# United States Sentencing Commission

## 2025 Amendment Cycle

Public Comment on Retroactivity of Certain 2025 Amendments
90 FR 19798

# UNITED STATES SENTENCING COMMISSION


## 2025 PUBLIC COMMENT ON RETROACTIVITY OF CERTAIN 2025 AMENDMENTS 90 FR 19798

# ISSUE FOR COMMENT: RETROACTIVITY

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. 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 **June 2, 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. 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 POSSIBLE RETROACTIVE APPLICATION OF PARTS A AND B OF THE CIRCUIT CONFLICTS AMENDMENT, AND SUBPARTS 1 AND 2 OF PART A OF THE DRUG OFFENSES AMENDMENT

On April 30, 2025, the Commission submitted to the Congress amendments to the sentencing guidelines, policy statements, and official commentary, which become effective on November 1, 2025, unless Congress acts to the contrary. The text of the amendments to the sentencing guidelines, policy statements, and commentary, and the reason for each amendment, may be accessed through the Commission's website at www.ussc.gov.

Section 3582(c)(2) of title 18, United States Code, provides that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Pursuant to 28 U.S.C. § 994(u), "[i]f the Commission reduces the term of imprisonment recommended in the

guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Commission lists in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2).

The following amendments may have the effect of lowering guidelines ranges: Part A (Circuit Conflict Concerning "Physically Restrained" Enhancements) and Part B (Circuit Conflict Concerning the Meaning of "Intervening Arrest" in §4A1.2(a)(2)) of Amendment 1; and Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5)) and Subpart 2 (Special Instruction Relating to §3B1.2) of Amendment 2. The Commission intends to consider whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any or all of these amendments should be included in §1B1.10(d) as an amendment that may be applied retroactively to previously sentenced defendants. In considering whether to do so, the Commission will consider, among other things, a retroactivity impact analysis and public comment. Accordingly, the Commission seeks public comment on whether it should make any or all the subparts or parts of the amendments listed above available for retroactive application. To help inform public comment, the retroactivity impact analyses of these amendments will be made available to the public as soon as practicable.

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

The Commission seeks comment on whether it should list in §1B1.10(d) as changes that may be applied retroactively to previously sentenced defendants any or all of the following subparts and parts of these amendments: Part A (Circuit Conflict Concerning "Physically Restrained" Enhancements) and Part B (Circuit Conflict Concerning the Meaning of "Intervening Arrest" in §4A1.2(a)(2)) of Amendment 1; and Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5)) and Subpart 2 (Special Instruction Relating to §3B1.2) of Part A of Amendment 2. For each subpart and part of the amendments listed above, the Commission requests comment on whether any such subpart or part should be listed in §1B1.10(d) as an amendment that may be applied retroactively.

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

COMMITTEE ON CRIMINAL LAW
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**Honorable Edmond E. Chang, Chair**

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June 2, 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 offer comment on whether the U.S. Sentencing Commission should give retroactive effect to certain amendments promulgated in the 2024-2025 cycle. The views expressed in this letter are those of the Committee, and we do not speak in this submission on behalf of the entire federal judiciary or for individual judges.

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] Beyond questions of retroactivity, such as the one discussed here, the Committee has submitted comment and presented testimony supporting the Commission's efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

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

Providing the Commission with feedback on the possible retroactive application of promulgated amendments is also 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 practical 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.

When the Committee considers whether the Commission should apply an amendment retroactively, it reviews any data provided by the Commission, and considers fundamental fairness and administrability, as well as the transparency, certainty, and predictability that are promoted by the finality of sentences.

This amendment cycle, the Commission requested comment on whether four provisions in the adopted amendments should be applied retroactively to individuals who were previously sentenced and are incarcerated. The provisions at issue are Parts A and B of Amendment 1 (Circuit Conflicts), and Subparts 1 and 2 of Part A of Amendment 2 (Drug Offenses). After considering the Commission's Retroactivity Impact Analysis and data, as well as its current retroactivity criteria, the Committee does not support retroactive application of these amendments.

**General Comments Regarding Retroactivity**

In its Issue for Public Comment that closed in April, the Commission stated that it would be examining the criteria that it considers in selecting amendments for retroactive application under § 1B1.10. Because the Commission has not yet had the opportunity to promulgate any changes to its retroactivity criteria, the Commission may want to consider delaying the retroactivity determination for this set of amendments until it addresses the issue of revising the criteria.

The Commission's Rules of Practice and Procedure state: "Generally, promulgated amendments will be given prospective application only."[2] In the Committee's April 18, 2025 comment letter on the retroactivity criteria (Retroactivity Factors Letter), we recommended that the Commission formally incorporate that principle of prospective application into the policy statement at § 1B1.10. The Background Commentary to § 1B1.10, in its current form, sets forth three factors for the Commission's consideration when determining whether to apply an amendment retroactively: "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." That commentary also states 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."

As we have noted in other comments, 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

[2] *See* Rule 4.1A (Retroactive Application of Amendments).

the system of certain and determinate sentencing established by the Sentencing Reform Act of 1984." Retroactivity Factors Letter, at 4 (quoting an earlier comment letter from the Committee).

Over the course of the Committee's comments to the Commission on retroactivity, we have consistently supported retroactive application where the purpose of the amendment was to address an inequity or issue of fundamental fairness, even where retroactive application would impose a heavy workload on the courts and probation officers. For example, the Committee supported retroactive application of the two amendments to the crack cocaine guidelines as well as the drugs-minus-two amendment, despite the ensuing tens of thousands of motions presented to the courts and probation officers.

For the same reasons, weighing the three criteria set out in the Background Commentary, the Committee has not supported retroactive application for amendments that were not intended to rectify an inequity or fundamental unfairness. Routine retroactive application, as we have stated before, undermines determinate and predictable sentencing, which in turn erodes the goals of the Sentencing Reform Act, especially deterrence. The 2010 "recency enhancement" in § 4A1.1 and the 2023 criminal history amendment are examples of amendments that were not adopted (in our view) to address an inequity or fundamental unfairness. Further, the legislative history of the Sentencing Reform Act reflects that courts should not be "burdened" with retroactive amendments unless "there is a major downward adjustment in guidelines because of a change in the community view of the offense."[3]

The Committee continues to support consideration of equity and fundamental fairness, whether under the current purpose-of-the-amendment criterion or under any new set of more specific criteria the Commission might adopt. The Committee would clarify, however, that the prospect of a different guideline range for individuals sentenced before an amendment and those sentenced after an amendment, without more, does not represent fundamental inequity or unfairness. That type of difference would apply across-the-board to essentially every amendment. Not every difference in sentence before and after an amendment represents the type of fundamental unfairness or inequity that warrants retroactive application—it simply represents the Commission's continual fine-tuning of the Guidelines over time. A fundamental fairness focus should be on systemic injustices (such as the cocaine powder/crack disparity).

In addition to focusing on fundamental inequities when considering retroactivity, we also urge the Commission to consider the workload burden on courts and probation offices, as we discussed in our Retroactivity Factors Letter. Although the Commission's retroactivity data reports are helpful in estimating the number of individuals potentially eligible for relief, the reports do not fully account for the workload, staffing, and budget impacts of a retroactive amendment. Our experience, as well as the Commission's post-retroactivity data reports, generally show that courts deal with a substantial number of non-meritorious motions, including motions filed by individuals who are not eligible for a reduction. In our April letter, we supplied data from the recent retroactive criminal history amendment as an example of motions

[3] S. Rep. No. 225, 98th Cong., 1st Sess. at 180 (1983).

filed by ineligible defendants amounting to a significant majority — ranging from nearly 70 to 80 percent — of the denied motions.[4]

**Comments on Potential Retroactivity of the 2024-2025 Amendments**

Based on the general principles discussed above, we address the potential retroactive application of the 2025 provisions at issue.

**I. Retroactivity of Amendment 1 (Circuit Conflicts), Part A (Physical Restraint)**

Amendment 1 modifies how use of a firearm and physical restraint are treated under USSG §§ 2B3.1 (Robbery), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means). The amendment alters the former "otherwise used" provisions relating to firearms to more specifically cover pointing a firearm at another (to direct movement) or using a firearm to make physical contact. It also amends these sections to require physical contact or confinement for the physical-restraint enhancement to apply. In short, it resolves an existing circuit split by providing that use of a firearm, without more, does not constitute physical restraint.

The Committee does not support retroactivity of this part of the amendment. The Commission's retroactivity data report estimates that a relatively small number of cases will be affected. Although the report was unable to estimate exact numbers, it suggested that just over 1,000 should be the upper limit of impacted cases, based on the number of individuals currently in custody who were subject to a physical restraint enhancement under one of these provisions. So, it is not workload concerns that drives the Committee's position on this amendment. Rather, the Commission's existing retroactivity criteria warrant giving this amendment prospective application only.

The purpose of the amendment, as noted above, is to resolve a circuit split. It does not address a fundamental inequity, but rather a situation where reasonable minds have differed on a question of interpretation. The Commission's data also shows that courts imposed below-guideline sentences not based on § 5K1.1 (Substantial Assistance) in just over a quarter of the potentially eligible cases, suggesting that courts have freely exercised their ability to sentence below the guidelines when warranted by the facts in these types of cases.

On the magnitude of the change, the Commission's data report was not able to provide an estimated average sentence reduction. Presumably, it would result in a 2-level reduction (removal of the physical-restraint enhancement) for those who are eligible, which is relatively small in the context of a robbery or extortion offense. The Commission estimates an outer limit of 1,063 eligible individuals, though it seems likely the number would be closer to the 397 out of that 1,063 who also had a 5-level or 6-level firearms enhancement. In short, the magnitude of the change, both with respect to numbers and amount of reduction, does not appear to warrant retroactivity.

[4] *See* April Retroactivity Factors Letter at 6.

This amendment would be difficult to apply retroactively. In almost all instances, retroactive application would require courts to conduct new factfinding to determine whether the physical restraint enhancement was based on use of a firearm, and if so, whether there is an independent ground (that is, not the pointing of a firearm) for the physical-restraint enhancement. The Committee is further concerned about the impact on public safety, as retroactivity of this part of the amendment would benefit a small subset of offenders, primarily violent ones.

**II. Retroactivity of Amendment 1 (Circuit Conflicts), Part B (Intervening Arrest)**

Part B of the amendment resolves a circuit split by modifying § 4A1.2(a)(2) to specify that a traffic stop is not an intervening arrest for purposes of calculating criminal history points. The retroactivity data report notes that because the Commission does not collect information about traffic stops, it is unable to estimate the number of individuals potentially affected by retroactive application of this amendment.

The Committee opposes retroactive application of this amendment. Retroactive application could cause a massive workload increase, but for very limited benefit. The Committee is concerned that any inmate with criminal history points could file a motion, requiring review of their full criminal history, to determine whether any of their points were based on a traffic stop as an intervening arrest.

The purpose of this part of the amendment is to resolve a circuit split. As with Part A above, this is a case of reasonable minds differing on interpretation and does not involve an issue of fundamental fairness. Further, in any case where the court believes the criminal history score is overrepresented, the court can depart or vary downward. On the magnitude of the change, the Commission's data report was unable to provide information on either the number of individuals who might benefit, or on the average amount of the decrease. The Committee believes that for those who might ultimately be eligible, it would result in a decrease of between 1 and 3 criminal history points, because it likely would be extraordinarily rare for a defendant to have more than one conviction where a traffic stop was used as an intervening arrest. Depending on a person's overall score, a change of points might not even lower the criminal history category.

As far as the difficulty of applying the amendment, the potential of a flood of motions (many of which will likely be non-meritorious)—with all or nearly all requiring factfinding on whether a traffic stop was used as an intervening arrest—means this would be a burdensome amendment to apply retroactively.

**III. Retroactivity of Amendment 2 (Drug Offenses), Part A, Subpart 1 (Mitigating Role)**

Subpart 1 of Part A of the drug offenses amendment revises the mitigating-role provisions in § 2D1.1(a)(5) to set certain mitigating-role caps depending on the defendant's base offense level, § 2D1.1(c), and the adjustment received under § 3B1.2 (Mitigating Role). It amends § 2D1.1(a)(5) in two ways. First, it sets a mitigating-role cap at level 32 if the defendant receives an adjustment under § 3B1.2 and has a base offense level above 34. Second,

if the defendant has a resulting offense level greater than 30 and receives a 4-level adjustment under § 3B1.2(a), then a mitigating-role cap of 30 applies.

Consistent with our earlier comments on retroactivity, the Commission's existing retroactivity criteria warrant giving this amendment prospective application only. On the first criteria—the purpose of the amendment—this provision does not address an issue of fundamental unfairness or inequity. Instead, according to the Commission's Reason for Amendment, both provisions at issue in Part A resulted from its study of the operation of § 2D1.1. The purpose of both subparts of Part A is to "address concerns that § 2D1.1 and § 3B1.2 (Mitigating Role) as they currently apply in tandem do not adequately account for the lower culpability of individuals performing low-level functions in a drug trafficking offense."[5] Subpart 1 of Part A specifically "amends the mitigating role provisions in § 2D1.1(a)(5) to *refine* the drug trafficking guideline in cases where an individual receives an adjustment under § 3B1.2" (emphasis added).[6] The provisions here reflect finetuning and refinement rather than major changes intended to rectify a fundamental unfairness.

In addition, the Commission's data shows that, even without this amendment, courts are tailoring sentences to the specific circumstances of individual cases by varying downward when the defendant has already received a mitigating role reduction and is accountable for a quantity of drugs triggering a fairly high base offense level. Specifically, nearly 60 percent of drug-trafficking inmates who would otherwise qualify for relief under this amendment would not see a benefit because the court varied downward to a sentence below the applicable range under this amendment. The data shows that judges are addressing (at least in part) any perceived fairness issues by varying downward, as appropriate, in individual cases.

Turning to the magnitude of the change in guideline range and the difficulty of applying the amendment retroactively, the Commission's retroactivity analysis shows that a relatively small number of cases would be affected. The analysis estimates that 650 individuals would be eligible to seek a reduced sentence, and that the average sentence reduction for those individuals is 14.8 percent. If this amendment were retroactive on November 1, 2025, 67 inmates would be eligible for immediate release, an additional 133 inmates would be eligible for release within the first year after the effective date, and a total of 413 inmates would be eligible for release within the first two years after the effective date of the amendment.

Although the Commission's estimates in terms of front-end resentencing or post-release supervision of inmates do not raise major workload concerns for our Probation and Pretrial Services system, we would note several important points about the impact estimates. First, for purposes of release planning and post-release supervision by our officers, we do not know whether the estimated number of releasees accounts for First Step Act credits; if not, then there would be a larger number of inmates being released to supervision sooner. Second, there is a significant geographic disparity in the number of eligible inmates, from zero in many districts to more than 70 in some of the busy border districts.

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[5] *See* Fed Reg Notice at 19.

[6] *See id.* at 20.

## IV. Retroactivity of Amendment 2 (Drug Offenses), Part A, Subpart 2 (Special Instruction)

Subpart 2 of Part A of the drug offenses amendment adds a new special instruction at § 2D1.1(e)(2) providing that, in addition to the circumstances identified in § 3B1.2, an adjustment under § 3B1.2 is generally warranted in a § 2D1.1 case if the defendant's primary function in the offense was to perform a low-level trafficking function. It also provides directions on when the specific adjustments at § 3B1.2(a) and (b) are generally warranted. The new special instruction states that an adjustment under § 3B1.2(a) is generally warranted if the defendant's primary function in the offense was plainly among the lowest level of drug-trafficking functions, and that an adjustment under § 3B1.2(b) is generally warranted if the defendant's primary function in the offense was performing another low-level trafficking function, with examples of each provided.[7]

Based on the retroactivity criteria, informed by the Commission's recent retroactivity impact analysis, the Committee strongly opposes making this subpart retroactive. First, the purpose of this provision, as discussed in the prior section, does not involve a matter of fundamental fairness or equity. Instead, this amendment to the special instruction is the sort of adjustment that the Commission continually makes to refine the guidelines. In addition, the other two criteria—magnitude of the change in guideline range and the difficulty of applying the amendment retroactively—weigh heavily against retroactivity. The Commission's retroactivity data analysis shows that the workload increase could be massive, with more than 53,000 inmates potentially filing reduction motions.[8] The data analysis states that there would be no way to estimate how many of those inmates would be eligible for this retroactive reduction, because the Commission does not regularly collect information on a defendant's primary function in a drug-trafficking offense. Retroactive application of this provision would have a profound impact on our judicial and probation office resources, including the probation system's workload, budget, and staffing needs. Community safety would be at risk if our probation office resources were diverted to handle that enormous number of motions—including many non-meritorious motions—and if even a fraction of that number were released to supervision early.

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[7] Examples provided under the § 3B1.2(a) adjustment include serving as a courier, running errands, sending or receiving phone calls or messages, or acting as a lookout. Examples under the § 3B1.2(b) adjustment include distributing controlled substances in user-level quantities for little or no monetary compensation or with a primary motivation other than profit (for example, the defendant was otherwise unlikely to commit such an offense and was motivated by an intimate or familial relationship, or by threats or fear to commit the offense).

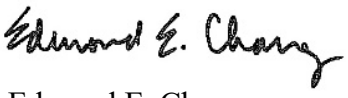
[8] Our estimate of 53,000 possible motions is based on the data provided on page 14 of the Commission's data analysis. Of the 62,045 people currently incarcerated for a drug trafficking offense, the analysis says that the court applied a mitigating-role adjustment under § 3B1.2 in 3,697 of those cases. In 3,429 of the 3,697 cases the adjustment to the final offense level was less than 4 levels and in the remaining 58,348 cases, the court did not apply a mitigating-role adjustment. From the total 58,348 cases, we subtracted 8,756 of those cases because the court applied an aggravating-role adjustment under § 3B1.1 and added the 3,429 cases where the adjustment was less than 4 levels.

The fact that it is not possible to estimate how many inmates might be eligible for a reduction under this provision is indicative of just how difficult this provision would be to apply retroactively. To apply the new special instruction to those previously sentenced, courts would likely need to perform additional factfinding to determine whether an individual's primary function in the offense was a low-level trafficking function and, if so, whether an adjustment is warranted and the extent of the reduction that is warranted. At a minimum, this would involve detailed review of the offense conduct discussed in the presentence report. In other cases, it would be necessary for the parties to present additional evidence establishing with greater specificity what the inmate's role had been in the offense. The difficulty of applying this amendment retroactively increases exponentially for older cases, where evidence, the original sentencing judge, and original counsel may be unavailable.

**Conclusion**

The Committee, as always, appreciates the extraordinary work of the Commission and the opportunity to respond to the Request for Comment on Possible Retroactive Application. 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

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

District Judge Stephen Bough, Missouri, Western

## Topics:

Retroactivity

## Comments:

I would encourage the retroactivity application to the guidelines, especially the mitigating role. When we are discussing minor v. minimal, sentencing judges have already recognized this is not the kingpin. As a matter of fundamental fairness and justice, two individuals sitting next to each other in prison should have the same set of rules. If the rules change, one defendant shouldn't get the benefit of the change, while the other sits there waiting. The rules should be applied equally, regardless of when an individual is sentenced.

Submitted on: May 15, 2025

**U.S. Department of Justice**

Criminal Division

*Appellate Section* *Washington, DC 20530*

June 2, 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 responds to the Sentencing Commission's request for comment on whether four recently-promulgated amendments to the Sentencing Guidelines should be applied retroactively: clarification of the "physically restrained" enhancement in §2B3.1(b)(4)(B); clarification of the definition of "intervening arrest" for criminal history scoring in §4A1.2(a)(2); revision of the mitigating role cap at §2D1.1(a)(5); and addition of the special instruction in §2D1.1(e)(2) for the mitigating role adjustment's application in drug cases.[1]

Although the Department greatly appreciates the care and attention that the Commission has shown in each of the promulgated amendments, we oppose their retroactive application. Retroactive application of these amendments would involve complex eligibility determinations, divert significant resources from pending cases, and undermine the predictability of sentences. Specifically, the amendment recalibrating how courts account for use of a firearm during a robbery or extortion, the amendment clarifying the definition of intervening arrest, and the amendment adding a new special instruction expanding application of the mitigating role adjustment in drug cases would require courts to engage in additional fact-finding from cold sentencing records. Additionally, the "physically restrained" and "intervening arrest" amendments are clarifying revisions that are insufficient to overcome the presumption of prospective application.

* * *

## I. The Commission Should Not Apply Any of the Amendments Retroactively

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'

[1] *Notice of request for public comment*, 90 Fed. Reg. 19798 (May 9, 2025), *see also* U.S. Sent'g Comm'n, *Issue for Comment on Retroactivity Published April 2025*, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202504_IFC.pdf.

and may not be modified by a district court except in limited circumstances."[2] And 18 U.S.C. § 3582(c)'s provision allowing courts to reduce otherwise final sentences in circumstances specified by the Commission is a "narrow" one.[3] 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. In particular, of the more than 800 technical and substantive amendments it has promulgated since 1987, the Commission has given retroactive effect to approximately 30.[4]

This prudent approach is supported by sound reasons. First, finality matters. As the Criminal Law Committee recently observed, "[f]requent or routine retroactive application of guideline amendments undermines determinate, predictable sentencing, and erodes the statutory sentencing goals, especially deterrence."[5] As one judge recently noted in comments to the Commission, "constant revisions to sentences undermine public trust and confidence in the system."[6] Accordingly, absent strong countervailing considerations, finality in sentencing is "essential to the operation of our criminal justice system" and helps ensure justice for victims, offenders, and other participants.[7] Requiring victims to revisit traumatic experiences, potentially years after the fact, imposes a significant burden, and should weigh significantly against retroactive application.[8]

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[2] *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 limited exceptions.").

[3] *Dillon*, 560 U.S. at 825–26.

[4] U.S.S.G. §1B1.10(d).

[5] Hon. Edmond E. Chang, Chair, Committee on Criminal Law of the Judicial Conference of the United States, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (April 18, 2025), at 4, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf#page=5.

[6] Hon. Catherine C. Eagles, Chief District Judge, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, (May 30, 2024), at 1, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf#page=96.

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

[8] *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 W. 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

Second, retroactivity imposes significant burdens on the criminal justice system as a whole and on public safety. As we have previously noted, the process of 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.[9] More specifically, 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 reviewed by the sentencing court; and the court must review all this information to evaluate the appropriateness of a reduction for each offender individually. In so doing, a court that was already required to consider the factors listed in 18 U.S.C. § 3553(a) at the original sentencing must re-assess those factors, as well as the offender'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.[10]

The capacity of courts, probation officers, prosecutors, and litigants is not unlimited. Retroactivity determinations are not automatic. And experience has shown that applications are not constrained to only those offenders who are eligible.[11] As one judge recently noted, courts tasked with making the eligibility determinations "receive no additional probation staff or law clerk assistance to divide the wheat from the chaff."[12]

Against this backdrop, the Commission has long considered a non-exhaustive list of factors to guide the retroactivity determination: "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."[13] 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.[14] And, in its Rules of Practice and

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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.

[9] Scott Meisler, U.S. Dep't of Justice, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (April 18, 2025), at 2, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf#page=13.

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

[11] The Commission's recent Retroactivity Report on Parts A and B of Amendment 821 revealed that more motions were denied than granted by a ratio of almost 2:1 (62.2% for Part A and 66.7% for Part B). The majority of denials were for ineligibility (almost 70% for Part A and 79% for Part B). U.S. Sent'g Comm'n, *Retroactivity Report on Part A of the 2023 Criminal History Amendment* (February 25, 2025), at Tables 1, 9, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202502-CH-Retro-Part-A.pdf; U.S. Sent'g Comm'n, *Retroactivity Report on Part B of the 2023 Criminal History Amendment* (February 25, 2025), at Tables 1, 9, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202502-CH-Retro-Part-B.pdf.

