

UNITED STATES SENTENCING COMMISSION

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May 17, 2024

MEMORANDUM

TO: Chair Reeves
Commissioners
Ken Cohen, Staff Director

FROM: Office of Research and Data
Office of General Counsel

SUBJECT: Retroactivity Impact Analysis of Certain 2024 Amendments¹

On April 30, 2024, the United States Sentencing Commission submitted to Congress amendments² to the federal sentencing guidelines.³ Specifically, as relevant to this memorandum, the acquitted conduct amendment revises USSG §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to exclude acquitted conduct from the scope of relevant conduct used in calculating an individual's guideline range.⁴ The circuit conflicts amendment addresses circuit conflicts involving §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or

¹ This memorandum discusses four of the 2024 amendments: (1) the acquitted conduct amendment; (2) Part A of the circuit conflicts amendment; (3) Part B of the circuit conflicts amendment; and (4) Part D of the miscellaneous amendment.

² Sentencing Guidelines for United States Courts, 89 FR 36853 (May 3, 2024).

³ U.S. SENT'G COMM'N, GUIDELINES MANUAL (Nov. 2023) [hereinafter USSG].

⁴ Amendment 1 of the amendments submitted by the Commission to Congress on April 30, 2024, 89 FR 36853 (May 3, 2024).

Ammunition) and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).⁵ Part A of the circuit conflicts amendment revises §2K2.1 to state that the 4-level enhancement at §2K2.1(b)(4)(B) applies when the serial number of a firearm has been modified such that the original information is rendered illegible or unrecognizable to the unaided eye.⁶ Part B of the circuit conflicts amendment revises Application Note 4 to §2K2.4 to state that subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c).⁷ Part D of the miscellaneous amendment revises §§2D1.1(a)(1)–(4) (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to clarify that the base offense levels in those provisions apply only when the individual is convicted of an offense under 21 U.S.C. §§ 841(b) or 960(b) to which the applicable enhanced statutory mandatory minimum term of imprisonment applies, or when the parties have stipulated to: (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level.⁸

Because each of the above provisions reduces the sentencing range for some individuals, the Commission is statutorily required to determine whether the amendments should be applied retroactively to individuals who were previously sentenced and are currently incarcerated.⁹ As required by its Rules of Practice and Procedure,¹⁰ the Commission voted at the April 17, 2024, public meeting to instruct staff to prepare a retroactivity impact analysis to aid the Commission in determining whether to do so. This memorandum provides that analysis.

Part I of the memorandum provides background on the statutory authority and guidelines policy statement governing retroactive application of amendments to the federal sentencing guidelines, noting the factors to be considered in the Commission’s decision regarding retroactivity. Part II of the memorandum provides an estimate of the impact of each of the amendments if the Commission were to authorize the courts to apply these amendments retroactively.

⁵ Amendment 3 of the amendments submitted by the Commission to Congress on April 30, 2024, 89 FR 36853 (May 3, 2024).

⁶ *Id.*

⁷ *Id.*

⁸ Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2024, 89 FR 36853 (May 3, 2024).

⁹ 28 U.S.C. § 994(u); *see also* Section I, *infra*.

¹⁰ U.S. SENT’G COMM’N, *Rules of Practice and Procedure*, Rule 4.1A (2016).

I. RETROACTIVITY OF GUIDELINE AMENDMENTS

A. Statutory Authority

Because the acquitted conduct amendment, Parts A and B of the circuit conflicts amendment, and Part D of the miscellaneous amendment reduce the sentencing range applicable to a particular offense or category of offenses for some individuals, the Commission is statutorily required to determine whether they may be retroactively applied. Section 994(u) of title 28, United States Code, provides that:

[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.¹¹

Sentencing courts are statutorily precluded from applying a guideline amendment retroactively unless the Commission has designated such amendment for retroactive application. Section 3582(c)(2) of title 18, United States Code, provides that the court may not modify a term of imprisonment once it has been imposed except that:

in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.¹²

Modifications of sentence under 18 U.S.C. § 3582(c)(2) are unaffected by *United States v. Booker*,¹³ and USSG §1B1.10 remains binding on courts in such proceedings.¹⁴ The Federal

¹¹ 28 U.S.C. § 994(u). The Commission’s Rules of Practice and Procedure address retroactive application of amendments and list the procedures that the Commission will follow when considering retroactivity. Among other things, “the Commission shall – (1) at the public meeting at which it votes to promulgate the amendment, or in a timely manner thereafter, vote to publish a request for comment on whether to make the amendment available for retroactive application; (2) instruct staff to prepare a retroactivity impact analysis of the amendment, if practicable. . . .” U.S. SENT’G COMM’N, *Rules of Practice and Procedure*, Rule 4.1A (2016). At its April 17, 2024, public meeting, the Commission voted both to publish an issue for comment on whether to make the amendments available for retroactive application, with a public comment period closing on June 21, 2024, and to instruct staff to prepare this retroactivity impact analysis.

