United States Sentencing Commission

2025 Amendment Cycle

Public Comment on the Criteria for Selecting Retroactive Guideline Amendments
89 FR 106761

UNITED STATES SENTENCING COMMISSION

2025 PUBLIC COMMENT ON THE CRITERIA FOR SELECTING RETROACTIVE GUIDELINE AMENDMENTS 89 FR 106761

ISSUE FOR COMMENT: CRITERIA FOR SELECTING GUIDELINE AMENDMENTS COVERED BY §1B1.10

This document sets forth the unofficial text of an issue for comment promulgated by the Commission and is provided only for the convenience of the user in the preparation of public comment. As with all proposed amendments on which a vote to publish for comment has been made but not yet officially submitted to the Federal Register for formal publication, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to the Federal Register, official text of the issue for comment will be posted on the Commission's website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register

Written public comment should be received by the Commission not later than **April 18, 2025**. Public comment received after the close of the comment period may not be considered. All written comment should be sent to the Commission via any of the following two methods: (1) comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov; or (2) 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 Criteria. For further information, see the full contents of the official notice when it is published in the Federal Register (available at www.ussc.gov).

The issue for comment is as follows:

REQUEST FOR COMMENT ON CRITERIA FOR SELECTING GUIDELINE AMENDMENTS COVERED BY §1B1.10

The Background Commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) provides a non-exhaustive list of criteria the Commission typically considers in selecting the amendments to be included in §1B1.10(d) for retractive application: "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 subsection (b)(1)." USSG §1B1.10, comment. (backg'd). This non-exhaustive list of criteria has remained substantively unchanged since the Commission originally promulgated the policy statement at §1B1.10 in 1989.

Issues for Comment:

1. The Commission seeks comment on whether it should provide further guidance on how the existing criteria for determining whether an amendment should apply retroactively are applied. If so, what should that guidance be? Should it revise or expand the criteria? Are there additional criteria that the Commission should consider beyond those listed in the existing Background Commentary to §1B1.10? Are there identifiable sources that the Commission should consult that highlight retroactivity criteria relied upon by other legislative or rulemaking bodies?

   If the Commission continues to list criteria relevant to determining whether an amendment should apply retroactively, should it adopt any bright-line rules? Is there a different approach that the Commission should consider for these purposes?

2. The Commission seeks comment on whether any listed criteria are more appropriately addressed in the Commission's Rules of Practice and Procedure rather than the Background Commentary to §1B1.10.

3. Rule 4.1A (Retroactive Application of Amendments) of the Commission's Rules of Practice and Procedure provides "[g]enerally, promulgated amendments will be given prospective application only." The Commission seeks comment on whether it should retain this provision. If so, how should the Commission ensure that any listed criteria reflect this provision?

COMMITTEE ON CRIMINAL LAW
of the
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April 18, 2025

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

Dear Chair Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, we appreciate the opportunity to provide input on the Commission's Issue for Comment regarding criteria for selecting guideline amendments covered by USSG §1B1.10.

The Committee's jurisdiction within the Judicial Conference includes overseeing the federal probation and pretrial services system and reviewing issues related to the administration of criminal law. The Committee provides these comments to the Sentencing Commission as part of its monitoring role over the workload and operation of probation offices and as part of its ongoing role in examining the fair administration of criminal law. The Judicial Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[1] To that end, the Committee has submitted comment and presented testimony on—and in many cases has supported—the

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

Commission's efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

Providing the Commission with feedback on the possible retroactive application of promulgated amendments is an important part of the Committee's role in overseeing the workload and operation of probation offices. The Committee strives to provide information on the real-life impacts that retroactive application of an amendment could have on judicial and probation-office resources, including the probation system's workload, budget, and staffing needs, and on the interplay of those impacts with the judiciary's mission and community safety. In addition to assessing the Commission's retroactivity criteria and any data provided by the Commission, the Committee considers fundamental fairness and administrability, as well as the transparency, certainty, and predictability that are promoted by the finality of sentences.

Discussion

Currently, the Background Commentary to § 1B1.10 sets forth three factors that the Commission considers in evaluating retroactivity:

> Among the factors considered by the Commission in selecting the amendments included in subsection (d) were 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 subsection (b)(1).

The Background Commentary adds that the Commission's decision to apply an amendment retroactively "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing."

The Committee appreciates that the Commission is taking a fresh look at its criteria for making amendments retroactive. The criteria set out in the Background Commentary has been substantively unchanged since the Commission originally promulgated the Policy Statement at §1B1.10 in 1989. Yet there seems to be a recent trend towards applying amendments retroactively, even when the amendments do not address a fundamental inequity. As discussed in a previous Committee comment,[2] any presumption in favor of retroactive application of amendments would run counter to the criteria set out in §1B1.10 and would undermine the predictability of sentences. Also, the retroactive application of an amendment typically leads to the filing of many motions that do not result in a reduction of sentence and yet impose a significant burden on the judges and probation offices that must evaluate the motions. Routinely making amendments retroactive would also undermine the essential principle of finality of criminal sentences, thus eroding the goals of the Sentencing Reform Act. To be sure, as would be expected from a balancing of competing factors, at times the Committee has favored (or not opposed) retroactive application of certain amendments. But given the

[2] The Committee discussed these issues in its June 2024 letter to the Commission.

importance of the finality of sentences, the Committee has also opposed retroactivity of many others.

As discussed below, the Committee also asks that the Commission specifically add to its criteria a required consideration of the workload and staffing impacts when determining whether to make an amendment retroactive.

The Commission's existing rule appropriately states that amendments generally should be given only prospective application.

The Commission's first Issue for Comment asks, among other things, whether the Commission should "adopt any bright-line rules" in its approach to retroactivity. Although the fair administration of justice typically resists the adoption of bright-line rules, the Commission has long applied a principle that appropriately comes close to setting a bright line: "Generally, promulgated amendments will be given prospective application only." Rule 4.1 of the Commission's Rules of Practice and Procedure has been on the books since the Commission first issued its rules in 1997.

Indeed, in response to the third Issue for Comment, the Committee believes that Rule 4.1 should be incorporated, more formally, into the policy statement at §1B1.10. The Guidelines Manual is constantly changing, and many amendments reflect fine-tuning of the Guidelines based on evolving research, case law, or legislative changes. Amendments addressing issues of fundamental fairness, which may warrant retroactive application, are relatively rare. In the view of the Committee, this general rule against retroactive application appropriately reflects the goals of the Sentencing Reform Act of 1984.

In particular, the Act abolished parole and created the Sentencing Commission to create a more predictable system of determinate sentencing. More specifically, the Act sought to create certainty in the amount of time a person would serve on a sentence, abolishing the old system under which release dates were later determined by the Parole Commission. Throughout the discussions in the legislative record, the Senate Committee on the Judiciary repeated its goal: "Under the bill, the sentence imposed by the judge will be the sentence actually served." The pertinent Senate Committee Report explained the benefits of truth-in-sentencing:

> Prison sentences imposed will represent the actual time to be served and the prisoners and the public will know when offenders will be released from prison. Prisoners' morale will probably improve when the uncertainties about release dates are removed. Public respect for the law will grow when the public knows that the judicially-imposed sentence announced in a particular case represents the real sentence, rather than one subject to constant adjustment.

S. Rep. No. 225, 98th Cong., 1st Sess. 56 (1983).

Reasonable certainty of release dates also ensures that individuals receive the advantages of release preparation and reentry services. Due to a number of budgetary and other factors, the Bureau of Prisons (BOP) is already struggling to provide individuals with the appropriate time in pre-release programs, residential reentry centers (RRCs), and other forms of

prerelease custody.[3] Appropriate release planning—which requires time, resources, and coordination, from both the BOP and our probation offices—is critical to an individual's success upon release, particularly for those who have served long sentences, those who lack family or other community support, and those with higher risks and needs.

Frequent or routine retroactive application of guideline amendments undermines determinate, predictable sentencing, and erodes the statutory sentencing goals, especially deterrence.[4] As we noted in our June 2024 letter, when amendments not addressing a fundamental unfairness or inequity are routinely deemed retroactive, "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." Even in the context of applying *constitutional* rules retroactively—which arguably represent an even more compelling case for retroactivity—the Supreme Court has recognized the importance of finality, explaining that "applying 'constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" *Edwards v. Vannoy*, 593 U.S. 255, 263 (2021) (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)); *see also Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect").

At the same time, the goal of finality can be overcome by extraordinary and compelling reasons in individual cases, as authorized by the First Step Act's relatively recent expansion of compassionate release in 18 U.S.C. § 3582(c)(1)(A)(i). The compassionate-release escape hatch is available for those extraordinary and compelling cases. But on the separate issue of applying Guidelines amendments retroactively, the pertinent Senate Committee Report underlying the Sentencing Reform Act explained that courts should be "burdened" with retroactive adjustments for those previously sentenced only "if there is a major downward adjustment in guidelines because of a change in the community view of the offense." S. Rep. No. 225 at 180.

The principles set forth in the Senate Committee Report—a "major" sentencing reduction due to a change in "community" views about the offense—aptly describe the Committee's previous support for retroactivity of crack amendments and the "drugs minus two" amendment. Those instances represented a significant change in the public's view of drug offenses. The crack-cocaine amendments, in particular, were driven by fundamental fairness concerns. Not coincidentally, the change in public opinion also was supported by pertinent sentencing data.[5]

In contrast, the recent criminal-history amendments (on status points and zero-point offenders) made retroactive in the 2023 cycle did not seem to be based on an overall change in

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[3] *E.g.*, *Woodley v. Warden*, 2024 WL 2260904 (D. Kan. 2024), one of a number of cases litigating RRC placement or other prerelease custody due to BOP limitations.

[4] 18 U.S.C. § 3553(a)(2)(B).

[5] U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy, Report to Congress* (May 2002) at 100 (explaining that data showed less prevalence of weapons possession in crack offenses than previously assumed).

the community view of those factors and did not implicate concerns over fundamental fairness. In an earlier amendment issued in 2010, the Commission declined to make a similar criminal-history amendment (on recency points) retroactive. Three Sentencing Commissioners spoke at the Commission's public meeting on September 16, 2010, to explain why retroactive application was not warranted. Then-Vice Chair Ketanji B. Jackson, now Associate Justice of the Supreme Court, first pointed out that the Commission correctly amended the guidelines to remove recency points based on updated recidivism research. She then explained that the amendment should not be made retroactive because of workload concerns as weighed against the expected benefit, and because the amendment was not intended to address the kind of fairness concerns presented by the 2007 crack-cocaine amendment. Similarly, then-Commissioner Beryl A. Howell emphasized that the amendment was not intended to address a perceived fundamental unfairness and would cause a significant workload burden, due to the large number of inmates who received recency points and would thus likely file a motion, regardless of the prospects of a reduction.[6] She also pointed out that the majority of those who would benefit were in Criminal History Categories IV, V, and VI, thus posing additional concerns over public safety.

More recently, the Commission seems to have applied retroactivity in a way that suggests most amendments would apply retroactively. In the Commission's public hearing on retroactivity of the 2023 criminal-history amendments, the Commission did acknowledge workload concerns and did delay the effective date of retroactivity. The Committee appreciates that consideration, but some of the points made in favor of retroactivity would likely apply to almost every amendment. For example, even short reductions in sentences are no doubt important to the incarcerated person and their families, and the financial costs of imprisoning someone runs into the tens of thousands of dollars per year. But those considerations would apply across-the-board, leading to retroactive application of most amendments, and that would be inconsistent with reserving retroactivity for "major downward adjustments." S. Rep. No. 225 at 180. In contrast to general retroactive application, the Committee instead recommends that the Commission adopt in § 1B1.10 the principle that amendments generally will be applied prospectively only.

The Commission Should Specifically Include in its Retroactivity Criteria the Impact on the Judiciary's Budget, Staffing, and Workload

Consistent with the general presumption of prospective application, the Committee also recommends that the Commission explicitly adopt into its retroactivity criteria the budget, staffing, and workload impact of retroactive application on judges and probation officers, as well as the resulting effect on judicial resources and public safety. But the capacity of judges and probation officers is limited. Any time devoted to considering retroactivity-based motions is time taken away from every other case, litigant, and supervisee. Probation offices in particular face significant limitations on resources, and reducing the time and attention spent on supervision of defendants necessarily makes it more difficult to reduce recidivism risks.[7] The

[6] It was estimated, at the time, that around 43,000 individuals had received recency points, but only around 8,000 would actually be eligible for a reduction.

[7] When supervising individuals, probation offices focus time and resources by applying evidence-based practices to assess risks and needs to reduce recidivism and to help the supervisee transition back into the

Committee, and the staff of the Administrative Office (AO), would welcome the opportunity to provide concrete information on workload concerns, whether historical or predicted.

For example, workload data from the recent retroactive amendment on status points and zero-point offenders (Amendment 821), shows how important it is to consider data the AO may provide. From August 24, 2023 (the day the Commission announced retroactivity for Amendment 821) through April 7, 2025, data from the AO's Probation and Pretrial Services Office (PPSO) show that officers submitted 31,482 retroactive-amendment reports to judges.[8] This equates to 73.03 authorized work units. In budgetary lingo, one authorized work unit equals one year of full-time work for one office staff member. Put another way, retroactivity of Amendment 821 has, so far, occupied the equivalent of one entire year's worth of full-time work for around 73 probation officers. That is like assigning *almost every* probation office staff member in the District of Utah to work solely on retroactivity for an entire year. This would be a significant amount of work even if probation offices were fully staffed. But as of March 2025, PPSO data reflects a national staffing utilization rate (that is, the rate of on-board staff compared to number of staff needed, as determined by the AO's workload formulas) of 83.2% in probation offices nationwide. Indeed, this workload data reflects just the front-end work on retroactivity, that is, the work needed on incoming motions when filed or anticipated. It does *not* account for the back-end work, that is, the increased workload from litigation arising from the motions (when judges sometimes ask probation officers to perform follow up work) and from the need to supervise individuals who are released earlier than originally anticipated. And none of this accounts for the workload of judges, law clerks, and other court staff.

Another significant workload concern is the time expended on motions from inmates who are ineligible for a reduction. That work must be done—but ends up benefiting no one. Before making the retroactivity determination for Amendment 821, the Commission estimated that 11,495 individuals would be eligible for a reduction under Part A (status points) and 7,272 would be eligible for a reduction under Part B (zero-point offender), for a total of 18,767. The Commission's post-retroactivity data, last updated in February 2025, shows 14,030 decisions on Part A motions (5,304 granted, 8,726 denied), and 10,984 rulings on Part B motions (3,654 granted and 7,330 denied). This means that, out of 25,014 motions filed, only 8,958 have resulted in sentence reductions. The Commission's data also reflects that the substantial majority of denials (69.9% for Part A and 78.5% for Part B) were based on outright ineligibility, rather than 18 U.S.C. § 3553(a) factors or other reasons. More specifically, around 6,099 status-point motions and 5,754 zero-point motions were filed by ineligible defendants. So the judiciary and probation officers have worked on, so far, 11,853 completely meritless motions.

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community. Applying this risk-principle approach means that higher-risk individuals typically receive more attention than lower-risk individuals. Tasking officers with additional work that does *not* take into account the associated risks takes time away from working directly with supervisees and implementing these evidence-based practices. And this all takes place in an already challenging work environment.

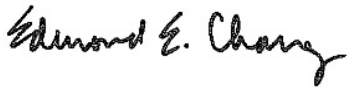
[8] Although PPSO data does not distinguish retroactivity reports by specific amendment, given the length of time that had passed since the effective date of previous retroactive amendments, it is highly likely that the vast majority of the reports submitted during this time were based on Amendment 821.

Just as the Commission took into account the need to avoid unnecessary waste of probation-system resources when evaluating potential supervised release amendments[9]—consideration which the Committee appreciates—the Committee urges the Commission to take into account the burden on judges and probation officers imposed by retroactive application. We emphasize again that there indeed will be instances when retroactive application is warranted. Workload concerns, even overwhelming ones, can of course be justified when there is a fundamental unfairness that must be righted. The Committee nonetheless urges the Commission to expressly account for the practical and operational burdens on our judicial system when setting the criteria for retroactivity in § 1B1.10. That consideration will allow judges and probation officers to focus more directly on public safety and on helping supervisees reintegrate into their communities.

Conclusion

The Committee, as always, appreciates the extraordinary work of the Commission and the opportunity to respond to the Issues for Comment on retroactivity. The Committee members look forward to working with the Commission to improve the overall effectiveness of the sentencing guidelines and the fair administration of justice. We remain available to assist in any way we can.

Respectfully submitted,



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

[9] The Commission's recently promulgated amendment on supervised release notes that the changes "are intended to better allocate taxpayer dollars and probation resources, encourage compliance and improve public safety, and facilitate the reentry and rehabilitation of defendants."

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

District Judge Micaela Alvarez, Texas, Southern

Topics:

Retroactivity Criteria

Comments:

The Commission should retain the Rule's language that "[g]enerally, promulgated amendments will be given prospective application only." Furthermore, the Commission should develop Guideline criteria that comport with this Rule. That criteria should consider the waste of judicial resources when an amendment is made retroactive. By way of example, I have handled close to 400 Amendment 821 requests for reduction when only 185 cases were flagged as being eligible for reduction. We identified an additional 16 cases, bringing the total to 201 eligible. Yet any defendant may file a motion, thus I have had to review and dispose of almost twice as many cases as are actually eligible. I doubt the filings will cease any time soon. Booker discretion is well established, and every judge should understand that the Guidelines are only the starting point. Retroactivity should be curtailed to conserve judicial resources.

Submitted on: April 3, 2025

U.S. Department of Justice

Criminal Division

Appellate Section *Washington, DC 20530*

April 18, 2025

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

Dear Judge Reeves:

Last year, you announced that the Sentencing Commission had "decided to heed th[e] calls" of commenters who were urging "the Commission to identify clear principles" for determining whether to make guideline amendments retroactive.[1] To that end, the Commission requested public comment on three issues: (1) whether the Commission should provide further guidance regarding the existing criteria for selecting guideline amendments to be covered by §1B1.10 and whether additional criteria should be considered; (2) whether any listed criteria are more appropriately addressed in the Commission's Rules of Practice and Procedure rather than the Background Commentary to §1B1.10; and (3) whether the Commission should retain the provision of its Rules providing that, "[g]enerally, promulgated amendments will be given prospective application only."[2]

This letter responds to the Commission's request for comment. With respect to the first issue, the Department offers several suggestions intended to clarify the existing criteria and to make their application more predictable in practice. Regarding the second issue, the Department encourages the Commission to move its presumption concerning the prospective application of amendments from its Rules of Practice and Procedure to the Background Commentary to §1B1.10. Finally, the Department recommends that the presumption of prospective application—in addition to being moved to §1B1.10—be strengthened to adequately reflect that retroactivity is the exception and not the rule. The Department addresses each of these issues in turn.

