumstances and how they lead to a set of "general principles" of retroactivity that can be applied to future circumstances. While individual commissioners have made statements at public hearings of their reasons for supporting or opposing retroactivity for individual amendments, the Commission as a body has never explained it's approach to retroactivity beyond the bland and unhelpful statement in the Background Commentary to §1B1.10 that "[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 and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants." Doesn't the reduction of a guideline

range always reflect a policy determination by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing?

The lack of explanation has led to what looks – to me anyway – like a rather silly notice and comment exercise each time the Commission considers a new amendment for possible retroactivity. The Commission publishes an issue for comment, seeking input into the retroactivity decision, and the stakeholders interpret the three factors listed in §1B1.10 in diametrically opposite ways. This is not surprising, as the listed factors can reasonably point in any direction. If the "magnitude of the change in the guideline range made by the amendment" is small, advocates for retroactivity can argue that the disruption to the system will likewise be small. If the magnitude is large, they can argue that the cost savings to the Bureau of Prisons will likewise be large, and that justice demands action in light of the enormity of the impact. Either way – small or large – the magnitude factor points both ways.

So, for the amendments passed in April, where the Federal Defender Sentencing Guidelines Committee can reasonably conclude that "[t]hese factors favor retroactivity for each amendment", *Letter from Heather Williams, Chair Federal Defender Sentencing Guidelines Committee to the Honorable Carleton W. Reeves*, June 21, 2024, the Department of Justice can reasonably come to the exact opposite conclusion. *Letter from Scott Meisler, U.S. Department of Justice ex-officio Member, U.S. Sentencing Commission to the Honorable Carleton W. Reeves*, June 21, 2024. Both can quote from individual commissioners –

> 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.

Letter from Heather Williams at p. 3.

> 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." 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."

Letter from Scott Meisler at p. 2.

Both can reasonably analyze the §1B1.10 factors and come to opposite conclusions. And while prosecutors and defense attorneys coming to such opposite conclusions is not something novel or unexpected, the factors listed in §1B1.10 are particularly unhelpful in creating any cognizable and applicable standard for retroactivity, at least without further explanation by the Commission about how and why it applies those factors and how and why they interact with one another and with the principle of finality.

The Commission has expressed no principles for the application of the §1B1.10 factors listed and especially how they weigh against the interests of finality. While §1B1.10 has been amended many times to address the mechanics and application issues of amendments that have been applied retroactively, the Commission has not addressed its decision-making on which amendments to apply retroactively.

Should retroactive application of guideline amendments be limited to instances "when an amendment would rectify an inequity," as suggested by the Criminal Law Committee of the Judicial Conference? *Letter from the Honorable Edmond E. Chang Chair, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable Carleton W. Reeves*, pp. 4-5, June 21, 2024. Should retroactivity be used "to rectify past unwarranted disparity in applying [an] enhancement" as suggested by the Federal Defender Sentencing Guidelines Committee? *Letter from Heather Williams* at p. 12. How does the Commission weigh the complexity of applying an amendment retroactively? How does it weigh the impact of retroactivity on the federal criminal justice system generally and how does that analysis relate to the legislative history of 28 U.S.C. § 994(u) which states: "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 old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983). How did the Commission decide to apply the "status points" amendment retroactively last year when the amendment leads in the vast majority of cases to the equivalent of a one-level adjustment and how is that consistent with Congress' direction not to apply an amendment retroactively when it is "only a minor downward adjustment in the guidelines?"

These and so many other questions deserve answers from the Commission. Over ten years ago, my colleague, Professor Berman, published an article discussing finality considerations, *Re-Balancing Fitness, Fairness, and Finality for Sentences*. Wake Forest J. L. & Pol'y, Volume 4:1, 151, 2014. In it, he identified some of the similarities and differences in the analysis of sentencing finality on the one hand and judgment finality on the other. Among other points, Professor Berman suggests different sentence finality concerns are implicated for crimes that create "lasting victims whose personal repose and psychic peace may only be well served by bestowing sentences with heightened certainty and predictability." His article and others engaging with distinct sentence finality concerns flag components of the work the Commission ought to do and then explain to stakeholders and the public.

None of this is to suggest that developing a reasoned Commission opinion – and set of principles from the §1B1.10 factors – on how it implements § 994(u) will be simple. Last year's 4-3 vote on retroactivity by members of the Commission regarding criminal history amendments suggests there may be majority and dissenting opinions. There will certainly be differences of views among the commissioners, some of which will be reconcilable and some of which will not. Nonetheless, the Commission owes it to the rest of us to wrestle with these issues, first privately, but then in a detailed, written, and reasoned accounting of its decision-making. Congress wisely gave the Commission the responsibility for retroactivity decisions. But the Commission owes it

both to Congress and the rest of us, to exercise its expertise more deliberately, explicitly, and transparently.