¹² 18 U.S.C. § 3582(c)(2).

¹³ 543 U.S. 220 (2005) (rendering guidelines advisory).

¹⁴ *See* *Dillon v. United States*, 560 U.S. 817 (2010).

Rules of Criminal Procedure provide that the defendant is not required to be present at a proceeding under 18 U.S.C. § 3582(c)(2).¹⁵

B. *Guidelines Manual Policy Statement*

The Commission promulgated USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement) to implement 28 U.S.C. § 994(u) and to provide guidance to a court when considering a motion under 18 U.S.C. § 3582(c)(2). Subsection (a) of §1B1.10 specifies when a reduction pursuant to 18 U.S.C. § 3582(c)(2) is available:

In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.¹⁶

Section 1B1.10 further explains that a reduction would not be consistent with the policy statement if none of the amendments listed in subsection (d) of section 1B1.10 is applicable to the defendant or if a listed amendment "does not have the effect of lowering the defendant's applicable guideline range."¹⁷ Additionally, that section provides that proceedings under 18 U.S.C. § 3582(c)(2) "do not constitute a full resentencing of the defendant."¹⁸

In addition to specifying which guideline amendments may be retroactively applied, consistent with 28 U.S.C. § 994(u), section 1B1.10 guides courts as to the extent of a sentence reduction under 18 U.S.C. § 3582(c)(2). Subsection (b)(1) of USSG §1B1.10 states:

In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In

¹⁵ FED. R. CRIM. P. 43(b)(4) ("A defendant need not be present [when a] proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)(2).").

¹⁶ USSG §1B1.10(a)(1).

¹⁷ USSG §1B1.10(a)(2).

¹⁸ USSG §1B1.10(a)(3).

making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.¹⁹

Section 1B1.10 further provides that, as a general matter, the extent of the reduction granted should not go below the amended guideline range determined in accordance with subsection (b)(1).²⁰ However, an exception is noted where the sentence originally imposed “was less than the term of imprisonment provided by the guideline range . . . pursuant to a government motion to reflect the defendant’s substantial assistance to authorities” in which case “a reduction comparably less than the amended guideline range . . . may be appropriate.”²¹ Under no circumstances may a court reduce a term of imprisonment to less than the term already served by the defendant.²²

C. Policy Determinations and Factors to be Considered Regarding Retroactivity

The decision to list an amendment as retroactively applicable to previously sentenced, imprisoned individuals in §1B1.10(d) (Covered Amendments) “reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants.”²³ The background commentary further provides that “authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.”²⁴

The retroactivity impact analysis and accompanying data that follow is intended to inform the Commission’s decision as to whether to include the acquitted conduct amendment, Part A of the circuit conflicts amendment, Part B of the circuit conflicts amendment, and/or Part D of the miscellaneous amendment as retroactive. Specifically, the below analyses are intended to assist the Commission’s evaluation of the factors traditionally considered in selecting the

¹⁹ USSG §1B1.10(b)(1).

²⁰ USSG §1B1.10(b)(2)(A).

²¹ USSG §1B1.10(b)(2)(B).

²² USSG §1B1.10(b)(2)(C).

²³ *See* USSG §1B1.10, comment. (backg’d.).

²⁴ *Id.*

amendments for retroactivity, including “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).”²⁵ The determination under each of these factors, as well as the weight they are accorded, may differ for each amendment. As discussed above, the purpose of each amendment was different, and each amendment addressed different concerns.