[12] Hon. Catherine C. Eagles Letter, *supra* note 6, at 2.

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

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

Procedure, the Commission has articulated a presumption that amendments to the Guidelines "will be given prospective application only."[15]

Additionally, the Commission recently requested public comment on whether to revise the criteria for evaluating retroactivity decisions and the placement of the criteria and presumption of prospective application.[16] In response, the Department, Criminal Law Committee, and Probation Officers Advisory Group each recommended that the Commission also consider the administrative and resource burdens that retroactivity poses on the courts, probation, litigants, and victims—and the resulting effects on public safety.[17] Evaluation of those factors, in addition to the ones traditionally considered by the Commission, counsel against retroactive application for these amendments. We discuss each in turn.

### A. Purpose of the Amendments

The Commission has traditionally limited 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 an existing guideline or amendments that reflect significant changes in the way that the justice system assesses the gravity of an offense or the culpability of particular offenders. Such limited application is consistent with Congress' directive in the Sentencing Reform Act that the Commission "provid[e] certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities."[18] Past Commissioners and commentators have expressed a similar understanding.[19]

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

[16] 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.

[17] U.S. Dep't of Justice April 18 Letter, *supra* note 9, at 4; Criminal Law Committee April 18 Letter, *supra* note 5, at 5 ("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"); Probation Officers Advisory Group, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, (April 18, 2025), at 2, 3 ("adding a consideration of public safety and victim impact is a valuable addition, allowing for appropriate consideration of offense classes without reducing flexibility." And noting that consideration of how recent retroactivity "may have impacted current resources" should be considered), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf#page=48.

[18] 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").

[19] *U.S. Sent'g Comm'n Public Meeting on September 16, 2010*, minutes at 2 (Statement of Comm'r Ketanji Brown Jackson) ("[T]he recency amendment was not intended to address the same types of fairness issues involved in the circumstances where retroactivity typically has been adopted in the past."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf; Hon. Randolph D. Moss, Chair, Criminal Law Committee, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (June 23, 2023), at 4 (noting that the Committee on Criminal Law of the Judicial Conference "has supported retroactive application for amendments that eliminated a

None of the amendments at issue here meets that criterion. These amendments are not fundamental revisions to the Guidelines or significant reassessments of offender culpability. Both amendments resolving circuit splits—the "physically restrained" and "intervening arrest" amendments—are intended to clarify guideline application. The Commission has recognized as much.[20] In promulgating the amendment and adopting the view of certain circuits, the Commission clarified that restricting a person's freedom of movement at gunpoint is insufficient to qualify for the two-level "physically restrained" increase at §2B3.1(b)(4)(B).[21] The Commission made corresponding changes to the "physically restrained" enhancements at §§2B3.2(b)(5)(B) and 2E2.1(b)(3)(B) and the "otherwise used" enhancements at §§2B3.2(b)(3)(A)(ii) and 2E2.1(b)(1)(B) and to the commentary. But in doing so, the Commission also clarified that using a firearm "to convey a specific (not general) threat of harm" or "to make physical contact with a victim" qualifies for the higher six-level increase under §2B3.1(b)(2)(B).[22] This contemporaneous decision to ensure an appropriate enhancement for the dangerous conduct of using a firearm to convey a specific threat or to make physical contact with a victim demonstrates that the Commission does not view this amendment as casting doubt on *whether* such conduct is dangerous or merits enhanced punishment. Instead, the Commission's amendment simply redistributes *how* the Guidelines account for the use of a firearm during a robbery or other related offenses. Such conduct is now accounted for under the higher "otherwise used" enhancement for prospective sentencings. Accordingly, although some offenders may benefit from retroactive application of this technical amendment, retroactivity would also create a disparity between those who would receive the retroactive reduction and those who would be sentenced prospectively for the same conduct under the greater "otherwise used" enhancement.[23]

Likewise, the intervening arrest clarification resolves a narrow circuit conflict on how to count multiple prior sentences for criminal history scoring purposes in Chapter Four. Prior sentences are counted separately under §4A1.2(a)(2) if imposed for offenses separated by an "intervening arrest." A circuit split arose as to whether a traffic stop constitutes an "intervening arrest." In adopting the majority view, the Commission simply clarified that "a traffic stop is not

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fundamentally unfair aspect of sentencing."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=12.

[20] U.S. Sent'g Comm'n, Adopted Amendments (Effective November 1, 2025), at 3 (referring to the "physically restrained" amendment as intended "promote uniformity and consistency in guideline application" and "to ensure that use of a firearm during a robbery is accounted for under this enhancement with more uniformity"); *id.* at 4 (referring to the intervening arrest amendment as revising §4A.12(a)(2) "to include th[e] clarification" that a traffic stop is not an intervening arrest), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202505_Amendments.pdf.

[21] *Id.*

[22] *Id.* The Commission noted that the five-level brandished enhancement "covers the general display of a weapon."

[23] Although the amendment clarifies that using a firearm to convey a specific threat or to make physical contact with a victim should be appropriately accounted for in the six-level "otherwise used" enhancement (and brandishing or possessing a firearm in the five-level enhancement), retroactivity would reduce—and not increase—the sentences of offenders who previously received the two-level "physically restrained" enhancement for such conduct in affected circuits. Offenders sentenced prospectively (after November 1, 2025) for the same conduct would be eligible for the five- or six-level increase. This outcome would potentially undermine public safety and result in unwarranted sentencing disparities.

an intervening arrest."[24] This technical correction is not a fundamental revision to the Guidelines and should not apply retroactively.

The amendments to the mitigating role cap and mitigating role instruction are similarly intended to address application concerns. The Commission styled the change as intended "to address the inconsistent application" of the mitigating role adjustment in drug cases and "to encourage broader use" of the mitigating role adjustment those cases.[25] In doing so, the Commission declined to promulgate more expansive changes to §2D1.1 that would have reflected a more sweeping reconsideration of §2D1.1.[26] The language of the amendment will broaden its application to some offenders who previously would not have qualified for a mitigating role reduction under §3B1.2 in an effort to boost application and address policy concerns. But this policy choice by the Commission does not represent a fundamental revision to the structure of the existing guidelines. To the contrary, especially given the advisory nature of the Guidelines, courts will have already accounted for many of the factors reflected in the new mitigating role instruction when conducting their original analysis of the § 3553(a) factors.

### B. Magnitude of the Change

As we explained in our recent retroactivity letter,[27] the magnitude criterion could be broadly understood to refer to the extent of the reduction that eligible offenders 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."[28] If understood in the latter way, the magnitude criterion would overlap considerably with the separate difficulty-of-retroactive-application criterion discussed below.[29] The modest reduction available to any individual offender is outweighed by the high costs that sentencing-modification proceedings would entail for the justice system as a whole. Under either formulation, this factor therefore weighs against retroactive application for the amendments at issue.

Neither amendment resolving circuit conflicts will likely result in significantly reduced sentences for eligible offenders. Eligible offenders who should not have received the "physically restrained" enhancement could receive a reduction of two offense levels. But with the Commission's corresponding clarification to the six-level "otherwise used" enhancement, the court may in its discretion under § 3553(a) decline to grant a sentencing reduction in recognition that using a firearm to convey a specific threat or to make physical contact with a victim would

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[24] U.S. Sent'g Comm'n, Adopted Amendments (Effective November 1, 2025), *supra* note 20, at 4.

[25] U.S. Sent'g Comm'n, Adopted Amendments (Effective November 1, 2025), *supra* note 20, at 8.

[26] *Compare Notice of request for public comment and hearing*, 90 Fed. Reg. 8968 (Feb 4, 2025), https://www.govinfo.gov/content/pkg/FR-2025-02-04/pdf/2025-02129.pdf *with* U.S. Sent'g Comm'n, Adopted Amendments (Effective November 1, 2025).

[27] U.S. Dep't of Justice April 18 Letter, *supra* note 9, at 7.

[28] 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 19.

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

generally now qualify for a higher enhancement. Such a decision would appropriately reflect that dangerous and violent conduct precludes a reduction.

The intervening arrest clarification would likely result in modest reductions to an individual offender's criminal history score. Eliminating one or two criminal points from an offender's previously calculated criminal history score would, at most, move an offender down one criminal history category under the rules set out in Chapter Four of the Guidelines. Using the Sentencing Table in Chapter Five, such a move is generally equivalent to a reduction of one offense level, the smallest reduction the Commission can make through a guideline amendment and, by any definition, the type of "minor downward adjustment" explained in the background commentary to §1B1.10 that Congress expected that the Commission would not make retroactive.[30]

Although the mitigating role cap reduction and mitigating role instruction may result in more substantial reductions for some eligible offenders, the Commission promulgated this change partially in response to data indicating that judges were imposing below-guideline sentences in most drug trafficking cases.[31] The same lower-culpability factors that persuaded the court to impose a below-guideline variance originally have already been accounted for in the sentence. Additionally, those same below-guideline sentences might foreclose eligibility for many offenders who might now claim to benefit from these amendments. Offenders who received a below-guideline sentence originally to account for lower-culpability drug trafficking conduct may well have a sentence that would be below the minimum amended range, thus making them ineligible for a reduction under §1B1.10(b)(2)(A).

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

Administrative and resource burdens are at their most onerous when courts have to engage in new fact-finding, especially when the facts needed to support new determinations are not likely to be found in the existing sentencing record.[32] 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.[33] The Commission has previously disfavored retroactive application of amendments under such circumstances. As then-Commissioner Howell noted when voting

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[30] U.S.S.G. §1B1.10, comment. (backg'd) *quoting* S. Rep. No. 98-225, at 180 (1983)); *see also Dillon* Amicus Br., *supra* note 28, 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 to the judicial system."). There are a few cells in the Sentencing Table from which a one criminal history category reduction is between a one- and two-offense level reduction, or equal to a two-offense-level reduction. But in no case is the reduction greater than two offense levels.

[31] *Compare Notice of request for public comment and hearing*, 90 Fed. Reg. 8968 (Feb 4, 2025), https://www.govinfo.gov/content/pkg/FR-2025-02-04/pdf/2025-02129.pdf *with* U.S. Sent'g Comm'n, Adopted Amendments (Effective November 1, 2025), *supra* note 20.

[32] *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).

[33] *Id.* at 203 (noting that "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").

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.[34] Such retroactive fact-finding, of the type that would be required here, would be "administratively burdensome to the point of impracticality."[35]

The Commission's recent *Retroactivity Impact Analysis* recognized that *at least* three of the amendments may require additional fact-finding if applied retroactively.[36] The physically restrained and otherwise used amendment involves a complex factual analysis beyond that which may have been required for the original sentencing. Retroactive application, as the Commission acknowledged, may require courts "to conduct additional fact-finding to determine whether to apply the 'physically restrained' and 'otherwise used' enhancements, as amended."[37] As the Commission explained in promulgating the amendment, prior case law in many circuits did not require proof of physical contact or confinement—restricting a victim's movement at gunpoint was sufficient.[38] As a result, the factual record may not be sufficiently developed for the sentencing court in those circuits to determine whether "any person's freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up," aside from using the firearm, such that the enhancement would still apply. A more sufficiently developed factual record may lead the court to decline to reduce the offender's sentence under § 3553(a) in recognition of the serious misconduct involved in directly pointing a firearm toward individual victims during a robbery or extortion.

By the Commission's own estimates, the effects of retroactively applying this amendment are difficult to predict. Of the 8,962 offenders currently incarcerated in BOP who were sentenced under pertinent guideline provisions, the Commission estimates that 1,063 cases received the physically restrained enhancements in affected circuits.[39] But as the Commission's retroactivity impact analysis makes clear, "the Commission cannot determine with precision the impact of the amendment" or how many of the 1,063 offenders would actually be eligible for a reduction.[40]

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[34] *Sent'g Comm'n Public Meeting on June 30, 2011,* at 19:1–14 (statement of Comm'r Howell) ("These are new factors, both aggravating and mitigating, 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 possibly litigation over whether application of the aggravating factors in particular would be warranted. And this process to my mind would just be administratively burdensome to the point of impracticality."), https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.

[35] *Id.*

[36] Sent'g Comm'n, *Retroactivity Impact Analysis of Certain 2025 Amendments* (May 15, 2025), at 6, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2025-amendments/2025_Amdts-Retro.pdf.

[37] *Id*.

[38] Sent'g Comm'n Adopted Amendments (2025), *supra* note 20, 2–3.

[39] *Retroactivity Impact Analysis*, *supra* note 36, at 14–15.

[40] *Retroactivity Impact Analysis*, *supra* note 36, at 15.

Similarly, the Commission "cannot estimate the impact" of the intervening arrest amendment on offenders.[41]

The mitigating role instruction and mitigating role cap reduction present additional complications. The mitigating role instruction contains several new and unlitigated criteria that use novel concepts beyond that required for proof of the substantive offense. The fact-based analysis required under the instruction is likely to complicate *prospective* sentencing proceedings as the parties dispute the wide variety of factual challenges that will arise. As the Department observed, the specific functions in the amendment do not necessarily reflect the nature and extent of an offender's role in a particular drug offense.[42]

Applying the new special instruction will be challenging for courts prospectively, and significantly more complicated to apply retroactively. Courts will need to engage in a multi-step factual and legal analysis first requiring them to parse an offender's "primary function" from the totality of the offender's criminal conduct. They will then have to determine whether such conduct was "plainly" "among the lowest level of drug trafficking functions" or akin to "another low-level" trafficking function. The aggravating and mitigating role adjustments already require courts to conduct a qualitative analysis to determine an offender's role under the totality of the circumstances. But parsing the frequency of the varying roles that the offender played to determine the offender's "primary function" is a novel concept that will be defined through litigation.

Compounding these complications is the absence of guidance for how courts should make the required determinations. For example, courts will need to determine how quantity and frequency affect this analysis. Is an offender who repeatedly served as a courier for a large-scale drug distribution still "plainly" performing a "low-level trafficking function"? What about an offender who served as a courier one time for a large quantity delivery versus an offender who served as a courier multiple times for smaller "user-level" quantities each time but resulting in the same large net quantity? Because these determinations are "heavily dependent upon the facts of the particular case" and beyond the facts required to prove the substantive offense, courts will face substantial challenges in making them from a cold sentencing record.

Because the Commission does not "regularly collect information on" the kind of granular function-focused information relevant under the new instruction, the Commission "cannot estimate the impact of this portion of the drug offenses amendment should it be made retroactive."[43] The Commission's conclusion underscores the substantial uncertainty about the number of offenders who would potentially benefit from retroactive application, and just as importantly, the number who would likely apply regardless of eligibility.

Although application of the mitigating role cap amendment may appear more straightforward, it will not necessarily be so in practice. The Commission estimated that 62,045

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[41] *Retroactivity Impact Analysis*, *supra* note 36, at 17.

[42] Scott A.C. Meisler, U.S. Dep't of Justice, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (March 3, 2025), at 10–12, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202503/90FR8968_public-comment_R.pdf#page=248.

[43] *Retroactivity Impact Analysis*, *supra* note 36, at 14.

offenders are currently incarcerated in BOP for a drug trafficking offense.[44] Of those, the Commission further noted that the court applied a mitigating role adjustment in 3,697 cases, with a resulting offense level between 31 and 38 in 2,313 cases.[45] Because of various exclusionary factors, the Commission estimated that only 650 of the 2,313 offenders would potentially be eligible for a reduced guideline range—the majority by one or two levels—if the mitigating role cap amendment applied retroactively.[46] As past experience has shown, the number of applications from ineligible offenders adds substantially to the workload and is a better metric to evaluate the burden of retroactive application of a particular amendment.[47]

Using that metric to measure the burden is especially appropriate in this instance because of potential uncertainty about the retroactive operation of the new special instruction at §2D1.1(e)(2). The Commission's *Retroactivity Impact Analysis* appears to view that instruction as independent of the changes to §2D1.1(a)(5)'s mitigating-role cap for retroactivity purposes.[48] But offenders may well argue that courts should consider the new instruction in determining whether "the offender receive[d] the 4-level reduction in §3B1.2(a)" and is thus subject to a potential offense level decrease pursuant to the reduction in the mitigating role cap. Courts might also need to consider whether offenders who previously qualified for the two- or three-level reductions may now use the new instruction to argue eligibility for the four-level reduction. And before applying any reduction, courts will still need to weigh whether a reduction would be appropriate under § 3553(a).

For these reasons, the Commission's analysis likely underestimates the number of offenders who would apply for reductions.[49] Not only will offenders who previously received the two- and three-level reductions likely seek further reductions, but also offenders who previously petitioned for—and were denied—the mitigating role reduction will likely apply. More fundamentally, regardless of how many offenders are ultimately eligible, the Department

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[44] *Retroactivity Impact Analysis*, *supra* note 36, at 7.

[45] *Id*.

[46] The Commission estimated that the remaining 1,663 offenders would be ineligible because their current sentence is below the amended guideline (and they did not receive a departure of substantial assistance), application of the new mitigating role cap would not change their base offense level, they were sentenced to a mandatory minimum sentence or under the career offender provision, or the data was missing to estimate. In remaining 650 cases that the Commission estimated are potentially eligible for a reduction, the amendment would lower the base offense level by one level in 169 cases (26.0%), by two levels in 448 cases (68.9%), by three levels in 29 cases (4.5%), and by four levels in four (0.6%). *Retroactivity Impact Analysis*, *supra* note 36, at 7–8.

[47] *See Retroactivity Report on Parts A and B of Amendment 821, supra* note 11. Additionally, when the 2014 drug amendments were applied retroactively, for example, more than 13,000 *ineligible* offenders sought sentencing reductions. 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. Similarly, nearly 7,000 *ineligible* offenders sought sentencing reductions when the "status points" amendment was made retroactive. 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.

[48] *Retroactivity Impact Analysis*, *supra* note 36, at 7.

[49] *Retroactivity Impact Analysis*, *supra* note 36, at 7, 13–14.

anticipates that many of the 53,289 offenders who are currently incarcerated in BOP for drug trafficking offenses and did not receive the aggravating role adjustment under §3B1.1 will move for a sentence reduction. [50]

Application of the Sentencing Guidelines is complex, and it will not be readily apparent to some in custody whether they qualify for a reduction. Still, the unavailability of reliable estimates of those who would potentially apply and those would ultimately benefit underscores the burdens of retroactivity.

Finally, retroactive application of some of these amendments would raise public safety concerns. Section 3553(a)(2) requires courts to impose a sentence that, among other factors, promotes respect for the law, provides adequate deterrence, and protects the public.[51] Prior Commissioners have relied on public safety considerations in voting against retroactive application of previous amendments.[52] Those same concerns counsel against retroactive application here. Using a firearm during a robbery represents a heightened public safety risk. And although the mitigating role amendments may benefit certain offenders who engaged in low-level functions, many of the roles that the Commission has identified in §2D1.1(e)(2)(B)(i) are fundamental to the success of drug operations. The amendment provides no exception for those involved in violence or possession of firearms, permitting potentially violent offenders to obtain—or at least apply for and litigate—potential sentence reductions. Additionally, the amendment is available to offenders "regardless of whether the offense involved other participants" and "regardless of whether the offender was substantially less culpable that the average participant in the criminal activity." As a result, offenders who are culpable solely for their own criminal conduct (without any involvement of co-conspirators) would potentially be eligible for sentencing reductions, regardless of the danger that their conduct posed to the public.

## II. Any Retroactivity Should be Delayed

If the Commission disagrees with our assessment of retroactivity and decides to apply any of these amendments retroactively, we recommend that it delay implementation a reasonable period to allow both the Bureau of Prisons and the Probation Office to make the necessary adjustments and preparations to ensure that all offenders receive the reentry and supervision services that they need and also for the courts and litigants to prepare so that reentry proceeds in an orderly and effective way.

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[50] *Retroactivity Impact Analysis*, *supra* note 36, at 14. The Commission estimates that 62,045 offenders currently incarcerated in BOP were sentenced for a drug trafficking offense, and that 8,756 offenders received the aggravating role adjustment under §3B1.1 and thus would be ineligible for a mitigating role adjustment under §3B1.2, resulting in 53,289 offenders.

[51] 18 U.S.C. § 3553(a).

[52] *U.S. Sent'g Comm'n Public Meeting on September 16, 2010,* minutes at 2 (Statement of Comm'r Judge Beryl Howell on retroactive application of the recency points amendment) (noting that "the majority of the 8,000 offenders who may be eligible to benefit are in Criminal History Categories IV, V, and VI, which raises public safety concerns"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission throughout the amendment year.

Sincerely,

*Scott Meisler*

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United States Sentencing Commission
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Suite 2-500, South Lobby
Washington, D.C. 20002-8002

**Re: Defender Comment on Possible Retroactive Application of Parts A and B of the Circuit Conflicts Amendment, and Subparts 1 and 2 of Part A of the Drug Offenses Amendment**

Dear Judge Reeves:

The Federal Public and Community Defenders appreciate the opportunity to share our perspective on the retroactivity of certain 2025 guideline amendments.[1] We have structured our comment around the Commission's currently applicable criteria for making retroactivity decisions, although the Commission is now considering what, if any, changes to make to these criteria.[2]

For the reasons below, Defenders support retroactive application of the Drug Offenses Amendment, Part A, Subparts 1 and 2 (sec. II, pp. 5–16). We also support retroactive application of the Circuit Conflicts Amendment, Part A (sec. III, pp. 16–18). While we welcome Part B of that amendment (concerning the meaning of "intervening arrest") and would be happy to see it retroactively applied, we lack sufficient information to address in detail the application of the Commission's criteria to this change. We suspect the population of impacted people is exceedingly small, making this a potentially

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[1] *See generally* USSC's 2025 Amendments to the USSG (Apr. 30, 2025).

[2] USSC, *Issue for Comment on Retroactivity Criteria* (Dec. 2024).

easy amendment to apply retroactively, but are unable to offer any meaningful assessment of impact beyond that.

Lastly, we address why "finality" concerns do not weigh against applying these amendments retroactively (sec. IV, pp. 19–21). We discuss finality separately and at some length because the Criminal Law Committee ("CLC") and the Department of Justice ("DOJ") will likely place undue emphasis on the need for sentence finality as a reason not to make these amendments retroactive—an argument that factored prominently into their comments on the retroactivity selection criteria.[3] This argument must fail in the guideline amendment context.

## I. Introduction

If ever there was a time for the Commission to make ameliorative guideline amendments retroactive, it is now. The reality is simple, indisputable, and unacceptable: the federal Bureau of Prisons ("BOP") is unable to humanely and safely hold the people in its custody. As Defenders explained earlier in the amendment cycle, the BOP is in the midst of multiple, self-described crises, which are decades in the making and from which the BOP has neither the plan nor the means to escape.[4] These crises

[3] *See* CLC's Comments on the USSC's Retroactivity Criteria, at 3–5 (Apr. 18, 2025) (relying heavily on finality as the value to justify ordinarily only applying amendments prospectively); DOJ's Comments on the USSC's Retroactivity Criteria, at 10 (Apr. 18, 2025) (urging a presumption against retroactivity as "consistent with the interests in the finality of criminal judgments").