[1] Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, Chair's Remarks at the Sent'g Comm'n Public Meeting on Aug. 8, 2024, at 5, at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240808/remarks.pdf.

[2] Request for public comment, 89 Fed. Reg. 106761 (Dec. 27, 2024), at https://www.federalregister.gov/documents/2024/12/30/2024-31278/sentencing-guidelines-for-united-states-courts.

I. The Commission should refine and clarify the retroactivity criteria

Historically, the Commission has rarely given amendments retroactive application.[3] As then-Commissioner Howell observed in 2011, "[t]he Commission has over its history used its authority under 28 U.S.C. 994(u) infrequently to [make] retroactive guideline amendments that reduce sentencing ranges."[4] Or, as the Commission itself put the point a year earlier, "the Commission has exercised its authority to make an amendment retroactive judiciously."[5] That cautious approach is supported by sound reasons—*viz.*, that revisiting previous sentences imposes significant costs on the justice system, including by redirecting the limited resources of judges, probation officers, prosecutors, and defense counsel from pending cases to closed ones.

To guide the retroactivity determination, the Commission has long considered a non-exhaustive list of factors: "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."[6] Additionally, the Commission has stated that "amendments that generally reduce the maximum of the guideline range by less than six months" are not given retroactive effect.[7] And, in its Rules of Practice and Procedure, the Commission has articulated a presumption that amendments to the guidelines "will be given prospective application only."[8]

In recent years, the factors that guide the determination of whether to give particular amendments retroactive effect have garnered public scrutiny, with some stakeholders questioning whether those factors lead to consistent, predictable, and transparent decision making. The Department shares concerns about the consistency, predictability, and transparency of the Commission's retroactivity decisions. We therefore appreciate the Commission's engagement with those public comments and the opportunity to offer the following suggestions.

A. The criteria should explicitly account for public safety

First, the Department urges the Commission to include in its retroactivity criteria explicit consideration of the potential effect of any guideline amendment on public safety. Among the sentencing factors identified in § 3553(a), two central considerations are "deterrence" of and

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[3] Of the more than 800 technical and substantive amendments it has promulgated since 1987, the Commission has given retroactive effect to approximately 30. U.S.S.G. §1B1.10(d).

[4] *Sent'g Comm'n Public Meeting on June 30, 2011,* 22:15-21 (Statement of Comm'r Howell), available at https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.

[5] Brief for U.S. Sent'g Comm'n as Amicus Curiae Supporting Respondent, *Dillon v. United States*, 560 U.S. 817 (2010) (No. 09-6338), 2010 WL 748254, at *4; *see also id.* at *18 ("Given the extraordinary nature of the remedy and the impact it has on the finality of sentences, the Commission exercises its authority regarding retroactivity with great care.").

[6] U.S.S.G. 1B1.10, comment. (backg'd).

[7] *Id.* (discussing legislative history reflecting Congress' expectation that courts should not be "'burdened'" with "'minor downward adjustment[s]'").

[8] U.S. Sent'g Comm'n, *Rules of Practice and Procedure*, Rule 4.1A, at https://www.ussc.gov/about/rules-practice-and-procedure.

"protection of the public" from defendants' future crimes.[9] The Commission's research has revealed strong statistical relationships between length of incarceration and recidivism, identifying "a statistically significant preventative effect" for offenders sentenced to more than 60 months and for offenders sentenced to more than 120 months.[10] And the Commission has identified age and criminal history as "consistently strong predictors of recidivism."[11]

Additionally, the Department observes that the Application Notes to §1B1.10 already direct district courts to "consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in" any *individual* defendant's term of imprisonment when applying a particular guideline retroactively.[12] It follows logically that the Commission should account for the danger posed by defendants covered by a particular amendment in determining whether to give that amendment retroactive effect. Indeed, individual Commissioners have repeatedly framed their concerns regarding retroactivity in terms of possible risks to public safety.[13]

Further, and as the Department has previously observed,[14] guideline amendments that could make large numbers of incarcerated defendants eligible for release within a short time frame implicate additional public safety concerns. Generally, the Bureau of Prisons starts planning for release 180 days in advance.[15] Transition planning includes securing beds in residential reentry centers and providing other programs that require space, resources, re-computation of release dates, and coordination with probation. It also involves working with probation offices to develop release and supervision plans. Amendments that make large numbers of defendants eligible for near-simultaneous release increase the burden on transition services,

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[9] *Dean v. United States*, 581 U.S. 62, 67 (2017); 18 U.S.C. §3553(a)(2)(B)-(C).

[10] U.S. Sent'g Comm'n, *Length of Incarceration and Recidivism* (June 2022), 19-20, at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivsm-SentLength.pdf.

[11] U.S. Sent'g Comm'n, *Recidivism of Federal Offenders Released in 2010* (Sept. 2021), 24, at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf.

[12] U.S.S.G. §1B1.10, comment. n.1(B)(ii).

[13] *See, e.g.*, *U.S. Sent'g Comm'n Public Meeting on August 24, 2023*, transcript at 37-39 (Comm'r Wong expressing concern regarding possible effects on public safety of status points amendment), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230824/transcriptR.pdf; *U.S. Sent'g Comm'n Public Meeting on June 10, 2014*, transcript at 142-143 (Vice Chair Breyer inquiring into Department's "public safety argument" regarding retroactivity of drug guideline amendment and agreeing public safety is "really right at the top, or close to the top of all the considerations of the Commission"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf; *U.S. Sent'g Comm'n Public Meeting on September 16, 2010*, minutes at 2 (statement of Comm'r Beryl Howell on retroactive application of the recency points amendment observing that criminal histories of potentially eligible offenders raise "public safety concerns"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf.

[14] Scott Meisler, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, U.S. Sent'g Comm'n, at 6, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf.

[15] *Sent'g Comm'n Public Hearing on Retroactivity of 2014 Drug Amendment (June 10, 2014),* 121:15-19 (Statement of Bureau of Prison Dir. Samuels, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf.

requiring support from probation offices and the Bureau of Prisons beyond what they may have the capacity to provide, diminishing the availability of services critical for successful reentry into the community, and increasing the risk of recidivism. For these reasons, the Department regularly requests that any retroactivity implementation be delayed. Even with delayed implementation, retroactivity raises the risk that some defendants might not receive a full array of reentry services and step-down transitioning.

Because the protection of public safety is a critical objective of sentencing generally, because the Commission itself has identified strong correlations between sentencing and recidivism, and because public safety is already often a part of the Commission's decision making in this area, the Department strongly urges the Commission to include the protection of public safety explicitly in the §1B1.10 retroactivity criteria.

B. The criteria should better reflect the burdens of retroactivity on courts, victims, and other stakeholders

Second, although the §1B1.10 factors currently reflect consideration of "the difficulty of applying the amendment retroactively,"[16] that very general factor should be made more precise. In particular, the Department suggests including language that explicitly accounts for two aspects of this difficulty: the administrative and resource burdens that retroactivity imposes on the courts, prosecutors, and other stakeholders; and the burdens on victims of crime.

The §1B1.10 factors should make clear that the possibility of imposing substantial administrative burdens on stakeholders in the criminal justice system weighs against applying an amendment retroactively. The diversion of resources required by any retroactive amendment has real consequences for the criminal justice system. As noted at the outset, the obligation to respond to retroactivity motions from previously sentenced offenders necessarily limits the ability of prosecutors to focus their attention on immediate and pressing public-safety matters. Each hour spent relitigating old cases is time that cannot be devoted to protecting communities from present-day threats. Courts, probation officers, and defense attorneys face similar constraints when they are looking backward, potentially affecting their ability to provide speedy trials and prompt sentencings for defendants who are currently facing charges.

Since its inception, the Commission has sensibly recognized that these burdens are an important factor in evaluating the appropriateness of retroactivity. That recognition reflects the potential complexities of sentence reductions under §1B1.10, which involve both a threshold eligibility determination and the exercise of judicial discretion. As then-Commissioner Brown Jackson observed during a public meeting on retroactivity in 2011, "in each eligible case, a federal judge must determine the appropriateness of a sentence reduction for that particular defendant, adjusting the sentence only if warranted and if the risk to public safety is minimal."[17] To get to that point, offenders must move for a sentencing reduction; the government must respond to the motion; probation officers must review the application and determine if the amendment affects the offender's guideline calculation and meets the criteria of §1B1.10; the Bureau of Prisons must gather disciplinary and other prison records for the offender to be

[16] U.S.S.G. §1B1.10, comment. (backg'd).

[17] *Sent'g Comm'n Public Meeting on June 30, 2011, supra* note 4, 14:14-18 (Statement of Comm'r Ketanji Brown Jackson).

reviewed by the sentencing court; and the court must review all this information to evaluate the appropriateness of a reduction for each eligible offender individually.[18] The sentencing court is required to consider the factors listed in 18 U.S.C. §3553(a) as well as the defendant's post-sentencing conduct to determine whether a reduction is warranted, the extent of any reduction, and "the nature and seriousness of the danger to any person or the community" that would result from a sentencing reduction.

As past experience has shown, moreover, the number of applications from ineligible individuals adds substantially to the workload. When the 2014 drug amendments were applied retroactively, for example, more than 12,000 *ineligible* offenders sought sentencing reductions.[19] Similarly, nearly 7,000 *ineligible* offenders sought sentencing reductions when the "status points" amendment was made retroactive.[20] To determine whether an inmate is eligible, prosecutors, defense attorneys, and probation officers are required to gather documents from closed cases and, frequently, to prepare written analysis for the court. Judges tasked with making the eligibility determinations "receive no additional probation staff or law clerk assistance to divide the wheat from the chaff."[21] And even when the district court finds an inmate ineligible, the court often undertakes an alternative analysis under the § 3553(a) factors to facilitate (or avoid unnecessary) appellate review. Ultimate ineligibility therefore does not prevent the expenditure of substantial efforts.

Administrative and resource burdens are at their most onerous when applying an amendment retroactively would require courts to engage in new fact-finding, especially where the facts needed to support new determinations are not likely to be found in the existing sentencing record.[22] Amendments that require fact-finding regarding the circumstances of an offense of conviction, for example, might be particularly difficult to apply retroactively as memories fade, evidence spoils, and witnesses die or otherwise become unavailable.[23] The Commission has previously disfavored retroactive application of amendments under such circumstances. As then-Commissioner Howell noted when voting against retroactive application of one part of a guideline amendment in 2010, "time-consuming and administratively difficult-to-apply factors" not previously considered during the original sentencing would be challenging for courts to evaluate and fact-find retroactively and would likely lead to hearings and litigation.[24]

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[18] *See generally In re Thomas*, 988 F.3d 783, 793 (4th Cir. 2021) (Wilkinson, J., concurring) ("[I]t imposes a Promethean task on criminal justice to revisit cases repeatedly in order to keep them 'current.'").

[19] U.S. Sent'g Comm'n, *2014 Drug Guidelines Amendment Retroactivity Data Report* (May 2021), Table 8, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf.

[20] U.S. Sent'g Comm'n, *Part A of the 2023 Criminal History Amendment Retroactivity Data Report* (February 2025), Table 9, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202502-CH-Retro-Part-A.pdf.

[21] Hon. Catherine C. Eagles, Chief District Judge, Letter to Hon. Carlton Reeves, Chair (May 30, 2024), at 2, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf#page=96.

[22] *See* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J. L. & POL'Y 179, 197-202 (2014) (discussing costs of relitigating sentences generally).

[23] *Id.* at 203 (noting "the passage of time may degrade the reliability of" information provided to courts and "courts are more likely to make errors at resentencing than at an initial sentencing").

[24] *Sent'g Comm'n Public Meeting on June 30, 2011*, *supra* note 4, 19:3-14 (statement of Comm'r Howell) ("These

Such retroactive fact-finding would be "administratively burdensome to the point of impracticality."[25] Accordingly, the Commission's criteria should explicitly recognize that the necessity of new fact-finding—especially where the predicate facts are not likely to be found in the existing record—constitutes an administrability problem that weights against retroactive application.

The Department also suggests explicitly referencing the burdens imposed on victims within a more detailed description of the "difficulty" of retroactive application. The criteria should include consideration of the loss of finality as a factor significantly affecting victims. Any victim who learns that the defendant may be eligible for early release due to retroactive application immediately faces the prospect of losing the closure they had gained when the defendant was initially sentenced. The harm caused by this loss of finality may be compounded if sentencing proceedings are reopened, particularly if the victim's participation is required to establish new findings of fact. Requiring victims to revisit traumatic experiences, potentially years after the fact, is a significant burden to impose, and it should have significant weight in the Commission's decision making.[26]

C. The "purpose of the amendment" criterion should be clarified

Third, the Department urges the Commission to clarify the significance of a guideline amendment's "purpose" in determining whether to apply it retroactively. Although it may be impossible for this criterion to capture all of the possible "purposes" for which future guideline amendments are promulgated, the Department suggests that the purpose factor be grounded in Congress' directive in the Sentencing Reform Act that the Commission "provid[e] certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities."[27] Thus, the Commission should limit retroactive application to those amendments that reflect more fundamental revisions to the Guidelines—such as amendments driven by empirical research casting doubt on the soundness of the existing guideline or amendments that reflect significant changes in the way that

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are new factors . . . that were not formerly considered by judges as part of the original guideline calculations, and consideration now, if we were to consider making that [part] of the amendment retroactive, would likely require courts to engage in new fact-finding with the concomitant need for hearings . . . And this process to my mind would just be administratively burdensome to the point of impracticality.").

[25] *Id.*

[26] *See United States v. Rodriguez-Pena*, 957 F.3d 514, 519 (5th Cir. 2020) (Oldham, J., concurring) ("Maybe it's no big deal for an expert to testify again. But it might be a very big deal to ask a victim to testify again. And even for victims who don't have to testify, just the uncertainty of a resentencing can impose very real 'human costs.'"); *United States v. Lewis*, 823 F.3d 1075, 1081 (7th Cir. 2016) ("We also keep in mind the costs of remands for resentencing, especially the human costs imposed on victims. In cases like this, where children have been victims of terrible abuse and where even one sentencing hearing can be traumatic, that concern is important."); Mary Graw Leary, Chair, Victims Advisory Group, U.S. Sent'g Comm'n, Letter to Hon. Carlton Reeves, Chair, U.S. Sent'g Comm'n, *Public Comment on Criminal History Amendment 8, Parts A and B*, at 2-3, ("[E]ven if not all petitions will be successful, each petition filed represents a crime victim whose life will be upended by the filing; a victim who will experience the repeated yet unexpected trauma of destabilizing their expectations of finality and due process regarding their offender's sentence."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=83.

[27] 28 U.S.C. § 994(f) ("The Commission . . . shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities."); 18 U.S.C. § 3553(a)(6) ("the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct").

the justice system assesses the gravity of an offense or the culpability of particular offenders. Only when prospective application of these fundamental revisions would produce unwarranted disparities between previously sentenced defendants and defendants sentenced under the revision should the Commission consider retroactive application. The Commission should also make explicit that guideline amendments intended to be clarifying, technical, or resolve circuit splits are less likely to warrant retroactive application.

This revision to the "purpose" criterion would make it more transparent and predictable in its application, and it would be consistent with the Commission's and commenters' past understandings. For example, in voting against retroactive application of an amendment to the criminal history guideline, then-Commissioner Brown Jackson noted that "the recency amendment was not intended to address the same types of fairness issues involved in the circumstances where retroactivity typically has been adopted in the past."[28] The Committee on Criminal Law of the Judicial Conference has expressed a similar understanding, explaining that it "has supported retroactive application for amendments that eliminated a fundamentally unfair aspect of sentencing."[29] The "purpose" criterion should make this explicit.

D. The "magnitude of the change" criterion should be clarified

Fourth, the Department suggests clarifying the meaning of the "magnitude" criterion. As a matter of plain meaning, this criterion could be understood to refer to the extent of the reduction that eligible defendants could receive or—as the Commission itself has at times suggested—as an effort to account for "any burdens that might be imposed on the judicial system."[30] If understood in the latter way, the magnitude criterion would overlap considerably with the separate difficulty-of-retroactive-application criterion discussed above.[31]

The Commission should clarify that the magnitude criterion turns principally on how extensive a reduction to the guideline range is expected to be for eligible defendants. In so doing, the Commission should retain language memorializing its longstanding practice of declining to make retroactive "amendments that generally reduce the maximum of the guideline range by less than six months."[32] As the current Background Commentary explains, the Commission's decision not to include such amendments in §1B.10 is consistent with the legislative history of 18 U.S.C. § 994(u), which reflects Congress's expectation that the Commission would not recommend adjusting sentences when the guidelines are refined in a way that might cause some existing sentences to fall above the amended guidelines "or when there is only a minor downward adjustment in the guidelines."[33]

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[28] *Sent'g Comm'n Public Meeting on June 30, 2011, supra* note 4, 13:5-9 (Statement of Comm'r Ketanji Brown Jackson).

[29] Hon. Randolph D. Moss, Chair, Criminal Law Committee, Letter to Hon. Carlton Reeves, Chair, U.S. Sent'g Comm'n (June 23, 2023), at 4.

[30] *Dillon* Amicus Brief, *supra* note 5, at *18.

[31] *Id.* (stating that both the magnitude and difficulty-of-application criteria "take into account any burdens that might be imposed on the judicial system").

[32] U.S.S.G. §1B1.10, comment. (backg'd).

[33] *Id.* (*quoting* S. Rep. No. 98-225, at 180 (1983)); *see also Dillon* Amicus Br., *supra* note 5, at 18 ("As noted in the Senate report on the SRA, frequent grants of retroactivity to small changes in the Guidelines could present a burden

Reaffirming that minor adjustments are unlikely to warrant retroactive application would not mean that the inverse is true, *i.e.*, that a greater reduction in the guideline range necessarily weighs in favor of retroactive application. To the contrary, and as explained further below, the Commission should start its analysis for each amendment—no matter its forecasted effects—with a presumption *against* retroactive application. The Commission's confirmation that retroactivity is generally unwarranted for more minor adjustments would simply make clear that such amendments are particularly unlikely to overcome the presumption—in other words, that the modest reduction available to any individual defendant is outweighed by the high costs that sentencing-modification proceedings entail for the justice system as a whole.

II. The criteria and the presumption of prospective application should be included together in the Background Commentary to §1B1.10

The Commission has requested comment on whether the retroactivity criteria are more appropriately addressed in the Commission's Rules of Practice and Procedure,[34] rather than the Background Commentary to §1B1.10. The Department recommends that the Commission keep the retroactivity criteria in §1B1.10's Background Commentary and that it move the presumption that guideline amendments will be applied prospectively from Rule 4.1A of the Commission's Rules to that same Background Commentary.