Similarly, the magnitude of the change in the guideline range as a result of each amendment and the difficulty of applying each amendment retroactively may differ. For the acquitted conduct amendment, courts may need to perform additional fact-finding to determine the amended guideline range. Similarly, for Part A of the circuit conflicts amendment, courts may need to perform additional fact-finding in some cases to determine whether an individual would continue to receive the 4-level enhancement for an “altered or obliterated” serial number at §2K2.1(b)(4)(B). For Part B of the circuit conflicts amendment, some cases may require additional fact-finding if it is not clear whether the drug trafficking count and the count under 18 U.S.C. § 924(c) are related to one another. Finally, for Part D of the miscellaneous amendment, courts will need to examine the record to determine whether an individual qualifies for an enhanced base offense level by virtue of a conviction or stipulation and if not, may need to conduct additional fact-finding to determine the applicable drug quantity in order to impose a new sentence.

II. IMPACT OF THE RETROACTIVE APPLICATION OF CERTAIN 2024 AMENDMENTS TO THE *GUIDELINES MANUAL*

A. Introduction to the Data Analysis

In response to the Commission’s directive to staff on April 17, 2024, this section of the memorandum provides an analysis of the estimated impact of four of the Commission’s 2024 amendments on persons incarcerated in the federal prison system, should the Commission authorize the courts to apply those amendments retroactively. This analysis is based, in part, on data from the Federal Bureau of Prisons (BOP) indicating that there were 156,532 persons incarcerated in the BOP on January 27, 2024. Of that group, 137,967 were serving a new sentence for a federal offense (*i.e.*, not a revocation sentence, a sentence for an offense in the District of Columbia offense, or a sentence imposed by a court-martial). Commission records could be matched to 137,119 of those cases.

²⁵ *Id.*

B. Findings as to the Amendment Relating to Acquitted Conduct

The amendment would, among other things, amend the *Guidelines Manual* to address the use of acquitted conduct for purposes of determining a sentence. It would provide that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

The Commission estimates that 1,971 persons currently incarcerated in the BOP were acquitted of one or more of the charges against them. This estimate is based upon a review of a ten percent random sample of the 13,500 persons currently incarcerated in the BOP who were convicted after trial. In reviewing the study sample, staff found that 14.6 percent had been acquitted of one or more of the charges in the case. Staff then extrapolated from the study sample to the total number of persons incarcerated after a conviction at trial to determine the estimated number of all incarcerated persons who might have been acquitted of one or more of the charges against them.

Staff are unable to determine whether and to what extent the courts may have relied upon any of the offense conduct related to the charge or charges for which the individual was acquitted in determining the guideline range; therefore, staff cannot estimate what portion of approximately 1,971 persons might benefit from retroactive application of the amendment. Therefore, the following tables provide information about the 13,500 persons currently incarcerated in the BOP who were convicted after trial.

Table 1 provides a list of the districts in which these individuals were sentenced and, therefore, where the consideration of the issue of retroactive application of the amendment in their cases would most likely occur. This list presents the individuals in descending order by the number of persons in each district.

Table 1
Geographic Distribution of Incarcerated Individuals
Convicted at Trial By District

District	N	%	District	N	%
TOTAL	13,500	100.0			
Southern Florida	743	5.5	Western New York	101	0.8
Middle Florida	575	4.3	Eastern Louisiana	100	0.7
Eastern Virginia	458	3.4	Colorado	99	0.7
Southern New York	454	3.4	Southern Illinois	98	0.7
Western Texas	376	2.8	North Dakota	94	0.7
Eastern Pennsylvania	374	2.8	Middle North Carolina	93	0.7
Southern Texas	362	2.7	Middle Georgia	92	0.7
Northern Texas	341	2.5	Nevada	92	0.7
Maryland	304	2.3	Southern Georgia	90	0.7
Central California	291	2.2	Southern Ohio	90	0.7
Eastern New York	281	2.1	Northern California	86	0.6
Northern Illinois	271	2.0	Northern Oklahoma	86	0.6
Puerto Rico	235	1.7	Eastern Arkansas	85	0.6
Northern Georgia	222	1.6	Middle Tennessee	85	0.6
Eastern Michigan	221	1.6	Southern Alabama	84	0.6
District of Columbia	213	1.6	Western Pennsylvania	83	0.6
Eastern North Carolina	211	1.6	Western Louisiana	82	0.6
Northern Ohio	206	1.5	Western Kentucky	78	0.6
Eastern Kentucky	205	1.5	Western Oklahoma	76	0.6
Arizona	200	1.5	Middle Alabama	75	0.6
Western Missouri	197	1.5	Connecticut	73	0.5
Eastern Tennessee	196	1.5	Northern New York	73	0.5
Western North Carolina	194	1.4	Western Washington	69	0.5
Eastern Texas	193	1.4	Eastern Oklahoma	68	0.5
Minnesota	190	1.4	Southern Mississippi	66	0.5
Southern Iowa	181	1.3	Eastern Wisconsin	60	0.4
Western Tennessee	181	1.3	Alaska	59	0.4
South Carolina	178	1.3	Idaho	56	0.4
New Jersey	176	1.3	Hawaii	55	0.4
South Dakota	163	1.2	Northern West Virginia	54	0.4
Southern Indiana	162	1.2	Southern West Virginia	48	0.4
Southern California	160	1.2	Oregon	48	0.4
Northern Florida	158	1.2	Wyoming	48	0.4
Middle Pennsylvania	158	1.2	Middle Louisiana	44	0.3
Northern Iowa	150	1.1	Eastern Washington	42	0.3
Western Michigan	147	1.1	Virgin Islands	41	0.3
Eastern Missouri	144	1.1	Utah	38	0.3
Central Illinois	129	1.0	Western Wisconsin	34	0.3
Massachusetts	120	0.9	Western Arkansas	32	0.2
Eastern California	113	0.8	Maine	30	0.2
Northern Indiana	113	0.8	Northern Mississippi	26	0.2
Nebraska	113	0.8	New Hampshire	26	0.2
Kansas	108	0.8	Delaware	20	0.2
New Mexico	108	0.8	Guam	15	0.1
Montana	105	0.8	Vermont	11	0.1
Northern Alabama	102	0.8	Rhode Island	10	0.1
Western Virginia	102	0.8	Northern Mariana Islands	1	0.0