[4] *See* Defenders' Comments on the USSC's 2025 Proposed Drug Amendments, at 8–14 (Mar. 3, 2025) (discussing conditions at BOP and Commission's statutory obligation to address same); *see also, e.g.,* Walter Pavlo, *Federal Prison Director on Record about her Two Years at Helm*, Forbes (Aug. 6, 2024) (quoting then-Director Colette Peters as saying that concern with halfway house capacity is "almost as significant of a problem as [BOP's] recruitment and retention crisis and our infrastructure crisis . . . .").

are costing people their lives,[5] while subjecting others to inhumane living conditions.[6]

And things will only worsen. The BOP currently suffers from a multi-billion-dollar infrastructure backlog and is unable to recruit and retain sufficient corrections, medical, psychological, and programmatic staff. At a time of unprecedented slashing of federal employee staffing and massive budget cuts, these deficiencies will only increase. Yet, the BOP's population may also *increase*, as those entangled in mass civil immigration enforcement are added to the BOP population.[7] Rather than develop solutions, the Executive branch threatens to exacerbate BOP's problems, with reports of actions like reopening one of its most heinously run prisons,[8] and repeated, open suggestions of exiling incarcerated people to other countries' even-worse prisons.[9] Likewise, the Executive branch is considering returning to for-profit prisons,[10] despite having derided those facilities for "not maintain[ing] the

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[5] *See, e.g.,* DOJ Office of the Inspector General, *Evaluation of Issues Surrounding Inmate Deaths in Federal Bureau of Prisons Institutions* (Feb. 2024) (examining hundreds of non-natural-causes deaths in BOP custody); Tirzah Christopher, *There is little scrutiny of 'natural' deaths behind bars*, NPR (Jan. 2, 2024) (discussing concerningly high rate of deaths declared to be of natural causes in BOP custody).

[6] *See, e.g., Cecilia Vega*, Inside the Bureau of Prisons, a federal agency plagued by understaffing, abuse, disrepair, 60 Minutes (Jan. 28, 2024); Askia Afrika-Ber, *Hunger and Violence Dominate Life at USP McCreary, Where Men are Incarcerated*, Washington City Paper (Jan. 19, 2024) (detailing the "house of horrors" at USP McCreary where "Prisoners are hungry [and v]iolence is everywhere" due to Warden's "policy of collective punishment"); D.C. Corrections Information Council, *USP McCreary Report on Findings and Recommendations*, at 5 (Mar. 23, 2023) (noting "[k]ey themes" of interviews with detained persons being "staff conduct (including allegations of physical abuse of inmates . . . ), the frequency of lockdowns and commissary restrictions, and the lack of hygiene supplies in the Special Housing Unit"; and also noting that staff indicated it would not investigate assault reports unless anonymous survey respondents' identities were disclosed).

[7] Sam Levin, *Not just Alcatraz: the notorious US prisons Trump is already reopening*, The Guardian (May 6, 2025).

[8] *See id.* (describing recent maintenance conducted at closed FCI Dublin, where BOP staff committed "systemic sexual abuse," "seemingly to prepare for a reopening").

[9] Brian Mann, *'Homegrowns are next': Trump hopes to depart and jail U.S. citizens abroad*, NPR (Apr. 16, 2025) .

[10] *See* Exec. Order No. 14,148, 90 C.F.R. 8,237, 8,238 (Jan. 20, 2025) (rescinding without specific explanation Executive Order 14,006, which directed the Attorney General not to renew private prison contracts).

same levels of safety and security for people in the Federal criminal justice system . . . ."[11]

The Commission is statutorily obligated to address the BOP's issues. Namely, the Commission must "formulate[]" the sentencing guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ."[12] The Commission itself has rightly understood that retroactivity is one way to address this mandate, relying heavily on prison capacity as the basis for its drugs-minus-two amendment, and for applying that amendment retroactively to a population of tens of thousands.[13]

Beyond this obligation, the Commission presently considers three, non-exhaustive criteria when deciding which ameliorative amendments to make retroactive: "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 . . . ."[14] These criteria favor retroactivity here. Specifically, each factor easily supports retroactivity of Part A, Subpart 1 of the Drug Offenses Amendment. For Subpart 2, the purpose and impact of the amendment outweigh the potential for more difficult (yet accomplishable) administrability. Finally, each factor favors retroactivity of Part A of the Circuit Conflicts Amendment. Primarily, retroactivity of this amendment would be easy to administer given the smaller population that stands to benefit.

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[11] *See* Exec. Order No. 14,006, 80 C.F.R. 7483, 7483 (Jan. 26, 2021) (relying in part on lack of humane and safe custody as basis for ceasing use of private prisons).

[12] 28 U.S.C. § 994(g).

[13] *See* USSG App. C, Amend. 782 (Nov. 1, 2014) ("The amendment was also motivated by the significant overcapacity and costs of the Federal Bureau of Prisons." (citing 28 U.S.C. § 994(g)); USSG App. C, Amend. 788 (Nov. 1, 2014) (relying upon same concern and statute to make Amendment 782 retroactive for an estimate 46,000 people). *See also* USSG App. C, Amend. 738 (Nov. 1, 2011) (relying, *inter alia*, on § 994(g) for amendment concerning alternatives to incarceration).

[14] USSG §1B1.10 (Background). Defenders refer to the "magnitude" factor as an "impact" factor to better capture how, historically, the factor has looked at both how significant the change will be in an individual's guideline range and how expansive the amendment's impact will be considering, for instance, the number of people assisted, the potential to reduce racial disparities, or fairness.

## II. The Commission should retroactively apply Part A of the Drug Offenses Amendment.

Part A of the Drug Offenses Amendment makes two changes related to §3B1.2's mitigating role reduction. First, Subpart 1 reduces several of the §2D1.1(a)(5) base offense level ("BOL") caps applicable to people who receive a §3B1.2 reduction. Second, Subpart 2 adds a special instruction regarding eligibility for §3B1.2's reduction in §2D1.1 cases to encourage broader application of the mitigating role reductions to drug trafficking offenses. The purpose, impact, and administrability of these amendments weigh strongly in favor of retroactivity.

### A. Purpose

The animating reason for Part A of the Drug Offenses Amendment is nothing short of monumental. As the Commission explained, it promulgated the role-related amendment "to address concerns that §2D1.1 and §3B1.2 . . . do not adequately account for the culpability of individuals performing low-level functions in a drug-trafficking offense."[15] Likewise, when it proposed to improve the guidelines for people engaged in low-level trafficking, the Commission said the proposal was part of an effort to "recalibrat[e] the use of drug weight in §2D1.1," referencing stakeholder input (consistently offered over the past four decades) explaining that "§2D1.1 overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing."[16]

The Commission's succinct explanations, and Defenders certainty that much more remains to be fixed, should not be read to undermine the significance of these changes. For as long as §2D1.1 has existed, it has been rightly criticized for its near-total reliance on drug weight and quantity as proxies for culpability.[17] Commenters across the decades and across the political spectrum have emphasized how the focus on quantity results in excessive punishment for people who engaged in lowest-culpability, low-level trafficking activity.[18] Yet, these low-level individuals make up a substantial

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[15] USSC's 2025 Amendments to the USSG, at 9 (Apr. 30, 2025).

[16] USSC's 2025 Proposed Amendments Drug Offenses, at 57 (Jan. 24, 2025).

[17] *See* Defenders' 2025 Drug Amendment Comment, at 3–8 (describing decades of criticism of §2D1.1 quantity-driven scheme by defenders, stakeholders, and judges).

[18] *See, e.g.,* Hon. Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 Am. Crim. L. Rev. 1, 15 (2014) (describing shift in views on drug sentencing from

portion of the hundreds of thousands of people who have been sentenced under §2D1.1's quantity-driven scheme.[19] Commenters have long decried that the least culpable (but easiest-to-find-and-prosecute) individuals have been sentenced under a guideline regime Congress expressly intended for mid- and high-level drug traffickers.[20] With Part A of this amendment, the Commission takes an important step to address one of the most unfair and derided guideline provisions.

The Commission has repeatedly, and for much of its history, deemed it proper to make retroactive those amendments that alter §2D1.1's method of calculating base offense levels. Specifically, the Commission has made such amendments retroactive in 1989 (twice),[21] 1993 (twice),[22] 1994,[23] 2000,[24]

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conservative and liberal groups alike); Albert W. Altschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chicago L. Rev. 901, 920 (1991) (describing Congress and the Commission addressing drug offenses "by placing cases in strangely defined groups and plucking numbers from the air").

[19] *Cf., e.g.,* USSC, *Public Data Briefing*, at 12 (finding in sample of FY2022 methamphetamine cases that 46.8% of the sample occupied roles of street level dealer, broker, courier, or employee/worker); *id.* at 15 (finding in sample of FY2019 fentanyl and fentanyl analogue cases that 60.8% of the sample occupied roles of street level dealer, broker, courier, or employee/worker).

[20] *See, e.g., United States v. Genao*, 831 F. Supp. 246, 247 (S.D.N.Y. 1993) (noting that "harsh mandatory minimum and guideline sentences . . . all too often are applied to people . . . whose lives are far from that" of the drug kingpin).

[21] *See* USSG App. C, Amend. 306 (Nov. 1, 1989) (making retroactive Amendment 126 regarding fentanyl weight calculations and Amendment 130 regarding wet/dry weights for peyote and psilocybin).

[22] *See* USSC App. C, Amend. 502 (Nov. 1, 1993) (making retroactive Amendments 484 and 488 concerning how to determine weight of substance at issue for drug quantity table purposes).

[23] *See* USSC App. C, Amend. 536 (Nov. 1, 1994) (making retroactive Amendment 505, which eliminated §2D1.1 quantity-based BOLs over 38).

[24] *See* USSC App. C, Amend. 607 (Nov. 1, 2000) (making retroactive Amendment 606, which corrected a typo in drug weight for a substance).

2003,[25] 2007,[26] 2008,[27] 2011,[28] and 2014.[29] Several of those amendments are especially significant because they demonstrate a pattern of retroactively applying changes that address the overly harsh §2D1.1 quantity scheme. Such was the case, for example, with the three most notable drug amendments—the crack amendments,[30] the Fair Sentencing Act amendments,[31] and drugs-minus-two.[32] Part A of the Drug Offenses Amendment is as monumental as these watershed retroactive §2D1.1 amendments. The Commission would be notably diverging from its past practice if it did not vote for retroactivity here.

To be clear, though the reasons for the amendment are important considerations, the Commission has not historically required a lofty purpose to retroactively apply §2D1.1 offense level adjustments. The Commission has, on multiple occasions, made retroactive §2D1.1 amendments that instead

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[25] *See* USSC App. C, Amend. 662 (Nov. 1, 2003) (making retroactive Amendment 657 concerning how to calculate weight of oxycontin and Percocet pills).

[26] *See* USSC App. C, Amend. 713 (Nov. 1, 2007) (making retroactive Amendment 706 as amended by Amendment 711, which changed BOLs for crack offenses).

[27] *See* USSC App. C, Amend. 716 (May 1, 2008) (making retroactive Amendment 715, which corrected "an anomaly" created by preceding year's crack amendment).

[28] *See* USSC App. C, Amend. 759 (Nov. 1, 2011) (making retroactive Amendment 750, which changed crack offense BOLs).

[29] *See* USSC App. C, Amend. 788 (Nov. 1, 2014) (making retroactive Amendment 782, which reduced drug quantity BOLs).

[30] *See* USSC App. C, Amend. 713, Reason for Amendment (Nov. 1, 2007) (making retroactive amendment that altered crack sentencings because prior ratio "significantly undermines various congressional goals set forth in the Sentencing Reform Act and elsewhere").

[31] *See* USSC App. C, Amend. 759, Reason for Amendment (Nov. 1, 2011) (explaining that First Step Act (FSA) amendments would be retroactive because amendments "reflect congressional action consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine significantly undermines the various congressional objectives" of the SRA and other laws (internal quotation omitted)).

[32] *See* USSC App. C, Amend. 782, Reason for Amendment (Nov. 1, 2014) (reducing quantity BOLs in part because Commission determined sentences above mandatory minimum quantities not needed to meet sentencing purposes).

made "conform[ing]"[33] changes or were simply intended to make the guideline "more accurate" in drawing quantity equivalencies.[34] For example, the Commission made retroactive amendments that: (1) changed the weight assigned to marijuana plants;[35] (2) added a wet and dry quantity for two hallucinogens;[36] (3) adjusted drug equivalencies for fentanyl and fentanyl analogues to better align with the drug quantity table ("DQT");[37] and (4) altered what did and did not constitute a portion of a mixture of a substance.[38] Though each change was arguably technical and not a matter of fundamental fairness,[39] they demonstrate the Commission's consistent willingness to apply drug calculations retroactively.

Beyond ameliorating one of the most emphasized flaws in the Guidelines Manual, the Commission indicates that Part A is intended to address courts under-utilizing §3B1.2 in drug trafficking cases. As the Commission notes, in 2015, the Commission amended §3B1.2 "to increase its

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[33] USSC App. C, Amend. 126, Reason for Amendment (Nov. 1, 1989) (explaining that adjusting fentanyl and fentanyl analogue marijuana equivalencies would "conform the equivalency . . . to that set forth in the Drug Quantity Table"); USSC App. C, Amend. 306 (Nov. 1, 1989) (making Amendment 126 retroactive).

[34] USSC App. C., Amend. 130, Reason for Amendment (Nov. 1, 1989) (differentiating wet and dry versions of substances "to provide more accurate approximations of the equivalencies and dosages"); Amend. 306 (Nov. 1, 1989) (making Amendment 130 retroactive).

[35] *See* USSC App. C, Amend. 536 (Nov. 1, 1995) (making retroactive Amendment 516, which changed marijuana equivalency for marijuana plants).

[36] *See* USSG App. C, Amend. 306 (Nov. 1, 1989) (making retroactive Amendment 130 regarding wet/dry weights for peyote and psilocybin).

[37] *See* USSG App. C, Amend. 306 (Nov. 1, 1989) (making retroactive Amendment 126 regarding fentanyl weight calculations).

[38] *See* USSC App. C, Amend. 662 (Nov. 1, 2003) (making retroactive Amendment 657 concerning how to calculate weight of oxycontin and Percocet pills); USSC App. C, Amend. 502 (Nov. 1, 1993) (making retroactive Amendments 484 and 488 concerning how to determine weight of substance at issue for DQT purposes).

[39] While the Commission has considered whether the amendment addressed a matter of fundamental fairness in some past drug retroactivity determinations, as Defenders recently pointed out, this is not a prerequisite to retroactivity and should not be made one. *See, e.g.*, Defender §1B1.10 Criteria Comment, at 7–9.

usage."[40] Despite this express purpose, "Commission data shows that the prior amendment did not result in a sustained increase in application of the mitigating role adjustment in §2D1.1 cases."[41] Likewise, the Commission found that the higher values of that reduction "are rarely applied."[42] Thus, Part A seeks to rectify courts' failure to correctly interpret and apply a role reduction the Commission intended to be more broadly applied. This raises a significant fairness concern: For ten years, people the Commission intended to receive lower sentences based on role did not. That purpose is well addressed by retroactivity at least as far back as the under-applied, prior §3B1.2 amendment in 2015. In this way, retroactivity would also emphasize to courts their failure to properly utilize §3B1.2 over the past decade and the need to do so now.

### B. Impact

#### i. Subpart 1 of Part A (mitigating role provisions at §2D1.1(a)(5))

The Commission's impact assessment makes clear that the new mitigating role base offense level caps merit retroactive application. Specifically, approximately 650 individuals' offense levels will be reduced, with nearly three quarters of those people receiving a two-level reduction.[43] The average sentence among this population will fall by one year, a potentially life-altering reduction (and possibly lifesaving given conditions at the BOP).[44]

Retroactivity also stands to make at least a small dent in the racially disparate makeup of the federal prison population. The Commission's assessment reveals a significant racial disparity among potentially impacted people with 71.8% of potentially eligible recipients being identified as

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[40] USSC, Amendments to the Sentencing Guidelines: Drug Offenses, at 10 (Apr. 30, 2025).

[41] *Id.*

[42] *Id.*

[43] USSC, *Retroactivity Impact Analysis of Certain 2025 Amendments*, at 7 (May 15, 2025).

[44] *Id.*

Hispanic. Thus, retroactivity would further the Commission's commitment (and obligation) to address racial disparities.[45]

### ii. Subpart 2 of Part A (special instruction relating to §3B1.2)

While the Commission is unable to determine the specific impacts of applying the new instruction retroactively, it is clear there would be significant impacts. There are likely thousands, if not tens of thousands, of people who may benefit from retroactivity. Commission special coding projects have uncovered that a substantial portion of people sentenced under §2D1.1 occupied the low-level roles addressed by the amendment.[46] Thus, there is reason to believe that thousands of the 62,045 people serving time for a drug trafficking offense were sentenced for conduct that §3B1.2 was supposed to, and now certainly must, cover.

And these thousands of people would receive a significant guideline range reduction. Primarily, any person who receives for the first time a §3B1.2 reduction would see at least a two-level decrease in their offense level. Over the past five fiscal years for which data is available, 70.9% of people sentenced under §2D1.1 had base offense levels of at least 26.[47] At that base offense level, and higher, a two-level decrease results in no less than a one-year reduction in a person's advisory range. A two-level reduction puts §3B1.2's lowest impact on par with acceptance of responsibility, a reduction primarily obtained when a person forgoes the full panoply of their constitutional trial rights. It likewise mirrors the reduction obtained for being safety valve eligible or for having no criminal history points, both extremely important sentencing reductions.

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[45] *Cf., e.g.,* Transcript of USSC's Public Meeting on Retroactivity of 2023 Amendments, at 51 (Aug. 24, 2023) (comments of Comm'r Gleeson) (supporting retroactively applying amendments in light of impact on racially disparate sentences).

[46] *See, e.g.,* USSC, *Public Data Briefing*, at 12 (finding in sample of FY2022 methamphetamine cases that 46.8% of the sample occupied roles of street level dealer, broker, courier, or employee/worker); *id.* at 15 (finding in sample of FY2019 fentanyl and fentanyl analogue cases that 60.8% of the sample occupied roles of street level dealer, broker, courier, or employee/worker).

[47] The data for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023. The dataset is publicly available for download on its website.

That two-level reduction will be, for many people, the low-water mark. A subset of recipients will now, for the first time, also receive the benefit of §2D1.1(a)(5). Likewise, a subset of recipients will be found eligible for a three- or four-level reduction, the latter of which will further enhance §2D1.1(a)(5)'s impact. Given that couriers—who have high drug weight but low culpability—are one of the most common drug functions sentenced federally, it is plausible (if not probable) that there will be people for whom the amendment will trigger as much as a *12-level swing* (dropping a BOL 38 to 30 and obtaining a four-level role reduction). A 12-level reduction from level 38 means this amendment's high-water mark of impact would be a *170-month reduction* from the bottom of a CHC I guideline range.

At either end of that spectrum, the impact is still substantial and strongly supports retroactivity.

### C. Administrability

#### i. Subpart 1 of Part A (mitigating role provisions at §2D1.1(a)(5))

The Commission's impact assessment shows that the number of people potentially eligible for relief if this subpart is made retroactive is manageable. The Commission identifies only 650 potentially eligible individuals in a prison system of over 150,000 people.[48] According to the Commission's assessment, there are only eight districts where more than 20 people may be eligible; the vast majority of districts have a single-digit number of potentially eligible people.[49] No district faces more than 74 potential recipients.[50]

Within each case, the amended BOL caps will be easy to apply on their own or, if the Commission makes the §3B1.2 changes retroactive, will add little additional work given how straightforward the rule is. For those who have already received the role reduction, a court will need only ask two questions to determine eligibility, both of which should appear in the sentencing record: (1) did the individual receive a §3B1.2 role reduction, and (2) did the individual have a BOL above 30. The court will then need only recalculate the person's base offense level to correspond to the extent of the role reduction received. Courts will not be required to engage in any

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[48] *See* *2025 Retroactivity Impact Analysis*, at 7.

[49] *See id.* at 8–9.

[50] *See id.* at 8.

additional fact finding and the binary nature of the reduction—either the prior BOL does or does not exceed the new cap—should remove any disputes about the new guideline calculation.

Nor will the amendment independently add any complexity if the Commission also makes the §3B1.2 eligibility amendment retroactive. While determining a person's eligibility for the broadened role reduction will be fact-based, once their role is established, the BOL cap will be a matter of rote application to the new guideline calculation.

The ease of administering the amended BOL caps weighs strongly in favor of retroactivity.

### ii. Subpart 2 of Part A (special instruction relating to §3B1.2)

There is no way around it: because Subpart 2, the new instruction relating to §3B1.2, requires a factual determination, it will be more difficult to administer than Subpart 1. And like the Commission's three most-significant drug amendments, the population of people who may file may be large, with an upper bound of 53,021 people.[51] But neither a fact-based inquiry nor a large potential population have stood as bars to retroactivity in the past.

The Commission has made several prior amendments retroactive despite their necessarily calling for fact-specific assessments. First, in Amendment 306, the Commission retroactively applied Amendment 269, which changed a fact-based, fraud-related specific characteristic's scope.[52] Specifically, prior to Amendment 269, a person could be subject to an increased offense level where he "derived a substantial portion of his income"

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[51] Defenders reason that 53,021 is the highest-*possible* (though not probable nor plausible) number of beneficiaries because it subtracts from the 62,045 people incarcerated for drug offenses the two groups that seem categorically unable to benefit from the amendment—268 people who received the maximum, four-level reduction under the prior standard and 8,756 people who received an aggravating role adjustment. *See* *2025 Retroactivity Impact Analysis*, at 14. There are also likely numerous individuals serving sentences for mandatory minimum terms that will preclude relief, to say nothing of the people who would not qualify as having engaged in low-level trafficking.

[52] USSG App. C, Amend. 306 (Nov. 1, 1989) (making Amendment 269 retroactive); USSG App. C, Amend. 269 (Nov. 1, 1989) (amending application note for livelihood enhancement).

from the offense. Amendment 269 changed the specific offense characteristic to hinge on whether the person engaged in their offense "as a livelihood." That new question—whether actions constituted a livelihood—was necessarily fact-intensive, considering matters like what other employment the person had, what expenses the person's life entailed, and what proportion of their needs were met by the criminal activity.[53] Notably, there was no guarantee that such information would be present in a person's sentencing record already, and thus retroactive application could have required extensive fact-finding. Nonetheless, noting only an intent to "implement the directive in 28 U.S.C. § 994(u)," the Commission added Amendment 269 to the §1B1.10 amendments list.

Second, in Amendment 454, the Commission narrowed the scope of the vulnerable victim specific offense characteristic in robbery cases by specifying that a person's job as a bank teller did not on its own suffice to trigger the enhancement.[54] As with Amendment 269, this necessarily would involve new factual assessments about the basis for the enhancement.[55] And, as with Amendment 269, it is far from inevitable that possible alternative vulnerabilities of a victim (whom the law may have originally treated as vulnerable per se) would be present in the materials prior to resentencing. Nonetheless, via Amendment 502, the Commission permitted retroactive sentence reductions in light of the amendment.[56]

Third, the Commission has made retroactive drug-related amendments that may have required further factual inquiry to apply. For instance, the Commission made retroactive amendments that provided for differing weights between wet and dry peyote and psilocybin,[57] and that excluded from drug mixture calculations materials that necessarily had to be removed

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[53] *Cf. United States v. Cianscewski*, 894 F.2d 74, 79 (3d Cir. 1990) (discussing post-amendment how a court might determine whether enhancement applied to individual).

[54] *See* USSG App. C, Amend. 454 (Nov. 1, 1992) (amending vulnerable victim enhancement to provide that bank tellers are not automatically vulnerable by virtue of their job).

