COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street, Room 2346
Chicago, IL 60604

Honorable Roy K. Altman
Honorable Kenneth D. Bell
Honorable Mark Jeremy Bennett
Honorable Terrence G. Berg
Honorable Nathanael Cousins
Honorable Katherine Polk Failla
Honorable Charles B. Goodwin
Honorable Beryl Howell
Honorable Joseph Laplante
Honorable Karen Spencer Marston
Honorable Diana Saldaña
Honorable Charles J. Williams

Honorable Edmond E. Chang, Chair

TELEPHONE
(312) 435-5795

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.

---

[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.

---

[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).

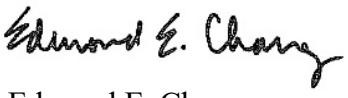
[8] Our estimate of 53,000 possible motions is based on the data provided on page 14 of the Commission's data analysis. Of the 62,045 people currently incarcerated for a drug trafficking offense, the analysis says that the court applied a mitigating-role adjustment under § 3B1.2 in 3,697 of those cases.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

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street, Room 2346
Chicago, IL 60604

TELEPHONE
(312) 435-5795

April 18, 2025

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

Dear Chair Reeves and Members of the Sentencing Commission:

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

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

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

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

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

Discussion

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

> Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

Frequent or routine retroactive application of guideline amendments undermines determinate, predictable sentencing, and erodes the statutory sentencing goals, especially deterrence.[4] As we noted in our June 2024 letter, when amendments not addressing a fundamental unfairness or inequity are routinely deemed retroactive, "over time the perception may arise that the Guidelines themselves are fundamentally unfair, thereby undermining public confidence in the system of certain and determinate sentencing established by the Sentencing Reform Act of 1984." Even in the context of applying *constitutional* rules retroactively—which arguably represent an even more compelling case for retroactivity—the Supreme Court has recognized the importance of finality, explaining that "applying 'constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" *Edwards v. Vannoy*, 593 U.S. 255, 263 (2021) (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)); *see also Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect").

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

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

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

---

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

[4] 18 U.S.C. § 3553(a)(2)(B).

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

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

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

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

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

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

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

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

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

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

---

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

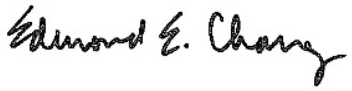
[8] Although PPSO data does not distinguish retroactivity reports by specific amendment, given the length of time that had passed since the effective date of previous retroactive amendments, it is highly likely that the vast majority of the reports submitted during this time were based on Amendment 821.

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

Conclusion

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

Respectfully submitted,



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

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