Total percentages may not add to 100% due to rounding.

SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 2 provide the demographic characteristics of these individuals. The majority are men (95.9%) and U.S. citizens (86.5%). Black individuals account for 47.5 percent of these persons, followed by Whites (24.2%), Hispanics (22.5%), and Other races (5.6%). The average age of these individuals on January 24, 2024, was 48 years.

Table 2
Demographic Characteristics of Incarcerated
Individuals Convicted at Trial

DEMOGRAPHICS		
<u>Race/Ethnicity</u>		
White	3,282	24.4%
Black	6,382	47.5%
Hispanic	3,028	22.5%
Other	746	5.6%
Total	13,438	100.0%
<u>Citizenship</u>		
U.S. Citizen	11,625	86.5%
Non-Citizen	1,821	13.5%
Total	13,446	100.0%
<u>Gender</u>		
Male	12,928	95.9%
Female	560	4.1%
Total	13,488	100.0%
<u>Average Age</u>		
	48 years	39 years
	(as of 01/24/2024)	(at sentencing)

The analysis involves a total of 13,500 cases, however, cases missing information for any specific analysis are excluded from that analysis.

Total percentages may not add to 100% due to rounding.

SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 3 provides the average sentence imposed in these cases and an analysis of the position of the sentence imposed relative to the guideline range that applied in the case.

Table 3
Average Sentence Imposed and Position Relative to the Guideline Range of Incarcerated Individuals Convicted at Trial

CHARACTERISTICS		
Average Sentence Imposed (in months)	294	
Sentence Relative to the Guideline Range		
Within Range	8,462	63.0%
Above Range	603	4.5%
Substantial Assistance §5K1.1	28	0.2%
Otherwise Below Range	4,334	32.3%
Total	13,427	100.0%

The analysis involves a total of 13,500 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages may not add to 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 4 provides information on the type of crime for the instant offense for these individuals. Drug trafficking was the most common type of crime, accounting for just over one third of all persons incarcerated after trial. Murder (12.1%), firearms (11.2%), and robbery offenses (10.1%) were the next most common.

Table 4
Instant Type of Crime for Incarcerated Individuals Convicted at Trial

Crime Type	N	%
TOTAL	13,487	100.0
Drug Trafficking	4,763	35.3
Murder	1,635	12.1
Firearms	1,514	11.2
Robbery	1,358	10.1
Sexual Abuse	1,244	9.2
Fraud/Theft/Embezzlement	771	5.7
Money Laundering	544	4.0
Child Pornography	405	3.0
Assault	351	2.6
Kidnapping	240	1.8
Administration of Justice	104	0.8
Immigration	84	0.6

Individual Rights	79	0.6
Extortion/Racketeering	70	0.5
Bribery/Corruption	66	0.5
All Other Crime Types	259	1.9

The analysis involves a total of 13,500 cases, 13 cases missing primary type of crime are excluded from that analysis. Total percentages may not add to 100% due to rounding.

SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

C. Findings as to Part A of the Circuit Conflicts Amendment (Relating to the Enhancement at §2K2.1(b)(4)(B))

Part A of the circuit conflicts amendment resolves a circuit conflict on how to interpret the term “altered” in the 4-level enhancement at §2K2.1(b)(4)(B), which applies when the serial number of a firearm has been “altered or obliterated.” Part A would amend §2K2.1 to provide that the enhancement applies when a serial number is “illegible or unrecognizable to the unaided eye.”

Of the individuals currently incarcerated in the BOP, 18,823 were sentenced under §2K2.1. Of those, staff estimate that 1,452 received the enhancement at §2K2.1(b)(4)(B). Individuals were identified for this group if Commission data indicated that the enhancement was applied at sentencing, or if the person was sentenced under §2K2.1(b)(4) using a guideline manual before 2006.²⁶ The Commission does not collect information on why the enhancement at §2K2.1(b)(4)(B) was applied and, therefore, cannot determine in which of the 1,452 cases the serial number might not have been illegible or unrecognizable to the unaided eye. Therefore, staff cannot estimate whether any specific individual in this group would be eligible for retroactive application of Part A of the amendment. For that reason, the data provided should be considered as the outer bound of the number of individuals who would be eligible to seek a modification of sentence under 18 U.S.C. § 3582(c)(2) through retroactive application of Part A of the circuit conflicts amendment.

Table 1 provides a list of the districts in which these individuals were sentenced and, therefore, where the consideration of the issue of retroactive application of the amendment in their cases would most likely occur. This list presents the individuals in descending order by the number of persons in each district.

²⁶ Commission data on cases in which the court applied a *Guidelines Manual* from amendment year 2006 or earlier do not indicate which portion of the enhancement at (b)(4) was applied. Therefore, all cases with this enhancement were included in this analysis. In some of these cases the sentenced individual received the enhancement for a stolen firearm and would not be eligible for a modification of sentence under 18 U.S.C. § 3582(c)(2) through retroactive application of the amendment.

Table 1
Geographic Distribution of Potentially Eligible Incarcerated Individuals
By District

<u>District</u>	<u>N</u>	<u>%</u>	<u>District</u>	<u>N</u>	<u>%</u>
TOTAL	1,452	100.0			
Northern Texas	67	4.6	South Dakota	13	0.9
Southern Florida	44	3.0	Middle Tennessee	13	0.9
New Jersey	43	3.0	Utah	13	0.9
Eastern Pennsylvania	43	3.0	Eastern California	12	0.8
Eastern Missouri	42	2.9	Middle Pennsylvania	12	0.8
Western Texas	42	2.9	Northern West Virginia	11	0.8
Middle Florida	40	2.8	Southern California	10	0.7
Northern Iowa	40	2.8	District of Columbia	10	0.7
Western Missouri	38	2.6	Southern West Virginia	9	0.6
Northern Illinois	37	2.6	Nebraska	9	0.6
Eastern North Carolina	36	2.5	Western Pennsylvania	9	0.6
Minnesota	30	2.1	Montana	8	0.6
Central Illinois	28	1.9	Northern California	7	0.5
Eastern Michigan	28	1.9	Kansas	7	0.5
New Mexico	28	1.9	Eastern Wisconsin	7	0.5
Northern Ohio	28	1.9	Wyoming	7	0.5
Western Tennessee	27	1.9	Southern Alabama	6	0.4
Southern Iowa	26	1.8	Alaska	6	0.4
Northern Georgia	24	1.7	Middle Louisiana	6	0.4
Maryland	24	1.7	Northern Oklahoma	6	0.4
Western Oklahoma	24	1.7	Oregon	6	0.4
Eastern Virginia	24	1.7	Western Virginia	6	0.4
Southern New York	23	1.6	Idaho	5	0.3
Western New York	23	1.6	Northern Mississippi	5	0.3
Western North Carolina	22	1.5	Northern New York	5	0.3
Central California	22	1.5	Arizona	4	0.3
Southern Texas	22	1.5	Western Arkansas	4	0.3
Puerto Rico	21	1.5	Connecticut	4	0.3
South Carolina	21	1.5	Eastern Louisiana	4	0.3
Eastern Arkansas	20	1.4	Maine	4	0.3
Western Michigan	19	1.3	North Dakota	4	0.3
Eastern Tennessee	18	1.2	Southern Ohio	4	0.3
Middle North Carolina	17	1.2	Eastern Oklahoma	4	0.3
Northern Indiana	17	1.2	Western Washington	4	0.3
Northern Alabama	16	1.1	Delaware	3	0.2
Colorado	15	1.0	Western Kentucky	3	0.2
Northern Florida	15	1.0	Western Louisiana	3	0.2
Southern Georgia	15	1.0	Nevada	3	0.2
Eastern New York	15	1.0	Western Wisconsin	3	0.2
Eastern Texas	15	1.0	Middle Alabama	2	0.1
Middle Georgia	14	1.0	Rhode Island	2	0.1
Southern Indiana	14	1.0	Virgin Islands	2	0.1
Eastern Kentucky	14	1.0	Eastern Washington	2	0.1
Massachusetts	14	1.0	Guam	1	0.1
Southern Mississippi	14	1.0	New Hampshire	1	0.1
Southern Illinois	13	0.9	Vermont	1	0.1