As an initial matter, publishing the criteria (including the presumption) in the Background Commentary better reflects their status as factors that inform the Commission's *substantive* determination of whether to make a guideline amendment available for retroactive application via motions brought under 18 U.S.C. § 3582(c)(2). Additionally, keeping the criteria in the widely distributed Guidelines Manual better serves the Commission's general goal of transparency than would housing them in internal procedural rules found on the Commission's website. It would also foster transparency toward, and notice to, coordinate branches of government. Indeed, courts have expressed concern about Congress's opportunity to respond to certain Commission actions *even when* the Commission acted through guideline commentary that had undergone notice-and-comment procedures.[35] The Commission should not place the considerations that drives its important retroactivity determinations further outside of the public eye by relegating them to its internal procedural rules.

III. The presumption of prospective application should be strengthened

The Commission has sought comment on whether to "retain the provision" stating that "[g]enerally, promulgated amendments will be given prospective application only."[36] If the Commission is asking whether the provision should be removed entirely, the Department strongly opposes deleting the presumption. Maintaining a presumption that amendments have only

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to the judicial system.").

[34] U.S. Sent'g Comm'n, *Rules of Practice and Procedure*, Rule 1.1 (explaining that the Commission "has established these rules governing its usual operating practices"), available at https://www.ussc.gov/about/rules-practice-and-procedure.

[35] *See, e.g.*, *United States v. Riccardi*, 989 F.3d 476, 488–89 (6th Cir. 2021).

[36] Request for public comment, 89 Fed. Reg. 106761 (Dec. 27, 2024) (internal quotations omitted), at https://www.federalregister.gov/documents/2024/12/30/2024-31278/sentencing-guidelines-for-united-states-courts.

prospective effect is appropriate. In fact, the Department recommends that the language setting forth the presumption be amended to strengthen it.

A. The language of the presumption of prospective application should be amended

The Rules of Practice and Procedure currently state that, "[g]enerally, promulgated amendments will be given prospective application."[37] The Department recommends that the Commission replace the term "generally" with a phrase sufficient to convey that retroactivity is the exception rather than the rule—for example, that amendments will be given prospective application "absent exceptional circumstances." Adding this language would maintain the current presumption that amendments are prospective and add a reinforcing presumption that retroactive amendments ought to be rare.

Amending the text to strengthen the presumption is appropriate for several reasons. First, the language of the current presumption has not been sufficient to keep the Commission from promulgating enormous changes retroactively, which has significantly affected the limited administrative, litigative, and judicial resources of the Department and of the courts. For example, after the Commission made its 2023 amendments to status points and zero-point offenders retroactive, over the objection of both the Department and the Criminal Law Committee of the Judicial Conference of the United States,[38] defendants filed 14,030 motions for the retroactive change to status points,[39] and 10,984 motions for the change for zero-point offenders.[40] Those motions, moreover, landed at a time when litigants, courts, and probation officers were already triaging tens of thousands of compassionate-release motions in the wake of the First Step Act of 2018 and the COVID-19 pandemic.[41]

Second, a more stringent presumption against retroactivity would be more consistent with the statutory scheme and the Commission's historical practice. By statute, sentencing in the federal system is subject to a "general rule of finality": "'a judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances."[42] And § 3582(c)'s provision allowing courts to reduce

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[37] U.S. Sent'g Comm'n, *Rules of Practice and Procedure*, Rule 4.1A, at https://www.ussc.gov/about/rules-practice-and-procedure.

[38] Hon. Randolph Moss, Chair, Judicial Conference of the United States, Letter to Hon. Carlton Reeves, Chair (June 23, 2023) at 4, Public Comment on Possible Retroactive Application of Parts A and B of the 2023 Criminal History Amendment.

[39] U.S. Sent'g Comm'n, *Retroactivity Data Report on Part A of the 2023 Criminal History Amendment*, (February 2025), Table 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202502-CH-Retro-Part-A.pdf.

[40] U.S. Sent'g Comm'n, *Retroactivity Data Report on Part B of the 2023 Criminal History Amendment* (February, 2025), Table 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202502-CH-Retro-Part-A.pdf.

[41] U.S. Sent'g Comm'n, *Compassionate Release Data Report* (Oct. 2024) (tallying more than 34,000 such motions filed between October 2019 and September 2024), Table 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY24Q4-Compassionate-Release.pdf.

[42] *Dillon v. United States*, 560 U.S. 817, 824 (quoting 18 U.S.C. §3582(b)) (brackets in *Dillon*); *see also Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." (internal quotation marks omitted)); *United States v. Hunter*, 12 F.4th 555, 569 (6th Cir. 2021) ("Congress established a general rule of finality and then carved out a few

otherwise final sentences in circumstances specified by the Commission is a "narrow" one.[43] Historically, the Commission has respected the finality of sentences by acknowledging that retroactive application of guideline amendments should be the exception and not the rule. It therefore "has exercised its authority to make an amendment retroactive judiciously."[44] As then-Commissioner Howell put it, "the finality of judgments is an important principle in our judicial system and we require good reasons to disturb final judgments."[45] Or, as Judge Catherine Eagles noted in a recent letter to the Commission, "constant revisions to sentences undermine public trust and confidence in the system."[46]

Third, the presumption in favor of prospective application is consistent with the interests in the finality of criminal judgments; finality generally bolsters the deterrent power of the criminal justice system, enhances its legitimacy, and preserves scarce resources. As the Supreme Court has repeatedly stated, the principle of finality is essential to the operation of our criminal justice system because, "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[47] "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[48] Finality also bolsters the legitimacy and public reputation of the criminal justice system, reducing "frequent relitigation of settled cases" that may "undermine public confidence."[49]

Fourth, reopening sentencing proceedings imposes substantial costs (including those discussed above with respect to administrative burdens) and may lead to errors in decision making given the (sometimes lengthy) passage of time and the possibility that a different judge may have to handle the proceeding.[50] The more factual or complex the decisions, the more administrative costs in the form of time, resources, and attention are required by courts, probation officers, litigants, defendants, and victims.[51] As then-Chair Saris noted in 2011, "[b]ecause of

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limited exceptions.").

[43] *Dillon*, 560 U.S. at 825-826.

[44] *Dillon* Amicus Brief, *supra* note 5, at *4; *see also id.* at *18 ("Given the extraordinary nature of the remedy and the impact it has on the finality of sentences, the Commission exercises its authority regarding retroactivity with great care.").

[45] *Sent'g Comm'n Public Meeting on June 30, 2011*, *supra* note 4, 22:15-21 (statement of Comm'r Howell)

[46] Hon. Catherine C. Eagles, Chief District Judge, Letter to Hon. Carlton Reeves, Chair, U.S. Sent'g Comm'n, *supra* n.21, at 1.

[47] *Teague v. Lane*, 489 U.S. 288, 309 (1989).

[48] *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

[49] Scott, *supra* n.22, at 187.

[50] *See, e.g.*, *Hawkins v. United States*, 724 F.3d 915, 918-919 (7th Cir. 2013) (emphasizing that "[j]udicial systems that ignore the importance of finality invite unreasonable delay in the disposition of cases" and that "[f]airness to victims of errors in guidelines calculation . . . must be balanced against the harm to victims of judicial delay brought about by judges' neglect of the social interest in judicial finality"); *United States v. Willis*, No. 3:09-cr-13, 2025 WL 275129, at *3 (W.D. Ky. Jan. 23, 2025) (observing that "the judge arrives less well-armed in many respects at the subsequent [sentence] modification stage—particularly if (as here) a different judge conducted the initial sentencing hearing" and noting "the procedural costs and error risks" of modifying sentences "en masse").

[51] Scott, *supra* n.22, at 199 (noting that sentencing challenges at the collateral review stage "disproportionately"

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."[52] Accordingly, absent strong countervailing considerations, finality in sentencing is "essential to the operation of our criminal justice system," helping ensure justice for victims, defendants, and other participants.[53]

For these reasons, the Commission should strengthen the presumption that "promulgated amendments will be given prospective application only" and should move that provision, as amended, from its Rules of Practice and Procedure to §1B1.10's Background Commentary.

B. The Commission should pair the amended language with additional measures designed to ensure a sound decision-making process and foster consensus

Because retroactivity determinations and the ensuing wave of § 3582(c) motions impose such substantial costs, it is imperative that the Commission reach its determinations through a sound decision-making process that affords sufficient respect to the views of the Department and the courts and other relevant stakeholders—and adequate time to formulate those views. The Department therefore recommends that the Commission consider reforms to its process for arriving at a retroactivity determination that would dovetail with the changes to the retroactivity criteria proposed above, including our proposed language clarifying that amendments will be given only prospective application "absent exceptional circumstances."

We can envision these measures taking several forms. For example, having recently formed an Ad Hoc Advisory Group on Research Data and Practices,[54] the Commission could examine the soundness and adequacy of its procedures for gathering and sharing information pertinent to retroactivity, including the retroactivity impact analysis required under Rule 4.1A(2) of the Rules of Practice and Procedure. The Commission might consider whether, as permitted by Rule 3.3(3), Commissioners would benefit from additional non-public meetings with the stakeholders most impacted by retroactivity determinations. The Commission could likewise consider more broadly whether sound determinations can realistically be made in the current compressed period for considering retroactivity—or whether, at a minimum, retroactivity decisions should be carried over to a subsequent amendment cycle when the Commission would benefit from updated data, and stakeholders would have additional time to gather data, conduct analyses, and prepare public hearing testimony.

Whether it considers any of these non-exhaustive suggestions or some others, the Commission should ensure that its process for determining retroactivity is a deliberative one that rests on sound data, respects the views of the most affected stakeholders, and builds in sufficient

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involve "the kind of severe sentences in which courts typically invest more time, resources, and attention")

[52] *Sent'g Comm'n Public Meeting on June 30, 2011*, *supra* note 4, 3:12-17 (statement of Chair Saris).

[53] *Teague*, 489 U.S. at 309 ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."); *see also United States v. Frady*, 456 U.S. 152, 166 (1982) (concluding that the federal government has an interest in the finality of criminal judgments).

[54] Research and Data Practices Advisory Group, Charter, at https://www.ussc.gov/sites/default/files/pdf/advisory-groups/research-data-practices-advisory-group/2025_rdpag_charter.pdf.

time for Congress to play its fundamental role in assessing the propriety of guideline amendments.

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The retroactivity of the Commission's amendments is an important issue for the Department, the courts, criminal defendants, and victims. For that reason, the Department suggests that the Commission identify retroactivity standards as a priority for the coming amendment cycle and hold a public hearing before making any changes to the criteria it considers in determining retroactivity or the procedures that govern those determinations.

Sincerely,

Scott Meisler

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U.S. Department of Justice
Ex Officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
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FEDERAL DEFENDER
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April 18, 2025

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
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Washington, D.C. 20002-8002

Re: Defender Comment on Criteria for Selecting Guideline Amendments Covered by §1B1.10

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide comment on the criteria the Commission uses for selecting guideline amendments for retroactive application under §1B1.10.

Section 1B1.10's background commentary lists three non-exhaustive criteria the Commission has historically relied on when making retroactivity determinations after adopting an amendment lowering the guidelines range for certain individuals: (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.[1] Since 1989, advocates have referred to these and other relevant factors to advocate for or against retroactivity, and the Commission has relied on the same to make ameliorative amendments either retroactive or prospective only.[2]

Most recently, in August 2023, the Commission cited principally to these criteria to make retroactive Parts A and B of Amendment 821 (the

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[1] *See* USSG §1B1.10 (Background) (identifying these concepts as "[a]mong the factors considered by the Commission" in identifying retroactive amendments).

[2] USSC, Issue for Comment: Criteria for Selecting Guideline Amendments Covered by §1B1.10, at 1 (Dec. 2024) (noting the non-exhaustive list of criteria were originally promulgated in the §1B1.10 policy statement in 1989).

Criminal History Amendment).[3] But at its August 2024 public meeting, the Commission announced it would not vote on whether to make retroactive four 2024 ameliorative guideline amendments. Instead, Chair Reeves explained the Commission was "heed[ing] the calls" of stakeholders who asked the Commission "to identify clear principles that will guide its approach to retroactivity."[4] One such stakeholder, former DOJ *ex officio* Commissioner Jonathan Wroblewski, publicly criticized the retroactivity criteria and other §1B1.10 background commentary as "bland and unhelpful," because advocates can reasonably analyze these criteria "and come to opposite conclusions."[5] He claimed the Commission has failed, over the years, to explain how these criteria should be "measured and assessed against one another" and to set forth guiding principles on how to apply the listed factors and "how they weigh against the interests of finality."[6] He then called on the Commission to develop a reasoned set of principles from the §1B1.10 criteria to provide the public better transparency into its retroactivity decision-making.[7]

In December 2024, the Commission published an Issue for Comment (IFC) on the criteria for selecting guideline amendments covered by §1B1.10.[8] The Commission requests feedback regarding: whether it should provide further guidance or brightline rules on how to apply the criteria and, if so, what that guidance should be (IFC 1); whether any listed criteria are more appropriately addressed in the Commission's Rules of Practice and Procedure (Rules) rather than §1B1.10 (IFC 2); and whether it should retain and

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[3] USSG, App. C, Amend. 825, Reason for Amendment (Nov. 1, 2023). This decision was split, with three Commissioners voting against retroactivity for both parts and four Commissioners voting in favor. *See* USSC, Tr. of Pub. Meeting on the Proposed Retroactive Application of the 2023 Criminal History Amendments, at 58–59 (Aug. 24, 2023).

[4] USSC, Tr. of Public Meeting on the Proposed Retroactive Application of Certain 2024 Amendments, at 10 (Aug. 8, 2024).

[5] *See generally* Reply Statement of Jonathan J. Wroblewski to USSC on the Proposed Retroactive Application of Certain 2024 Amendments, at 2 (July 17, 2025).

[6] *Id*. at 2, 4.

[7] *Id*. at 4–5.

[8] *See generally* Retroactivity Criteria Issue for Comment.

incorporate into §1B1.10 language in Rule 4.1A that "[g]enerally, promulgated amendments will be given prospective application only" (IFC 3).

Below, Defenders address each of these questions in turn.

I. The Commission should maintain the existing retroactivity criteria but may wish to draw from its organic statute to provide further guidance or modify these criteria (IFC 1).

A. The current standard is workable.

As an initial matter, Defenders do not agree with Mr. Wroblewski that the current standard is unworkable simply because different advocates can make reasoned but opposing arguments under this standard. That stakeholders can interpret the retroactivity criteria in "diametrically opposite ways"[9] simply reflects the nature of legal standards and advocacy. In litigation, opposing parties use the same legal standard to advocate for opposing outcomes every day. In the sentencing context, defense attorneys frequently rely on the § 3553(a) factors to argue for probation or time served, while the government uses those same factors, in the same case, to suggest a lengthier prison term is warranted. In the policy space, where the Commission exercises wide discretion to make judgment calls consistent with broad statutory directives, it is even more appropriate and expected that stakeholders with diverse and distinct backgrounds, perspectives, interests, and ideologies would make reasoned but opposing arguments.

After reviewing these stakeholder comments and hearing testimony, and after its own internal discussion and debate, the Commission—a policymaking body—does as was intended: It makes policy decisions on whether amendments should be made retroactive based on the strongest arguments under the relevant standard.[10] Mr. Wroblewski's criticism misunderstands the value of the retroactivity criteria—they do not identify

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[9] *See* Wroblewski Reply, at 3.

[10] *See* §1B1.10 (Background) ("The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants.").

some objectively indisputable outcome, but guide advocates in advancing policy arguments for or against retroactivity.

Nor does the fact that one set of commissioners declined to make the recency amendment retroactive while other commissioners chose to make the similar status points amendment retroactive prove the current standard fundamentally flawed. As with different judges at every level of the state and federal court systems, different commissioners will view and weigh the same factors differently. There are inevitable distinctions in sentences despite similar facts from one courtroom to the next, with some judges developing reputations as tough sentencers while others are more lenient. And there are frequent dissenting opinions applying the same statutory or constitutional provisions to the same set of facts as those in the majority. These are realities of legal and policy decision-making in our flexible, discretionary legal tradition, not aberrations. They reflect a legal system working as intended, not one that is broken.

Moreover, the Commission's standard for making retroactivity decisions has been established, well-recognized, and has proven workable for the last three-and-a-half decades. While experienced policy attorneys are adept at arguing for or against retroactivity for the same amendment using the same criteria, the decision is ultimately left to the sound discretion of the Commission, as envisioned by the Sentencing Reform Act (SRA).[11] The Commission has been able to determine, after reviewing advocates' arguments, in which direction it believes the factors weigh.

Although Defenders see no need to significantly alter the current standard, in the next section we suggest ways, consistent with congressional directives, that the Commission could elaborate on the purpose and magnitude prongs of its three-factor test to provide stakeholders additional guidance. For ease, at the end of that section, Defenders include a sample, redline of the relevant §1B1.10 background paragraph that incorporates our suggestions.

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[11] *See Dillon v. United States*, 560 U.S. 817, 826 (2010) (discussing the "substantial role Congress gave the Commission with respect to sentence-modification proceedings" including both "whether to amend the guidelines, §994(o), and whether and to what extent an amendment will be retroactive, §994(u)").

B. Any additional guidance in §1B1.10 should come from congressional mandates in the Commission's organic statute.

As discussed above, the current §1B1.10 criteria provide a helpful foundation, and sufficient transparency to the public, for guideline amendment retroactivity decisions. And, because the criteria are not exhaustive,[12] commentators and the Commission can and do rely on additional factors, where appropriate, to either flesh out or expand upon the existing criteria. That said, if the Commission believes explicit further guidance is needed, it should look to factors Defenders, other advocates, and past Commissions have raised during retroactivity amendment cycles. Many, if not all, of these considerations come from the Commission's obligations outlined in 28 U.S.C. §§ 991 and 994.

In creating the Commission and tasking it with the important and complex job of establishing national sentencing policy, Congress identified the most-salient factors for the Commission to bear in mind when carrying out its duties. And they are not mere suggestions, but *mandates* that the Commission must follow. These factors include, for instance, the requirement that the Guidelines reflect advancement in knowledge of human behavior as it relates to the criminal justice process,[13] promote fairness in sentencing,[14] reduce unwarranted racial and other disparities, [15] and advance the statutory sentencing purposes in § 3553(a).[16] Especially critical, the Guidelines must be "formulated to minimize the likelihood that the Federal prison population

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[12] *See* USSC, Issue for Comment: Criteria For Selecting Guideline Amendments Covered by §1B1.10 at 1 (Dec. 2024) ("The Background Commentary to 1B1.10 . . . provides a non-exhaustive list of criteria the Commission typically considers" and "[t]his non-exhaustive list of criteria has remained substantively unchanged since the Commission originally promulgated the policy statement at §1B1.10 in 1989.").

[13] 28 U.S.C. § 991(b)(1)(C).

[14] *Id.* § 991(b)(1)(B).

[15] *See id.* § 994(f) (mandating that the Commission pay "particular attention to the requirements . . . [for] reducing unwarranted sentencing disparities").

[16] *Id.* § 991(b)(1)(A). Critically, in addition to identifying three non-exhaustive criteria relevant to the retroactivity decision, §1B1.10's background commentary explains 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 . . . ."

will exceed the capacity of the Federal prisons"[17]—an attribute retroactivity is exceptionally able to address.

