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of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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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).

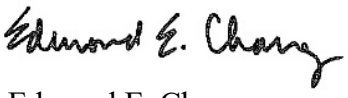
[8] Our estimate of 53,000 possible motions is based on the data provided on page 14 of the Commission's data analysis. Of the 62,045 people currently incarcerated for a drug trafficking offense, the analysis says that the court applied a mitigating-role adjustment under § 3B1.2 in 3,697 of those cases. 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,



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