Total percentages may not add to 100% due to rounding.

SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 2 provide the demographic characteristics of these individuals. Most were men (98.9%) and U.S. citizens (96.8%). Black individuals account for 55.6 percent of these persons, followed by Whites (23.0%), Hispanics (19.0%), and Other races (2.4%). The average age of these individuals on January 24, 2024 was 39 years.

Table 2
Demographic Characteristics of Potentially Eligible
Incarcerated Individuals

DEMOGRAPHICS		
<u>Race/Ethnicity</u>		
White	333	23.0%
Black	806	55.6%
Hispanic	275	19.0%
Other	35	2.4%
Total	1,449	100.0%
<u>Citizenship</u>		
U.S. Citizen	1,405	96.8%
Non-Citizen	47	3.2%
Total	1,452	100.0%
<u>Gender</u>		
Male	1,436	98.9%
Female	16	1.1%
Total	1,452	100.0%
<u>Average Age</u>		
	39 years	34 years
	(as of 01/24/2024)	(at sentencing)

The analysis involves a total of 1,452 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages may not add to 100% due to rounding.

SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 3 provides the average sentence imposed in these cases and an analysis of the position of the sentence imposed relative to the guideline range that applied in the case.

Table 3
Average Sentence Imposed and Position Relative to the
Guideline Range of Potentially Eligible Incarcerated Individuals

CHARACTERISTICS		
Average Sentence Imposed (in months)		118
Sentence Relative to the Guideline Range		
Within Range	828	57.0%
Above Range	56	3.9%
Substantial Assistance §5K1.1	63	4.3%
Otherwise Below Range	505	34.8%
Total	1,452	100.0%

The analysis involves a total of 1,452 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages may not add to 100% due to rounding. SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

D. Findings as to Part B of the Circuit Conflicts Amendment (relating to the §2K2.4, Application Note 4 (Grouping))

Part B of the circuit conflicts amendment would amend the Commentary to §2K2.4 to address a circuit conflict concerning whether subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c) based on the drug trafficking count.

Staff reviewed the records of all persons incarcerated in the BOP who were sentenced for a drug trafficking offense, where at least one of the counts of conviction occurred under both 18 U.S.C. § 924(c) and 18 U.S.C. § 922(g), and where more than one multiple count computation unit was applied to the combined offense level under §3D1.4. There were 102 cases that met the criteria.

Because of the fact-specific nature of the grouping rules, staff cannot determine with precision the cases in which the grouping rules might have been applied in a manner inconsistent with the amendment. Therefore, staff cannot estimate whether any specific individual would be eligible for retroactive application of Part B of the amendment. For that reason, the data provided should be considered as the outer bound of the number of individuals who would be eligible to seek a modification of sentence under 18 U.S.C. § 3582(c)(2) through retroactive application of Part B of the amendment.

Table 1 provides a list of the districts in which these individuals were sentenced and, therefore, where the consideration of the issue of retroactive application of the amendment in

their cases would most likely occur. This list presents the individuals in descending order by the number of persons in each district.