[55] *See, e.g., United States v. Frank*, 247 F.3d 1257, 1260 (11th Cir. 2001) ("Whether a 'vulnerable victim' sentence enhancement should be made is a fact intensive inquiry that must be made on a case-by-case basis.").

[56] USSG App. C, Amend. 502 (Nov. 1, 1993).

[57] *See* USSG App. C, Amend. 306 (Nov. 1, 1989) (making retroactive Amendment 130 regarding wet/dry weights for peyote and psilocybin).

before use.[58] In each instance, the calculation would have required new factual probing: whether the substance at issue was wet or dry or whether the substance needed removing before use. And, in each instance, there was no guarantee that those facts would already be a part of the sentencing record given that the prior definition obviated the need for those facts. Nonetheless, the Commission made each amendment retroactive.

While the number of potentially eligible people for Subpart 2 would exceed the numbers for these prior fact-based amendments, there would still be factors easing administrability. In particular, much, if not all, of the information necessary to apply the amendment should already appear in the PSR, and, if not, in the sentencing record as a whole. The amendment looks to such factors as what function a person served in the overarching drug trafficking scheme and what the individual's underlying motivations were. Though long absent from the guidelines equation, these considerations are quintessential examples of the "nature and circumstances of the offense" under § 3553(a). The factors that militate in favor of a §3B1.2 reduction are precisely the information that one would anticipate defense counsel having elicited (and, often, the Government having conceded) in arguing for a lesser sentence. The factors that militate against a §3B1.2 reduction are precisely the information that would appear in a PSR offense conduct description, and that the government would argue in support of a within- or above-guidelines sentence. New fact-finding would likely be the exception as the pre-existing record would, in the mine run case, contain the facts needed for determining eligibility.

Experience has shown the entire system to be extraordinarily capable of adapting, planning, and efficiently implementing even amendments with tens of thousands of eligible people. In fact, they have proved so manageable that the CLC endorsed retroactivity of the Commission's most expansively available amendment (drugs-minus-two), with delayed implementation, despite anticipating 51,000 reduction motions during difficult fiscal circumstances.[59] The population here is likely to be below that high watermark once facially ineligible people are excluded.

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[58] *See* USSG App. C, Amend. 502 (Nov. 1, 1993) (making retroactive Amendments 484 and 488 concerning how to determine weight of substance at issue for DQT purposes).

[59] *See* Testimony of Hon. Irene M. Keeley on behalf of CLC to USSC, at 11 (June 10, 2014) (endorsing retroactivity with a delay despite ongoing fiscal concerns).

Notwithstanding that reality, there will likely be substantial concerns voiced by some stakeholders that the fact-specific nature of the inquiry and/or size of the potential recipient pool make retroactivity of this subpart unmanageable. Those concerns simply cannot outweigh the significant purpose and impact here. In fact, in this instance, allowing the amount of work to outweigh purpose and impact would itself be fundamentally unfair, if not Kafkaesque.

The potential number of impacted people is so high for three, overarching reasons. *First*, the most-often-applied sentencing guideline, §2D1.1, operates on a flawed, weight-based premise that has been derided since before the Guidelines Manual took effect precisely because it elevates weight above culpability and role. *Second*, despite Supreme Court, scholarly, and Commission consensus that the ADAA's weight-based scheme is intended to target middle- and high-level trafficking, and despite the vast weight of authority that adhering to the ADAA's weights does not accomplish that goal, the Executive Branch has spent the past four decades seeking harsh sentences against tens of thousands of people who played low-level roles. *Third*, despite an explicit attempt by the Commission ten years ago to moderately improve the guidelines of low-level players in drug trafficking conspiracies, §3B1.2 has remained under-utilized. Numerous people in BOP custody have been sentenced more harshly than the statute or guideline ever intended. To allow the amount of work at issue to control the retroactivity decision would be to say only errors that are quickly corrected or minimal in their reach should be fixed and that the largest, most expansive and harmful errors should be left in place.

Moreover, strains on the court are not a legal inevitability but rather hinge heavily on the discretion exercised by one of the primary stakeholders involved: the DOJ. The Department decides how to allot its resources.[60] On a daily basis, it exercises authority that can swell the courts' dockets—pursuing, for example, charges for non-citizens failing to register with the government[61] or trespassing on "national defense areas"[62]—or can reduce them—for example, by curbing enforcement of the Foreign Corrupt Practices

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[60] *Cf. Wayte v. United States*, 470 U.S. 598, 607 (1985) (emphasizing the Government's "broad discretion as to whom to prosecute" (internal quotation omitted)).

[61] *See, e.g.,* Aarón Torres, *Texas man charged with failing to register as an undocumented migrant*, Dallas Morning News (Apr. 29, 2025).

[62] *See, e.g.,* Jack Healy *et al.*, *Judge Dismisses 'Trespassing' Charges Promoted by Trump in Border 'Defense Area'*, N.Y. Times (May 15, 2025).

Act.[63] If the Commission were to act on the power expressly afforded to it by Congress, nothing would prevent the Department from adjusting its priorities to ensure that the DOJ, courts, and Defenders are not inhibited in their ability to meet their statutory and constitutional obligations. The DOJ may prefer to expend resources on these other matters rather than respond to motions for reductions in sentences based on retroactive guideline amendments, but the Commission is not required to co-sign those policy decisions by allowing manageability concerns to override the significant purpose and impact of this change.[64]

Defenders encourage retroactivity knowing we will bear a significant portion of the workload and will do so simultaneously with our own budgetary uncertainty and promises of increased caseloads from increased prosecutions. Defenders are prepared to do even more with less if it means that fairness, and not workload, dictates the retroactivity decision.

## III. The Commission should retroactively apply Part A of the Circuit Conflicts Amendment.

### A. Purpose

The Commission promulgated Part A of the Circuit Conflicts Amendment to "respond[] to a circuit conflict" over whether the two-level "physical restraint" enhancement applies where a robbery victim is restricted from movement at gunpoint but not otherwise physically immobilized.[65] "To

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[63] *See* Exec. Order No. 14,209, *Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security*, 90 Fed. Reg. 9,587 (Feb. 10, 2025) (placing moratorium on Foreign Corrupt Practices Act enforcement and investigations because, *inter alia*, such actions "waste[] limited prosecutorial resources").

[64] To be clear, Defenders are not encouraging the Commission to consider whether DOJ's shifting charging priorities are correct. Rather, Defenders are encouraging the Commission to fulfill its role under § 994(u) without assuming those priorities will make retroactivity a problem for the courts and stakeholders.

[65] USSC, Amendments to the Sentencing Guidelines, at 1 (Apr. 30, 2025). Five circuits had held that the psychological coercion of pointing a gun at someone, without more, does not qualify for the enhancement, whereas another five had held that restricting a person's movement at gunpoint is enough to trigger the enhancement. *See id.* Part A also amended §2B3.1(b)(2)(B) to ensure uniform application of the "otherwise used" six-level enhancement. The Commission made

promote uniformity and consistency in guideline application," the Commission determined that the enhancement requires physical contact or confinement, and that psychological coercion alone is not enough.[66]

In other words, Part A is intended to ameliorate an unwarranted disparity based on geography that made individuals' sentences in at least five circuits needlessly harsh. This is a significant purpose. Guarding against unwarranted (and unfair) sentencing disparities among individuals with similar records who have been found guilty of similar conduct is one of the Commission's core purposes.[67] And where the Commission adopts one circuit's interpretation over others, it explains how the guideline should have operated all along in those other circuits. Individuals who suffered as result of these incorrect interpretations should be given the chance to have their sentences corrected. Indeed, the Commission has, on multiple occasions, made retroactive amendments that resolved circuit conflicts.[68] In fact, a conflict in *district* courts' interpretations of the guidelines resulted in one of the first retroactive amendments.[69]

### B. Impact

The Commission cannot discern how many of the 1,063 people who received a physical restraint enhancement in a court on the rejected side of the split would be eligible for a reduction.[70] It is thus unable to provide concrete explanations of how significant the reduction would likely be for

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similar changes to other guidelines with "physically restrained" and "otherwise used" specific offense characteristics. *See id.* at 2.

[66] *Id.* at 1.

[67] *See* 28 U.S.C. § 991(b)(1)(B).

[68] *See, e.g.*, USSG App. C, Amend. 502 (Nov. 1, 1993) (making retroactive Amendment 484, "address[ing] an inter-circuit conflict regarding the meaning of term 'mixture or substance,' as used in §2D1.1"); Amend. 607 (Nov. 1, 2000) (making retroactive: (1) Amendment 591, clarifying that the appropriate Chapter Two guideline is determined with reference to the statute of conviction, not relevant conduct, to resolve a circuit split; and (2) Amendment 599, resolving a circuit split on when it would be appropriate to apply a specific offense characteristic related to a weapon where there was an accompanying § 924(c) count).

[69] *See* USSG App. C., Amend. 306 (Nov. 1, 1989) (making retroactive Amendment 269, resolving a conflict between two district courts on the intended scope of the "engaged in as a livelihood" fraud enhancement).

[70] *See* 2025 Retroactivity Impact Analysis, at 14–15.

eligible individuals. However, those who are eligible will receive a meaningful benefit. As with the §3B1.2 amendment, outside of the lowest offense levels, a two-level reduction will result in a significant decrease in sentence of a year or more. This is especially true for §2B3.1, which starts all calculations at a base offense level 20 and includes six different enhancements beyond the one at issue in the amendment.[71] Moreover, nearly three quarters of potentially eligible individuals are Black.[72] Thus, retroactivity could address a racial disparity in federal prison populations. These impacts are more than sufficient to support retroactivity.

### C. Administrability

Retroactivity would be relatively easy to administer. *First*, the number of cases involved is manageable. The Commission has identified only 1,063 people who may be eligible for a reduction.[73] And that 1,063 is an outer estimate because the Commission "does not regularly collect information on the facts underlying a court's decision to apply the physical restraint enhancement . . . ."[74] *Second*, retroactive application should not require significant new factual inquiry. In most cases, the PSR will provide the facts that justified application of the enhancement. Where defense counsel objected to the enhancement, their pleadings will spell out the basis for the objection. Defense and government sentencing memoranda should likewise elucidate these facts. Both what a person did with a gun and whether any restraint was psychological or physical in nature are quintessential considerations under 18 U.S.C. § 3553(a).

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[71] Defenders presume a two-level reduction as the only outcome possible on retroactive application. A net one-level reduction would occur if a person received the two-level reduction for the first time but simultaneously received a higher firearm enhancement under Part A's brandishing/otherwise-used language. However, Defenders are skeptical that a court could apply the firearm enhancement retroactively. *Compare* 28 U.S.C. § 994(u) (allowing retroactivity for amendments that lower guideline ranges) *with* USSG §1B1.10(b)(1) ("[T]he court shall substitute only [the retroactive amendment] and shall leave all other guideline calculation decisions unaffected.").

[72] *See* 2025 Retroactivity Impact Analysis, at 16 (noting that 73.8% of potentially eligible individuals are Black).

[73] *Id.* at 14.

[74] *Id.* at 15.

## IV. Retroactivity would not undermine sentence finality.

Any time the Commission considers retroactivity, some stakeholders inevitably contend that the Commission should tread lightly to preserve the value of finality. We anticipate similar arguments in this instance given the potential that thousands of people would benefit from retroactive application of Part A of the Drug Offenses Amendment.[75] These arguments suffer both legal and practical flaws.

*First*, legal. As Defenders have previously explained, conviction finality under federal habeas law and sentence finality are different in kind, addressing fundamentally different concerns.[76] In the guideline amendment context, there is no textual or historical basis for applying a presumption against retroactivity and in favor of sentence finality.[77] Indeed, the modern statutory landscape places nowhere near the weight on sentence finality that it once did. In the decades since 1984, Congress has enacted multiple pieces of legislation that undid otherwise final sentences for broad swaths of individuals. Perhaps most notably, in 2021, Congress passed the First Step Act, which contained provisions permitting incarcerated individuals to seek sentencing reductions.[78]

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[75] During this year's comment period regarding the Commission's retroactivity criteria, both the CLC and DOJ have encouraged the Commission, either implicitly or explicitly, to narrow the criteria for applying amendments retroactively. Both comments place substantial emphasis on the need for finality in sentencings as a philosophical basis for their positions and contend that narrowing retroactivity's reach is necessary to preserve that philosophical value. *See, e.g.*, CLC Comments on the USSC's Retroactivity Criteria, at 3–5 (Apr. 18, 2025) (relying heavily on finality as a value to justify ordinarily only applying amendments prospectively); DOJ Comments on the USSC's Retroactivity Criteria, at 10 (Apr. 18, 2025) (urging a presumption against retroactivity as "consistent with the interests in the finality of criminal judgments"). While Defenders rely primarily on our own retroactivity criteria comment to combat these contentions, *see* Defender Comment on Criteria for Selecting Guideline Amendments Covered by §1B1.10, at 14–18 (Apr. 18, 2025), we briefly respond here to emphasize that making these amendments retroactive would not undermine finality.

[76] Defender §1B1.10 Criteria Comment, at 17–18.

[77] *See id.* at 15–18.

[78] *See, e.g.,* First Step Act of 2018, Pub. L. No. 115-391 § 603(b), 132 Stat. 5194, 5239–40 (enlarging access to sentence reductions under 18 U.S.C. § 3582).

As Professors Wroblewski, Berman, and Chanenson recently observed, Congress's decreased emphasis on sentence finality has occurred simultaneously with "the American Law Institute . . . , many states, and the . . . Commission itself hav[ing] expressed concerns about strict truth-in-sentencing and hav[ing] embraced new mechanisms for review, reconsideration, and adjustment of imposed sentences, and in particular, especially long sentences."[79] They emphasized:

> 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.[80]

Indeed, a crabbed view of retroactivity conflicts with the Commission's legal obligations to enact policies that "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process,"[81] and that are "consistent with *all* pertinent provisions of any federal statute,"[82] including those enacted since 1984. So, while making these amendments retroactive would undoubtedly undo some otherwise final sentences, that is what Congress intended and is fully consistent with the Commission's organic statute.

*Second*, practical. Rather than undermine finality principles, retroactive guideline amendments create only a limited exception to sentence finality. Many incarcerated individuals will never benefit from this limited exception. Section 3582(c)'s bar on sentencing modifications is exceedingly broad, providing that, in general, "a court may not modify a term of imprisonment once it has been modified . . . ."[83] Far from a litany of

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[79] Profs. Wroblewski, Berman, & Chanenson's Comments on the USSC'S Retroactivity Criteria, at 3–4 (Apr. 14, 2025).

[80] *Id.*

[81] 28 U.S.C. § 991(a).

[82] *Id.* § 994(a) (emphasis added).

[83] The Code also separately contains various extreme limitations on habeas review. *See, e.g.,* 28 U.S.C. § 2254(d)(1) (limiting habeas based on errors of law to only those "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law"). However, as Defenders explained in our prior comment,

exceptions, § 3582(c) offers the sentenced person narrow and limited opportunities to change their sentence: a reduction in sentence motion due to either "extraordinary and compelling reasons"[84] or being at least 70 years old and having served three decades in custody,[85] *and the Commission's authority to make ameliorative amendments retroactive*.[86]

For its part, the Commission contemplates retroactivity only after carefully considering stakeholder feedback and determining the amendment better achieves the purposes of sentencing than the former rule.[87] Many of the changes the Commission has made over the years have *increased* sentencing ranges, rather than decreased them, and could not be made retroactive for that reason. And Part A of the Drug Offenses Amendment is far narrower than some of the original proposals. Thus, even if it is made retroactive, there are tens of thousands of people in prison who will see no relief whether because they were sentenced for non-drug offenses, were sentenced as career offenders, were not involved in low-level trafficking activity, were sentenced pursuant to mandatory minimums, or for another reason.[88] When retroactivity is viewed as just a small piece of the much-larger federal sentencing puzzle—a piece that most federally imprisoned individuals will never access—it becomes clear that critics overstate both how expansive an opening retroactivity creates and the concerns that retroactivity has for finality generally.

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the values at issue in conviction finality differ from those of sentencing. *See* Defender §1B1.10 Criteria Comment, at 17.

[84] 18 U.S.C. § 3582(c)(1)(A)(i).

[85] *Id.* § 3582(c)(1)(A)(ii).

[86] *Id.* § 3582(c)(2).

[87] *See* PAG's Comments on the USSC's Retroactivity Criteria, at 1–2 (Apr. 18, 2025) (describing how the Commission's amendment process establishes that amendment decisions are "never taken lightly by the Commission").

[88] Even with the Drug Offenses Amendment Part A, subpart 2—a potential big-impact amendment—retroactivity would leave a majority of current prison sentences untouched. The Commission indicates that there are 154,155 people serving sentences in federal prisons. *See* 2025 Retroactivity Impact Analysis, at 6. A minority of those people, 62,045, are serving original sentences for drug offenses. *Id.* at 14. And thousands of those people would not benefit from retroactivity because, for example, they received an aggravating role adjustment and thus are virtually certain to not obtain a role reduction. *See id.* (noting that 8,756 of the 62,045 people received an aggravating role enhancement).

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The reality is plain: the BOP is not presently capable of safely and humanely holding anywhere near the number of people the courts have entrusted to its custody and care. This Commission possesses the rare power to address that reality and has a statutory obligation to do so. Retroactive application of these amendments would meet this obligation while also satisfying the criteria set forth in §1B1.10.

Very truly yours,

Heather Williams
Federal 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

# PROBATION OFFICERS ADVISORY GROUP

*An Advisory Group of the United States Sentencing Commission*



June 2, 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 Retroactivity.

POAG understands that the Commission is required to consider retroactive application of Guidelines when a guideline can potentially lower the defendant's guideline level.

Balancing the concern of fundamental fairness, the purpose of the amendment, the magnitude of the change, the difficulty of applying the amendment retroactively, and the workload, POAG is opposed to the retroactive application of the proposed amendments, as further described herein.

## Amendments under Consideration for Retroactive Application

*Circuit Conflict – "Physically Restrained"*

POAG does not support a retroactive application of the amended "physically restrained" enhancement under USSG §§2B3.1, 2B3.2, and 2E1.1. The purpose of the amendment is to resolve a circuit split on what "physically restrained" means. Many Circuit Courts approached this issue and worked to interpret the language provided, believing it was appropriate to give some degree of weight to a defendant's restraint of a victim through non-physical means. Those Courts of Appeal were not necessarily wrong, but they had a different interpretation of the language. POAG believes that, while it is extremely important to get clarity on this going forward, it is not something that warrants a retroactive application. Additionally, behind those appeals, were victims impacted

by the defendant's conduct who may have felt the finality of the sentence to be intact after the appellate process was complete. If this were to be applied retroactively, many victims of the defendants would have that finality disrupted.

The magnitude of the change would be up to a two-level reduction on approximately 1,063 defendants; however, this two-level reduction could be tempered somewhat by whether the defendant had originally been assessed a five-level increase that would now be more clearly a six-level increase as part of the overall amendment. The Commission estimates that of the 1,063 cases that could be impacted, 397 of them would only receive a single-level reduction because of the interplay between the two provisions.

POAG believes that there would be some difficulty in retroactively applying this amendment. While many presentence reports may have sufficient information, there are likely a significant number of reports wherein the circumstances surrounding the restraint are less clear and require additional fact finding to effectuate appropriate evaluation. If the defendant only needed to threaten the victim to receive the enhancement, then the presentence investigator may not have pursued or included further information, and the information to clarify the ambiguity may not be available. Additionally, there could be some latent oddities in removing one enhancement while increasing the total offense level under another.

Given the purpose and the magnitude, POAG does not advise making this amendment retroactive.

*Circuit Conflict – "Intervening Arrest" Definition*

POAG does not support a retroactive application of the Circuit Conflicts, Part B, concerning the meaning of "Intervening Arrest" in USSG §4A1.2(a)(2). POAG observes that the purpose of the amendment is to ensure that this term is interpreted uniformly in order to avoid disparity in treatment amongst defendants who have a similar criminal history. Similar to the physical restraint amendment, the basis of this amendment is to address a circuit split. As it is not dealing with an issue of fundamental fairness, but clarity, POAG does not view the purpose of the amendment to weigh heavily towards making the amendment retroactive.

Further, what is difficult to determine and weigh within this factor analysis is how large of a change this would produce for the average defendant who was impacted. It is also difficult to ascertain how many defendants could be impacted. Given the rarity of this issue, POAG would speculate that there would not be many defendants impacted and that the change to the criminal history score would not be substantial; however, it is unclear.

The main reason for the lack of clarity on this issue is because it is extremely difficult to determine if a defendant was impacted without doing a renewed assessment of their criminal history with available criminal history records. Not all probation offices retain the criminal history records of cases that have been sentenced and many older cases will have had records destroyed after a

prescribed period. It would be an extremely time-consuming undertaking that could result in disparity based on record retention and availability, with what we believe to be a relatively minor impact (if any) to the criminal history scores of most defendants who are evaluated. In POAG's estimation, the magnitude being an unknown and the complexity of applying this amendment both weighs heavily against supporting this amendment for retroactivity.

*Mitigating Role Provisions of USSG §2D1.1(a)(5)*

POAG observed that the purpose of this amendment is to increase the reduction a defendant would receive from a mitigating role adjustment. While this purpose does increase that reduction, POAG observes that the defendants that are impacted have already received some degree of recognition of their reduced culpability and that those who are impacted are a very small percentage of those who received a mitigating role reduction, who are in turn a small percentage of all of those who are sentenced under USSG §2D1.1.

POAG also observes that the magnitude of the change does vary from one level to four levels, with the vast majority of the cases receiving either a one-level or two-level reduction, resulting on average to a reduction of one year or less. The Commission has estimated that there will be 650 defendants eligible to receive a further benefit from a mitigating role through this reduction. POAG is concerned that, in an effort to further reduce the sentence of those who could have been impacted, a retroactive application of this amendment would result in tens of thousands of more filings than the 650 who may benefit from it.

POAG believes that, of the amendments at issue, this amendment would be the most straight-forward in its retroactive application. Since the original sentencing Court has already determined whether a mitigating role applies to the defendant, the further reduction to the base offense level under USSG §2D1.1(a)(5) will be easy to determine and calculate. However, Courts may have also considered mitigating factors when granting a departure or variance, and the degree to which that departure or variance further considered the mitigating role may be challenging to ascertain. Despite the ease of application, POAG believes that the relatively minor reduction to the sentences of defendants who have already received a reduction for their mitigating role in their respective offense is not a circumstance that warrants retroactivity.

*Special Instructions related to USSG §3B1.2 - Function*

POAG observes that the purpose of this amendment is to create a new mechanism by which to reduce the total offense level of low-level drug trafficking participants. While the Guidelines previously just evaluated a defendant's role in an offense, as compared to the others involved; this amendment would allow for reductive consideration of the defendant's function within the individual crime or criminal conspiracy. While there may be many who overlap and could achieve the same ends through either a role or a function consideration, there would undoubtedly be

defendants who would benefit from a function consideration that did not qualify for a minor or minimal role reduction.

Despite the generalized impression that there would be defendants who benefit, the Commission does not have data available to estimate the magnitude of this change or the number of defendants who may be impacted because this information is not currently collected. Without a function reduction in place at the time those older presentence reports were written; those reports may lack the perspective necessary within the offense conduct to adequately assess and consider the issue. In a retroactive application, this would require extensive fact finding, likely beyond the presentence report including, but not limited to, discovery, transcripts, and sentencing memorandum. Approximately 94% of defendants currently incarcerated for a drug trafficking offense did not receive a role adjustment. Potentially, a review for all 58,348 of those defendants would need to be completed to determine if they would qualify for a low-level trafficking function reduction.