1. Advancement in knowledge of human behavior as it relates to the criminal justice process

As the Commission seeks to balance its "mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing,"[18] commentators and the Commission alike have historically relied on § 991(b)(1)(C) during retroactivity amendment cycles. This is particularly true when empirical evidence, such as scientific data and sociological assessments, support the underlying amendment.[19]

For instance, in applying Parts A and B of Amendment 821 retroactively, the Commission noted these amendments were driven by updated recidivism data, as well as data on court sentencing practices, reflecting advancements in knowledge related to the criminal justice process.[20] That year, both Defenders and NACDL argued that because Amendment 821 was grounded in recidivism research and data reflecting advancement in knowledge of human behavior, it should be applied

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[17] *Id.* § 994(g).

[18] *See* USSG, App. C, Amend. 825, Reason for Amendment (Nov. 1, 2023) (explaining decision to apply Amendment 821 retroactively).

[19] *See, e.g.,* Defender Comments on USSC's 2007 Proposed Retroactivity Amendments, at 5 (Oct. 31, 2007) ("[T]he Commission has acted in response to scientific data and sociological assessments in order to remedy unwarranted disparity and to reduce disproportionately severe sentences as compared with other drugs."); USSC, Tr. of Public Meeting on Retroactive Application of Amend. 750, at 21 (June 30, 2011) (Comm'r Howell) (describing amendment as "the culmination of many years of Commission research, data collection, analysis, and reports that persuaded us that the steps we took in 2007, 2008, 2010, and today are the right ones."); USSC, Tr. of Public Meeting on Retroactive Application of Amend. 782, at 11 (Aug. 24, 2023) (Chair Reeves) ("The Commission originally believed status points were consistent with the existing empirical research assessing components of recidivism and patterns of career criminal behavior. But the most recent data proves we were wrong.").

[20] *See* Amend. 825, RFA ("The purpose of these targeted amendments is to balance the Commission's mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing and to reflect 'advancement in knowledge of human behavior as it relates to the criminal justice process.'").

retroactively.[21] And when, in June 2011, the Commission voted to make Parts A and C of Amendment 750 retroactive, Commissioner Howell remarked that, among the "lofty" statutory responsibilities the Commission must consider when making retroactivity determinations, is whether the amendment "reflect[s] to the extent practicable, advancements in knowledge of human behavior as it relates to the criminal justice process."[22]

Likewise, the legislative history of the SRA, encouraging retroactivity if the guidelines amendment is a result "of a change in the community views of the offense," supports including § 991(b)(1)(C) as a further guidepost. [23] The two considerations are remarkably similar. Accordingly, if the Commission wishes to add guidance to "the purpose of the amendment," Defenders recommend adding language from § 991(b)(1)(C).

2. Ensuring fairness and reducing unwarranted disparities

The Commission's organic statue also prioritizes "certainty and fairness" and reducing "unwarranted disparities" by referencing these factors in two separate provisions.[24] Adding to this, some past Commissioners have, on occasion, cited "fundamental fairness" concerns as a justification for

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[21] Defender Comments to USSC on Retroactivity of the 2023 Amendments, at 14 (June 23, 2023) ("When the Commission amends the guidelines to better reflect advancement in knowledge of the criminal justice process, the benefit of that knowledge should be shared among all to whom it applies."); NACDL Comments to USSC on Retroactivity of the 2023 Amendments, at 4 (June 23, 2023) ("As the Commission has been tasked by Congress to establish sentencing policies that 'reflect advancement in knowledge or human behavior as it relates to the criminal justice process,' the Commission's recent studies make clear that including status points and over-punishing zero-point offenders do not further the purposes of sentencing. NACDL cannot think of a more compelling reason for retroactivity than the data-supported conclusion that human beings may be serving unnecessarily lengthy prison terms without it.").

[22] USSC, Tr. of Public Meeting on Retroactivity of Amendment 750, at 23 (June 30, 2011) (Comm'r Howell).

[23] S. Rep. 98-225, at 180 (1983) ("[I]f there is a major downward adjustment in the guidelines because of a change in the community view of the offense, the Commission may conclude that this adjustment should apply to persons already serving sentences.")

[24] *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f).

making certain amendments, including 750 (Parts A and C) ("Fair Sentencing Act") and 706 ("Crack Minus Two"), retroactive.[25] Seizing upon these statements, some commentators and Commissioners have argued that an amendment that does not, in their view, redress a fundamental unfairness or serious miscarriage of justice, should not be made retroactive.[26] Defenders disagree.

While determining an amendment addresses a fundamental fairness concern should be a sufficient basis for retroactivity, it should not be elevated to a necessary factor for two reasons. First, nothing in § 994(u) or its legislative history supports fundamental fairness as a prerequisite to retroactivity. The phrase appears nowhere in the statute and fairness is only one of multiple purposes identified by the SRA.[27] Indeed, the Commission has made many amendments retroactive without specifically finding the amendment redresses a fundamental unfairness or serious miscarriage of justice.[28] Second, the concept of redressing a fundamental unfairness or serious miscarriage of justice is just as malleable as the other criteria the

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[25] *See, e.g.*, USSC, Tr. of Public Meeting on Retroactivity of Amendment 750, at 13, 17 (June 30, 2011) (Vice Chair Jackson); *id.* at 37 (Vice Chair Carr).

[26] *See, e.g.*, Statement of Sapna Mirchandani on behalf of Defenders to USSC on Retroactivity of Criminal History Amendment to §4A1.1 (Status Points) and §4C1.1 (Zero-Point Offenders), at 3–4 (July 19, 2023) (citing to 2023 letters from the CLC and DOJ); USSC, Public Meeting Minutes, at 2 (Sept. 16, 2010) (reflecting that Commissioners Howell, Jackson, and Castillo voted against making the recency amendment retroactive in part because that amendment was "not intended to address a fundamental fairness issue like the crack cocaine amendment"). *But compare* USSC, Tr. of Public Hearing on Retroactivity of 2014 Drug Amendment, at 252–53 (June 10, 2014) (VC Jackson) (suggesting that Amendment 782 ("Drugs Minus Two") did not address the same kind of fundamental fairness concerns as "crack retroactivity") *with* USSC, Public Meeting Minutes, at 8 (July 18, 2014) (reflecting that Vice Chair Jackson voted in favor of retroactivity of Amendment 782).

[27] *See generally* 28 U.S.C. § 991 *et seq.*

[28] See FAMM Comments Supporting Retroactivity of 2024 Amendments, at 3–4 (July 22, 2024) (discussing instances where the Commission made amendments retroactive without an explicit finding that fundamental fairness necessitates retroactivity); Statement of Mary Price on behalf of FAMM to USSC on Retroactivity of 2023 Criminal History Amendment, at 1 (July 10, 2023) ("[E]ven if the Commission finds addressing fundamental fairness is not one of the anticipated outcomes of retroactivity, the Commission has historically made prior amendments retroactive without a finding of fundamental fairness.").

Commission is now examining.[29] Nonetheless, ameliorative amendments that lead to fairer sentencing outcomes deserve special consideration in the retroactivity context, and the Commission may wish to highlight this factor to elaborate on the purpose prong.

Relatedly, the Commission has justified retroactivity decisions as needed to ameliorate longstanding, unwarranted racial disparities in sentencing. For example, to support retroactive application of Amendment 750, Commissioner Howell explained:

> Among the purposes of sentencing that we must try to achieve are fairness, proportionality, and avoiding unwarranted sentencing disparities. And to my mind, retroactive application of Parts A and C of our guidelines—FSA guideline amendment helps to achieve those purposes of the Sentencing Reform Act. I share the view of the Congressional Black Caucus that retroactive application of the Fair Sentencing Act guideline changes would help address racial disparities and excessive sentences for crack offenders and undo a long history of injustice in federal sentencing.[30]

And in 2023, when discussing the importance of retroactively applying the status points amendment, Commissioner Gleeson said:

> The comments we received could not establish more clearly that Black and Brown people in our country have been arrested and

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[29] *Compare* USSC, Tr. of Public Meeting on Retroactivity of Amendment 821, at 29–30, 43–44, 46 (Aug. 24, 2023) (statements on behalf of commissioners voting against retroactivity of Parts A and B of Amendment 821 in part because, in their view, those amendments fail to address issues of systemic unfairness) *with id.* at 48–49, 54 (Comm'r Gleeson) (disagreeing and arguing that Amendment 821 redressed a fundamental unfairness affecting thousands of predominantly Black and Brown individuals "based on assumptions we now know from the data are wrong").

[30] USSC, Tr. of Public Meeting on the Retroactive Application of Amend. 750, at 24 (June 30, 2011); *see also* Congressional Black Caucus Comments to USSC Supporting the Retroactive Application of Parts A and C of Amendment 750, at 1 (May 26, 2011) ("While both Democrats and Republicans acknowledged that the federal cocaine laws were exacerbating racial and sentencing disparities, the CBC recognizes that making this amendment to the sentencing guidelines retroactive is the next step in correcting this 25-year-old injustice.").

> convicted and then found themselves in the status of being under supervision at disproportionately higher rates for decades. And not for justifiable reasons . . . . There's no such thing as fully remedying a racial disparity that's been baked into our criminal justice system for so long. But making these amendments retroactive will have a tangible effect on thousands of people of color.[31]

Because increasing fairness in sentencing and reducing unwarranted disparities are critical congressional mandates the Commission and stakeholders have historically relied on to support retroactivity, it makes sense to offer further explicit guidance grounded in these ideals.

3. Minimizing the likelihood that the federal prison population will exceed the capacity of the federal prisons

One essential and particularly timely duty of the Commission, as set forth by Congress, is to "take into account the nature and capacity of the penal, correctional, and other facilities and services available," and to "formulate[] [sentencing guidelines] to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[.]"[32] Considering the Bureau of Prisons' serious infrastructure and staffing needs, overcrowding, history of systemic abuse, and current administration upheaval, the "BOP lacks the capacity to safely and humanely hold the people sentenced to federal prison."[33] And despite the commands of 28 U.S.C. § 994(g), the BOP has long operated beyond any semblance of adequate capacity.[34] Given the BOP's myriad problems, retroactivity decisions should include consideration of § 994(g). Indeed, § 994(g) is a particularly intuitively

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[31] USSC, Tr. of Public Meeting on Retroactivity of Amendment 821, at 48–51 (Aug. 24, 2023).

[32] 28 U.S.C. § 994(g).

[33] Defender Comments on the USSC's 2025 Proposed Amendments on Drugs, at 13 (Mar. 3, 2025).

[34] *See id.* at 9 (Mar. 3, 2025) ("[T]he OIG has issued over 100 reports in the past 20 years that have identified recurring issues that impede the BOP's efforts to consistently ensure the health, safety, and security of all staff and inmates within its custody." (citation and quotation marks omitted)).

sound consideration given its direct connection to current (as opposed to forward-looking) prison capacity issues.

As with addressing empirical advancements, fairness, and unwarranted disparities, the Commission has previously relied on the number of individuals impacted by amendments and has cited § 994(g) to support retroactivity.[35] Specifically, the Commission emphasized its obligation to alleviate federal prison overcrowding in adopting Amendment 782,[36] and applying the amendment retroactively.[37] More generally, when discussing the "magnitude" factor for retroactivity determinations, Defenders and other commentators have highlighted not just the extent of the reduction in the guideline range, but the overall "impact of retroactivity," including the number of people who would potentially be released from the BOP early, and their demographic makeup.[38] Thus, the Commission should consider

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[35] *See, e.g.*, USSC, Tr. of Public Meeting on Retroactivity of 2014 Drug Amendment, at 6–7 (June 10, 2014) (Chair Saris) ("An overarching theme for our amendment cycle has been a focus on the statute, the Sentencing Reform Act at Section 994(g) . . . . So we made it a priority to work to reverse the trends of increasing prison populations and costs."); USSC, Tr. of Public Meeting on Retroactivity of Amendment 750, at 23–24 (June 30, 2011) (Comm'r Howell) ("Congress have [given]us both lofty goals and practical goals . . . Practical goals included directions to the Commission to examine the capacity of prison facilities when we promulgate guideline amendments, and in fact Congress directed us to formulate the guidelines to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.").

[36] USSG, App. C, Amend. 782, Reason for Amendment, at 68 (2014) ("The amendment was also motivated by the significant overcapacity and costs of the Federal Bureau of Prisons . . . . In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons.").

[37] USSG, App. C, Amend. 788, Reason for Amendment, at 83 (2014).

[38] *See, e.g.,* Defender 2023 Retroactivity Comment, at 5–7, 11–12 (discussing the overall impact of making retroactive Amendment 821, Parts A and B); s*ee also* PAG Comment on Retroactivity of the 2023 Criminal History Amendment, at 4 (June 23, 2023) (stating in discussion of "magnitude" that retroactivity would "impact[] a significant number of Defendants, a majority of whom will benefit from a reduction of up to 12 months. The Commission has previously determined that when a substantial number of defendants are affected, retroactivity is justified."); FAMM Comments on Retroactivity of Criminal History Amendment, at 6 (June 23, 2023) ("Taken together, the changes [in both criminal history amendments] would have a significant impact on nearly 18,000 individuals incarcerated in the federal Bureau of

expanding its "magnitude" factor to better reflect its statutory obligations in § 994(g) by focusing not just on the extent of the change in the guidelines range but on the overall *impact* of the amendment, including the number and type of people who retroactivity would affect.[39]

4. A revised retroactivity standard

If the Commission decides to expand upon the retroactivity criteria as Defenders recommend above, we suggest the following revisions to the third paragraph of §1B1.10's background commentary:

> The Commission considers the following non-exhaustive factors when ~~Among the factors considered by the Commission in~~ selecting the amendments ~~included~~ to include in subsection (d): ~~were~~
>
> 1) the purpose of the amendment, including the Commission's obligations to ensure sentencing policies reflect "the advancement in knowledge of human behavior as it relates to the criminal justice process," provide "fairness in meeting the

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Prisons, significantly shortening sentences for up to 12 percent of the current population . . . .").

[39] Defenders understand that this "impact" factor initially appears in tension with "administrability," given that larger numbers of eligible individuals filing motions for sentence reductions result in larger numbers of cases for all stakeholders. On the other hand, history has shown that the criminal system's stakeholders can manage even massive amendment pools. With each retroactivity period, defense attorneys, probation officers, prosecutors, and courts become more proficient in handling retroactivity motions. *See* Defender Comments on the Proposed Retroactivity of USSC's 2024 Amendments, at 4–5 (June 21, 2024). Predictions that retroactivity would overwhelm the courts and lead to "chaos," *see* Reply Statement of Jonathan J. Wroblewski to USSC on the Proposed Retroactive Application of Certain 2024 Amendments, at 4 (July 17, 2025); Statement of Mary Leary on behalf of VAG to USSC on Retroactivity of Certain 2024 Amendments, at 3 (June 21, 2024) (claiming that retroactivity will cause "chaos" in the courts), have not come to pass. *See* Defender 2024 Retroactivity Comments, at 5 (pointing out that DOJ's speculation that roughly half of the BOP population would file motions for retroactive relief under Amendment 821 did not happen and was highly unlikely given the Commission's own retroactivity report data). Thus, while Defenders think administrability will inevitably be a consideration, actual difficulties pale in comparison to the often-dire forecasts advanced, and an increased-but-manageable workload should never outweigh the Commission's mandated policy considerations.

purposes of sentencing," and avoid "unwarranted sentencing disparities," under 18 U.S.C. §§ 991(b)(1)(B) and (C);

2) the ~~magnitude~~ impact of making the amendment retroactive, including the magnitude of the change in the guideline range made by the amendment, the number of people who will potentially be entitled to retroactive sentence reductions, whether the amendment will decrease racial disparities, and retroactivity's ability to help alleviate BOP overcrowding and the financial costs of incarceration under 28 U.S.C. §994(g); and

3) the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection(b)(1).

II. The criteria for determining retroactivity belong in §1B1.10 (IFC 2).

The Commission also requests comment on whether its retroactivity criteria are more appropriately addressed in its Rules of Practice and Procedure,[40] rather than the Background Commentary to §1B1.10. Defenders believe the Commission should either list these criteria in both places or leave them in the policy statement rather than move them only to the more obscure Rules.

After thirty years, the Commission's process of soliciting comments for amendments to the guidelines is familiar to stakeholders.[41] And when the Commission is considering making amendments retroactive, stakeholders know to look to §1B1.10 for guidance on making their arguments, as they have done for decades. The Commission's Rules are no doubt less familiar to

[40] The Commission established these rules in 1997 pursuant to 28 U.S.C. § 995(a)(1) and other provisions of its organic statute to govern its usual operating practices and in an effort "to involve interested members of the public in its work to the maximum extent practicable." USSC, Rules of Practice and Procedure, Rule 1.1 (Application and Purpose) (Aug. 2016). The Commission made clear that its rules "are not intended to create or enlarge legal rights for any person."

[41] The Sentencing Commission's publicly available comments on retroactivity stretch back to1996.

stakeholders.[42] In our view, keeping the criteria in §1B1.10 or listing them in both places would help ensure robust retroactivity notice and comment.

Additionally, moving the retroactivity criteria from the policy statement to the Rules risks undermining certainty, fairness, and transparency. Under Rule 1.2, a majority of all serving Commissioners may vote to temporarily "suspend any rule contained herein and/or adopt a supplemental or superseding rule . . . ."[43] In contrast, the Commission typically does not amend or set aside Guideline commentary and policy statements without stakeholder involvement. Stakeholders, including impacted people, deserve to know and weigh in on what criteria the Commission will consider to make its retroactivity determination.

III. The Commission should not establish a presumption against retroactivity and should remove the first sentence in Rule 4.1A (IFC 3).

Finally, the Commission requests comment on whether the first sentence of Rule 4.1A of the Commission's Rules of Practice and Procedure should be retained. The first paragraph of Rule 4.1A states:

> *Generally, promulgated amendments will be given prospective application only*. However, in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants (see 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall . . . [take certain procedural steps before an amendment is made retroactive].[44]

Some stakeholders have argued that Rule 4.1A constitutes a presumption against retroactivity.[45] The Commission should not employ a

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[42] In fact, the last time the Commission solicited comment on its Rules of Practice and Procedure, it received only one response: from the Federal Public and Community Defenders. *See* Public Comment from June 1, 2016 (containing only a comment authored by Defenders).

[43] *See* USSC, Rules of Practice and Procedure, Rule 1.2 (Rules Amendment Procedure) (Aug. 2016).

[44] *See* USSC, Rules of Practice and Procedure, Rule 4.1A (Retroactive Application of Amendments) (Aug. 2016) (emphasis added)

[45] *See* Statement of Mary Leary on behalf of VAG to USSC on Retroactivity of Certain 2024 Amendments, at 2 (June 21, 2024), at 2 ("The entire analysis of

presumption against retroactivity and should strike the above-italicized language to make clear no such presumption exists.