Table 1
Geographic Distribution of Potentially Eligible Incarcerated Individuals
By District

<u>District</u>	<u>N</u>	<u>%</u>
TOTAL	102	100.0
Central Illinois	19	18.6
Northern Illinois	12	11.8
Northern Indiana	7	6.9
New Hampshire	4	3.9
Southern New York	4	3.9
Eastern Pennsylvania	4	3.9
Eastern Tennessee	4	3.9
Eastern Virginia	4	3.9
South Carolina	3	3.0
Eastern Wisconsin	3	3.0
Western North Carolina	2	2.0
Southern Georgia	2	2.0
Western Louisiana	2	2.0
Eastern Michigan	2	2.0
New Mexico	2	2.0
Western New York	2	2.0
Western Texas	2	2.0
Western Washington	2	2.0
Middle North Carolina	1	1.0
Central California	1	1.0
Delaware	1	1.0
District of Columbia	1	1.0
Middle Florida	1	1.0
Northern Florida	1	1.0
Northern Georgia	1	1.0
Southern Indiana	1	1.0
Maryland	1	1.0
Massachusetts	1	1.0
Montana	1	1.0
Nevada	1	1.0
Eastern New York	1	1.0
Northern New York	1	1.0
North Dakota	1	1.0
Northern Ohio	1	1.0
Eastern Oklahoma	1	1.0
Northern Oklahoma	1	1.0
Western Tennessee	1	1.0
Eastern Texas	1	1.0
Western Virginia	1	1.0
Western Wisconsin	1	1.0
All Other Districts	0	0.0

Total percentages may not add to 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles,
 USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 2 provide the demographic characteristics of these individuals. All of the individuals were men and all but one were U.S. citizens (99.0%). Black individuals account for 74.5 percent of these persons, followed by Whites (13.7%), Hispanics (8.8%), and Other races (2.9%). The average age of these individuals on January 24, 2024 was 43 years.

Table 2
Demographic Characteristics of Potentially Eligible
Incarcerated Individuals

DEMOGRAPHICS		
<u>Race/Ethnicity</u>		
White	14	13.7%
Black	76	74.5%
Hispanic	9	8.8%
Other	3	2.9%
Total	102	100.0%
<u>Citizenship</u>		
U.S. Citizen	101	99.0%
Non-Citizen	1	1.0%
Total	102	100.0%
<u>Gender</u>		
Male	102	100.0%
Female	0	0.0%
Total	102	100.0%
<u>Average Age</u>		
	43 years	36 years
	(as of 01/24/2024)	(at sentencing)

The analysis involves a total of 102 cases, however, cases missing information for any specific analysis are excluded from that analysis.
Total percentages may not add to 100% due to rounding.
SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 3 provides the average sentence imposed in these cases and an analysis of the position of the sentence imposed relative to the guideline range that applied in the case.

Table 3
Average Sentence Imposed and Position Relative to the
Guideline Range of Potentially Eligible Incarcerated Individuals

CHARACTERISTICS		
Average Sentence Imposed (in months)	257	
Sentence Relative to the Guideline Range		
Within Range	43	42.6%
Above Range	3	3.0%
Substantial Assistance §5K1.1	7	6.9%
Otherwise Below Range	48	47.5%
Total	101	100.0%

The analysis involves a total of 102 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages may not add to 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

E. Findings as to Part D of the Miscellaneous Amendment (Relating to Enhanced Penalties for Drug Offenders)

Part D of the miscellaneous amendment clarifies that the alternative enhanced base offense levels at §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) are based on the offense of conviction, not relevant conduct. The amendment amends §§2D1.1(a)(1)–(4) to clarify that the base offense levels in those provisions apply only when the individual is convicted of an offense under sections 841(b) or 960(b) of title 21 to which the applicable enhanced statutory mandatory minimum term of imprisonment applies, or when the parties have stipulated to: (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level.

There are 63,913 persons currently incarcerated in the BOP who were sentenced for drug trafficking. Staff estimate that 538 of those persons were sentenced using a Base Offense Level (BOL) determined under subsections (a)(1)–(4) of that guideline. To establish this number, staff identified all incarcerated persons sentenced under section §2D1.1 as the primary guideline, or under one of the other six drug trafficking guidelines that reference §2D1.1 to determine the BOL. For persons sentenced in fiscal year 2012 or later, the Commission regularly records the provision in §2D1.1 under which the BOL was established. For persons sentenced before fiscal year 2012, additional steps were necessary to determine how the court established the BOL that applied. In those cases, staff first included all cases in which the BOL was 43. Next, cases in which the BOL was 26, 30, or 38 were identified as presumptively included. Cases from that group in which the drug weight in the offense would establish the same BOL under §2D1.1(a)(5) were then excluded. Staff reviewed all the remaining cases in the “presumptively included

group” individually to confirm that the BOL the court applied was established by the death and serious bodily injury provisions in §2D1.1(a)(1)-(4). Cases for which the Commission does not have electronic documentation could not be individually reviewed and were retained in the analysis.²⁷ Finally, regardless of the sentencing year, cases in which the drug offense of conviction carried a mandatory minimum term of imprisonment of at least 20 years were excluded from the eligible group.