Also of note, this is a new concept and new consideration. This reduction will likely result in extensive litigation as to who qualifies and what factors to consider.

As such, POAG believes that the function amendment may best be considered in future cases only.

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
June 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*

***Voting Members***
*Honorable Natasha K. Anderson*
*Manny Atwal*
*Meghan Bishop*
*Neil Fulton*
*Jami Johnson*
*Honorable Gregory Smith*
*Carla R. Stinnett*

June 2, 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 possible retroactive application of Parts A and B of Amendment 1, and Subparts 1 and 2 of Part A of Amendment 2 to the United States Sentencing Guidelines.

**Amendment 2, Subpart 1 of Part A: Revision to the mitigating role provisions under § 2D1.1(a)(5).**

TIAG supports retroactive application of Subpart 1 of Part A of Amendment 2 as consistent with the factors the Commission considers when determining whether a guideline should apply retroactively.

First, it appears that a significant purpose of the amendment is to respond to feedback from observational study of district court judges around the country, the majority of which appear routinely to impose sentences below those recommended by the Guidelines in cases involving defendants responsible for large quantities of drugs who receive a minor role reduction. The collective wisdom of these judges suggests that individuals who received within- or above-Guidelines sentences for the same conduct, *i.e.* defendants theoretically eligible for a retroactive sentence adjustment, may currently be

serving sentences longer than necessary to accomplish the statutory purposes of sentencing under 18 U.S.C. § 3553(a). TIAG therefore believes that considerations of equity and fairness militate in favor of retroactive application.

Second, with 650 potentially eligible defendants, the magnitude of the change appears significant. It moreover appears from the data briefing that more than 1/3 of eligible defendants would be eligible for a reduction in sentence of over one year, which is a significant reduction.

Lastly, retroactive application of this amendment appears to raise no substantial administrability concerns. Individuals who qualify are readily ascertainable from a review of the presentence report and statement of reasons without the need for additional investigation or fact-finding.

**Amendment 2, Subpart 2 of Part A: Revision to the mitigating role provisions under § 2D1.1(a)(5).**

TIAG does not support the retroactive application of Subpart 2 of Part A of Amendment 2 primarily because of concerns about administrability. Because the amendment introduces new factual criteria for evaluating whether § 3B1.2 applies in drug cases, it appears that retroactive application of this amendment would require additional investigation and fact-finding in many, if not most, potentially eligible cases. For TIAG, these issues of administrability are significant enough to overcome positive equities related to the purpose of the amendment and the magnitude of the change.

**Amendment 1, Part A: Circuit Conflict Concerning "Physically Restrained" Enhancements.**

TIAG supports retroactive application of Part A of Amendment 1 as consistent with the Commission's mission to promulgate Guidelines that encourage uniform application across the nation. TIAG considered whether the fact-specific nature of the inquiry would pose administrability problems but ultimately concluded that because district courts in affected jurisdictions were required to make factual findings regarding both physical restraint and the use of a firearm at the time of sentencing, the presentence report likely contains all the information necessary for district courts to determine whether the

amendment affects the resultant Guidelines calculation. This distinguishes this amendment from Subpart 2 of Part A to Amendment 2, which introduces new criteria not foreseen at the time of sentencing.

**Amendment 1, Part B: Circuit Conflict Concerning Meaning of "Intervening Arrest" in 4A1.2 §(a)(2).**

TIAG generally favors making this amendment retroactive as a matter of equity and fairness but acknowledges that the only circuit that appears affected is one in which there is limited Indian country jurisdiction. It is therefore not clear the number of Indians in Indian country affected by this amendment.

Sincerely yours,

Ralph R. Erickson

# VICTIMS ADVISORY GROUP

*A Standing Advisory Group of the United States Sentencing Commission*



May 28, 2025

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

**RE: Request for Comment on Possible Retroactive Application Pursuant to § 1B1.10 of Approved 2025 Guideline Amendments.**

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 whether the Commission should authorize retroactive application under § 1B1.10 of certain Sentencing Guidelines ("Guidelines") amendments. The identified Guideline amendments were approved by the Commission in April 2025 and are to become effective only with prospective application on November 1, 2025, unless Congress otherwise acts.

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. For the reasons offered below, the VAG asks the Commission to follow its Practice and Procedure Rule 4.1A, providing generally prospective only application, and to decline retroactive application of any of the identified 2025 Guideline amendments.

## A. RETROACTIVE APPLICATION OF GUIDELINES AMENDMENTS HARMS CRIME VICTIMS AND UNDERMINES PREDICTABILITY, CERTAINTY AND FINALITY IN THE CRIMINAL JUSTICE SYSTEM.

Consistent with our prior public comments, the VAG supports the Commission's general presumption against the retroactive application of Guideline amendments.[1] Concerns about retroactivity have been conveyed to this Commission by the VAG and other groups during past amendment cycles.

Retroactive application of Guidelines amendments undermines predictability, certainty and finality 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 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 be 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,[2] "to transform the federal criminal justice system's treatment of crime victims…"

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[1] "Generally, promulgated amendments will be given prospective application only." *U.S.S.C. Rules of Practice and Procedure*, 4.1A.

[2] 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.

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 crime victims [3] 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 or robbery at gunpoint, causes significant psychological implications conceptualized within a post-traumatic stress disorder ("PTSD") framework, the most consistently documented consequence of violent

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> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, 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.

[3] "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).

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 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.

Delayed judicial proceedings negatively affect crime victims. Retroactive application of Guidelines amendments is a delay in the criminal justice system. 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."). Congress intended for victims to have a right to due process. The Commission's consideration of how victim rights under the CVRA are affected by the retroactive application of Guideline amendments is critical.

### B. COMMISSION STANDARDS TO APPLY WHEN CONSIDERING POSSIBLE RETROACTIVE APPLICATION OF GUIDELINE AMENDMENTS.

#### 1. The Commission's Non-exhaustive Factors for Considering Retroactive Application.

"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)." USSG § 1B1.10, Background.

The Commission's recent 2024 request for public comment on retroactivity criteria, observed 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."[4] Among the public comments received to this request, the VAG recommended that the Commission bear in mind that Congress passed the CVRA in 2004, fifteen years after the 1989 § 1B1.10 policy statement. The VAG recommended that the Commission must consider these statutory crime

[4] *Issue for Comment: Criteria for Selecting Guideline Amendments Covered by §1B1.10*, U.S.S.C 12/19/24.

victim rights, and the impact on crime victims of retroactive application, as part of its analysis of possible retroactive application of Guideline Amendments.[5]

2. **CVRA Rights Directly Affected in Retroactive Consideration.**

*The right to be to be reasonably protected from the accused, 18 U.S.C. § 3771(a)(1).*

Retroactive application of a Guidelines Amendment only reduces an already imposed sentence. USSG § 1B1.10. For federal crime victims, especially victims of violent crime, a reduced sentence substantially poses a direct threat, or a reasonably perceived threat, of future harm from a convicted offender who is released early from prison. The Commission must consider as part of its retroactive application analysis the serious weight of risk to a victim's safety, which safety is to be reasonably protected pursuant to 18 U.S.C. § 3771(a)(1).

*The right to reasonable, accurate, and timely notice of any public court proceeding [...] involving the crime or of any release [...] of the accused, 18 U.S.C. § 3771(a)(2).*

In considering possible retroactive application, the Commission must consider the required reasonable, accurate and timely notice to the victim. Notice is required to reasonably protect the victim's safety from the offender, 18 U.S.C. § 3771(a)(1), referenced above, and also to meet the victim's right to be heard as to the release or sentencing of the offender, pursuant to 18 U.S.C. § 3771(a)(4). In addition to affording victims their statutory right of notice, pursuant to 18 U.S.C. § 3771(a)(2), the Commission must consider as part of its retroactive application analysis that the time and expense of providing that reasonable, accurate and timely notice to the victim will fall on the government.

A retroactive Guidelines amendment application reducing an already imposed sentence should not be thought of as an academic exercise to be done behind closed doors by the court, the U.S. Attorney and defense counsel. Retroactive application does not merely lower the guideline range pursuant to USSG § 1B1.10. A retroactive reduction of sentence to a crime victim, particularly a victim of violent crime, is not an academic exercise at all but is a real exercise of reigniting the trauma caused by the offender. A retroactive reduction raises for the

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[5] A Guidelines Policy Statement requires that the courts ensure that the statutory crime victim rights are afforded: "In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of federal law pertaining to the treatment of crime victims." *USSG § 6A1.5, p.s.*

victim a valid reason to question the anticipated finality of the federal court process. Notice must be provided pursuant to 18 U.S.C. § 3771(a)(2). The Commission must consider as part of its retroactive application analysis the serious weight of additional emotional harm to the victim and the damage to the victim's perception of the legitimacy of the court process.

*The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, 18 U.S.C. § 3771(a)(4).*

The opportunity for the crime victim to be heard by the court, pursuant to 18 U.S.C. § 3771(a)(4), on a resentencing pursuant to a retroactive application of a Guidelines amendment is a fundamental due process right for the Commission to include in its analysis.

*The right to proceedings free from unreasonable delay, 18 U.S.C. § 3771(a)(7).*

The Commission must also consider whether the length of time passing between sentencing and a reduction of sentence based on a retroactive application of a Guidelines amendment is an unreasonable delay, affecting the victim's right under 18 U.S.C. § 3771(a)(7). This may be especially true for a crime victim led to believe by the court that the criminal justice process was final many years beforehand. A prolonged experience in the criminal justice system adds to the intense, painful consequences of initial victimization. Parsons & Bergin at 182-183.

*The right to be treated with fairness and with respect for the victim's dignity and privacy, 18 U.S.C. § 3771(a)(8).*

A lack of certainty and finality in criminal sentencing is unfair to victims, demonstrating a lack of respect for their dignity and privacy. The Commission must weigh this victim impact when considering the possibility of a retroactive application of a Guidelines amendment.

### C. THE 2025 GUIDELINE AMENDMENTS SELECTED FOR POSSIBLE RETROACTIVE APPLICATION.

#### 1. Part A of the Circuit Conflicts Amendment (Circuit Conflict Concerning "Physically Restrained" Enhancement).

The VAG strongly recommends that the Commission decline to make Part A of the Circuit Conflicts Amendment (Circuit Conflict Concerning "Physically Restrained" Enhancement) apply retroactively. Crime victims are involved in each and every of the 1,063 cases that the Commission's Retroactivity Impact Analysis *estimates* may be "an 'outer bound' of

the number of cases in which the amendment might apply should it be made retroactive."[6] Significantly, the Retroactivity Impact Analysis offers no data whatsoever on the impact on these crime victims of a retroactive application of this Guidelines amendment. The more than 1,063 crime victims in these cases who were robbed at gunpoint should not be punished further by the Commission through a retroactive application of this 2025 Guidelines amendment. The Commission should decline to apply this amendment retroactively.

There are crime victims in each and every one of these estimated 1,063 cases. The crimes to which the Guidelines amendment applies, primarily the violent crime of robbery, each involve the "physical restraint of an individual[s]" by the use of a firearm[s]. These violent offenses were traumatic and life-threatening for the victims. A retroactive reduction of the convicted offenders' sentence will initiate further victim trauma, raise risk for personal safety [7] and crush the victim's sense of finality in the criminal justice system, as discussed above.

Action by the courts to develop the facts and to resentence any qualifying offender will require application of the CVRA rights of reasonable protection, reasonable notice, to be heard, from unreasonable delay and to be treated with fairness and respect.

*a. Amendment Purpose is Clarification to Resolve Interpretation Difference.*

This amendment offers a Guidelines clarification for the purpose of resolving a Circuit Court conflict over a reasonable interpretation of the term "physically restrained," for purposes of § 2B3.1(b)(4)(B), by the First, Fourth, Sixth, Tenth, Eleventh and D.C. Circuits which contrasts with a differing reasonable interpretation by the Second, Third, Fifth, Seventh, and Ninth Circuits.

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[6] *USSC Memorandum Retroactivity Impact Analysis of Certain 2025 Amendments, May 15, 2025*, p. 15. The outer bound estimate of 1,063 to which the amendment might apply is out of an estimated 8,962 persons currently incarcerated in the BOP who were sentenced under §§ 2B3.1, 2B3.2, or 2E2.1. *Id.*, at 14. That outer bound estimate is a little less than 12% of the estimated total currently incarcerated.

[7] Commission research data shows that the recidivism rates for Firearms offenders is 69%, for Robbery offenders 63% and for Violent offenders 64%. *USSC Report at a Glance: Recidivism and Federal Sentencing Policy (2022)*. The estimated 1,063 convicted offenders to which this Guidelines amendment may apply used a firearm in the crime of violence of robbery. A reduction in their already imposed sentence places the victims and the public in an increased future safety risk.

This amendment also amends § 2B3.1(b)(2)(B) for the purpose " to clarify that the 6-level 'otherwise used' enhancement applies 'if a firearm was used to convey a specific (not general) threat of harm (e.g., pointing the firearm at a specific victim or victims; directing the movement of a specific victim or victims with the firearm) or to make physical contact with a victim (e.g., pistol whip; firearm placed against victim's body).'"[8]

The Commission's Retroactivity Impact Analysis recognizes that the purpose of the amendment is to *clarify* the application of §§ 2B3.1(b)(4)(B) and 2B3.1(b)(2)(B).[9] As a *clarification* between a balanced split in reasonable but differing interpretations by the Circuit Courts, the clarifying purpose of the amendment certainly does not compel a retroactive application. USSG § 1B1.10, Background.

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

The outer bound estimate of 1,063 cases to which retroactive application of the Guideline amendment might apply is out of an estimated 8,962 persons currently incarcerated in the BOP who were sentenced under §§ 2B3.1, 2B3.2, or 2E2.1 (or less than 12%).[10] The Retroactivity Impact Analysis reports that it cannot determine the impact of the amendment for these estimated 1,063 cases because data regarding the facts underlying the court's sentencing decision is unavailable. Whether many or none of the estimated 1,063 cases will see reduced the two-level enhancement imposed by §§ 2B3.1, 2B3.2, or 2E2.1 is unknown to the Commission. Whether many or none of the estimated 397 [11] of those estimated 1,063 cases will see one-level reduced (from six to five) for an enhancement imposed by § 2B3.1(b)(2)(B) is unknown to the Commission. Without important analysis on how the Guidelines amendment may affect these estimated cases, the Commission cannot reasonably determine the magnitude of the change in Guideline range and must decline retroactive application. USSG § 1B1.10, Background.

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[8] *USSC Memorandum Retroactivity Impact Analysis of Certain 2025 Amendments, May 15, 2025, supra,* at 14.

[9] *Id.*, at 14.

[10] *See* fn. 6, *supra.*

[11] *USSC Memorandum Retroactivity Impact Analysis of Certain 2025 Amendments, May 15, 2025, supra,* at 15.

*c. The Difficulty of Applying the Amendment Retroactively.*

Finally, the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1) may prove difficult or not at all possible. The Retroactivity Impact Analysis recognizes that "For Part A of the circuit conflicts amendment, courts may need to conduct additional fact-finding to determine whether to apply the "physically restrained" and "otherwise used" enhancements, as amended."[12]

The facts underlying the court's sentencing decision may not be clear in the record or may take additional fact-finding by the U.S. Attorney and the defense in a court hearing. The District Courts in the First, Fourth, Sixth, Tenth, Eleventh and D.C. Circuits, where the estimated 1,063 cases were heard, relied on their Circuit's reasonable and precedential interpretation of § 2B3.1(b)(4)(B) that robbery by gunpoint qualified for the "physically restrained" two-level enhancement, as noted in the opinions from those Circuits cited by the Commission.[13] Relying on that reasonable and precedential interpretation, it is highly possible that no additional factual inquiry of facts less dangerous than robbery at gunpoint was made on the record. The Commission's new 2025 clarifying Guideline amendment explaining that the "'physically restrained' enhancement applies only when 'any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape'" is a limitation these courts were

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[12] *Id.*, at 6.

[13] "*See, e.g., United States v. Wallace*, 461 F.3d 15, 34–35 (1st Cir. 2006) (affirming application of enhancement where one victim had her path blocked and was ordered at gunpoint to stop, and the other had a gun pointed directly at his face and chest, "at close range," and was commanded to "look straight ahead into the gun and not to move"); *United States v. Dimache*, 665 F.3d 603, 608 (4th Cir. 2011) (upholding enhancement where "two bank tellers ordered to the floor at gunpoint were prevented from both leaving the bank and thwarting the bank robbery"); *United States v. Howell*, 17 F.4th 673, 692 (6th Cir. 2021) (noting that the Sixth Circuit has "rejected the notion of a 'physical component' limitation as inapt" and upholding enhancement where victim was ordered at gunpoint to lie down on the floor (citation omitted)); *United States v. Miera*, 539 F.3d 1232, 1235–36 (10th Cir. 2008) (pointing gun around, commanding bank occupants not to move, and blocking door sufficed for enhancement); *United States v. Deleon*, 116 F.4th 1260, 1261–62 (11th Cir. 2024) (affirming application of enhancement where the defendant "pointed a gun at the cashier while demanding money" but never "actually touched the cashier")." *USSC, Proposed Amendment: Circuit Conflicts, Proposed Amendments to the Sentencing Guidelines (Preliminary), Dec. 19, 2024, p. 2.*

not contemplating. Without important analysis on how difficult the Guidelines amendment may be to apply, the Commission cannot reasonably determine the application difficulty and must decline retroactive application. USSG § 1B1.10, Background.

For the foregoing reasons, the VAG strongly recommends that the Commission decline to make Part A of the Circuit Conflicts Amendment (Circuit Conflict Concerning "Physically Restrained" Enhancement) apply retroactively.

2. **Part B of the Circuit Conflicts Amendment (Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)).**

The VAG offered no public comment on the proposed amendment of whether a traffic stop is an "intervening arrest," as it did not appear to affect crime victims, and makes no comment as to possible retroactive application.

3. **Subpart 1 of Part A of the Drug Offenses Amendment (Mitigating Role Provisions at §2D1.1(a)(5)).**

The Commission's Retroactivity Impact Analysis offers no data whatsoever on the number of crime victims or the type of victimization in the estimated 650 drug trafficking cases that may have sentences reduced by a retroactive application of this Guidelines amendment. The Analysis reports that "[t]he current average sentence for these 650 individuals is 81 months. If the courts were to grant the full reduction possible in each case, the projected new average sentence for those individuals would be 69 months, a reduction of 12 months (or 14.8%). These individuals would be released over a period of six years."[14]

Whether the drug trafficking offenses involving methamphetamines, powder cocaine or fentanyl (the top three unlawful substances listed in Retroactivity Impact Analysis, Table 4) led to victim fatalities, victim disabilities or victim addictions is not addressed in the Retroactivity Impact Analysis. Without this critical information on the victim impact of retroactive application, the VAG does not recommend a retroactive application of Subpart 1 of Part A of the Drug Offenses Amendment (Mitigating Role Provisions at §2D1.1(a)(5)).

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[14] *USSC Memorandum Retroactivity Impact Analysis of Certain 2025 Amendments, May 15, 2025, supra,* at 7.

4. **Subpart 2 of Part A of the Drug Offenses Amendment (Special Instruction Relating to §3B1.2).**

For Subpart 2 of Part A of the Drug Offenses Amendment, the Retroactivity Impact Analysis offers no data on the number of crime victims or the type of victimization in these drug trafficking cases that may have sentences reduced by a retroactive application of this Guidelines amendment. Even a low-level drug trafficker may have played a role, including distributing user-level quantities, that led to victim fatalities, victim disabilities or victim addictions. Without this critical information on the victim impact of retroactive application, the VAG does not recommend a retroactive application of Subpart 2 of Part A of the Drug Offenses Amendment (Special Instruction Relating to §3B1.2).

Critically, the Commission's Retroactivity Impact Analysis plainly states that it cannot estimate the retroactive impact because the Commission does not collect data on an offender's primary function in a drug trafficking offense.[15]

The Analysis provides no specifics as to the magnitude of the change in Guideline range nor the application difficulty beyond stating that "to the new special instruction on the application of §3B1.2 to §2D1.1 cases, courts may need to perform additional fact-finding to determine whether an individual's primary function in the offense was a low-level trafficking function and, if so, whether an adjustment is warranted and the extent of the reduction that is warranted."[16]

The Commission lacks data on a drug trafficker's primary function. The Retroactivity Impact Analysis acknowledges that "courts may need to perform additional fact-finding to determine whether an individual's primary function in the offense was a low-level trafficking function." The Analysis case estimate numbers are obscure and provide no specificity on how many of the 62,045 persons currently incarcerated may qualify for retroactive application.[17]

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[15] *Id.*, at 14.

[16] *Id.*, at 6.

[17] "[T]he Commission estimates that there are 62,045 persons currently incarcerated in the BOP who were sentenced for a drug trafficking offense. In 3,697 of those cases, the court applied a mitigating role

Lacking important analysis on the magnitude of the change in range and application difficulty of the Guidelines amendment, the Commission cannot reasonably determine either of these factors and must decline retroactive application. USSG § 1B1.10, Background.

For the foregoing reasons, the VAG recommends that the Commission decline to make Subpart 2 of Part A of the Drug Offenses Amendment (Special Instruction Relating to §3B1.2) apply retroactively. USSG § 1B1.10, Background.

The VAG appreciates the opportunity to comment upon the Commission's request for public comment on Possible Retroactive Application Pursuant to § 1B1.10 of Approved 2025 Guideline Amendments. 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

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adjustment under §3B1.2. In 3,429 of the 3,697 cases the adjustment to the final offense level was less than four levels. In the remaining 58,348 cases, the court did not apply a mitigating role adjustment. However, in 8,756 of those cases the court applied an aggravating role adjustment under §3B1.1."
*Id.*, at 14.

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Baltimore Community Chapter/National Action Network

## Topics:

Retroactivity

## Comments:

Please make retroactive

Submitted on: May 30, 2025

BRENNAN CENTER FOR JUSTICE

June 2, 2025

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

**RE: Retroactive Application of April 11, 2025 Amendments to the Sentencing Guidelines**

Dear Judge Reeves and Members of the Commission:

The Brennan Center for Justice at New York University School of Law welcomes the opportunity to comment on whether the April 11, 2025 amendments to the Sentencing Guidelines should be applied retroactively.

Earlier this year, we wrote in support of the Commission's proposed amendments on drug sentencing, and we were pleased to see that they were adopted. We are encouraged that the Commission is working hard to place greater emphasis on a defendant's role in the commission of a drug offense and less on drug quantity. Weight-driven sentences have often lead to extraordinarily harsh sentences, even if a defendant does not have a leadership role in a drug trafficking organization. We also applaud the Commission clarifying circuit court conflicts related to gun enhancements, to ensure that the term "otherwise used" in §2B3.1(b)(2)(B) applies in cases of specific threats, not simply possession. This change would better ensure that these enhancements are only applied when there is specific intent to cause harm.

On May 15, 2025, the Commission released a "Retroactivity Impact Analysis of Certain 2025 Amendments," to determine whether people currently in prison could be eligible for a sentence reduction due to these changes. Regarding the drug sentencing amendments, the Commission's analysis states that 650 people would have a lower guideline range than their current sentence and therefore would be eligible to seek a sentence modification, amounting to about a year on average in sentence reduction. This population is more than 83 percent Black or Hispanic. Although the Commission's analysis determined that 397 people in federal prison are serving sentences that factored in either the "otherwise used" provision or the "brandished" provision of the firearm enhancement guidelines, it could not

determine how many people would benefit from retroactive application of the amendment without more detailed information on the facts underlying these cases.