Public Comment - Reply Comment on Retroactivity of Certain 2024 Amendments

Submitter:

Jermaine Highsmith-Ruffin

Topics:

Acquitted Conduct (Amendment #1)

Comments:

I believe the most important thing for the commission to consider is transparency. Without this we have no public trust. When the public has to be informed through media organizations about things like acquitted conduct or murder sentencing through hearsay we lose trust. I am for all of the proposed changes and recommend that we make base level enhancements for murder be proven at conviction and not through hearsay. I also believe retroactivity shows fairness to all as well a willingness to make corrections.

Thank You,

Jermaine Highsmith-Ruffin

Submitted on: July 5, 2024

Public Comment - Reply Comment on Retroactivity of Certain 2024 Amendments

Submitter:

Lisa Jacobi

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Acquitted Conduct should be made retroactive mainly because if people should never have been sentenced by using their acquitted conduct, their sentence should be reduced, retroactive, and only bear the true sentence of which they were found guilty of.

There should be no question that acquitted conduct should not come into play at sentencing, and if it did, it must be retroactive to make it right.

Submitted on: July 7, 2024

Public Comment - Reply Comment on Retroactivity of Certain 2024 Amendments

Submitter:

Gary Jacques

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Strongly requesting that Prohibition of Acquitted Conduct Amendment #1 become retroactive on November 1, 2024

Submitted on: July 14, 2024

Public Comment - Reply Comment on Retroactivity of Certain 2024 Amendments

Submitter:

Issabel Jacques

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Please make Acquitted conduct amendment retroactive

Submitted on: July 15, 2024

Public Comment - Reply Comment on Retroactivity of Certain 2024 Amendments

Submitter:

Arianne Jean Baptiste

Topics:

Acquitted Conduct (Amendment #1)

Comments:

I am pro retroactivity !

Submitted on: July 14, 2024

Public Comment - Reply Comment on Retroactivity of Certain 2024 Amendments

Submitter:

William Kerlin

Topics:

Acquitted Conduct (Amendment #1)

Comments:

To The Honorable Judge Reeves:

I am writing in response to the USSC request for public comment on what we can do to help keep our justice system fair and trustworthy. I see that the commission has proposed some amendments and I agree with them all. I don't believe that Acquitted Conduct would have ever been approved by the founders of our constitution. I also read recently that someone could be sentenced for Murder without ever being charged, let alone convicted, of this crime. I think this is wrong and I think the public loses faith in our system when we see things like this. This letter is meant to serve as my suggestion to change Murder enhancements to be tried at conviction. Murder is too serious of an offense to be handed out by only the preponderance of evidence. I understand that the 2D1.1 has been made to be proven at conviction and I feel as though the 2D1.1(d)(1) should also be made this way. I also support the retroactivity of all of this. I appreciate the opportunity to allow me to have my voice heard.

With much respect,
William Kerlin

Submitted on: July 5, 2024

Public Comment - Reply Comment on Retroactivity of Certain 2024 Amendments

Submitter:

Nicholas Parnell

Topics:

Acquitted Conduct (Amendment #1)

Comments:

Dear Judge Reeves,

This letter responds to the public comment on acquitted conduct recently published by the Commission.

After reviewing many of the comments left during the comment period, I felt compelled to submit another response especially considering my original comment was not included in the publicized public comment.

I was incredibly disheartened to see the quantity of judges writing in to oppose the amendment for Acquitted Conduct being applied retroactively because it would, said simply, make their jobs more difficult.

I fully recognize the uphill battle the court system faces due to the amount of work that burdens each court. However, that is not unique to the federal judicial system and is certainly not a compelling case for such a critical decision.

Speaking on the Acquitted Conduct amendment specifically, the number of eligible inmates is miniscule compared to the total prison population. Many commenters referenced the tedious work required to even identify if an inmate submitting an appeal is even eligible for the release stipulation he/she is applying for. However, the scope of inmates that this applies to is black-and-white given it is only applicable to those with acquitted conduct.

Based on your committee's research, it is also clear that this scope is miniscule compared to other situations referenced in public comments.

It would be a disservice to this country's institutions if such a critical decision was strongly

influenced by a group of comments who did not issue any argument against the amendment itself but against the work they would have to do because of it.

The Sentencing Commission made a decision that this ruling makes sense proactively. There is no logical rationale for not applying the same rationale retroactively.

Thank you.

Submitted on: July 17, 2024

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