The pertinent statutes, 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2), do not establish (and §1B1.10 does not contain) a presumption against retroactivity of guideline amendments. Instead, Congress provided the Commission the specific authority to determine whether and to what extent an amendment should be made retroactive.[46] The statutory text is devoid of any implicit or explicit discouragement or limitation. If Congress had wanted to dictate that there should be a presumption against retroactivity, Congress could have easily done so and would have. Congress could, for example, have provided further criteria or limitations on how the Commission should exercise its authority. It did not.

Nonetheless, there have been attempts to read a presumption into the statute based upon a pair of sentences in the SRA's legislative history indicating that the Senate Judiciary Committee did "not expect that the Commission will recommend adjusting existing sentences 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."[47] Reading that provision as favoring a narrow retroactivity power is flawed for two reasons. First, if Congress intended to create a presumption against retroactivity in certain circumstances, it needed to do so in the statutory text and not in a statement

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retroactivity begins with the presumption that any amendments to the Guidelines are presumed to not be retroactive. The Rules of Practice and Procedure are explicit on this point, 'Generally, promulgated amendments will be given prospective application only.'"); DOJ Comment to USSC on the Proposed Retroactive Application of Certain 2024 Amendments, at 2–3 (June 21, 2024) ("The Commission's own rules suggest caution in making amendments retroactive: the Rules of Practice and Procedure recognize that, '[g]enerally, promulgated amendments will be given prospective application only.'").

[46] *See Dillon v. United States*, 560 U.S. 817, 826 (2010) (describing the "substantial role Congress gave the Commission" for retroactive guideline matters); *see also* 28 U.S.C. § 994(u) ("If 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." (emphasis added)).

[47] S. Rep. 98-225, at 180.

in one chamber's committee report. And the Senate report is particularly unhelpful in this context because, to Defenders' knowledge, there is no other discussion of that expectation in the SRA's decade-plus drafting history. Second and more importantly, the equivocal statement (speaking of "expectations" of use instead of what the statute requires) is limited to circumstances where an amendment causes "isolated instances [of changed guidelines]" or "minor downward adjustments"[48] and is immediately followed by the Committee expecting that another class of changes will be retroactive—namely, where "there is a major downward adjustment in guidelines because of a change in the community view of the offense."[49] None of this language contemplates or sets forth a presumption against retroactivity.

Simultaneously with § 994(u)'s silence (and that of its legislative history) as to any presumption against retroactivity, other core congressional directives do not support any such presumption. For instance, the Commission is tasked with "provid[ing] certainty and fairness in meeting the purposes of sentencing and avoiding unwarranted sentencing disparities," neither of which are supported by a presumption against retroactivity.[50] Indeed, failing to make amendments retroactive leads to unjust temporal disparities by allowing individuals to continue serving sentences the Commission has determined under § 994(o) no longer meet the purposes of punishment. What, in fact, could be more unfair and create more uncertainty and unwarranted disparity than the date of one's sentencing driving the punishment? As the Criminal Law Committee observed to support applying Amendment 782 retroactively: "We do not believe that the date a sentence was imposed should dictate the length of imprisonment. Rather, it should be the defendant's conduct and characteristics that drive the sentence whenever

[48] Notably, the Senate Report was necessarily written prior to the Commission's creation and thus prior to any draft of the Guidelines Manual. We now know a single-level decrease in offense level or criminal history will equate to months or years of incarceration. Nothing in the legislative history's reference to "minor" adjustments indicates that the Committee would have viewed obtaining freedom months or years earlier as "minor."

[49] S. Rep. 98-225, at 180.

[50] 28 U.S.C §§ 991(b)(1)(B), 994(f).

possible."[51] Likewise, a presumption against retroactivity conflicts with the Commission's duty to minimize the likelihood that the BOP population will exceed its capacity.[52]

To the extent that certain stakeholders rely on *Teague v. Lane*[53] to support a presumption against retroactivity based on finality concerns, they are misguided.[54] *Teague* addresses federal habeas law and the finality of state criminal convictions.[55] In contrast, retroactivity determinations under § 994(u), §1B1.10, and § 3582(c)(2), concern *sentencing* finality,[56] which, as legal scholars and stakeholders have made clear, is "different in kind" from conviction finality and addresses fundamentally different concerns.[57] This is, of course, compounded by the inherent flaws of *Teague*, a decision widely considered to have been poorly decided.[58]

Because there is no textual or legislative support for a presumption against retroactivity, the Commission's organic statute militates against such a presumption, and reliance on conviction finality is misplaced, the

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[51] USSC, Tr. of Public Hearing on Retroactivity of 2014 Drug Amendment, at 20 (June 10, 2014).

[52] 28 U.S.C. § 994(g).

[53] 489 U.S. 288, 309 (1989).

[54] *See, e.g.*, 2024 DOJ Retroactivity Statement, at 2 n.81; Wroblewski Reply, at 2.

[55] *See, e.g., Teague*, 489 U.S. at 292 (describing holding of case as adopting an earlier Justice's "approach to retroactivity for cases on collateral review").

[56] Testimony of Adeel Bashir on behalf of Defenders to the USSC, at 35:40–36:46 (July 15, 2024) (arguing that federal habeas cases, including *Teague*, which concern conviction finality, are "in an entirely different universe" from sentence finality in retroactivity determinations).

[57] *See, e.g.*, Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J. L. & Pol'y 151, 170 (2014); *see also id.* at 152 ("[C]ourts and commentators have long recognized that the determination of guilt and the imposition of punishment involve distinct stages of criminal adjudication calling for different rules and procedures . . . .").

[58] *See, e.g.,* John Blume & William Pratt, *Understanding Teague v. Lane*, 18 N.Y.U. Rev. L. & Soc. Change 325, 326 (1991)(arguing that *Teague* "departed from the doctrinal purposes underlying retroactivity and made the law hopelessly complex and unworkable"); *Edwards v. Vannoy*, 593 U.S. 255, 293 (2021) (Gorsuch, J., concurring) (writing that the Court's precedents "illustrate how mystifying the whole *Teague* project has been from its inception").

Commission should clarify, as follows, in its Rules that no presumption against retroactivity exists:

> ~~Generally, promulgated amendments will be given prospective application only. However,~~ [I]n those cases in which the Commission is considering~~s~~ an amendment for retroactive application to previously sentenced, imprisoned defendants (*see* 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall— . . . [sets forth procedural steps taken when considering if an amendment should be made retroactive].
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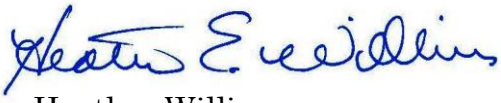
> * * *

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

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. 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

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

April 18, 2025

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Practitioners Advisory Group Comment on the Criteria for Retroactivity of Guideline Amendments Under the *Guidelines Manual*

Dear Judge Reeves,

The Practitioners Advisory Group ("PAG") submits the following comment on the criteria for retroactivity of guideline amendments under the *Guidelines Manual*. Because the purpose of guideline amendments is the application of more fair and just sentencing guidelines, the PAG recommends that the Commission eliminate the criteria set forth in the Background Commentary to §1B1.10 and amend the Commission's Rules of Practice and Procedure to make amendments presumptively retroactive instead of prospective. Defendants sentenced under older versions of the guidelines should benefit from potential reductions because the timing of sentencing should not arbitrarily dictate the length of the sentence.

I. The Commission Should Simplify the Determination of Retroactivity by Making Amendments Presumptively Retroactive

The PAG recommends that the Commission not provide further guidance on the existing criteria or revise or expand the criteria for the retroactive application of guideline amendments in the *Guidelines Manual*. Instead, the PAG suggests that the Commission simplify the determination of retroactivity by removing the criteria entirely and making retroactivity the presumption. Doing so will avoid disparities based solely on a defendant's sentencing date and will more broadly apply reform that is meant to promote fairness and proportionality.

The decision to adopt an amendment is never taken lightly by the Commission. The Commission only arrives at its decisions to adopt amendments after: considering the impact on available penal and correctional resources; providing public notice, considering public input, and

conducting public hearings; collecting relevant data, reports, and other information; and soliciting formal and informal input from advisory groups.[1] When the Commission adopts an amendment, it does so because after considering all this information, it determines that the goals of sentencing are better achieved with the amendment.

The Commission's careful consideration and examination prior to adopting an amendment supports the presumptive retroactive application of guideline amendments. Amendments generally reflect a determination that previous guidelines were too severe or unjustified, and they often address well-documented sentencing disparities. In other words, guideline amendments are driven by fairness, proportionality, and error correction. These goals apply equally to defendants serving sentences, and therefore, support a presumptively retroactive application. The alternative results in the arbitrary application of the guidelines based solely on a defendant's sentencing date.

II. The PAG Proposes that the Commission Amend Its Rules of Practice and Procedure to Reflect the Presumptive Retroactivity of Amendments

Instead of amending the Background Commentary to §1B1.10 by providing further guidance, or by revising or expanding the criteria for retroactivity determinations, the PAG suggests that the Commission amend its Rules of Practice and Procedure 4.1A on the Retroactive Application of Amendments. Currently, this Rule provides that promulgated amendments are generally given prospective application only.[2] The PAG recommends that Rule 4.1A instead provides that promulgated amendments are presumed to be retroactive upon implementation.

The current rule outlines a procedure to determine retroactivity that includes a separate vote on retroactivity; a retroactivity impact analysis that requires staff resources; a public hearing on retroactivity; and a separate public meeting to vote on whether an amendment should apply retroactively. The use of these resources could be avoided with the presumption of retroactivity.

III. The Current Non-Exhaustive Criteria Support Presumptive Retroactivity and Any Additional Administrative Burden Is Outweighed By Increased Justice

Currently, the Background Commentary to §1B1.10 provides a non-exhaustive list of criteria to consider when determining whether an amendment will be included in §1B1.10(d) for retroactive application: "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 subsection (b)(1)."[3] A general assessment of how each criteria applies to a guideline amendment supports a presumptively retroactive approach. Further, an exclusion for *de minimus* guideline changes written into the Commission's Rules of Practice and Procedure (which mirrors the current exclusion in the Background commentary)

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[1] *See* U.S.S.C., *Rules of Practice and Procedure* ("Rules of Practice") 4.2, 4.3, 4.5, 5.3 & 5.4 (as amended August 18, 2016), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf

[2] *See* Rule of Practice 4.1A.

[3] U.S.S.G. §1B.10 cmt. (Background).

would alleviate any retroactivity concerns related to the purpose or magnitude of the amendment.[4] The PAG does not believe that presumptive retroactivity will result in increased administrative costs, and any concerns about the administrative burden of retroactivity are outweighed by the promotion of fairness that retroactive application brings to the criminal justice system.

When the Commission evaluates the purpose of an adopted amendment, it considers whether the amendment was designed to address issues of fairness or whether it addresses another issue, such as to simplify an administrative task. Where the purpose of the amendment is to address fairness, the Commission generally applies the amendment retroactively.[5] Conversely, the Commission typically does not give retroactive effect to amendments that generally reduce the maximum of the guideline range by no more than six months. These types of "minor downward adjustment(s)" can be addressed in the Commission's Rules of Practice and Procedure. While amending Rule 4.1A to provide for a presumption of retroactivity, the Commission could exclude from the general presumption amendments falling into this *de minimis* change category. Excluding amendments with relatively small guideline changes from presumptive retroactivity would also have the effect of excluding purely administrative amendments that have little impact, directly addressing the Commission's concern with the purpose or magnitude of any given amendment. Amendments that change the guidelines by more than six months almost certainly address issues of fairness, which supports retroactive application in every circumstance.

A guideline change of more than six months is enormous for any person serving a sentence of imprisonment and for the resources exhausted by the prison system. A sentence reduction of six months or more will allow our clients to reunite with their families sooner and transition back into their communities. Our clients often miss the opportunity to see their children graduate or get married, or to say goodbye to elderly loved ones, by just a matter of weeks or months. The ability to be present for these milestone events helps our clients' relationships with their families and in turn, their ability to successfully return to their communities. Retroactive application of guideline amendments also will help alleviate prison overcrowding and conserve resources for those defendants whose sentences remain fair under the guidelines.[6]

In addition, the difficulty of applying an amendment retroactively to determine an amended guideline range under subsection (b)(1) will not significantly change with presumptive retroactivity because administrative burdens exist with both prospective and retroactive application of amendments. Even if presumptive retroactivity causes an administrative burden,

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[4] *See id*. (excluding from §1B1.10 "amendments that generally reduce the maximum of the guideline range by less than six months . . . or when there is only a minor downward adjustment in the guidelines.").

[5] *See, e.g.*, §1B.10(d) & (e)(2) (retroactively applying Amendment 821 reducing status points under §4A1.1 and creating a downward adjustment for certain Zero-Point Offenders under §4C1.1).

[6] *See, e.g.*, Bureau of Prisons, *Annual Determination of Annual Cost of Incarceration Fee (COIF)*, 89 Fed. Reg. 97072 (Dec. 6, 2024) ("the average annual COIF for a Federal inmate housed in a Bureau or non-Bureau facility in FY [Fiscal Year] 2023 was $44,090 ($120.80 per day.")).

the Commission should accept that some administrative burden is an acceptable cost to increase justice.

In the PAG's experience, presumptive retroactivity is not likely to increase the administrative burden of guideline amendments. Under the current system, whether an amendment is explicitly made retroactive and listed in §1B1.10(d), courts still receive many motions seeking sentence reductions. Incarcerated individuals generally do not wait to find out if an amendment is retroactive before filing motions for sentence reductions. Understandably, they believe that justice will be uniformly applied and assume that if an amendment is enacted to make sentencing more just, it must equally apply to all. Court resources are used whether an amendment is made retroactive. Courts not only receive these motions, but in the experience of the PAG, courts often appoint counsel to advise *pro se* litigants on the applicability of an amendment. To say that an administrative burden only exists once an amendment is made retroactive ignores the reality of the federal system. Administrative costs exist whether the Commission formally deems an amendment retroactive.

Additionally, presumptive retroactivity does not mean that a guideline amendment will result in a resentencing for every person potentially affected. The courts still retain the power to determine whether a reduction in the term of imprisonment is appropriate under §1B1.10(b). But presuming retroactivity removes the administrative costs of determining retroactivity and allows the courts to use §1B1.10(b) to determine whether specific retroactive application is appropriate.

Significantly, even if presumptive retroactivity results in additional administrative burden, the PAG recommends that the Commission accept this additional cost as the price of increased justice and fairness. It is easy to list a parade of horribles that can result from any change, but as Justice Brennan warned, we should not fear "too much justice" because of the cost of administration.[7] Indeed, our Supreme Court routinely acknowledges that we must accept the costs of more justice, as "the magnitude of a legal wrong is no reason to perpetuate it."[8] Here, even if an additional administrative burden accompanies presumptive retroactivity, because a more fair and proportional system is the result of the change, the increased cost should be considered necessary and acceptable.

The presumption of retroactivity promotes trust because reforms implemented to promote fairness and proportionality are applied broadly. It will prevent arbitrary outcomes based solely on the timing of sentencing. Adopting a presumption of retroactivity simplifies litigation, fosters consistency, and promotes the public's trust in sentencing reform. These benefits of presumptive retroactivity outweigh any increase in administrative costs.

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[7] *See McCleskey v. Kemp,* 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

[8] *McGirt v. Oklahoma*, 591 U.S. 894, 934 (2020); *see also Ramos v. Louisiana*, 590 U.S. 83, 108, 110-111 (2020) ("retrying or plea bargaining [hundreds of] cases will surely impose a cost. But new rules of criminal procedures usually do, often affecting significant numbers of pending cases across the whole country. . . . [This] cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties").

IV. Conclusion

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

Respectfully submitted,

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PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

April 18, 2025

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

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (the Commission) regarding the issue for comment on USSG §1B1.10, solicited on January 24, 2025.

Criteria for Selecting Guideline Amendments Covered by §1B1.10

POAG unanimously agrees that the Commission should provide further guidance on how the existing criteria for determining whether an amendment should be retroactively applied. POAG has suggestions on additional factors or subfactors that the Commission could include for guidance in the background section of USSG §1B1.10 in making these difficult determinations. The considerations that POAG believes should be included are public safety and victim impact, collateral impacts from case law or statutory changes since sentencing, collateral impacts on stakeholders (such as Bureau of Prison policies, as one example), the availability of graduated release options or the post-release implications, the prospect a delay in implementation could have on resources and the clarity of the amended guideline, consideration of any negative consequences on defendants, the timing or need for delay on certain retroactive amendment implementations, and the recency and similarity of other retroactive amendment implementations.

POAG believes that there are some classes of offenses committed by defendants that, as a result, pose a higher degree of risk to the public and warrant consideration of the impact on victims. Violent offenses or sex offenses often include defendants who pose a higher risk to the community and often have victims that are impacted for life. Firearms offenses often demonstrate a generalized risk to the public, and Career Offender cases often pose a higher risk of recidivism. Despite the

ease of making these classes of offenses into a bright-line list prohibited from retroactivity, POAG thinks there is a way to allow for those considerations while maintaining some flexibility. By making this a factor for consideration, it affords future Commissioners the opportunity to balance the risks and the victim impact against a variety of other factors. Additionally, the Commission seems to already, as a course of practice, get feedback from victim advocacy groups, and including this consideration as a factor is articulating what is already occurring. POAG believes that adding a consideration of public safety and victim impact is a valuable addition, allowing for appropriate consideration of offense classes without reducing flexibility.

POAG has seen some instances in the recent Amendment 821 retroactivity initiative where collateral impacts from case law or statutory changes since sentencing could impact cases. A case wherein the defendant was sentenced prior to *United States v. Pulsifer*, 601 U.S. 124 (2024) in an "and-is-and" district could be more heavily impacted by a retroactive status point adjustment. While that is a national example with regional implications, there could just as easily be circuit specific impacts. For example, in the *United States v. Barrett*, --- F.4th ----, 2025 WL 920997 (4th Cir. 2025), the Fourth Circuit Court of Appeals issued an opinion in which the reduction of status points resulting in a criminal history category reduction to criminal history category one, now allows for the consideration of the safety valve reduction in drug cases. Considering how these changes could complicate or impact retroactivity would be valuable.

POAG has observed that retroactivity can have unexpected collateral impacts on stakeholders. In the most recent retroactivity, Amendment 821, the Bureau of Prisons (BOP), following the First Step Act of 2018, had adjusted their methodology for calculation of an incarcerated individual's projected release date. As the projected release date helps to guide prioritizing the response on these memos, the BOPs adjustments caused some confusion in appropriately prioritizing the cases for submission of retroactive memos. This was especially the case in circumstance wherein the incarcerated individual was not a U.S. Citizen, and a final deportation order had not yet been entered. Defendants in BOP custody were accruing good time credit under the First Step Act, but once a final deportation order had been entered following their 821 retroactivity reduction, their projected release date was being recalculated without the First Step Act credit. The recalculation without the credit would drive the projected release date back. The calculation also caused issues with the Residential Drug Abuse Program (RDAP), as incarcerated individuals could not complete RDAP without being released to and successfully completing their time at a Residential Re-entry Center (RRC). An individual who at the last moment, receives a 5-month reduction on his or her sentence could find that he or she is no longer eligible to successfully complete RDAP and now no longer qualifies for the year reduction they were to benefit from upon completing RDAP. Retroactive considerations should involve considering the interplay the retroactivity could have with other stakeholders, such as the BOP.