Even though the Commission was not able to determine how many people could benefit from changes to firearm possession enhancements, we urge the Commission to retroactively apply both amendments. Regarding changes to the firearm enhancement provision, trial judges can look at individual facts on a case-by-case basis to determine whether a sentence reduction is warranted. Retroactive application of these amendments will ensure the guideline changes are applied fairly and equitably across the federal system, a goal the Commission should strive to meet.

Again, we thank the Commission for the opportunity to comment on the retroactive application of amendments to the sentencing guidelines. We appreciate the Commission's willingness to meet with stakeholders and incorporate suggestions into the amendment process, and we would be happy to discuss these matters further.

Sincerely,

JC Hendrickson
Senior Policy Strategist
Brennan Center for Justice
at NYU School of Law

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Criminal Law and Justice center

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am a Staff Attorney at the Criminal Law & Justice Center at UC Berkeley School of Law, and I run our Resentencing Project. In that capacity, I've seen first hand the power of redemption and rehabilitation, and have had the honor of reuniting nearly 80 individuals with their families and communities. I am writing to urge that the Commission vote to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For many years, the Commission has heard from stakeholders that the drug guidelines, largely driven by drug quantity, often result in sentences that are greater than necessary. The Commission's data supports this criticism. The 2025 amendments will reduce the sentences for certain future drug defendants, resulting in more fair guideline ranges. But many people are serving lengthy prison sentences based on the old calculation. There is no reason to deny the court a chance to reassess their sentences in light of the mitigating role amendments.

Welcoming our community members and loved ones home a little early will have a tremendous impact on people in prison and those of us on the outside who count down the days until their release. It incentives rehabilitation and opens space for genuine healing and community support.

Allowing people to seek a reduced sentence based on the changes that the Commission made will also help ameliorate decades-long injustices in the drug guidelines, including racial disparities and inequities.

We urge you to make these amendments retroactive.

Sincerely,

(DE)SERVING Life

*Building bridges for people to go from serving life to living it*

P.O. Box 25202, Albuquerque, New Mexico 87125
Phone: (505) 788-7210
Fax: (1 505) 944- 9325
www.de-serving.org

May 28, 2025

Dear Judge Reeves,

We are writing to strongly urge the Commission to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For years, our communities have watched as overly harsh sentences have torn families apart and kept people in prison far longer than necessary. As professionals and advocates who work closely with people in reentry and recovery, we have seen firsthand the deep impact of these outdated drug guidelines. The Commission's own data confirms what we have witnessed—that sentences often exceed what is just or necessary, especially for those who played only a minimal role in these offenses.

The 2025 amendments are a vital step in creating a fairer system for the future. But fairness demands that we extend these changes to those still serving sentences that no longer reflect current law or practices. Without retroactivity, we are choosing to keep people incarcerated under guidelines we now know are too harsh and out of step with today's understanding.

Every day behind bars for these individuals is a day of missed opportunity, lost family connection, and delayed personal growth. We know how transformative it can be for someone to have even a modest reduction in their sentence—how it can spark hope, rebuild ties, and restore a sense of dignity.

We strongly urge you to make these amendments retroactive, to give those already sentenced under these outdated guidelines the chance to come home sooner and rejoin the communities who love and support them.

Thank you for your time and consideration.

Sincerely,

Matthew Pettit
Parole Success Advocate
(De)serving Life

June 2, 2025

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

Re: Comment on Possible Retroactive Application of Subparts 1 and 2 of Part A of the Drug Offenses Amendment

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate before the U. S. Sentencing Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines touch countless individuals and families, including many of our members – over 75,000 people nationwide. We welcome the opportunity to comment on the retroactivity of recent amendments.

For over 30 years, FAMM has been dedicated to reducing overly punitive drug sentences. FAMM advocates retroactivity of ameliorative guideline amendments because we believe that when sentencing practices evolve, people in custody who are serving sentences that are longer than necessary to meet the purposes of punishment should benefit from the changes that might reduce their sentence. It is with this in mind that we support retroactivity of Part A of the Drug Offenses Amendment.

## I. Retroactivity of Subpart 1 of Part A of the Drug Offenses Amendment is an Important Step Toward Ameliorating Decades-long Injustices in Drug Sentencing.

On April 30, 2025, The Commission submitted amendments adopted in the 2024-2025 cycle to Congress.[1] Among the amendments were changes to USSG §2D1.1 and §3B1.2.[2]

[1] Sentencing Guidelines for United States Courts, 90 FR 19798 (May 9, 2025).
[2] *Id.*

Subpart 1 imposes a cap on base offense levels ("BOL") for people who receive a mitigating role reduction under §3B1.2.[3]

Because this amendment would reduce the sentencing ranges for previously sentenced individuals, the Commission is required to consider whether to make it retroactive.[4] On April 11, 2025, the Commission asked staff to prepare an impact report to assist the Commission in deciding whether to make the amendment retroactive.[5] In deciding retroactivity, the Commission is guided by the following factors: the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively.[6] All these factors support making Subpart 1 of Part A of the Drug Offenses Amendment retroactive.

*a. The Purpose of the Amendment Supports Retroactivity by Addressing the Decades-Long Issues of Equating Drug Quantity with Culpability Under USSG §2D1.1*

For some time now, FAMM and others have objected to the Commission's use of drug quantity as a proxy for culpability in drug sentencing.[7] The Commission promulgated this amendment because, after extensive study and stakeholder feedback, "targeted changes were warranted to ensure appropriate penalties. . . ."[8] The amendment is intended to address concerns that §2D1.1 and §3B1.2 "do not adequately account for the lower culpability of individuals performing low-level functions in a drug trafficking offense."[9] Moreover, the Commission amended this provision to address concerns that courts were inconsistently and infrequently using §3B1.2.[10]

The purpose of this amendment supports retroactivity. The Commission has long recognized the flaws in §2D1.1 and the impact of the relevant conduct rule. Writing in 2004, the Commission observed that "[t]he drug trafficking guideline that ultimately was promulgated *in combination with* the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice. . . ."[11] At various times in the Commission's history, it has

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[3] Amendment 2 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025).
[4] 28 U.S.C. § 994(u).
[5] USSC Public Hearing (April 11, 2025), https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-april-11-2025.
[6] USSG §1B1.10, Comment. (bckg'd).
[7] *See, e.g.*, FAMM Comment on Proposed Amendments (March 3, 2025) (quoting *United States v. Diaz*, No. 11-cr-812-2, 2013 WL 322243, at *10 (E.D.N.Y. Jan 28, 2013).
[8] USSC, 2025 Reason for Amendments at 9 (Apr. 30, 2025).
[9] *Id.*
[10] *Id.* at 10.
[11] USSC*, Fifteen Years of Guideline Sentencing: An assessment of how well the federal criminal justice system is achieving the goals of sentencing reform* at 49 (Nov. 2004) (emphasis added), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-andsurveys/miscellaneous/15-year-study/15_year_study_full.pdf.

attempted to address issues with §2D1.1.[12] And often, those amendments were made retroactive.[13]

Despite these changes, low-level drug defendants continue to be treated at sentencing as among the most culpable because of the quantity of drugs for which they may be responsible. Subpart 1 of the amendment would provide needed relief to individuals who already qualified for the mitigating role adjustment but whose base offense levels remain stubbornly high. These inflated base offense levels contribute significantly to the overall lengthy sentences that low-level drug defendants ultimately serve. Such overly punitive sentences often do not fit the purposes of punishment, particularly for the population eligible for a mitigating role reduction.[14] Unfortunately, the mitigating role adjustment fails to correct unduly long sentences. Correcting this problem will also address disparities observed in how judges treat low-level defendants associated with large drug quantities. Although judges rely on the drug guidelines (resulting in these high sentences), there are also many judges who vary [15]

As such, the purpose of this amendment squarely supports retroactivity. Going forward it will help drug guideline sentences more accurately reflect someone's low-level of culpability and make the guidelines more useful and relevant. Looking back, it will permit judges to revisit and recalibrate outdated sentences equipped with a better measure of the defendant's role in the offense.

*b. The Impact of Retroactivity is Significant and Justifies Retroactive Application of Subpart 1 to Part A*

According to the Commission's impact report, approximately 650 people sentenced using USSG §2D1.1 and §3B1.2 would have a lower guideline range if Subpart 1 of Part A were made retroactive.[16] This number is meaningful, but not overwhelming. Consequently, concerns that the Department of Justice is likely to raise about disrupting the finality of drug trafficking sentences are simply overstated. We are talking about a small fraction of the population. The relatively small number, however, does not in any way undermine the *impact* that retroactivity could have on people, their loved ones, and on the larger criminal justice system.

For starters, the Commission estimates that if the amendment were made retroactive, 67 people would be eligible for immediate release.[17] In three years, an estimated 450 more people

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[12] *See, e.g.*, USSC App. C, Amend. 662 (Nov. 1, 2003); USSC App. C, Amend. 713 (Nov. 1, 2007); USSC App. C, Amend. 788 (Nov. 1, 2014).
[13] *See id.*
[14] USSC, *Proposed Amendments on Drug Offenses, Data Briefing*, (2025) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf.
[15] *Id.*
[16] USSC, *Retroactivity Impact Analysis of Certain 2025 Amendments* (May 15, 2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2025-amendments/2025_Amdts-Retro.pdf.
[17] *Id.* at 13.

would be eligible for early release.[18] The people who might be eligible for early release are more than just a number. These are family members, people who will have demonstrated rehabilitation, people who have loved ones counting the days until they walk out of the prison doors. They are people the Commission has determined are highly likely to have served more time than necessary, given their low-level of involvement in the drug trafficking offense. The Commission should never lose sight of the human faces behind the data.

Impact is measured not just by the number of people affected, but also the significance of the reduction from a guideline perspective. In the majority of cases under Subpart 1 (448, or 68.9%), the base offense would be lowered by two levels. In guideline terms, two levels is weighty. Under §2D1.1, the Commission adds two levels to an offense for conduct including: possession of a dangerous weapon;[19] use of violence;[20] distribution of drugs in a prison like setting;[21] maintaining a premises for the purpose of manufacturing a controlled substance,[22] among others. Two level enhancements bear real significance in the guidelines. Consequently, that most people would be subject to at least a two-level reduction (some people even more than two levels) demonstrates that the guideline change is impactful.

Applying this amendment retroactively would also help to alleviate the racial burden on communities disproportionately impacted by drug sentencing. The Commission well knows that Black and Brown communities have borne disparate rates and lengths of sentences. This amendment, if made retroactive, would help alleviate the burden imposed on Hispanic communities, in particular. The Commission estimates that 71.8% of people who may be eligible for a reduction are identified as Hispanic.[23]

During this amendment cycle, the Commission proposed an amendment to help ameliorate unwarranted disparities in sentencing for methamphetamine. Stakeholders and the Commission have recognized that the lengthy meth sentences far exceed those necessary to fulfill the purposes of punishment. The Commission studied the problems germane to methamphetamine sentences.[24] Based on the Commission's report and stories from FAMM members, FAMM supported the Commission's proposal to rid the guidelines of meth disparities.[25] For whatever reason, the Commission was unable to advance that amendment this cycle. But that does not mean it cannot take strides to address meth sentences in other ways. Making Subpart 1 retroactive would help get at the unfair meth sentences. The Commission estimates that nearly 80% of the people who would be eligible for reduced sentences if Subpart 1

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[18] *Id.*
[19] USSG §2D1.1(b)(1).
[20] USSG §2D1.1(b)(2).
[21] USSG §2D1.1(b)(3).
[22] USSG §2D1.1(b)(12).
[23] *Supra* n.16 at 9.
[24] *See generally* USSC, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/researchpublications/2024/202406_Methamphetamine.pdf.
[25] *See supra* n.7 at 8.

were made retroactive are serving sentences for methamphetamine convictions.[26] We do not know whether these convictions are for actual meth, ice, or a mixture of meth. But we do know that the population eligible for a reduced sentence likely received longer sentences than necessary – whether for the meth disparity or for the low-level involvement they had in the offense. And the Commission now has an opportunity to help address some of these issues affecting low-level meth defendants going forward and retroactively.

Finally, it is also worth considering the impact of *not* adopting retroactivity. More people will remain in the custody of the Federal Bureau of Prisons (BOP) longer than the Commission has determined is necessary. BOP simply cannot handle this. It is widely known that the war on drugs swelled the prison population. BOP is chronically understaffed, with crumbling infrastructure, and frequent lockdowns.[27] These problems mean that incarcerated people are serving their sentences under conditions that do not support the purposes of punishment. The Commission has a statutory obligation to consider the impact of its policies on BOP.[28] And it is hard to see how the Commission could, in line with that obligation, oppose a common-sense solution to free certain low-level drug defendants from prison when they have completed the term the Commission has crafted to better reflect individual culpability.

*c. The Ease of Administrating Subpart 1 of Part A Weighs in Favor of Retroactivity*

As mentioned above, only about 1% of people serving drug trafficking sentences are even eligible for a reduced sentence under this Subpart 1. Thus, the burden on courts will not be significant. Prior retroactive amendments have made far more people eligible for a reduced sentence.[29] Most recently, the Commission approved retroactive application of Amendment 821, making an estimated 11,495 people eligible for a reduced sentence under Part A of Amendment 821.[30] Some stakeholders argued that this number would make retroactivity too difficult to administer and would impose too great a burden on the courts.[31] And yet, the Commission voted to make the amendment retroactive because it was the right thing to do. And the system was able to absorb motions brought under § 3582(c)(2). Retroactivity of Subpart 1, with 650 people eligible, pales in comparison.

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[26] *Supra* n.16 at Tbl 4.
[27] FAMM Comment to the Commission on Issue for Comment Re: Fentanyl and Fentanyl Analogues at 6 (May 1, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202505/90FR8840_comment.pdf.
[28] 28 U.S.C. § 994(g).
[29] *See supra* n.12.
[30] USSC, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment at 9 (May 15, 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.
[31] *See* Comments submitted by the Criminal Law Committee and Department of Justice regarding retroactivity (June 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf.

Moreover, retroactivity of Subpart 1 of Part A can be easily applied. There are two primary factors that need to be identified in an individual's case: (1) whether the person received a §3B1.2 mitigating role reduction; and (2) whether the person's base offense level was above 30. The application from there on is straightforward. Depending on whether the person received a 2- or 4- level reduction and determining the base offense level at the time of sentencing, the court would simply impose a new base offense level cap. This is a fairly objective amendment and does not require a lot of additional fact finding or subjective analysis.

In conclusion, FAMM supports retroactivity of Subpart 1 of Part A of the drug trafficking amendment when evaluated in light of the purpose of the amendment, its impact, and ease of administration, and because it is only right to recalibrate unduly long sentences for low-level traffickers.

II. FAMM supports retroactivity for Subpart 2 of Part A

A few months ago, FAMM submitted comments to the Commission urging an expanded definition of "low-level traffickers" and urged that people who qualified be eligible for a lower offense level.[32] We have heard from our members how the guidelines do not currently account for important circumstances that may demonstrate the diminished culpability of a low-level trafficker. Circumstances such as the manipulation of an abusive partner, an individual's own substance abuse, or the lack of significant compensation, contrast with the roles or position of more culpable drug traffickers. We are thrilled that the Commission listened and included a new definition for low-level traffickers that includes these considerations while also allowing courts to assess each individual's particular circumstances.

We understand that the Commission was unable to identify the specific impacts of retroactivity of this amendment. We agree wholeheartedly with the analysis submitted by the Federal Public and Community Defenders regarding the purpose of the amendment, impact, and administrability of Subpart 2.

[32] *Supra* n.7 at 6-7.

## III. Conclusion

FAMM appreciates the opportunity to weigh in on this critical issue. We stand firm in our belief that sentences should reflect the Commission's best assessment of an appropriate guideline range, and that the evolution in sentencing knowledge should benefit incarcerated people. They deserve the chance to petition for the reduced sentence. We urge the Commission to make Part A retroactive for all the reasons discussed above and in the comments submitted by the Federal Defenders.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Free Da Gang LLC

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am writing to urge that the Commission vote to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For many years, the Commission has heard from stakeholders that the drug guidelines, largely driven by drug quantity, often result in sentences that are greater than necessary. The Commission's data supports this criticism. The 2025 amendments will reduce the sentences for certain future drug defendants, resulting in more fair guideline ranges. But many people are serving lengthy prison sentences based on the old calculation. There is no reason to deny the court a chance to reassess their sentences in light of the mitigating role amendments.

Welcoming our community members and loved ones home a little early will have a tremendous impact on people in prison and those of us on the outside who count down the days until their release.

Allowing people to seek a reduced sentence based on the changes that the Commission made will also help ameliorate decades-long injustices in the drug guidelines.

We urge you to make these amendments retroactive.

Sincerely,
Free Da Gang LLC

fwd.us

June 2, 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

**Re: Retroactive Application of Parts A and B of the Circuit Conflicts Amendment, and Subparts 1 and 2 of Part A of the Drug Offenses Amendment**

Dear Judge Reeves:

FWD.us is a bipartisan advocacy organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, FWD.us is committed to addressing America's incarceration crisis, eliminating racial disparities, expanding opportunities for people and families impacted by the criminal justice system, and advancing safe and effective reforms.

We write today to urge the Sentencing Commission to exercise its authority under 28 U.S.C. § 994(u) to apply Parts A and B of the Circuit Conflicts Amendment ("Circuit Conflicts Amendment"), and Subparts 1 and 2 of Part A of the Drug Offenses Amendment ("Drug Offenses Amendment") retroactively. Retroactive application of these amendments (1) builds on federal courts' proven success in implementing retroactive changes to the Guidelines; (2) strengthens public safety; and (3) reaffirms the Commission's commitment to fairness and consistency.

Part A of the Circuit Conflicts Amendment resolves the circuit split over the application of the enhancement for physically restraining someone during the commission of a robbery under §2B3.1(b)(4)(B) by clarifying that the enhancement only applies when a person's movement is restricted through physical contact or confinement. Part A also revises §2B3.1(b)(2)(B) to ensure the 6-level enhancement for when a firearm is "otherwise used"[1] during a robbery is applied consistently across courts under a uniform definition of the conduct. Similarly, Part B of the Circuit Conflicts Amendment resolves conflicting interpretations among circuit courts on whether a traffic stop qualifies as an "intervening arrest" under §4A1.2(a)(2) for purposes of

[1] *See* USSG §2B3.1., *Robbery*, https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?APP_GL_ID=%C2%A72B3.1

assigning criminal history points by clarifying that it should not. Together, Parts A and B of the Circuit Conflicts Amendment ensure the fair and uniform application of the Guidelines by resolving inconsistencies in their application.

Subpart 1 of Part A of the Drug Offenses Amendment revises §2D1.1(a)(5) by setting new mitigating role caps where a person receives an adjustment under §3B1.2, while Subpart 2 creates a new special instruction in §2D1.1(e) to ensure a broader and consistent application of §3B1.2. Combined, these two amendments more accurately account for the culpability of individuals performing low-level functions in drug trafficking offenses and help prevent unnecessarily long sentences for these individuals.

The Circuit Conflicts Amendment and Drug Offenses Amendment reflect the Commission's commitment to fair, consistent, and evidence-driven federal sentencing. These amendments correct inconsistencies in the application of the Guidelines and reduce sentences without compromising public safety. Applying these amendments retroactively is a necessary step toward fairer and consistent federal sentencing.

## I. Federal Courts' Proven Success in Implementing Amendments Sets a Strong Precedent for the Successful Retroactive Application of the Circuit Conflicts Amendment and Drug Offenses Amendment

In reaching its decision on whether to apply amendments retroactively, the Commission must consider, among other things, "the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range."[2] Over the past 15 years, federal courts have effectively implemented several retroactive changes to the sentencing guidelines that have reduced federal prison terms, many of which potentially impacted a significantly larger number of people than the current amendments.

Prior examples of the federal courts' proven track record of implementing retroactive changes demonstrate that the Circuit Conflicts Amendment and Drug Offenses Amendment can be applied retroactively without massive disruptions to the operations of the federal court system.

- **2007 Crack Minus Two Amendment:** In 2007, the Commission reduced the recommended sentences for crack cocaine offenses across the board and made the changes retroactive, allowing incarcerated people to petition courts for a reduced sentence. By June 2011, federal courts had granted 16,511 of the 25,736 motions for a reduced sentence.[3]

[2] *See* USSG §1B1.10, *Background*, https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?app_gl_id=%C2%A71B1.10 .
[3] United States Sentencing Commission [hereinafter "U.S.S.C.], "Preliminary Crack Cocaine Retroactivity Data Report," p.4, 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

- **2010 Fair Sentencing Act Guideline Amendment:** The Commission amended the Guidelines in 2010 to incorporate the reduced statutory penalties for crack cocaine offenses in the Fair Sentencing Act of 2010 and made these changes retroactive the following year. By October 2014, courts granted 7,748 of the 13,990 retroactivity motions.[4]

- **2014 Drugs Minus Two Amendment:** In 2014, the Commission adopted the Drugs Minus Two Amendment that reduced the base offense level derived from the Drug Quantity Table for all drug quantities across all drug types and voted unanimously to make the amendment retroactive. According to the Commission's data, as of September 2020, federal courts had granted 31,908 of 50,998 retroactivity motions.[5]

- **2023 Criminal History Amendment:** In August 2023, the Commission voted to make Parts A and B of the 2023 Criminal History Amendment retroactive, and its implementation has proceeded smoothly. According to the most recent data from the Commission, courts have decided on 25,014 motions as of December 31, 2024, granting 38% of Part A motions[6] and a third of Part B motions.[7] A total of 8,958 people have received reduced sentences pursuant to these amendments.[8]

Again and again, federal courts have implemented retroactive changes to the Guidelines. There is no reason to think courts cannot do the same with the current amendments. The Commission's impact analysis on parts of the Circuit Conflicts Amendment and Drug Offenses Amendment shows that the number of people eligible for sentence modification would be much smaller compared to the examples highlighted above. According to the Commission, 650 individuals would be eligible to seek a sentence modification if Subpart 1 of Part A of the Drug Offenses Amendment was applied retroactively, and a maximum of 1,063 individuals may seek a sentence modification if Part A of the Circuit Conflicts Amendment was applied retroactively.[9] Though courts may need to perform some additional fact-finding to determine if an individual qualifies

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[4] U.S.S.C., "Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment," p.2, March 2018, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf

[5] U.S.S.C., "2014 Drug Guidelines Amendment Retroactivity Data Report," p.4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf

[6] U.S.S.C., "Part A of the 2023 Criminal History Amendment Retroactivity Data Report," p.4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202502-CH-Retro-Part-A.pdf

[7] U.S.S.C., "Part B of the 2023 Criminal History Amendment Retroactivity Data Report, p.4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202502-CH-Retro-Part-B.pdf

[8] U.S.S.C., supra note 6, at p. 4 and U.S.S.C., supra note 7, at p. 4

[9] U.S.S.C., "Retroactivity Impact Analysis of Certain 2025 Amendments," p. 7, 15, May 2025, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2025-amendments/2025_Amdts-Retro.pdf

for Subpart 2 of Part A of the Drug Offenses Amendment and Part B of the Circuit Conflicts Amendment, federal courts are well-equipped to do so.

