Before the United States Sentencing Commission
Public Hearing on the Potential Retroactive Application of Amendments related to Acquitted Conduct and USSG §§ 2K2.1 and 2D1.1

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Honorable Chair Reeves, Vice-Chairs, and Commissioners: thank you for inviting me to share the views of the Federal Public and Community Defenders about whether the Commission should retroactively apply Amendment 1 on Acquitted Conduct, Parts A and B of Amendment 3 resolving circuit conflicts related to USSG §2K2.1, and Part D of Amendment 5 regarding the enhanced base offense levels under USSG §2D1.1. As Defenders' written comment explains, we strongly urge the Commission to exercise its authority under 28 U.S.C. § 994(u) and USSG §1B1.10 to apply these amendments retroactively.[1]

My testimony is intended to supplement our written comment by providing practical insight from my decade-plus experience as an Assistant Federal Public Defender and Appellate Supervisor working on every aspect of 18 U.S.C. § 3582(c)(2) litigation following the retroactive application of Amendments 706, 750, 782, and 821.[2] First, I'll talk about how my district handled past amendment cycles, which is a fairly typical approach in many places. Then, I'll talk about the current amendments on the table in light of that experience, with a particular focus on the Acquitted Conduct and Firearms Serial Number ("AOSN") Amendments, which have been the target of objections based on administrability concerns.[3]

Critics of retroactivity for the current batch of amendments overlook that courts' and stakeholders' experience with past retroactive amendments provide a solid foundation for handling this round. In all the rounds of retroactive amendments I've managed, implementation would begin well before the amendment's effective date. My defender office, U.S. Probation, and the U.S. Attorney's Office would work together to set up procedures for

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[1] *See generally* Fed. Defender Comments to the U.S. Sent'g Comm on Possible Retroactive Application of Amendment 1, Part A of Amendment 3, Part B of Amendment 3, and Part D of Amendment 5 (June 21, 2024) (discussing how each of the four proposed amendments promotes fairness and reduces sentencing disparities).

[2] This experience includes collaborating with key stakeholders to implement systems for evaluating and handling cases, working in the trenches, and filing hundreds of motions seeking retroactive relief, managing retroactivity projects, and supervising staff, litigating appeals, and providing local and nationwide training to defenders and panel attorneys on the substance and logistics of retroactivity.

[3] *See, e.g.*, Letter from Edmond E. Chang on behalf of the Criminal Law Committee to U.S. Sent'g Comm at 3–7 (June 21, 2024); Letter from Scott Meisler on behalf of DOJ to U.S. Sent'g Comm at 8–12 (June 21, 2024); Letter from Probation Officers Advisory Group to U.S. Sent'g Comm at 1–5 (June 21, 2024).

processing cases in the district court and my office would get to work identifying the universe of potentially eligible individuals.[4] We generally worked under a standing order appointing the defender office to represent arguable retroactivity claims, which streamlined the retroactivity process, encouraged agreements between the parties where possible, and minimized the burden on the courts.[5]

Within the defender office, over several rounds of retroactive amendments, we learned to effectively manage filings by prioritizing cases based on urgency and complexity. For any client who was eligible for relief, we sought consent from all parties involved; worked with the client's family, loved ones, and U.S. Probation to set up release plans; and filed motions according to our tier system. The first tier of filings typically included unopposed motions for individuals whose earliest projected release dates were in the past or the near future. The second priority tier included unopposed motions where the expected reductions would still leave a period of incarceration. And the third tier consisted of cases involving eligibility questions or disputes over whether discretionary relief should be granted. For clients who fit within our third tier, my office would follow the streamlined process established by the court's standing order and the parties would brief the case. Litigating these issues is a regular part of our practice and a routine function of the courts, which are fully equipped to settle legal and factual disputes, as shown by the success of past retroactivity projects.

On the other hand, when we determined that a client was ineligible for relief, we communicated that information to the client and, if there was a pro se motion filed, we would file a notice with the district court of the fact that we would not be representing the petitioner. In my experience, this

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[4] My office would cross-reference the Commission's list of potentially impacted persons with internal lists that we created based on data about former clients. Historically, we found that the Commission's lists were often both over- and underinclusive. Additionally, we would send a one-page letter to inmates, informing them of the retroactive amendment and asking those who believe they are eligible to contact the Defender's office with their name and case number for evaluation.