POAG also recommends that the factors in USSG §1B1.10 include consideration of the availability of graduated release options, the post-release implications, or potential negative consequences on

the defendant. Some of these considerations may overlap with the consideration of collateral impacts on stakeholders. POAG has observed that, when there is a surge of retroactive applications, there is a corresponding surge in demand on RRCs. Many individuals with a newly advanced release date were unable to get bedspace in the RRCs. This type of impact can cause instability for those persons under supervision as they come out without the benefit of graduated release. This may be solvable in terms of considering a delayed implementation. However, POAG does believe it is a factor that should be given consideration.

POAG recommends that the Commission include the consideration of when a retroactive amendment would best be implemented as part of the factors. A delay in implementation may provide much needed time for the various stakeholders associated with the retroactive initiative to get appropriate resources in position to meet the needs of those released while protecting the public. Those delays may also provide time for particularly complicated amendment language to be clarified through the observation of application and litigation. Delayed implementation provides time for resources to be aligned and a heightened clarity of application in some instances, but it should also be balanced against the impact it would have on the defendants and on many of the factors that should be considered in retroactive consideration.

Lastly, POAG supports including the consideration of other recent retroactivity, how that recent retroactivity may have impacted current resources, and to what degree the retroactivity being considered is consistent with the Commission's previous decisions to make an amendment retroactive. Retroactive efforts year-over-year could have a significant impact on the system's resources. There is a further complexity when there is year-over-year retroactivity that interplays with the single manual rule and other *ex post facto* issues. It should not be the only consideration, but we do believe it should be one of the considerations in a constellation of other considerations. Some districts noted that almost two years after the implementation of the 821 Amendments, they are regularly receiving retroactive filings from defendants. POAG discussed how a sunset provision might resolve some of the later filings, most of which involve requests from those who are ineligibile. Moreover, there was concern that the data from the Commission does not reflect the full picture of the retroactive filings, as sometimes the filings are for counsel and a retroactive analysis is still conducted at that stage, but not included in the Commission's statistics. In many districts, the additional filings for retroactive consideration are often double the number of cases identified as eligible by the Commission.

POAG also observes that the Commission works very hard to create consistency and continuity within the guidelines. The consistency within the guidelines creates an ease of application and a predictability of thought process that helps the guidelines function. POAG would support a similar approach within the Commission's consideration of what should be retroactive. The Commission should include a factor that allows the consideration of how similar the proposed amendment is to previous retroactivity decisions to either make an amendment retroactive or not. This would help create a continuity that creates some degree of predictability.

POAG was not in favor of extending these considerations or changes into the Commission's Rules of Practice or Procedure. POAG also supports retaining the provision "[g]enerally, promulgated amendments will be given prospective application only," as this phrase establishes that the factors for consideration of a retroactive application of an amendment need to be the rare exception of this standard, when the various factors overwhelmingly support it.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to share our perspective.

Respectfully,

Probation Officers Advisory Group
April 2025

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

April 17, 2025

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

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the United States Sentencing Commission's call for public comment on issues related to the criteria for retroactive application of amendments to the sentencing guidelines.

1. The Commission seeks comment on whether it should provide further guidance on how the existing criteria for determining whether an amendment should apply retroactively are applied. If so, what should that guidance be?

   TIAG continues to believe that avoiding unwarranted disparity and fairness should be the guiding principles when determining retroactivity. We have seen that with prior retroactive amendments districts have systems in place to tackle such amendments. As such, the "burden" argument should not serve as additional criteria. Additional guidance or criteria is not necessary.

2. The Commission seeks comment on whether any listed criteria are more appropriately addressed in the Commission's Rules of Practice and Procedure rather than the Background Commentary to §1B1.10.

TIAG believes that this is an area in which the Commission has greater expertise than it has and it takes no position on the proposal.

3. Rule 4.1A (Retroactive Application of Amendments) of the Commission's Rules of Practice and Procedure provides "[g]enerally, promulgated amendments will be given prospective application only." The Commission seeks comment on whether it should retain this provision. If so, how should the Commission ensure that any listed criteria reflect this provision?

   Making amendments retroactive increases fairness and justice for all defendants. The retroactivity avoids unwarranted disparities.

Again, keeping in mind the principles of fairness and avoiding unwarranted disparity, TIAG suggests that the Commission delete the first sentence of Rule 4.1A or remove the word "only."

Sincerely yours,

Ralph R. Erickson

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

April 18, 2025

United States Sentencing Commission
One Columbus Circle, N.E.
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Washington D.C. 20008-8002

RE: Request for Comment on Criteria for Selecting Guideline Amendments Covered by § 1B1.10

Dear Chair Reeves, Vice-Chairs, Members of the Commission:

The Victims Advisory Group ("VAG") appreciates this opportunity to provide information to the Sentencing Commission ("Commission") regarding criteria that the Commission may use to select approved Sentencing Guidelines ("Guidelines") amendments for application under § 1B1.10. Our advisory group responsibility is to assist you in fulfilling your statutory responsibilities under 28 U.S.C. § 994(o) and to provide our views on how your proposed amendments may and will affect federal crime victims.

The Commission first asks for comment on the following issue:

1. The Commission seeks comment on whether it should provide further guidance on how the existing criteria for determining whether an amendment should apply retroactively are applied. If so, what should that guidance be? Should it revise or expand the criteria? Are there additional criteria that the Commission should consider beyond those listed in the existing Background Commentary to §1B1.10? Are there identifiable sources that the Commission should consult that highlight retroactivity criteria relied upon by other legislative or rulemaking bodies? If the Commission continues to list criteria relevant to determining whether an amendment should apply retroactively, should it adopt any bright-line rules? Is there a different approach that the Commission should consider for these purposes?

The VAG generally is opposed to retroactive application of amendments to the Sentencing Guidelines. Concerns related to retroactivity have been conveyed to this Commission by the VAG and other groups during past amendment cycles. The consequences of retroactivity must be considered as part of this comment as well as in any upcoming decision that the Commission may make regarding retroactive application of recently approved 2025 Guideline amendments the Commission designated for retroactive consideration.

Primarily, retroactive application of Guideline amendments undermines predictability and certainty for all actors in the criminal justice system. Judicial officers, court staff, United States Attorneys' Offices, federal defenders, Bureau of Prison staff, and probation officers each will face a tremendous administrative burden that is funded by taxpayers. Judges and court staff will receive numerous motions from inmates regardless of whether the amendment is applicable to their case and the government will be required to respond. Judges, already carrying extremely heavy caseloads, will spend hours reviewing the motions and drafting rulings.

Retroactive application also risks the erosion of public confidence in the criminal justice system. When an offender commits a crime, the public presumes that the offender will be subject to the laws in effect at the time of the offense and held accountable. When an offender is perceived to not be held accountable, or to be held less accountable by a future sentence reduction, the public may lose respect for both our laws and our legal process.

However, the most significant impact of retroactivity falls on crime victims. Retroactivity undermines the intent of the Crime Victims Rights Act ("CVRA"), 18 U.S.C. § 3771,[1] "to transform the federal criminal justice system's treatment of crime victims…"

[1] 18 U.S. Code § 3771(a) reads:

> (a)Rights of Crime Victims.—A crime victim has the following rights:
> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence,

Honorable Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, And Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L.R. 581, 593 (2005). Victims' rights are "intended to reestablish the important and central role of victims, to humanize and individualize the victims of crime, and to recognize that victims also have rights to fair treatment and due process in criminal proceedings." Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421, 424 (2015).

The CVRA provides a victim the right to be treated with fairness and respect. 18 U.S.C. § 3771(a)(8). A lack of certainty and finality in criminal sentencing is unfair to victims. Fairness requires an acknowledgement by the criminal justice system of the trauma victims of violent crime endure at the hands of violent offenders as well as the secondary trauma from a victim's interaction with the justice system. Victims have a compelling interest in certainty and finality as it is essential to their emotional healing and recovery. Violent crime, such as the murder of a loved one, causes significant psychological implications conceptualized within a post-traumatic stress disorder ("PTSD") framework, the most consistently documented consequence of violent crime. Heidi M. Zinzow, et al., *Examining Posttraumatic Stress Symptoms in a National Sample of Homicide Survivors: Prevalence and Comparison to Other Violence Victims*, 24 J. Traum. Stress 743 (December 2011); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on*

> determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
> (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
> (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

Victims' Mental Health, 23 J. Traum. Stress 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress 119 (2003); Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. Interpersonal Violence 223, 225 (1993). Victims of all types of violent crime can experience PTSD or various symptom clusters, but homicide survivors are twice as likely to meet the criteria for PTSD and report more symptoms of PTSD than victims of other types of trauma. Zinzow at 744. The high prevalence of PTSD in homicide survivors may be partially due to the fact that survivors are forced to cope not only with the loss of a loved one, but also the sudden and violent nature of their death. Zinzow at 744, citing Angelynne Amick-McMullan, et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study*, 2 J. Traum. Stress 21, 35 (1989). Studies also suggest a connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide. Parsons & Bergin at 182.

The criminal justice system overlooks the effect on victims of delayed judicial proceedings, to which delay retroactive application of amendments to the Guidelines inevitability leads. A prolonged experience in the criminal justice system adds to the intense and painful consequences of initial victimization. *Id*. at 182-183; see also Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traum. Stress 159, 159 (2003). Secondary victimization often causes more harm than the initial criminal act. Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc. Just. Res. 313, 321 (2002). A victim's experience with the justice system often "means the difference between a healing experience and one that exacerbates the initial trauma." Parsons & Bergin at 182.

The lead sponsor of the CVRA, Sen. Jon Kyl, made clear the right to fairness includes the right to due process. 150 Cong. Rec. S4269 (Apr. 22, 2004) (Senator Kyl) (explaining that the right to be treated with "fairness" under the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, "includes the notion of due process"). The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, (1976); *accord Hamdi v. Rumsfeld*, 542 US 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose

rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded."). While Congress intended for victims to have a right to due process, the consideration of whether rights under the CVRA are affected by retroactivity is largely lacking from the Guidelines.

The Commission notes that the current "non-exhaustive list of criteria" for determining whether an amendment should receive retroactive application "has remained substantively unchanged since the Commission originally promulgated the policy statement at § 1B1.10 in 1989." The VAG strongly believes the Commission must acknowledge the legislative change fifteen years later of the crime victims' rights created with the October 30, 2004, passage of the CVRA and also include consideration of those rights within the Guidelines, especially as to retroactive application consideration. CVRA rights directly affected in retroactive consideration include: the right to be to be reasonably protected from the accused; the right to reasonable, accurate, and timely notice of any public court proceeding […] involving the crime or of any release […] of the accused; the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing; the right to proceedings free from unreasonable delay; and the right to be treated with fairness and with respect for the victim's dignity and privacy. 18 U.S.C. § 3771(a)(1), (2), (4), (7) and (8).

Sentence reductions impact crime victims and their federal rights. The criteria in § 1B1.10, Background, for determining whether amendments should be made retroactive, reads "Among the factors considered by the Commission in selecting the amendments included in subsection (d) were 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 subsection (b)(1)." The Commission should add to these factors "the potential impact upon victims."

VAG recognizes that not every federal crime has an identifiable "crime victim" [2], but crimes of violence, including murder, robbery, sexual offenses, and many firearms offenses, do have crime victims, as do intimate partner stalking, many federal financial crimes and many federal drug offenses.

Violent criminals are also the most likely to be recidivists, thereby creating additional crime victims. The Commission published an Article in January of 2019, Recidivism Among Federal Violent Offenders, that studied over 25,000 federal offenders and their history. Among the key findings: violent offenders recidivated at a higher rate than non-violent offenders. The study found that over 60 percent of violent offenders recidivated by being rearrested for a new crime or for a violation of supervision conditions, whereas non-violent offenders had a recidivism rate of less than 40 percent. Additionally, violent offenders recidivated more quickly than non-violent offenders and did so with more serious crimes than non-violent offenders.

In addition to the Commission's report, in January 2023 it was reported in *Examining Intimate Partner Violence-Related Fatalities: Past Lessons and Future Directions Using U.S. National Data*, J Fam Violence, 2023 Jan, 12:1–12, that intimate partners kill almost 50 percent of female murder victims, a staggering statistic that cannot be ignored when considering the possibility of a retroactive sentence reduction for any offender with a history of domestic violence or of violent offenses.

The Commission also asks about other identifiable sources that the Commission should consult that highlight retroactivity criteria relied upon in other jurisdictions. The Arizona Supreme Court, in the recent case of *Vande Krol v. Superstition/Benchmark,* No. CV-23-0211-PR, Filed March 26, 2025, had occasion to discuss the Arizona legal system's presumption against retroactivity:

> This "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly

[2] "The term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771 (e)(2)(A).

> disrupted." *Landgraf v. USI Film Prods*., 511 U.S. 244, 265 (1994) (footnote omitted). "For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Id.* (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (Scalia, J., concurring)).
>
> Notably, this "antiretroactivity principle finds expression in several provisions of our Constitution." *Id.* at 266 (discussing the Ex Post Facto Clause, see U.S. Const. art. I, § 9, cl. 3; the prohibition on state laws "impairing the Obligation of Contracts," see U.S. Const. art. I, § 10, cl. 1; the Fifth Amendment's Takings Clause, see U.S. Const. amend. V; the prohibition on "Bills of Attainder," see U.S. Const. art. I, § 9, cl. 3; and the Due Process Clause, see U.S. Const. amend. V). "These provisions demonstrate that retroactive statutes raise particular concerns" with respect to the legislature's ability "to sweep away settled expectations suddenly and without individualized consideration." *Id*.

This court's analysis adequately frames the jurisprudential context for considering the Commission's current approach to retroactivity.

The statutory context is also important. 18 U.S. Code § 3582 does not allow a modification of an already imposed sentence except in extremely limited instances. One of those instances requires the sentencing court "after considering the factors set forth in section 3553(a), to the extent that they are applicable, (i) *if it finds that extraordinary and compelling reasons warrant such a reduction*, […] and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S. Code § 3582(c)(1)(A) (emphasis added). The emphasized language is important as it stresses the Congressional intention that modifications of sentence are generally considered to be rare.

18 U.S. Code § 3582(c)(2) then addresses the issue of retroactive application of a lowered sentencing range: "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), […] 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."

Significant 18 U.S.C. § 3553(a) factors for the court to consider do not use the words "crime victim" or "victim":

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (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)(1) and (2).

Of each of the § 3553(a) factors, only 18 U.S.C. § 3553(a)(7) uses the word "victim": "the need to provide restitution to any victims of the offense."

Given that 18 U.S.C. § 3553(a) factors do not reference victims, but for restitution issues, the Commission's should amend its Commentary Application Note 1(B)(ii) to §1B1.10 Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement), to specifically include "crime victim," in the Public Safety Consideration, as underlined below:

1. Application of Subsection (a).—

[…]

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to <u>the crime victim,</u> any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

The current existing criteria for determining whether an amendment should apply retroactively are inadequate. They fail to incorporate victims' rights established by the CVRA, 18 U.S.C. § 3771. Those rights include the right to be reasonably protected from the accused and the right to be treated with fairness. These rights are nowhere included among the considerations for retroactive applications, and it is therefore incumbent upon the Commissioners to establish the consideration of the impact on victims as a criteria when considering retroactivity. As a matter of fairness, finality, and justice, victim rights must be included.

2. *The Commission seeks comment on whether any listed criteria are more appropriately addressed in the Commission's Rules of Practice and Procedure rather than the Background Commentary to §1B1.10.*

In addition to the Background Commentary to §1B1.10, which provides courts, legal professionals and the public with important underlying reasons for the Commission's actions, the criteria also should be in the Commission's Rules of Practice and Procedure to guide the Commission on § 1B1.10 considerations.

3. *Rule 4.1A (Retroactive Application of Amendments) of the Commission's Rules of Practice and Procedure provides "[g]enerally, promulgated amendments will be given prospective application only." The Commission seeks comment on whether it should retain this provision. If so, how should the Commission ensure that any listed criteria reflect this provision?*

To acknowledge the Congressional intent that modifications of imposed sentences are to be rarely given, as reflected by 18 U.S. Code § 3582(c)(1)(A)(i), and that Congress provided crime victim rights pursuant to the CVRA, 18 U.S.C. § 3771, this provision should be strengthened to read "promulgated amendments will be given prospective application only

unless there are extraordinary and compelling reasons warranting retroactive application and the retroactive application is consistent with the rights of crime victims."

The VAG appreciates the opportunity to comment upon the Commission's request on Criteria for Selecting Guideline Amendments Covered by § 1B1.10. The VAG seriously takes its commitment to advise the Commission, share victim perspectives on the sentencing process and respect the rights of victim survivors.

Respectfully yours,

Christopher C. Quasebarth

The Victims Advisory Group
Christopher Quasebarth, Chair

cc: Advisory Group Members

April 18, 2025

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

Re: Issue for Comment on Retroactivity

Dear Judge Reeves,

The Commission holds tremendous power. Not only is it authorized to review the guidelines and make amendments that best reflect current sentencing practices, but it also has a statutorily provided path to retroactivity for amendments that could result in lower sentences. Making ameliorative amendments retroactive is called for when doing so provides just punishment, deterrence, rehabilitation, and protection of the public. Retroactivity in this manner also boosts public confidence in the criminal justice system.

Since its existence, FAMM has elevated the voices of people impacted by the criminal justice system. We are in daily communication with people in custody and their families, fighting for more just sentences and more humane treatment of people in the system. We also strive to explain the system to incarcerated people and their families. But few things are more difficult to explain or understand than when an ameliorative amendment is not made retroactive. It defies logic, defeats just punishment, and discourages impacted people from participating in the policymaking process.

With this in mind, we write in response to the Issue for Comment to remark on the tremendous value of retroactivity and share our ideas about how the Commission can best continue to make retroactivity a viable path for ameliorative amendments.

1. **Congress gave the Commission considerable discretion to provide retroactivity of ameliorative amendments.**

The Commission is instructed to "periodically . . . review and revise" the sentencing guidelines.[1] In undertaking this mandate, the Commission has, throughout its history, uncovered and corrected guidelines that it found did not align with the goals of proportionality or further the basic purposes of punishment. In these instances, Congress specifically provided the Commission with a path to amend the guidelines and revisit cases of people serving sentences

[1] 28 U.S.C. § 994(o).

calculated using those guidelines.[2] This grant of authority to the Commission came with considerable discretion.[3]

In its Rules of Practice and Procedure, the Commission has elucidated, in line with Congress' direction, procedures for considering retroactivity.[4] And to help guide the decision on retroactivity, the Commission has identified three primary criteria: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range; and (3) the difficulty of applying the amendment retroactively.[5] The criteria provide a framework for Commissioners' consideration and also for stakeholder feedback.