## II. Retroactive Application of the Circuit Conflicts Amendment and Drug Offenses Amendment will Reduce the Federal Prison Population without Compromising Public Safety

Evaluations of past policy changes that have safely reduced federal prison sentences offer the strongest precedent for the retroactive application of the current amendments. Legislative reforms like the First Step Act and the CARES Act, as well as retroactive application of changes to the Guidelines, have shortened prison terms for thousands of people in federal prisons and allowed many to return to their families and communities without compromising public safety.

Again, because there are several examples of retroactive sentencing reductions, there is robust data showing that people can be released from prison early without a difference in recidivism rates compared to people who serve their full prison term.

- **First Step Act:** According to the Federal Bureau of Prisons (BOP), as of January 2024, 44,673 individuals have been released earlier than their original release date under the First Step Act, which was signed into law in 2018.[10] The recidivism rate among people released early under this law was 9.7%,[11] much lower than the one, two, and three-year general recidivism rates among everyone released from the BOP in FY 2018.[12] One study even found that the recidivism rate was 55% lower among people released under the First Step Act than a comparable group with similar risk levels who were released before the law was enacted.[13]

- **CARES Act:** Congress passed the CARES Act in 2020 in response to the COVID-19 pandemic, which, among many other measures, authorized the BOP to place eligible individuals in home confinement earlier in their sentence than previously allowed. As of May 2023, 13,204 people have been released to home confinement, and 99.8% had not been rearrested for any new offenses.[14] According to the BOP's own study, those released earlier to home confinement under the CARES Act were actually less likely to recidivate

[10] U.S. Department of Justice, "First Step Act Annual Report," p.40, June 2024, https://web.archive.org/web/20250416012352/https://www.ojp.gov/pdffiles1/nij/309223.pdf
[11] Id., p. 41
[12] National Institute of Justice, "2022 Review and Revalidation of the First Step Act Risk Assessment Tool," p.12, March 2023, https://www.ojp.gov/pdffiles1/nij/305720.pdf?first-step-act The one-, two-, and three-year general recidivism rates of people released from BOP custody in FY 2018 were 28.5%, 40.6%, and 46.2%, respectively.
[13] Council on Criminal Justice, "First Step Act: An Early Analysis of Recidivism," December 2024, https://counciloncj.foleon.com/first-step-act/fsa/
[14] Senator Cory Booker, "CARES Act Home Confinement Three Years Later," p.4, June 2023, https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf

one year after release from prison compared to similarly situated individuals released to home confinement without the CARES Act.[15]

- **Crack Minus Two Amendment:** The Crack Minus Two Amendment shortened sentences for 16,511 people by an average of 26 months.[16] When the Commission evaluated the recidivism rate of people who received a reduced sentence as a result of the retroactive application of the Crack Minus Two Amendment, it found that it was similar to the rate for people who had been released before the amendment was adopted.[17]

- **Fair Sentencing Act Guideline Amendment:** The Commission estimated that retroactive application of the FSA Guideline Amendment would save 14,333 prison bed-years.[18] In later evaluating the impact of those reductions, the Commission found that the recidivism rate was nearly identical among people who were released early through the retroactive application of the FSA Guideline Amendment and those who served their full term.[19]

- **Drugs Minus Two Amendment:** The Drugs Minus Two Amendment reduced sentences for nearly 31,908 in federal prison by an average of 26 months.[20] A study conducted by the Commission found, yet again, that people who were released early as a result of the Drugs Minus Two Amendment were not any more likely to recidivate than a comparable group who served their full sentence.[21]

These examples provide the clearest evidence that the Circuit Conflicts and Drug Offenses Amendments can be applied retroactively without compromising public safety. These studies are also in line with a growing body of research over the last twenty years that has made clear that the marginal benefit of lengthier sentences is minimal at best—and counterproductive at worst.[22]

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[15] Federal Bureau of Prisons, "CARES Act: Analysis of Recidivism," March 2024, https://www.bop.gov/resources/research_projects/published_reports/recidivism/202403-cares-act-white-paper.pdf
[16] U.S.S.C., supra note 3, at p. 4, 11
[17] U.S.S.C, "Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment," p.3, May 2014, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf
[18] U.S.S.C., "The Fair Sentencing Act of 2010 Policy Profile," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_FSA_2010.pdf
[19] U.S.SC., "Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment," p.3, March 2018, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf
[20] U.S.S.C., supra note 5, at p. 4, 10
[21] U.S.S.C., "Retroactivity & Recidivism: The Drugs Minus Two Amendment," p.1, July 2020, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf
[22] *See* Laura Bennett and Felicity Rose, Center for Just Journalism and FWD.us, "Deterrence and Incapacitation: A Quick Review of the Research," https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research; Roger Pryzybylski, et al., "The Impact of Long Sentences on Public Safety: A Complex Relationship," November 2022, https://councilonci.org/wp-content/uploads/2024/05/Impact-of-Long-Sentences-on-Public-Safety.pdf

There is a growing consensus among researchers that incarceration does not reduce the chances of reoffending, and in fact, it can actually increase the likelihood of returning to jail or prison in the future.[23] Retroactively applying these amendments is in the interests of justice and public safety.

## III. Applying the Amendments Retroactively Furthers the Commission's Commitment to Principled, Evidence-Based Policymaking

Retroactive application aligns with the Commission's stated mission to "establish sound and equitable sentencing policies and practices"[24] by ensuring that all individuals are subject to the same updated Guidelines in line with the latest data and research, regardless of when they were sentenced. By applying Parts A and B of the Circuit Conflicts Amendment and Subparts 1 and 2 of Part A of the Drug Offenses Amendment to those who've already been sentenced, the Commission reaffirms its commitment to fairness and consistency.

As the Commission has done many times, it should continue to do everything in its power to correct past sentencing disparities by applying the Circuit Conflicts and Drug Offenses Amendments retroactively. Given the Commission's decision to adopt these changes prospectively, retroactive application would prevent many incarcerated people from continuing to serve outdated sentences that no longer reflect current evidence, and as highlighted above, these sentence reductions will not compromise public safety.

Thank you for the opportunity to submit written comments and for considering our thoughts.

Sincerely,

Elissa Johnson
Vice President, Criminal Justice Campaigns
FWD.us

[23] Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson, and Francis T. Cullen, "Custodial Sanctions and Reoffending: A Meta-Analytic Review," Crime and Justice, 2021, https://www.journals.uchicago.edu/doi/abs/10.1086/715100?journalCode=cj; Charles E. Loeffler and Daniel S. Nagin, "The Impact of Incarceration on Recidivism," Annual Review of Criminology, 2022, https://www.annualreviews.org/doi/abs/10.1146/annurev-criminol-030920-112506

[24] U.S.S.C.," Overview of the United States Sentencing Commission," https://www.ussc.gov/sites/default/files/pdf/about/overview/2023_About-Us-Trifold.pdf

June 2, 2025

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

Re: Issue for Comment on Retroactivity of Drug Offenses Amendment, Part A, Subparts 1 and 2

Dear Judge Reeves:

NACDL is pleased to respond to the Commission's request for comment on the retroactive application of the Drug Offenses Amendment, Part A, Subpart 1 (which reduces base offense levels for people previously granted a mitigating role reduction pursuant to USSG §3B1.2) and Subpart 2 (which adds an instruction to encourage broader application of the mitigating role reductions in drug cases). NACDL enthusiastically endorses retroactive application for both provisions without limitation. In addition to the foregoing, NACDL agrees with the analysis and positions set forth in comments submitted by the Federal Defenders and joins in the Federal Defenders' comments with respect to the Commission's other requests.

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With retroactivity, hundreds or potentially thousands of incarcerated people will be eligible for release over the next several years. Without it, these same people will serve unnecessarily and disproportionately lengthy terms of imprisonment at enormous expense to the prisons that house them and to the integrity of the criminal justice system that needlessly detains them. By shortening the sentences of those drug offenders who occupy supportive roles, the Commission is enacting a required improvement identified in the Commission's own studies, stakeholders' critiques, and the congressional mandate that the drug guidelines appropriately reserve the highest sentences for the most culpable. People who will be eligible for reduced sentences pose little danger to the community, and because any reduction is accompanied by a judge's separate individual risk assessment,[1] their eligibility for release does not raise public safety concerns. Although the number of potentially eligible inmates for reduced sentences under both parts of the amendment may be significant, it is still modest compared to the number of incarcerated individuals who qualified for sentence reductions following previous retroactive amendments. The Bureau of Prisons, the United States Probation Office, the judiciary, and counsel on both

[1] *See* USSG §1B1.10, cmt. n. 1(B) (district court must apply 18 U.S.C. § 3553(a) factors as well as a separate "Public Safety Consideration" before deciding to grant any reduction and in determining the extent of the reduction).

sides are competent and equipped to implement retroactive application of the amendment.

The Commission has set forth its policy statement regarding retroactive application of amendments in §1B1.10 of the Guidelines and has specifically identified thirty amendments that may be applied retroactively.[2] The Commission has explained that in selecting these particular amendments, the Commission considered, among other 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 under subsection (b)."[3] Examination of the Drug Offenses Amendment, Part A, Subparts 1 and 2, with regard to these factors unequivocally establishes the just conclusion that they be applied retroactively.

**A. Purpose**

Part A, Subpart 1, of the Commission's Drug Offenses Amendment amends the mitigating role provisions in §2D1.1(a)(5) to further lower the base offense levels for individuals who receive a mitigating role adjustment under §3B1.2. The Commission's stated reason for the Amendment was to "ensure appropriate penalties commensurate with an individual's function in a drug trafficking offense" by reducing offense levels for people whose participation in the offense is less culpable.[4]

Part A, Subpart 2, of the amendment adds a new special instruction at §2D1.1(e) to encourage broader use of §3B1.2 in these cases by providing that an adjustment under §3B1.2 is generally warranted if the defendant's primary function in the offense was performing a low-level trafficking function.[5] As the Commission explained, the purpose of this amendment is to redress the Commission's findings that its previous efforts in 2015[6] to increase use of the mitigating role adjustment had not been effective. In fact, "Commission data show that when §3B1.2 is applied in §2D1.1 cases, the vast majority of these cases receive only a 2-level reduction; 3-and 4-level reductions are rarely applied" and, in addition, "Commission data shows variations across districts in application of §3B1.2 to §2D1.1 cases."[7]

Although there has been near-consensus for decades that quantity-driven drug Guidelines routinely overstate criminal culpability,[8] the Commission is only now emphasizing that the role adjustment should be more liberally and frequently applied and imposing a cap based on role in

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[2] *See* USSG §1B1.10(c).
[3] *Id.* cmt. background.
[4] Reader Friendly Version of Final 2025 Amendments to the Sentencing Guidelines at 9, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202505_RF.pdf.
[5] USSC's 2025 Amendments to the USSG, at 10 (Apr. 30, 2015).
[6] §3B1.2 (Mitigating Role) was amended in 2015 after a Sentencing Commission study "found that mitigating role is applied inconsistently and more sparingly than the Commission intended." *See* United States Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014). Moreover, in drug cases, the Commission's study "confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions." *Id.*
[7] *Id.*
[8] *See, e.g.*, *United States v. Johnson*, 379 F. Supp. 3d 1213, 1220-22 (M.D. Ala. 2019) ("the offender's role in the crime is more useful for determining culpability than the quantity of drugs involved"); *United States v. Diaz,* No. 11-CR-00821-2 JG, 2013 WL 322243 at *13 (E.D.N.Y. Jan. 28, 2013) (citing, *inter alia,* 1994 Department of Justice report).

the offense, limiting the effect of overall drug quantity where a person's role is reduced. This commonsense notion cries out for retroactive application to correct historic sentencing injustices. Judges who felt constrained by high Guidelines sentencing ranges imposed lengthy terms of imprisonment on low-level participants in the drug trade, many of whom are victims themselves. The purpose of the new Guidelines can only be achieved by applying them retroactively so that men and women *already* serving lengthy terms, whose role in the crime was limited, can benefit from the change to achieve proportionality in 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 that failed to reflect their actual criminal culpability.

## B. Impact

On May 15, 2025, the Commission's Office of Research and Data submitted its Retroactivity Impact Analysis of the 2025 Drug Offenses Amendment.[9] In it, the Commission estimated that 650 individuals will be eligible to seek a sentence reduction if Subpart 1 is applied retroactively, yielding an average Guidelines reduction of 12 months.[10] These individuals would be released over a period of six years.[11] The Commission states that it cannot estimate the impact of Subpart 2 because it does not regularly collect information on a defendant's primary function in a drug trafficking offense.[12] The Commission notes that approximately 50,000 currently incarcerated drug offenders did not receive a mitigating or aggravating role adjustment, suggesting that 50,000 cases would need to be reviewed if the measure applies retroactively.[13] But distinguishing from those thousands of cases the ones that involve only low-level conduct will have a uniformly positive effect, allowing shorter sentences for deserving incarcerated people while allowing the BOP to focus on those who are more culpable.

Additionally, retroactive application serves the Commission's important objective of minimizing the likelihood that prison populations exceed capacity. As of May 2025, more than 156,000 individuals were incarcerated in the Federal Bureau of Prisons and the numbers have been *increasing* since the 2020 COVID pandemic.[14] With fewer inmates in February 23, 2023, the Bureau of Prisons was operating at six percent above rated capacity.[15] In addition to assisting incarcerated people and their families, retroactive application of the role amendments could substantially alleviate the strains of overcrowding in BOP facilities.

Moreover, retroactive application of the drug role amendments comes with no risk of reducing public safety. The Commission's general studies on the recidivism rates of all federal prisoners who have been released as a result of retroactive application of other amended guidelines have confirmed that there is no statistically significant difference between the rearrest rates for offenders who received a sentence reduction under prior amendments and offenders who had

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[9] *See* Retroactivity Impact of 2025 Drug Offenses Amendment.
[10] *Id.* at 7.
[11] *Id.*
[12] *Id.* at 14.
[13] *Id.*
[14] https://www.bop.gov/about/statistics/population_statistics.jsp
[15] U.S. Dep't of Justice, Federal Prison System, FY 2024 Performance Budget Congressional Submission, 12. *See also* OIG, Audit of the Federal Bureau of Prisons' Efforts to Maintain and Construct Institutions (2023), https://tinyurl.com/59h3dync.

served their full sentences before the guideline reductions took effect.[16] In these circumstances, risk of serious re-offense will be even lower than with other amendments because the only people released will, by definition, be low-level participants in the crimes at issue. Accordingly, the overwhelmingly positive effects of retroactivity of these provisions on individuals and the federal prison system at large comes with virtually no risk of negatively impacting public safety.

## C. Implementation

As to both amendments, the significant benefits of retroactive application outweigh the costs of implementing these changes retroactively. While implementation of a retroactive amendment necessarily requires resources, here we submit the costs are modest and manageable. Retroactive implementation of Subpart 2 would require the review of 50,000 cases (most likely handled by a screening review of the presentence reports to determine the role the defendant played in the offense), but experience has shown that such reviews can be conducted expeditiously through district committees comprising prosecutors, federal defenders and probation officers.[17]

In comparison, retroactive application of the last three significant amendments to the drug guidelines qualified several tens of thousands of inmates for potential sentence reductions in the first few years. For example, in the first three and a half years following retroactive application of the 2007 crack cocaine amendment, federal district courts processed 25,515 motions (almost one and a half the projected number of all potential applications under retroactive application of Part A and Part B, Subpart 1 of this year's amendment).[18] In 2014, the Commission's unanimous vote to apply retroactive treatment to the Drugs Minus Two Amendment qualified an estimated 46,290 inmates for judicial review of their sentences (nearly two and a half times more than Part A and Part B, Subpart 1 eligibility).[19] Notably, despite the volume of eligible inmates, retroactive application of the amended drug guidelines has been smooth and well-coordinated among the courts, probation officers, U.S. Attorney offices, and the defense community. The system has likewise seamlessly processed retroactivity applications under the 2023 Criminal History Amendments.

In short, the factors the Commission considers when selecting amendments for retroactivity—the purpose of the amendment, the magnitude of the change made by the amendment, and the difficulty, or lack thereof, of applying retroactivity—all weigh in favor of retroactive application of both subparts of Part A of 2025's Drug Offenses Amendment. Retroactivity is fundamentally fair and a well-supported, sound sentencing policy.

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[16] *See, e.g.,* U.S. Sent'g Comm'n, *Retroactivity and Recidivism, The Drugs Minus Two Amendment* 1, 6 (July 2020), available https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

[17] *See* Caryn Davis, *Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782*, 10 Fed.Cts.L.Rev. 39, 71, 74 (2018).

[18] U.S. Sent'g Comm'n, News Release, U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively, June 30, 2011, https://www.ussc.gov/about/news/press-releases/june-30-2011.

[19] U.S. Sent'g Comm'n, News Release, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences, July 18, 2014, https://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf.

**D. Finality**

Lastly, we wish to add a comment about finality. While we acknowledge the benefits of finality to victims and other stakeholders in the criminal justice system, research has shown that long sentences do not deter.[20] It is more costly to incarcerate people than it is to release them and provide support. For the clients of our members, the possibility of a retroactive reduction in sentence provides hope, which translates into good conduct in prison and a powerful inventive to seek rehabilitation. Especially for clients who receive below-Guidelines sentences in the first place, the judge's discretion in evaluating the sentence under the newly calculated Guideline will typically hinge on the person's conduct while incarcerated, which strongly motivates these clients to achieve provable steps towards rehabilitation while imprisoned.

Finally, a victim's need for closure is real and deserving of respect, but broader humanitarian and societal interests should not be overlooked. As we wrote in our report in support of our model second look legislation: "Part of being human is the capacity to make conscious choices, including to adopt new paths in life, to admit we were wrong, to forgive. When society consigns prisoners to long sentences – often decades-long sentences – without any recourse, it undermines not only their humanity, but that of victims and others affected by the sentence. and our own. Making these amendments retroactive is to acknowledge and, where appropriate, reward an incarcerated person's personal transformation, thereby consciously achieving the most important purpose of criminal sentencing."[21]

Respectfully submitted,

JaneAnne Murray
Chair, NACDL Sentencing Committee

Zachary Margulis-Ohnuma
Member, NACDL Sentencing Committee

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[20] Michael Tonry, *Remodeling Am. Sent'g: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 Criminology & Pub. Pol'y 503, 507 (2014).
[21] NACDL Report, Second Look = Second Chance: Turning the Tide Through NACDL's Model Second Look Legislation at 18 (2021).

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Our Brothers Keepers

## Topics:

Retroactivity

## Comments:

We at Our Brothers Keepers assist returning citizens after incarceration. My experience has been that long prison terms destroy lives. We, working for justice, must consider the impact on communities, families, and individuals of lengthy prison terms. There is no rehabilitation. No moral grounds on which to stand. No one wins except the share holders who make money off of incarcerating human beings.

Submitted on: May 28, 2025

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

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Alison Siegler
*Clinical Professor of Law*
*Founding Director, Federal Criminal Justice Clinic*

June 2, 2025

The Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
*Via Public Submission Portal*

**Re: Retroactivity of Amendments to the Drug Sentencing Guidelines**

Dear Judge Reeves, Vice Chairs, and Commissioners,

In our original Comment and Reply Comment, we urged the Commission to adopt (with modifications) Part A of the Proposed Drug Amendments. We respectfully submit this Comment to urge the Commission to give the promulgated version of this Amendment retroactive effect.

The Commission should apply Part A of the Drug Offenses Amendment retroactively to previously sentenced defendants. This will best achieve the Commission's goal of preventing unwarranted sentencing disparity.

Section 1B1.10(a) of the Sentencing Guidelines states that "the court may reduce the defendant's term of imprisonment" where the Guideline range applicable to that individual has subsequently been lowered as a result of an amendment to the Guidelines.[1] As enumerated in subsection (d), over thirty amendments already apply retroactively,[2] including the 2023 Criminal History Amendment that was adopted less than two years ago.[3]

Giving retroactive effect to this Amendment would not result in an automatic reduction. To the contrary, courts are expected to look at individuals holistically and consider all relevant factors found in § 3553(a).[4] According to the Commentary to § 1B1.10, the resentencing court should consider the nature and seriousness of the danger to the community when determining whether a reduction is warranted.[5]

[1] U.S. SENT'G GUIDELINES MANUAL § 1B1.10(a) (U.S. SENT'G COMM'N 2024).
[2] *Id.* § 1B1.10(d).
[3] *See* U.S. SENT'G GUIDELINES MANUAL § 4A1.1 (U.S. SENT'G COMM'N, amended 2023).
[4] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.10(a) cmt. n.1(B); *see also* 18 U.S.C. § 3582(c)(2) (explaining that the court "*may* reduce the term of imprisonment, after considering the factors set forth in section 3553(a) . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission" (emphasis added)).
[5] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.10(a) cmt. n.1(B).

### A. Giving Retroactive Effect to This Amendment Is in Line with Past Practice and Will Not Put the Public at Risk

The Commission has previously applied similar drug amendments retroactively without any increase in recidivism.[6] For example, the Fair Sentencing Act Amendment (Amendment 750) reduced the statutory penalties for crack cocaine offenses (among other things) and was applied retroactively. In a report studying the recidivism rates of individuals over a three-year period following their release, the Commission found that the "FSA Retroactivity Group" and the "Comparison Group" had a "virtually identical" recidivism rate.[7]

Similarly, the Drugs Minus Two Amendment (Amendment 782) reduced by two the base offense levels assigned by the Drug Quantity Table across *all* drug types. The Commission unanimously voted to give retroactive effect to that amendment. Between November 1, 2015, and September 30, 2020, courts granted nearly 31,000 retroactivity motions, resulting in an estimated average sentence reduction of 17.2% (from 146 down to 121 months' imprisonment).[8] More importantly, in the wake of those releases, the Commission found that "[t]here was no statistically significant difference in the recidivism rates of offenders released early pursuant to retroactive application of the Drug Minus Two Amendment and a comparable group of offenders who served their full sentences."[9]

Finally, the Commission also voted unanimously to apply the two-level reduction in the 2007 Crack Cocaine Amendment retroactively and similarly found that that such retroactive sentence reductions did not result in higher recidivism rates.[10]

### B. Applying Part A of the Drug Offenses Amendment Retroactively Is Consistent with the § 1B1.10 Retroactivity Considerations

The Commission should also apply Part A of the Drug Offenses Amendment retroactively because doing so is compatible with the three considerations enumerated in the background to § 1B1.10. Specifically, applying the Amendment retroactively is consistent with its purpose, the magnitude of the changes to the resulting Guideline ranges are significant, and determining the amended Guideline ranges is manageable.[11]

**First, applying the changes to the drug Guidelines retroactively advances the purpose of the Amendment.**

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[6] *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1 (U.S. SENT'G COMM'N, amended 2010); U.S. SENT'G GUIDELINES MANUAL § 2D1.1 (U.S. SENT'G COMM'N, amended 2014).
[7] U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 3 (2018).
[8] *See* U.S. SENT'G COMM'N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT tbl.7 (2021).
[9] U.S. SENT'G COMM'N, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 1 (2020).
[10] *See Retroactive Sentence Reductions Don't Increase Recidivism*, U.S. CTS. (July 18, 2014), https://www.uscourts.gov/data-news/judiciary-news/2014/07/18/retroactive-sentence-reductions-dont-increase-recidivism.
[11] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.10(a) cmt. background.