[5] *See, e.g., In re: Administrative Orders of the Chief Judge*, Order Regarding Amendment 821 to the U.S. Sent. Guidelines, No. 3:21-mc-1, Doc. 115 (Oct. 31, 2023). In addition to standing orders like these, my office would coordinate with the court's clerk to get alerts whenever an individual filed a pro se motion for retroactive relief so we could evaluate the case for potential representation.

comprehensive approach best ensures that each person's case is handled efficiently and fairly, working within a system capable of addressing these matters.[6]

Turning from my past experience to this year's amendments, the Commission's top-end estimate of just over 4,000 individuals potentially eligible for relief for all four amendments combined is lower than estimates of potentially eligible individuals under recent amendments, including Amendment 821. And based on our experience, Defenders believe far fewer persons will be potentially eligible for relief under each of the four amendments this year than compared to last.

The primary concern related to administrability with the Acquitted Conduct and AOSN Amendments is that there will be questions not regarding retroactivity per se, but regarding the amended guideline itself. As Defenders discussed in our Comment, this is similar to Amendment 821 Part B ("Zero-Point Offender"), where legal disputes would be happening prospectively regardless of retroactivity. Still, experience teaches that screening cases to determine eligibility would not be nearly as complicated as opponents contend. Section 3582(c)(2) depends on showing that there's been a change in the applicable guideline range. And courts are generally precluded from reducing an individual's sentence below the amended guideline range or below any applicable statutory mandatory-minimum sentence. As a result, many people can be screened as disqualified from relief based on these factors, without digging any deeper.

[6] In some districts, like our neighboring Southern District of Florida, the Defenders, U.S. Probation, U.S. Attorneys, and the district courts have organically developed a nearly identical process for managing §3582(c)(2) without a formal standing order.

So, for example, for the Acquitted Conduct Amendment, if I were still in my old defender office, I might create an eligibility assessment form that looks something like this:

➢ Did the case involve at least one acquitted count? (Yes/No) ➢ If yes, complete the chart below:					
Original Sentencing Analysis					
BOL	SOC	Original Guideline Range	Received a 5K or Rule 35? (Yes/No)	Sentence Imposed or Serving	Statutory Range
➢ Was the guideline range calculated based on acquitted conduct? (Yes/No/Maybe) ➢ Does the case involve a question of overlapping conduct? (Yes/No/Maybe)					
Amended Sentencing Analysis					
BOL without Acquitted Conduct	SOC without Acquitted Conduct	Amended Guideline Range	Comparable 5K Reduction (if any)	Projected Release Date	Lowest Available Sentence, if Eligible

And a form for a retroactive AOSN amendment might look like this:

Original Guideline Range:	
Received a 5K or Rule 35?	
Statutory Range:	
Sentence Imposed or Serving?	
➢ Did the client receive a §2K2.1(b)(4)(B) enhancement at the original sentencing?	Yes/No
➢ If yes above, what, if anything, does the PSR indicate about the legibility of the serial number to the unaided eye? o If PSR contains such information, include PSR language and citation. o If the PSR is silent, indicate as such.	
➢ Was an argument made or facts presented in the proceedings showing that the serial number was still legible? o If yes, include citation to where the argument was made in the record.	Yes/No
➢ Does the record contain any information about the firearm's serial number? o If yes, include citation and nature of information (i.e., pictures, police reports, or other discovery available for review).	
Amended Guideline Range:	
Comparable 5K Reduction (if any)	
Projected Release Date?	
Lowest Available Sentence, if Eligible:	

In my experience, most questions about eligibility and the extent of a reduction can be resolved by starting with simple forms like these, and by reviewing the presentence report, indictment, and judgment. And I expect that the current amendments—including the Acquitted Conduct and AOSN Amendments—will be no different.

To be sure, after forms like these eliminate ineligible individuals, and lead to agreements regarding others, there will be disputes—and some of those disputes may require close review of records and new fact-finding. But complex disputes will be rare, and related disputes will no doubt simultaneously be occurring in prospective litigation. Moreover, courts, probation offices, and attorneys are up to the task; this is the work we signed up for. That we may need to take on additional work to correct past injustices in pursuing a fairer system is no reason for the Commission to preclude individuals from even asking sentencing courts for retroactive relief.

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So, in the end, Defenders expect a relatively small but significant group to be eligible for relief under the four amendments. At the same time, we expect the decrease in sentence for these individuals will often be greater than that for those eligible for Amendment 821 relief. Therefore, we believe this manageable group stands to benefit significantly from retroactive application. Past experience shows that Defenders stand ready, willing, and able to do our part to process these cases and assist partners—indeed, Defenders often shoulder much of the workload. And experience shows that the system is capable of managing the modest increase in court filings. The Commission should therefore exercise its authority to designate for retroactive application Amendment 1 on Acquitted Conduct, Parts A and B of Amendment 3 resolving circuit conflicts related to USSG §2K2.1, and Part D of Amendment 5 regarding the enhanced base offense levels under USSG §2D1.1.