

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

Joshua Luria, Chair, 11th Circuit
Melinda Nusbaum, Vice Chair, 9th Circuit



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Tandis Farrence, 2nd Circuit
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Vacant, DC Circuit
Amy Kord, FPPOA Ex-Officio
Dollie Mason, PPSO Ex-Officio

June 2, 2025

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

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (the Commission) regarding the issue for comment on Retroactivity.

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

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

[**Amendments under Consideration for Retroactive Application**](#)

Circuit Conflict – “Physically Restrained”

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

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

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

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

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

Circuit Conflict – “Intervening Arrest” Definition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to share our perspective.

Respectfully,

Probation Officers Advisory Group
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