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June 2, 2025

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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,

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