2. The criteria in §1B1.10 provide a workable framework for assessing retroactivity.

For over thirty years, the Commission has used the same criteria in §1B1.10 to guide retroactivity decisions. Although some commentators have critiqued the criteria,[6] we believe that it is a workable framework for the Commission. We do write, however, to suggest one update.

A. "Impact" may be a better guide for retroactivity decision-making than "magnitude"

Although we think the current criteria can be left as is, since the Commission seeks comment on ways to provide additional guidance, we suggest changing "magnitude" to "impact." Using this term will help draw a throughline from the Commission's own language which reports on the "impact" of retroactivity and thus could provide more useful guidance for stakeholder commentary and commissioner review of retroactivity.

"Magnitude" has come under criticism recently. In a critique of the Commission's "magnitude" criterion, Johnathan Wroblewski said that if the "magnitude of the change" 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."[7] To be sure, the

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[2] 28 U.S.C. § 994(u).
[3] *Id.* ("If 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."); *see also United States v. Dillon,* 130 S. Ct. 2683, 2691 (2010) (observing that Congress gave the Commission discretion to decide "whether to amend the guidelines [] and whether and to what extent an amendment will be retroactive []").
[4] 28 U.S.C. § 994(u); USSC Rules of Practice and Procedure, Rule 4.1A.
[5] USSG §1B1.10.
[6] *See* Reply Statement of Jonathan J. Wroblewski to the U.S. Sent'g Comm on the Proposed Retroactive Application of Certain 2024 Amends., at 3 (critiquing the criteria because stakeholders can interpret the criteria in "diametrically opposite ways"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR36853_reply-comment_R.pdf.
[7] *Id.*

government and stakeholders in opposition of retroactivity also use both sides of the magnitude coin.[8]

But, we take the point. Because there is no agreed understanding of magnitude as a consideration for guideline retroactivity, advocates *have* used the concept in diverging ways. Definitionally speaking, magnitude often refers to the numerical result, great size, or extent of something, whereas impact often refers to the overall forceful effect or consequence of an action (or inaction) on another.

The Commission has been tasked with considering far more than just the numerical result of retroactivity, and in fact, arguing about the numerical result alone has little additive value for the Commission – it has the impact reports that set out the number of people who might be affected. Using impact includes magnitude but also allows the Commission to consider qualitative factors that may be more helpful in guiding a retroactivity analysis.

FAMM and others have used "impact" to make arguments in favor of retroactivity beyond the purely quantitative metric of how many people would be eligible for resentencing.[9] Impact has included arguments about, for example, the damage done to public trust in the system if incarceration is continued, the effect of incarceration on racial disparities, and the burden on the federal Bureau of Prisons.[10]

Soliciting comments about impact will also allow stakeholders to more closely tie their arguments to the information contained in the retroactivity impact reports. Impact reports contain data, but the data also addresses things like the cost savings on the BOP,[11] geographic

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[8] *Compare* Dep't of Just. Comment on Retroactivity of 2007 Crack Cocaine Amendments at 9 (Nov. 1 2007) (opposing retroactivity because of the sheer volume of people eligible for resentencing), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_001.pdf, *with* Dep't of Just. Comment on Retroactivity 2010 Recency Amendments at 3 (Sept. 13, 2010) (opposing retroactivity because of the "small magnitude of the reduction from the amendment"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20100915/DOJ_RecencyComment2010.pdf.

[9] FAMM Reply Comment on Retroactivity 5 (July 22, 2024) ("In some cases, the impact of an amendment can be measured in the damage that has been done to our system of justice through practices such as the use of acquitted conduct to increase sentences.").

[10] *See* USSC Public Meeting, Statement by Commissioner Gleeson at 51 (Aug. 24, 2023) ("There's no such thing as fully remedying a racial disparity that's been baked into our criminal justice system for so long. But making these amendments retroactive will have a tangible effect on thousands of people of color."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230824/transcriptR.pdf.

[11] USSC Analysis of the Impact of the 2014 Drug Guideline Amendment if Made Retroactive (May 17, 2014), www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf.

disparities,[12] racial disparities,[13] and the lives saved[14]. Impact will allow stakeholders to argue about the overall effect of making an amendment retroactive – not just the number of people, but how their sentences and lives will be changed by retroactivity. It will also help stakeholders provide information to the Commission that conforms with the directive under 28 U.S.C. § 994(g).[15] We believe that this small change could facilitate more comprehensive review of the effect of retroactivity.

B. Fundamental fairness should not be added as a prerequisite to retroactivity

In its request for comment, the Commission asked whether it should include any bright-line rules to the factors used to assess retroactivity. Right now, the criteria in §1B1.10 are informative, but not dispositive. In recent years, however, some have suggested that fundamental fairness should be a prerequisite to retroactivity.[16] Although fairness concerns are appropriate for the Commission to consider in assessing retroactivity, adding fundamental fairness as a prerequisite would not be helpful.

While fundamental fairness has figured in many recent comments on retroactivity[17] the Commission historically has made prior retroactivity decisions without an explicit finding that fundamental fairness requires them.[18] From the earliest days of the Commission, retroactivity decisions were either unexplained, or were adopted for a variety of reasons, including disparity concerns. Fundamental fairness was not cited for these early decisions, or most that followed.[19]

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[12] *Id.* at Tbl. 2.
[13] *Id.* at Tbl. 3.
[14] *Id.* at 15 (estimating that "395 offenders will be released who would otherwise die in prison if the amendment were not made retroactive).
[15] (instructing the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated").
[16] Criminal Law Committee Comment on Retroactivity (June 21, 2024) ("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"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf.
[17] *See* FAMM Reply Comment on Retroactivity at 4 (July 22, 2024) (addressing the fundamental fairness of making acquitted conduct retroactive).
[18] *See*, Witness Statement of Mary Price, General Counsel, FAMM Before the United States Sentencing Commission at 1-6 (July 10, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230719/FAMM.pdf.
[19] *See* U.S. Sent'g Comm'n, 1993 *Annual Report* at 8 (1993) (explaining that LSD amendment resulting in "unwarranted disparities" but not citing fundamental fairness), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1993/1993%20Annual%20Report.pdf.

The Commission should not use that value as a screen to limit retroactivity. While fundamental fairness was discussed with respect to "crack minus two"[20] and Fair Sentencing Act retroactivity,[21] those occasions are the exception rather than the rule.

For example, the largest retroactivity decision in Commission history made Amendment 782, which reduced all drug offense levels by two, retroactive.[22] 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.[23] 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.[24] 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 of retroactivity as the best means to express its conclusion that the now-discarded guideline failed to meet the purposes of punishment.

Moreover, absent a commonly accepted definition of "fundamental fairness" as it applies to retroactivity, the term itself is as amorphous as other terms used and would not be helpful guidance to stakeholders or the Commission. Last year's comment cycle is evidence of this. The Criminal Law Committee suggested that fundamental fairness would not support retroactivity of

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[20] U.S. Sent'g Comm'n, Transcript of Meeting on Retroactivity (Dec. 11, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20110630/Meeting_Minutes.pdf.
[21] U.S. Sent'g Comm'n, Public Meeting Minutes 3, 4 and 8 (June 30, 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20110630/Meeting_Minutes.pdf.
[22] *Compare* U.S. Sent'g Comm'n, Final Crack Retroactivity Data Report: Fair Sentencing Act, 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, U.S. Sent'g Comm'n, Preliminary Crack Cocaine Retroactivity Data Report, 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.
[23] U.S. Sent'g Comm'n, Amendment to the Sentencing Guidelines (July 18, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendlyamendments/20140718_RF_Amendment782_0.pdf.
[24] U.S. Sent'g Comm'n, Transcript of Public Hearing on Retroactivity of the 2014 Drug Amendment, 252-253 (June 10, 2014), 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?").

the acquitted conduct amendments.[25] And yet, as FAMM and others advocated, it is hard to imagine an amendment that more directly gets at fundamental fairness than punishing people for crimes of which they were acquitted. In that regard, fundamental fairness is as malleable as magnitude, perhaps more so. Thus, the Commission should reject any proposal that "fundamental fairness" serve as a prerequisite for retroactivity.

3. The Commission should amend the language in Rule 4.1A.

Rule 4.1A states that "[g]enerally, promulgated amendments will be given prospective application only."[26] It goes on to detail the steps the Commission takes when it "considers an amendment for retroactive application to previously sentenced, imprisoned defendants . . ."

Although there is a general presumption of finality in federal law, the statutes in 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u) provide a specific-carve out for retroactivity of ameliorative amendments. According to 28 U.S.C. § 994(u), when the Commission votes in favor of an ameliorative amendment, the Commission "shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."[27] Notably there is nothing in the statute that articulates a general presumption of application either in favor of or against retroactivity.[28] The statute simply makes clear that when an amendment is ameliorative, and the Commission votes to make it retroactive, it must set out under what circumstances and by how much retroactivity shall apply.

The first sentence in Rule 4.1A, however, reads as a presumption against retroactivity.[29] But this presumption is not supported by the statute. [30]

To address this confusion, we think that the Commission can simply delete the first sentence in Rule 4.1A, leaving the rest. It would look like this:

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[25] *Supra* n. 16.
[26] USSC Rules of Practice and Procedure, Rule 4.1A.
[27] 28 U.S.C. § 994(u).
[28] *See id.*; *see also* 18 U.S.C. § 3582(c)(2).
[29] *See* Victims Advisory Group Statement Opposing Retroactivity at 2–3 (June 21, 2024) ("The entire analysis of retroactivity begins with the presumption that any amendments to the Guidelines are presumed to not be retroactive. The Rules of Practice and Procedure are explicit on this point, 'Generally, promulgated amendments will be given prospective application only.'"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf.
[30] Some have suggested that the use of retroactivity is an affront the "principle of finality" set out in Teague. *See supra* n. 16 at 3; Dep't of Justice Comment on Retroactivity at 2, n.8 (2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf. But those arguments are red herrings. *Teague* and its progeny relate to an entirely different set of circumstances (federal habeas jurisdiction over the constitutionality of state convictions following a new rule of federal constitutional procedure). In this instance, Congress carved out a specific exemption to finality for ameliorative guideline amendments. *See* 28 U.S.C. § 994(u). *Teague* is irrelevant here.

~~Generally, promulgated amendments will be given prospective application only. However,~~ In those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants (*see* 28 U.S.C. §994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall—

(1) at the public meeting at which it votes to promulgate the amendment, or in a timely manner thereafter, vote to publish a request for comment on whether to make the amendment available for retroactive application;
(2) instruct staff to prepare a retroactivity impact analysis of the amendment, if practicable, and make such an analysis available in a timely manner to Congress and the public;
(3) hold a public hearing on whether to make the amendment available for retroactive application; and
(4) at a public meeting held at least 60 calendar days before the effective date of the amendment, vote on whether to make the amendment available for retroactive application.

Amending the language this way is a simple fix that will more closely align the rules and guidelines with the statute. If, however, the Commission feels it cannot strike the first sentence, as an alternative, the Commission can amend the language in Rule 4.1A as follows:

> Generally, promulgated amendments will be given prospective application ~~only~~, unless the Commission determines the criteria supporting retroactivity have been met as set forth in USSG §1B1.10. ~~However, i~~In those cases in which the Commission is considering~~s~~ an amendment for retroactive application to previously sentenced, imprisoned defendants (see 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall . . . *[procedural steps taken when considering if an amendment should be made retroactive].*

4. Conclusion

We are grateful for the opportunity to weigh in on issues that are critical to ensuring fair sentencing system.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Paralegal Project

Topics:

Retroactivity Criteria

Comments:

Why would you not make most amendments retroactive? How fair is it to change how current sentences are determined when not making it fair for others who were sentenced to much longer sentences to be treated equitably under the law? Much like you allow the DOJ attorneys to lie to get longer sentences? I have a client who was sentenced to life for a murder she did not commit because the govt lied.

Submitted on: February 19, 2025

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Surviving Freedom

Topics:

Retroactivity Criteria

Comments:

Dear Judge Reeves,

When changes are made to the sentencing guidelines that could shorten someone's sentence, I believe it is imperative that the Commission make those changes available to people who have already been sentenced. Not doing so undermines confidence in the criminal justice system.

Imagine if you successfully advocated lowering guideline ranges and were told that your advocacy was important to the new lower sentence. Only to then be told that change would not apply to your loved one who is serving time in prison, simply because their sentence was imposed before the ameliorative amendment. You'd be left shaking your head at the injustice.

I think that the existing criteria fairly captures the circumstances that should be considered when deciding whether to make a change retroactive. I would suggest, however, that changing "magnitude" to "impact" would help provide some clarity. Magnitude is captured by impact, and I think understanding the impact of making an amendment retroactive more accurately gets at what the Commission is seeking to assess. I also believe that the sentence in the Rules of Practice and Procedure should be updated to read, "[g]enerally promulgated amendments should be given prospective application only, unless they meet the criteria set forth in USSG §1B1.10.

Retroactivity is a critical aspect of ensuring fairness in federal sentencing.

Thank you for considering my views.

Submitted on: April 10, 2025

April 14, 2025

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

Dear Judge Reeves:

This letter is in response to the Sentencing Commission's *Request for Comment on Criteria for Selecting Guideline Amendments Covered by §1B1.10*, published in the Federal Register on December 30, 2024.[1] Section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) currently provides a non-exhaustive list of criteria to be used to determine whether a guideline amendment will be included in subsection (d) of §1B1.10 and thus eligible for retroactive application. The Commission seeks comment on whether and how this list, and the guidance otherwise provided around selecting amendments for retroactive application, might be changed.[2]

We appreciate the opportunity to share our thoughts with you on this important issue. Consistent with congressional policies set forth in the Sentencing Reform Act, the First Step Act, and elsewhere, we view the retroactive application of guideline amendments as only one of many good reasons for enabling reconsideration of an otherwise final sentence, and our comments come from this perspective. Recent expansions of post-sentencing mechanisms for review and adjustment of sentences have confused judges, practitioners, defendants, and the public and also risk significant unwarranted disparities. We think it is critical for the Commission to undertake a comprehensive review of these mechanisms in order to propose reforms to make more coherent, transparent, and understandable federal sentencing modification procedures.

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Before the enactment of the Sentencing Reform Act (SRA)[3] in 1984, parole was a fundamental component of federal sentencing law, policy, and practice. It was the mechanism, embodied in law, for reconsideration and reduction of imprisonment sentences imposed by federal district courts. It provided for regular second – and often third and fourth – looks at the

[1] U.S. SENT'G COMM'N, *Sentencing Guidelines for the United States*, 89 Fed. Reg. 106761 (December 30, 2024), https://www.govinfo.gov/content/pkg/FR-2024-12-30/pdf/2024-31278.pdf.
[2] *Id*.
[3] Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (1984).

length and necessity of the prison term imposed by a judge's initial sentencing decision, after an offender had served a minimum portion of that prison sentence. Though parole decision-making has traditionally been focused on an offender's rehabilitative progress and potential for safe reentry into the community, a host of other factors have often influenced parole board decisions.

In the 1970s, as crime rates were rising, academics, advocates, victims, practitioners, and politicians began to express serious concerns about the "truthfulness" of imposed prison sentences. Discretionary release systems, like parole, led to offenders serving only a portion of the announced prison sentence. The average in the federal system, pre-SRA, was around 50%. These systems were seen as undermining both trust and confidence in the criminal justice system, in part because of concerns about inappropriate factors like race and class leading to disparate release decisions. Analysis of prison rehabilitative programs then suggested that "nothing works" to reduce recidivism, which fostered concerns about the effectiveness of parole systems to help reduce crime. These and other forces led to the "truth-in-sentencing" movement, which had as its primary goal to ensure that imposed prison terms were mostly, if not entirely, served.

The SRA embodied the goals of the truth-in-sentencing movement by abolishing federal parole release and adding provisions to Title 18 of the United States Code to ensure that, in most cases, the amount of prison time served by an offender was close to the prison sentence imposed by the sentencing court. Section 3582 of Title 18, for example, makes clear and explicit that a sentence that includes a prison term constitutes a final judgment and cannot be modified except for specific, limited, and delineated circumstances.

The legislative history of the SRA shows that Members of Congress in 1984 were focused on eliminating what they saw as unwarranted disparities in the amount of time served by similarly situated offenders and also counterproductive sentencing uncertainties associated with the federal parole system.[4] Under the then-new law, offenders could only earn limited credits towards early release for good behavior in prison. Those credits could amount to no more than 15% of the imposed prison term and for most offenders was the only way to reduce the time served in prison. And yet, section 3582 still provided four express means for district judges to grant sentence reductions under specified circumstances: (1) for offenders who provided substantial assistance to authorities on motion by prosecutors; (2) for offenders who presented "extraordinary and compelling reasons" (originally) on motion by the Bureau of Prisons; (3) for certain elderly offenders who had served decades in prison; and (4) for offenders who were sentenced based on guideline ranges that had since been reduced and made retroactive.

In 1994, Congress reaffirmed its commitment to truth-in-sentencing when it enacted the Truth-in-Sentencing Incentive Grants program as part of the so-called Clinton Crime Bill. That program provided financial grants to states that adopted policies to ensure that offenders

[4] S. Rep. No. 98-223 at 45 (1983) ("[S]entencing in the Federal courts is characterized by unwarranted disparity and by uncertainty about the length of time offenders will serve in prison.").

convicted of certain violent crimes served at least 85% of their sentence.[5] About half the states enacted truth-in-sentencing laws either before or as a result of the 1994 Crime Bill.[6]

In the last decade or so, Congress, the American Law Institute (two of us are members of ALI), many states, and the U.S. Sentencing Commission itself have expressed concerns about strict truth-in-sentencing and have embraced new mechanisms for review, reconsideration, and adjustment of imposed sentences, and in particular, especially long sentences. This policy shift has been the result of a new understanding on how prison programming can be effective to reduce recidivism, how incentives to participate in such programs can work to improve public safety at lower costs (both within and outside of prison), how time can lead both to penitence and to self-improvement and reform, and how the values and judgments around sentencing policy can change over time. In addition, the Supreme Court's Eighth Amendment rulings limiting life without parole sentences (LWOP) for juvenile offenders has required or prompted many jurisdictions to provide new means to reconsider lengthy prison sentences imposed on younger offenders.

Perhaps most consequentially for the federal sentencing system, the First Step Act of 2018, signed into law by President Trump, created a system in which imprisoned offenders can earn time credits for participating in recidivism reduction programming or productive activities. These credits can significantly reduce the portion of an imposed prison sentence actually served in prison.[7] First Step Act credits are in addition to credits for good behavior in prison[8] and any reduction for participating in the Bureau of Prisons' Residential Drug Treatment program.[9] By some estimates, these new credits can enable certain defendants to be transferred into home confinement after serving as little as half of the prison term announced by the district judge.