The promulgated Amendment recognizes that the current drug Guidelines result in sentences that are greater than necessary to accomplish the purposes of punishment for offenders who performed low-level trafficking functions because they overemphasize drug type and quantity as a measure of culpability.[12] Applying Part A, Subpart 1's mitigating role cap retroactively furthers the Amendment's purpose of avoiding unwarranted disparities by ensuring not only that *future* offenders encounter consistent sentencing practices, but also that *past* offenders reap the benefits of this important and fundamental change. This same justification applies with equal force to the mitigating role provision for people performing low-level trafficking functions contained in Part A, Subpart 2. If this Amendment is not applied retroactively, the unwarranted disparities relating to mitigating role's historic application in an "inconsistent[] and more sparingly than intended" manner will persist.[13] In addition, equally unwarranted disparities will arise between pre-Amendment sentences and post-Amendment sentences.

**Second, this Amendment should be applied retroactively because of the magnitude of the changes to the Guidelines.**

Applying Part A, Subpart 1 retroactively would affect hundreds of incarcerated individuals. The Commission's Retroactivity Impact Analysis estimates that 650 people currently incarcerated would have a lower Guideline range if Subpart 1 were made retroactive.[14] Further, applying the Amendment retroactively is expected to reduce the average sentence of these individuals by 12 months—an entire year of their lives.[15] And for 32 individuals, retroactive application would reduce their sentences by more than 2 years.[16] In sum, retroactive application of Subpart 1 would save low-level offenders, and society, approximately 7,800 months of prison time.

Determining the effect of applying Subpart 2 retroactively is admittedly more difficult, but there is nevertheless reason to believe that its impact will be similarly significant. The Commission estimates that there are over 62,000 people currently incarcerated in the BOP who were sentenced for a drug trafficking offense.[17] Courts applied a mitigating role adjustment in a paltry 3,697 of these cases, while applying an aggravating role adjustment in 8,756 cases. This suggests that there are just under 50,000 individuals who did not benefit from the application of § 3B1.2 who may be eligible for an adjustment under Subpart 2 if they performed a low-level

[12] *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENT: DRUG OFFENSES, *in* AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY), at 1, 3 (2025) [hereinafter U.S. SENT'G COMM'N, PROMULGATED DRUG AMENDMENTS].
[13] *Id.* at 3.
[14] U.S. SENT'G COMM'N, RETROACTIVITY IMPACT ANALYSIS OF CERTAIN 2025 AMENDMENTS 7 (2025) [hereinafter U.S. SENT'G COMM'N, RETROACTIVITY ANALYSIS].
[15] *Id.* Notably, this 12-month average reduction in Guideline range is substantially greater than the 6-month minimum generally utilized by the Commission when determining retroactive application. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.10(a) cmt. background.
[16] *See id.* at 12, fig.1.
[17] *Id.* at 14.

trafficking function.[18] And there is good reason to believe that many of these individuals did in fact perform low-level functions—after all, as the Commission has recognized, the mitigating role adjustment has been applied "more sparingly than intended."[19]

To take one very discrete example, according to the Commission's Public Data Briefing on this Amendment, there were at least 105 couriers and employees/workers sentenced for methamphetamine trafficking in 2022 who did not receive a mitigating role adjustment.[20] These individuals, and hundreds—if not thousands—of other low-level functionaries, would benefit from the retroactive application of Subpart 2.

There is also reason to believe that the impact of retroactively applying Subpart 2 would be substantial in depth as well as breadth—that is, the impact on these individuals' sentence length would also be significant. The Amendment's presumption of mitigating role corresponds to an at least two-level offense level reduction.[21] This in turn translates into an up to 68-month reduction in prison sentence,[22] or a 47-month reduction for a first-time offender.[23] Further, if retroactively applied in tandem with Subpart 1's mitigating role caps, the effect on sentence length could be even more substantial for certain offenders.

**Third and finally, the administrative burdens of applying Part A retroactively are manageable, which further weighs in favor of retroactive application.**

The change promulgated in Part A, Subpart 1 requires no additional fact-finding to determine the amended Guideline range[24] and would be just as straightforward to apply retroactively as the changes wrought by the Drugs Minus Two Amendment (Amendment 782) and the Crack Cocaine Amendment (Amendment 706), both of which are already included in § 1B1.10(d).

While the change promulgated in Part A, Subpart 2 may require some additional fact-finding, determining whether a particular individual served a low-level trafficking function may be apparent on the face of the indictment, or at most will likely involve questions that were already answered prior to the original sentencing. The Amendment also takes steps to assist courts in determining the appropriate level of reduction by providing examples of functions generally warranting an adjustment, further reducing the burdens of applying Subpart 2 retroactively.[25]

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[18] *Id.* This assumes that individuals who received an aggravating role enhancement under § 3B1.1 would not be eligible for the retroactive application of Subpart 2.
[19] U.S. SENT'G COMM'N, PROMULGATED DRUG AMENDMENTS, *supra* note 12, at 3.
[20] *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS ON DRUG OFFENSES: PUBLIC DATA BRIEFING 13 (2025).
[21] *See* U.S. SENT'G GUIDELINES MANUAL § 3B1.2.
[22] This 68-month reduction would result from moving from offense level 38 to 36 for an individual with a Criminal History Category of V (from a low-end Guideline range of 360 months to 292 months).
[23] This 47-month reduction would result from moving from offense level 38 to 36 for an individual with a Criminal History Category of I (from a low-end Guideline range of 235 months to 188 months).
[24] U.S. SENT'G COMM'N, RETROACTIVITY ANALYSIS, *supra* note 14, at 6.
[25] U.S. SENT'G COMM'N, PROMULGATED DRUG AMENDMENTS, *supra* note 12, at 6.

Finally, if the Commission is concerned about the administrative burdens of retroactive application of Subpart 2, we would recommend limiting its retroactivity to individuals falling within § 2D1.1(e)(2)(B)(i). That is, limit retroactive application to the "lowest level of drug trafficking functions," such as couriers, for whom the new Amendment does not require an inquiry into their motivations or extent of monetary compensation. This would narrow the range of fact-finding for a resentencing court and would ensure that those most deserving of mitigating role reductions still receive the benefits of the Commission's revisions.

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Thank you for considering these views on the retroactivity of the promulgated Drug Offenses Amendment, which are submitted in our individual capacities. Please do not hesitate to reach out with any question or concerns at [redacted].

Sincerely,

Alison Siegler
Founding Director of the Federal Criminal Justice Clinic
Clinical Professor of Law

**Written with:**
Alyssa Fagel, University of Chicago Law School, Class of 2025
Grant Delaune, University of Chicago Law School, Class of 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Jl Angell, Presbyterian

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am writing to urge that the Commission vote to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For many years, the Commission has heard from stakeholders that the drug guidelines, largely driven by drug quantity, often result in sentences that are greater than necessary. The Commission's data supports this criticism. The 2025 amendments will reduce the sentences for certain future drug defendants, resulting in more fair guideline ranges. But many people are serving lengthy prison sentences based on the old calculation. There is no reason to deny the court a chance to reassess their sentences in light of the mitigating role amendments.

Welcoming our community members and loved ones home a little early will have a tremendous impact on people in prison and those of us on the outside who count down the days until their release.

Allowing people to seek a reduced sentence based on the changes that the Commission made will also help ameliorate decades-long injustices in the drug guidelines.

We urge you to make these amendments retroactive.

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Quincy Blair, Counsel

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am writing to urge that the Commission vote to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For many years, the Commission has heard from stakeholders that the drug guidelines, largely driven by drug quantity, often result in sentences that are greater than necessary. The Commission's data supports this criticism. The 2025 amendments will reduce the sentences for certain future drug defendants, resulting in more fair guideline ranges. But many people are serving lengthy prison sentences based on the old calculation. There is no reason to deny the court a chance to reassess their sentences in light of the mitigating role amendments.

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Allowing people to seek a reduced sentence based on the changes that the Commission made will also help ameliorate decades-long injustices in the drug guidelines.

We urge you to make these amendments retroactive.

Sincerely,
Quincy Blair

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Margaret Boyce-Furey, Attorney

## Topics:

Retroactivity

## Comments:

Many, who are charged as a co-conspirator with minimal participation were clueless as to the crimes the main criminals were committing. These people deserve a 2nd chance. I urge the Sentencing Commission to consider their minimal participation & give them another chance at living in society, where they can be Law abiding citizens.

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Sandra Collins, Esquire

## Topics:

Retroactivity

## Comments:

Good Morning U. S. Sentencing Commission:

I support your principle of retroactivity for 2025 proposed reforms.

Sincerely,
Sandra Collins, Esq.

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Alison Flaum, Legal Director

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am writing to urge that the Commission vote to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For many years, the Commission has heard from stakeholders that the drug guidelines, largely driven by drug quantity, often result in sentences that are greater than necessary. The Commission's data supports this criticism. The 2025 amendments will reduce the sentences for certain future drug defendants, resulting in more fair guideline ranges. But many people are serving lengthy prison sentences based on the old calculation. There is no reason to deny the court a chance to reassess their sentences in light of the mitigating role amendments.

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Allowing people to seek a reduced sentence based on the changes that the Commission made will also help ameliorate decades-long injustices in the drug guidelines.

I urge you to make these amendments retroactive.

Sincerely,
Alison Flaum

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Tracy Johnson, Retired - USPS-OIG

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am writing to urge that the Commission vote to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For many years, the Commission has heard from stakeholders that the drug guidelines, largely driven by drug quantity, often result in sentences that are greater than necessary. The Commission's data supports this criticism. The 2025 amendments will reduce the sentences for certain future drug defendants, resulting in more fair guideline ranges. But many people are serving lengthy prison sentences based on the old calculation. There is no reason to deny the court a chance to reassess their sentences in light of the mitigating role amendments.

Welcoming our community members and loved ones home a little early will have a tremendous impact on people in prison and those of us on the outside who count down the days until their release.

Allowing people to seek a reduced sentence based on the changes that the Commission made will also help ameliorate decades-long injustices in the drug guidelines.

We urge you to make these amendments retroactive.

Sincerely,

Tracy Johnson

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Amy Kimpel, Associate Professor of Law

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am writing to urge that the Commission vote to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For many years, the Commission has heard from stakeholders that the drug guidelines, largely driven by drug quantity, often result in sentences that are greater than necessary. The Commission's data supports this criticism. The 2025 amendments will reduce the sentences for certain future drug defendants, resulting in more fair guideline ranges. But many people are serving lengthy prison sentences based on the old calculation. There is no reason to deny the court a chance to reassess their sentences in light of the mitigating role amendments.

Welcoming our community members and loved ones home a little early will have a tremendous impact on people in prison and those of us on the outside who count down the days until their release.

Allowing people to seek a reduced sentence based on the changes that the Commission made will also help ameliorate decades-long injustices in the drug guidelines.

We urge you to make these amendments retroactive.

Sincerely,

Amy Kimpel

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

David Mcmaster, Pastor of Non-Denominational Christian Church and Ministries

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am writing to urge that the Commission vote to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

For many years, the Commission has heard from stakeholders that the drug guidelines, largely driven by drug quantity, often result in sentences that are greater than necessary. The Commission's data supports this criticism. The 2025 amendments will reduce the sentences for certain future drug defendants, resulting in more fair guideline ranges. But many people are serving lengthy prison sentences based on the old calculation. There is no reason to deny the court a chance to reassess their sentences in light of the mitigating role amendments.

Welcoming our community members and loved ones home a little early will have a tremendous impact on people in prison and those of us on the outside who count down the days until their release.

Allowing people to seek a reduced sentence based on the changes that the Commission made will also help ameliorate decades-long injustices in the drug guidelines.

We urge you to make these amendments retroactive.

Sincerely,
David McMaster
Pastor of Christian Ministry

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Deione Wills, Women board

## Topics:

Retroactivity

## Comments:

Please make this retroactive so kids can have their parents home, everyone deserves a second chance!!! God forgive us all of our sins no one perfect!!! I see if they was rapist or murders are big Kingpin Cartel but a lot of these are small Minor drug dealers with nonviolent offense. I'm asking you to find it in your heart to give people a second chance to make this retroactive. God bless.

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Shane Guidry

## Topics:

Retroactivity

## Comments:

Dear Members of the United States Sentencing Commission,

My name is Shane Guidry, and I am writing to express my strong support for the retroactive application of the recent amendments to the Federal Sentencing Guidelines currently under review.

I believe that retroactivity is essential for ensuring fairness, consistency, and justice in our legal system. When the Commission determines that certain sentencing policies were overly harsh or misaligned with evolving legal and societal standards—and corrects them—it is only just that those already serving sentences under outdated guidelines have the opportunity to benefit from those corrections.

Allowing retroactive relief reflects a fundamental principle of equity: that no person should serve a sentence deemed excessive under today's standards simply because they were sentenced at an earlier time. Retroactivity is not about disregarding accountability; rather, it acknowledges that justice evolves and that our system must evolve with it to remain legitimate and humane.

Moreover, retroactive application promotes public confidence in the justice system, reduces unnecessary incarceration costs, and allows for second chances for individuals who have demonstrated growth, rehabilitation, and readiness to return to their communities. In many cases, these individuals are serving sentences that would be substantially shorter if imposed today.

I commend the Commission's efforts to review and reform sentencing policies and strongly urge that these important amendments be applied retroactively. This approach is not only consistent with past practice but is also essential to ensuring that justice is applied fairly and equally to all.

Thank you for considering my perspective.

Sincerely,
Shane and Katie Guidry 5/16/2025 14:39 PM

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Anya Axelrod

## Topics:

Retroactivity

## Comments:

Dear Judge Reeves,

I am writing to urge the Commission to make Subparts 1 and 2 of Part A of the Drug Offenses Amendment retroactive.

My son is currently incarcerated at FPC Duluth for a drug-related offense. He was a young man who got involved in a situation where he was acting under the direction of someone else—someone who ultimately fled the country and was never brought to justice. Because that individual disappeared, my son ended up being held more responsible than he otherwise would have been. Had the true leader been apprehended, the nature of my son's role would have been clearer and more accurately classified as minor.

The mitigating role adjustments in the 2025 amendments would reflect the reality of many such cases, where the individuals serving long sentences were not the masterminds but rather followers, sometimes young and impressionable, who played a lesser role. These changes would bring the guidelines closer to justice—but only if they are made retroactive.

It is painful to know that, under the current system, people like my son remain in prison serving sentences that would be lower if they were sentenced today. Making these amendments retroactive would allow the courts to reassess cases like his and correct overly harsh punishments that no longer reflect current sentencing policy.

Welcoming our loved ones home even a little earlier would not only bring relief to families like mine, but it would also restore a measure of fairness to the system. Justice should not have an expiration date.

Please vote to make these amendments retroactive. It would mean everything to families like mine—and to the many people inside who are hoping for a second chance.

Sincerely,
Anya Axelrod

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Vonetta Barnwell

## Topics:

Retroactivity

## Comments:

I am writing to express my full support for the retroactive application of the reduced sentencing guidelines for drug offenses. This policy change is deeply personal to me because my son is currently serving a lengthy prison sentence for a non-violent drug offense. The possibility of a reduced sentence under the new guidelines would not only bring hope and relief to him, but it would also have a profound impact on our entire family.

My son has a young child with autism who needs the support of both his parents and is currently growing up without his father, and the emotional toll it has taken on both of them is heartbreaking. Allowing the guidelines to apply retroactively would give my son a chance to return home sooner, rebuild his life, and be the father his son needs. It would also ease the financial and emotional burden on our family, who have been trying to support him from a distance for years.

This change would mean a second chance for someone who has already paid dearly for his mistakes and is ready to become a productive and responsible member of society. I respectfully urge you to consider the lives of the families affected by these sentences, and to apply the new guidelines retroactively. It would bring fairness, hope, and healing to countless individuals and communities.

Thank you for your time and consideration.

Submitted on: May 20, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Emma Benson

## Topics:

Retroactivity

## Comments:

I am asking for you to make the current guideline changes retroactive. My mom is sitting in prison right now under low level meth charges. This would impact her being able to file and possible come home earlier. She was at a home that was raided and charged among other people. We thank you for your work and just ask that you continue to think of everyone and apply justice equally.

Submitted on: May 2, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Kiana Cerna

## Topics:

Retroactivity

## Comments:

Comment in Support of Retroactive Application of the 2025 Amendments

I respectfully submit this comment in support of making the 2025 amendments to the United States Sentencing Guidelines retroactive. The principles of justice, equity, and consistent sentencing demand that individuals who were sentenced under outdated or now-revised guidelines be given the opportunity to benefit from these important reforms.

Retroactive application of sentencing amendments ensures that similarly situated defendants are not treated disparately simply due to the date of their sentencing. Justice should not be arbitrary or time-dependent. If the Commission has determined that certain sentencing enhancements or ranges are excessive or inconsistent with evolving legal standards, it is only fair that those conclusions be extended to individuals currently serving sentences under the outdated framework.

Moreover, retroactivity aligns with the goals of rehabilitation and public safety. Many individuals impacted by these amendments have demonstrated personal growth and rehabilitation while incarcerated. Providing them with a path to resentencing may not only result in a more proportional punishment but also encourage continued positive behavior and reintegration into society.

Finally, retroactivity promotes public confidence in the justice system by demonstrating the legal system's commitment to fairness and responsiveness. It sends a clear message that the system is capable of acknowledging and correcting past excesses in sentencing.

For these reasons, I urge the Commission to designate the 2025 amendments as retroactive and to allow currently incarcerated individuals the opportunity to seek relief consistent with the updated guidelines.

Respectfully,
Kiana Cerna

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Elizabeth Delgado

## Topics:

Retroactivity

## Comments:

I am writing to respectfully ask that the 2025 guideline changes be applied retroactively.

My loved one is currently serving a sentence affected by outdated guidelines.

Applying these changes retroactively would bring fairness to people who were sentenced under harsh rules that no longer reflect current thinking about justice and rehabilitation. My loved one has worked hard to change while incarcerated.

Please consider that families like ours have been deeply impacted by long sentences. Giving people a second chance would bring hope, heal families, and allow them to become productive members of society again.

Thank you for your time and commitment to fairness.

Sincerely,
Elizabeth Delgado

Submitted on: May 5, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Charea Fairey May. 02, 2025

## Topics:

Retroactivity

## Comments:

The principle of justice demands consistency and fairness, particularly in sentencing. When new sentencing guidelines reduce excessive penalties or correct disparities, failing to apply them retroactively undermines the very purpose of reform. Individuals incarcerated under outdated, harsher standards continue to serve sentences that no longer reflect society's evolving understanding of proportional punishment.

Retroactive application ensures that all individuals—regardless of when they were sentenced—are treated under the same legal standards. This approach not only upholds fairness but also reduces unnecessary incarceration costs, eases burdens on families, and promotes successful reintegration. When reform is enacted, justice requires that it reach all who have been impacted.

Thank you for considering this crucial step toward fairness and equity in our justice system.

Submitted on: May 2, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Susan Griffith

## Topics:

Retroactivity

## Comments:

I am asking you to consider mandating that revised sentencing guidelines be made retroactive. This engenders hope in incarcerated persons and inspires faith in the justice system which is essential in reducing recidivism. My son who was incarcerated benefited from a reduction in sentencing guidelines which was applied to his case, and I would like to see all inmates benefit from this practice. As an added benefit, this would reduce overcrowding and decrease costs.

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Aja Hall

## Topics:

Retroactivity

## Comments:

As a family member of an incarcerated individual I strongly agree with the retroactive of the adopted amendments. It would give individuals a second opportunity to be An upstanding citizen of society it will give my family and friends an opportunity to build a stronger bond.

Submitted on: May 19, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Walter Harris

## Topics:

Retroactivity

## Comments:

Hi, my name is Walter Harris and I served time in Federal Prison for drug charges. I know first hand what it feels like for laws to change that are directly tied to the charges or sentence you're serving and the relief don't affect you because it's not made retroactive. There are a lot of men and women in prison just looking for another chance or some miracle to relieve them from the long sentences sometimes handed out for drug charges. This is that miracle, this could be that second chance. Please make these amendments retroactive, it will definitely affect another community activists like me.
Thank you for your time and consideration.

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Angel Hopper

## Topics:

Retroactivity

## Comments:

The principle of justice demands consistency and fairness, particularly in sentencing. When new sentencing guidelines reduce excessive penalties or correct disparities, failing to apply them retroactively undermines the very purpose of reform. Individuals incarcerated under outdated, harsher standards continue to serve sentences that no longer reflect society's evolving understanding of proportional punishment.

Retroactive application ensures that all individuals—regardless of when they were sentenced—are treated under the same legal standards. This approach not only upholds fairness but also reduces unnecessary incarceration costs, eases burdens on families, and promotes successful reintegration. When reform is enacted, justice requires that it reach all who have been impacted.

Thank you for considering this crucial step toward fairness and equity in our justice system.

Submitted on: May 2, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Nancy Matthews

## Topics:

Retroactivity

## Comments:

Years of research on the policies related to drug enforcement have shown that they resulted in unjust and ineffective sentences. We need to fix this, including retroactively!

Submitted on: May 29, 2025

## Public Comment Submission

To the United States Sentencing Commission,

I am writing to express my strong support for making the 2025 amendment to U.S.S.G. §3B1.2 (Mitigating Role) retroactive.

This amendment acknowledges that individuals who played minor or minimal roles in drug trafficking — such as couriers, runners, or helpers — should not face excessive sentences solely because of drug quantity. By applying this amendment retroactively, the Commission can ensure fairness not only for future defendants but also for those already serving disproportionately long sentences under outdated rules.

My loved one, Jaime Avalos (BOP [redacted]), is currently incarcerated on a federal drug trafficking case. Jaime was a small participant with no leadership role, no violence, and no major financial gain, yet his sentence was largely determined by drug quantity enhancements. Allowing the 2025 mitigating role amendment to apply retroactively would correct this imbalance and recognize the need for individualized, proportionate sentencing.

Retroactivity would promote fairness, consistency, and justice for thousands of families — not just those whose cases happen to fall after November 1, 2025. As a family member, I respectfully ask the Commission to apply this amendment retroactively so that people like Jaime have the chance to benefit from these important reforms.

Sincerely,
Dolores Ortiz

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Suzanne Palmer

## Topics:

Retroactivity

## Comments:

The principle of justice demands consistency and fairness, particularly in sentencing. When new sentencing guidelines reduce excessive penalties or correct disparities, failing to apply them retroactively undermines the very purpose of reform. Individuals incarcerated under outdated, harsher standards continue to serve sentences that no longer reflect society's evolving understanding of proportional punishment.

Retroactive application ensures that all individuals—regardless of when they were sentenced—are treated under the same legal standards. This approach not only upholds fairness but also reduces unnecessary incarceration costs, eases burdens on families, and promotes successful reintegration. When reform is enacted, justice requires that it reach all who have been impacted.

Thank you for considering this crucial step toward fairness and equity in our justice system.

Please help those Adults in custody who are relegated to lack of Healthcare and ineffective staff that serve this population. They are not given proper meals and their time served is overlooked and are not being released on their outdate. It is truly an awful and inhumane existence.  My loved one is not allowed outdoors most of the time. Fire alarms are sounded often for 5 and six hours at a time. Even in hours of sleep.

Submitted on:  May 2, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Gary Quigg

## Topics:

Retroactivity

## Comments:

The Amendment should be made retroactive since such would both be beneficial to defendants/prisoners; and, it would not be burdensome to implement because of the lower numbers who would be effected.

Submitted on: May 28, 2025

# Public Comment - Issue for Comment on Retroactivity of Certain 2025 Amendments

## Submitter:

Eileen Sanchez

## Topics:

Retroactivity

## Comments:

I believe that sentences should reflect the law and practices that are most current. And when the law and practices change, and people's sentences would be lower if they were sentenced today, people should get the benefit of those changes. Otherwise, we keep people in prison for sentences that we recognize are too long.

Submitted on: May 28, 2025

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