In addition, the First Step Act changed the procedures required for judges to be able to consider sentence reductions based on "extraordinary and compelling reasons." Federal prisoners no longer must depend on the Bureau of Prisons to make a motion for such a reduction; these prisoners are now permitted to petition district courts for such a reduction directly.

Similarly, the American Law Institute, which developed the Model Penal Code and is the leading independent organization working to improve American law, adopted a second look sentencing policy in 2017. Its revision of the Model Penal Code's sentencing provisions calls for all jurisdictions to "authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence" from all prisoners who have served 15 years of imprisonment.[2] The commentary to the policy explains the multiple reasons ALI had for providing a means for lengthy prison sentences to be reviewed and potentially modified:

> The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense

[5] Pub. L. 103-322, 108 Stat. 1796 (1994).
[6] U.S. Gov't Accountability Off., GAO/GGC-98-42, *Truth in Sentencing Availability of Federal Grants Influenced Laws in Some States* 6 (1998).
[7] Pub. L. 115-391, 122 Stat. 657 (2018).
[8] 18 U.S.C. § 3624.
[9] 18 U.S.C. § 3621.

> gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods . . . It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values . . .
>
> On utilitarian premises, lengthy sentences may also fail to age gracefully. Advancements in empirical knowledge may demonstrate that sentences thought to be well founded in one era were in fact misconceived . . . For example, research into risk assessment methods over the last two decades has yielded significant (and largely unforeseen) improvements. Projecting this trend forward, an individualized prediction of recidivism risk made today may not be congruent with the best prediction science 20 years from now. Similarly, with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change.

Several states have also adopted second-look mechanisms and others are actively considering adopting them. A prosecutor-initiated resentencing law was enacted in California in 2018, and similar laws have been enacted in Illinois, Maryland, Minnesota, Oregon, and Washington, and have been proposed or introduced in Georgia, Massachusetts, New York, Texas, and Utah, among other states. Of course, many states still maintain parole release and other discretionary release mechanisms.

And finally, the Commission itself has increasingly embraced second looks. It has applied many important guideline amendments retroactively in recent years, including several amendments that have impacted thousands of imprisoned persons. It has also made significant changes to what it considers "extraordinary and compelling reasons," potentially justifying a second look and a sentence reduction under 18 U.S.C. § 3582(c).

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As the Commission itself has documented, the changes in federal law and policy around the reexamination and reduction of otherwise final sentences that have occurred over the last decade or so, and especially the First Step Act reforms, have created confusion – for offenders, victims, judges, probation officers, and the public – around the portion of imposed federal sentences that will actually be served. The Commission has done a valiant job trying to explain on its website how the various mechanisms work. Nonetheless, predicting on the day of sentencing the amount of prison time likely to be served by the sentenced individual is quite challenging. This is understandable as the current mechanisms for reconsideration of sentences are the result of different policy determinations made over time by different Congresses, Administrations, and Commissions. For example, the Biden Administration enacted regulations for First Step Act credits that were quite different than the first Trump Administration. The various mechanisms for reconsideration of otherwise final sentences do not have a singular philosophical foundation nor are they applied identically by all federal judges.

The piecemeal approach to reform has not only led to much confusion but also to the risk of a wide range of possible disparities. We urge the Commission to enhance its research focus to

better asses the risks and reasons for possible unwarranted disparity in the application of post-sentencing imprisonment term reductions. The Commission's retroactivity decisions, which have themselves arguably been haphazard, inconsistent, and thinly explained over the years, have contributed to confusion and potential disparity. The eligibility requirements for earning and then applying First Step Act credits have as well. The disparate application of compassionate release criteria by judges across the country is yet another factor.

We think rather than risking more confusion with any complicated new criteria for retroactivity, the Commission should first undertake a broad review of all the various existing second-look and sentence adjustment mechanisms and seek to develop a set of coherent policies that can better embody congressional and Commission values and our better understanding of what works to promote successful reentry. We think this review will be a great asset for just describing all of the existing sentence review mechanisms and their operation currently, and we would hope the Commission could then develop a set of legislative proposals to harmonize and improve the current system. The Commission's work would be greatly advanced, and would contribute to nationwide reform efforts, by studying the various state second-look and compassionate release, including modern discretionary parole release, models as well as the federal experience with the First Step Act.

There is much to learn from the states and the ALI and other reform proposals. To that end, the *Federal Sentencing Reporter* is partnering with Stanford Law School to convene a small second look conference this fall, where we will gather academic and practitioner experts to review the various models and experiences. We would love for commissioners to join us there. We think this type of convening can be part of a comprehensive Commission review of all second-look mechanisms. It could help the Commission develop a set of coherent principles and policies for sentencing reductions in order to recommend sound legislative proposals and other reforms that may be needed.

We believe an improved, more coherent and coordinated federal post-sentencing reconsideration system can be developed. A reformed second-look system would seek to better and more clearly balance the various values at stake, including: sentencing honesty and fairness, appropriate finality in sentencing, victim interests, incentives for good behavior and self-improvement, recognition of changed circumstances, costs, and efficiency. It could make into a coherent whole a set of policies and procedures that may be contributing to haphazard and disparate results.

A reformed approach might, for example, mandate judicial reconsideration of all (or nearly all) sentences that include imprisonment terms of 10 years or more after the service of half of the imposed prison term. (Prior to the enactment of the Sentencing Reform Act, federal parole consideration occurred after one-third of the announced sentence and actual release occurred, on average, after about half the sentence was served.) That reconsideration would allow courts to review the First Step Act and good behavior credits earned by the offender, any changes to the guidelines made over the intervening years, any relevant court decisions or other changes in law, among many other considerations. It would give all offenders the incentive to participate in recidivism reducing programs and to make amends with any victims in their case. It would also provide greater predictability, at least of procedure, for those victims. It would make far more

transparent and understandable both the sentence imposed and the process for its review and implementation and would be cost-effective and not a significant burden on the federal courts.

Under such a system, most guideline changes could and would be considered as one of a number of factors in the judicial reconsideration process, and formal and blanket retroactivity of guideline amendments would be reserved only for amendments to change patently unjust or unlawful guidelines. The Supreme Court recognized in *Montgomery v. Louisiana*, 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). When an unlawful or patently unjust guideline is changed, it would be wrong to leave in place sentences based on such a guideline.

Judges have expressed a similar view that blanket retroactivity for guideline amendments should be circumscribed along these lines. The Criminal Law Committee, for example, recognized that retroactive application of guideline amendments should be limited to instances "when an amendment would rectify an inequity." *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. Under a reformed system along the lines we are suggesting, this would be all that would remain for guideline retroactivity determinations.

Similarly, under this kind of reform, "compassionate release" could be limited to significant health or family circumstances that amount to a kind of exercise in structured compassion rather than an opaque mechanism for reconsidering sentences generally based on more ubiquitous arguments revolving around such things as legal changes or offender rehabilitation. In addition, because all sorts of non-legal considerations are often the focus of compassionate release motions, decision-making regarding this form of "compassionate release" might be soundly allocated to a special (independent) body with expertise in prison administration, medicine, and social work, which could make more informed and consistent release decisions than district judges. Congress, through the First Step Act, remedied one problem with the operation of the statutory mechanism for compassionate release by allowing prisoners to file motions directly, but the Commission's review and analysis of judicial decision-making on these motions might lead to recommendations for further reform of this process.

With these comments, we are just seeking to set forth a few tentative ideas regarding what comprehensive sentence reduction reform might look like in the federal system. Were the Commission to study and analyze the operation of existing methods in depth, the current experiences, good and bad, could and should further inform reform perspectives.

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Retroactive application of guideline amendments is only one of many good reasons for sometimes reconsidering an otherwise final sentence. We think making more coherent, transparent, and understandable federal second-look mechanisms is an important goal for the future of federal sentencing. We believe the Commission should comprehensively review all the

existing and proposed post-sentencing review and adjustment mechanisms, should encourage robust and public discussion among relevant policymakers and stakeholders about important sentencing reconsideration principles and practices, and ultimately propose and advance reforms to create that better second-look policy.

We hope these comments – and the fall conference – can help the Commission.

Sincerely,

/s/ Jonathan J. Wroblewski
Jonathan J. Wroblewski
Director, Semester in Washington Program
and Lecturer on Law
Harvard Law School

/s/ Douglas A. Berman
Douglas A. Berman
Newton D. Baker-Baker & Hostetler Chair in Law
Executive Director, Drug Enforcement and Policy Center
The Ohio State University Moritz School of Law

/s/ Steven L. Chanenson
Steven L. Chanenson
Professor of Law
Faculty Director, David F. and Constance B. Girard DiCarlo
Center for Ethics, Integrity and Compliance
Villanova University Charles Widger School of Law

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Requia Campbell, Payne Memorial AME Mass Choir President

Topics:

Retroactivity Criteria

Comments:

Dear Judge Reeves,

When changes are made to the sentencing guidelines that could shorten someone's sentence, I believe it is imperative that the Commission make those changes available to people who have already been sentenced. Not doing so undermines confidence in the criminal justice system.

Imagine if you successfully advocated lowering guideline ranges and were told that your advocacy was important to the new lower sentence. Only to then be told that change would not apply to your loved one who is serving time in prison, simply because their sentence was imposed before the ameliorative amendment. You'd be left shaking your head at the injustice.

I think that the existing criteria fairly captures the circumstances that should be considered when deciding whether to make a change retroactive. I would suggest, however, that changing "magnitude" to "impact" would help provide some clarity. Magnitude is captured by impact, and I think understanding the impact of making an amendment retroactive more accurately gets at what the Commission is seeking to assess. I also believe that the sentence in the Rules of Practice and Procedure should be updated to read, "[g]enerally promulgated amendments should be given prospective application only, unless they meet the criteria set forth in USSG §1B1.10.

Retroactivity is a critical aspect of ensuring fairness in federal sentencing.

Thank you for considering my views. My husband William Campbell [redacted] has been sentenced to 360 months on a bad guideline everyone he's on the case with has been released meanwhile because he was sentence improperly he's still there. We seek justice and fairness... this would help tremendously as a mother of four children's I've been raising the last 8 years alone.. it's time for a change.

Submitted on: April 10, 2025

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Mary Grey, Public defender

Topics:

Retroactivity Criteria

Comments:

If the law pass it should apply to everybody the system is over crowded

Submitted on: March 13, 2025

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Paula Baird

Topics:

Retroactivity Criteria

Comments:

Dear U.S. Sentencing Commission,

I appreciate the Commission's efforts to improve fairness and justice in sentencing through the proposed changes to the Career Offender Guidelines, Supervised Release, and Drug Sentencing policies. These reforms acknowledge the need for a more just and proportional system—one that moves away from outdated and overly punitive measures.

However, if these changes only apply prospectively, they will leave behind thousands of individuals who were sentenced under the old, flawed guidelines. Justice should not be dependent on the date of sentencing. Those already serving time under the prior framework deserve the same opportunity for reconsideration as those who will be sentenced in the future.

I strongly urge the Commission to make these reforms retroactive so that fairness applies equally to all. Without retroactivity, the injustices of the past remain uncorrected, and countless individuals will continue serving excessive sentences that no longer reflect current standards.

Ensuring retroactivity would not only promote fairness but also restore public confidence in the integrity of our justice system. I appreciate your time and consideration of this critical step toward a more equitable system.

Thank you.

Submitted on: March 10, 2025

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Gabriel Barber

Topics:

Retroactivity Criteria

Comments:

In 1987 the Sentencing Guidelines, pertaining to methamphetamine adopted the "Ice" purity distinction from "Meth-Mixture". This was supposed to be done off of empirical data, showing that if distributors can purchase 90% + pure methamphetamine then you had access to the Mexican cartels. Basically a role enhancement was included based off the purity levels of meth which increased sentences drastically. This is the only drug that has this kind of distinction even though other drugs can be diluted, cut and redistributed.

Around 2017 or possibly sooner, empirical data has shown that end users who possess user quantities of meth possess 90% pure or better meth around an 80% percentile. These end users have no access to the Mexican cartels, are punished for a role that they don't have and therefore the Guidelines don't reflect the empirical data at this time. Also, studies have shown that when users of meth go to rehabilitation they receive the same treatment whether it's "Ice" or "Meth-Mixture". Some lawyers and researches actually argue that "Ice" is actually more organic and not as harsh on the body compared to the shake and bake made meth or "Meth-Mixture".

The Guidelines should reflect empirical data at that current time. Studies have shown, lawyers have argued and some judges recognize that "Ice" is being sentenced too harshly. Defendants have received sentences that reflect the "Meth-Mixture" Guideline calculation. I urge the Sentencing Commission to take the "Ice" distinction out of the Guidelines and charge all meth as "Meth-Mixture". This will also fix the fact that meth carries the worst punishment even compared to fentanyl which accounts for a staggering amount of deaths across this nation.

I also urge the Commission to make this change retroactively due to years of empirical data reflecting the Guidelines being inaccurate, which resulted in improper role enhancements and sentences. Also a retroactive change would negate sentencing disparities among comparable defendants across this nation.

Sincerely,

Gabriel Barber

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Hamah Bradley

Topics:

Retroactivity Criteria

Comments:

There was 64,124 individuals sentenced in fiscal year of 2023 1,351 individuals were sentenced under the career offender guidelines. The proposed amendment for career offender needs to be made retroactive. There has been over 1,300 individuals each year for the past 5 years that has been sentenced under the career offender guidelines. The career offender proposed amendment has to be made retroactive so that thousands of individuals will be affected by the change in law. If it's not made retroactive it would create sentencing disparities between individuals that has been sentenced under the career offender guidelines. Retroactive amendments will help those with minor cases that had low guidelines before they was enhanced as a career offender to be resentenced again. And that only promotes more respect for the law when those people that already locked up benefits from an amendment that's made retroactive.

Submitted on: February 5, 2025

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Brittany Calaunan, Pass retroactivity on 924C Stacking

Topics:

Retroactivity Criteria

Comments:

Pass Retroactivity on 924c stacking.

I believe the retroactivity should be given to the people who

1) Did not do physical harm to others.

2) Who were young when they did the crime.

3) Those who have stayed out of trouble while in prison.

Our family is for Retroactive on 924 c stacking.

This is fair. Thank you for listening...95

Submitted on: February 6, 2025

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Laurren Chase

Topics:

Retroactivity Criteria

Comments:

Dear U.S. Sentencing Commission,

I appreciate the work being done to improve fairness in sentencing, and I strongly support the proposed changes to Career Offender Guidelines / Supervised Release & Drug Sentencing.

The fact that these policies are being reconsidered shows that they needed to change—but if they only apply to future cases, those already sentenced under the old rules will be left behind.

I respectfully ask the Commission to make these changes RETROACTIVE so that individuals who are currently incarcerated can receive the same consideration as those sentenced moving forward. Fairness shouldn't depend on the date of sentencing—justice should apply to everyone.

Thank you for your time and for considering this important step toward a more just system.

Sincerely,
Laurren Chase
Seattle, WA

Submitted on: March 11, 2025

Regan Rose
[redacted]

March 10, 2025

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

Comment on Retroactive Application of Amendments to the U.S. Sentencing Guidelines

Dear United States Sentencing Commission,

I appreciate the opportunity to provide comments regarding the retroactive application of amendments to the U.S. Sentencing Guidelines. I strongly believe that amendments that rectify injustices, align with evolving legal standards, or correct excessive sentencing disparities should be applied retroactively.

The Commission has asked whether it should provide further guidance on how the existing criteria for determining retroactivity should be applied. In my view, additional guidance should emphasize the fundamental principle that justice should not be arbitrarily constrained by procedural technicalities. Amendments that reduce excessive sentencing should not be limited to prospective cases alone, especially when those sentenced under prior guidelines continue to suffer unduly harsh penalties.

Additionally, the Commission should revise and expand its criteria for determining retroactivity by considering the following:

1. **Fairness and Proportionality:** If an amendment reduces a sentencing range based on a reassessment of fairness and proportionality, it should be applied retroactively to ensure equity.
2. **Consistency with Judicial Trends:** The Commission should examine case law trends and legislative actions that support reduced sentencing for certain offenses, ensuring that past sentences reflect current legal perspectives.
3. **Evidence-Based Justification:** Amendments based on empirical research demonstrating the ineffectiveness or disproportionate impact of prior sentencing structures should be made retroactive.
4. **Public Safety Considerations:** If retroactivity does not present a significant risk to public safety, amendments should apply to those already sentenced.
5. **Rehabilitation and Reintegration:** Many individuals sentenced under outdated guidelines have demonstrated rehabilitation. Ensuring retroactivity for amendments allows those individuals a fair chance at reintegration into society.

Furthermore, there are countless inmates who were sentenced 12 or more years ago under guidelines that imposed far harsher sentences than would be given today. These individuals remain incarcerated under outdated and unjust sentencing structures, despite legislative and judicial shifts recognizing the excessive nature of their punishments. Failing to apply amendments retroactively means that people continue to serve sentences that society and the legal system now acknowledge as overly severe.

Regarding the possibility of bright-line rules for retroactive application, I believe the Commission should adopt a presumption in favor of retroactivity for amendments that reduce sentencing disparities, correct errors, or align with modern legal and criminological insights. While flexibility is necessary, clear guidance that prioritizes fairness and equity should be paramount.

The Commission also inquires whether criteria for retroactivity should be included in its Rules of Practice and Procedure rather than in the Background Commentary to §1B1.10. While both may serve a purpose, including explicit criteria within the Rules of Practice and Procedure would provide clearer enforceability and guidance for courts.

Lastly, Rule 4.1A states that amendments will generally be given prospective application only. I urge the Commission to reconsider this approach. A rigid presumption against retroactivity can perpetuate injustices by leaving individuals to serve sentences that have been acknowledged as excessive or unfair. Instead, the rule should allow for meaningful case-by-case assessments, ensuring that justice is dynamic and responsive rather than static and arbitrary.

Thank you for considering my input. I hope the Commission will take these concerns into account and move toward a sentencing framework that prioritizes fairness, proportionality, and justice.

Sincerely,
Regan Rose

Public Comment - Issue for Comment on Retroactivity Criteria

Submitter:

Nohely Zuniga

Topics:

Retroactivity Criteria

Comments:

Studies have consistently shown that retroactive sentence reductions do not compromise public safety. In fact, data from previous retroactive guideline reductions (such as those for crack cocaine offenses) demonstrate that individuals released early under fairer policies have not posed increased risks to society. Instead, they have benefited from the opportunity to reintegrate and contribute positively to their communities.

Justice should not be limited by timing. If these amendments reflect a more just approach to sentencing, then fairness demands that relief be granted to those who were sentenced before these changes took effect. I urge the Commission to ensure that these amendments apply retroactively, providing meaningful relief to those who have already served disproportionate sentences.

Thank you for your time and consideration.

Submitted on: March 15, 2025

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