The resulting group of 538 individuals, therefore, are those who appear to have been sentenced §2D1.1 using a BOL relating to death or serious bodily injury, but who were not charged in such a way as to apply the statutory mandatory minimum term of imprisonment for drug cases involving death or serious bodily injury.

The Commission does not collect information as to whether parties have stipulated under §1B1.2 that the offense falls under §2D1.1(a)(1)-(4) for the purpose of calculating the guideline range or the applicable BOL. Therefore, staff cannot determine in which of the 538 cases the court may have applied a BOL under §2D1.1(a)(1)-(4) only using relevant conduct. Therefore, the number of persons who are eligible for retroactive application of this part of the miscellaneous amendment could be less than 538. For that reason, the data provided should be considered as the outer bound of the number of individuals who would be eligible to seek a modification of sentence under 18 U.S.C. § 3582(c)(2) through retroactive application of Part D of the amendment.

Table 1 provides a list of the districts in which these individuals were sentenced and, therefore, where the consideration of the issue of retroactive application of the amendment in their cases would most likely occur. This list presents the individuals in descending order by the number of persons in each district.

²⁷ The Commission does not maintain electronic sentencing documents for persons sentenced before fiscal year 2006.

Table 1
Geographic Distribution of Potentially Eligible Incarcerated Individuals
By District

<u>District</u>	<u>N</u>	<u>%</u>	<u>District</u>	<u>N</u>	<u>%</u>
TOTAL	538	100.0			
Southern New York	36	6.7	Central Illinois	4	0.7
Eastern Missouri	29	5.4	Northern Illinois	4	0.7
Southern Florida	25	4.7	Northern Ohio	4	0.7
Southern California	24	4.5	Western Wisconsin	4	0.7
Maryland	24	4.5	Colorado	4	0.7
Central California	23	4.3	Northern Florida	3	0.6
Western Texas	20	3.7	Middle Georgia	3	0.6
Southern Ohio	19	3.5	Northern Iowa	3	0.6
Middle Florida	16	3.0	Northern New York	3	0.6
Southern Iowa	15	2.8	Northern Oklahoma	3	0.6
Western New York	13	2.4	Oregon	3	0.6
Puerto Rico	13	2.4	South Dakota	3	0.6
Northern Texas	13	2.4	Southern West Virginia	2	0.4
Eastern Virginia	13	2.4	Western Arkansas	2	0.4
Western Virginia	13	2.4	Idaho	2	0.4
Eastern Texas	12	2.2	Southern Illinois	2	0.4
Eastern New York	10	1.9	Eastern Kentucky	2	0.4
Eastern Washington	10	1.9	Eastern Louisiana	2	0.4
Southern Georgia	9	1.7	Western Michigan	2	0.4
Eastern Michigan	9	1.7	Montana	2	0.4
Alaska	8	1.5	Western Oklahoma	2	0.4
Eastern North Carolina	7	1.3	Western Pennsylvania	2	0.4
Kansas	7	1.3	South Carolina	2	0.4
Nebraska	7	1.3	Middle Alabama	1	0.2
Eastern Pennsylvania	7	1.3	Northern Alabama	1	0.2
Arizona	6	1.1	Eastern Arkansas	1	0.2
Northern Georgia	6	1.1	Connecticut	1	0.2
New Jersey	6	1.1	Delaware	1	0.2
Middle Pennsylvania	6	1.1	Western Kentucky	1	0.2
Eastern Wisconsin	6	1.1	Middle Louisiana	1	0.2
Western North Carolina	5	0.9	Western Louisiana	1	0.2
District of Columbia	5	0.9	Southern Mississippi	1	0.2
Northern Indiana	5	0.9	Western Missouri	1	0.2
Maine	5	0.9	Nevada	1	0.2
Eastern Tennessee	5	0.9	New Mexico	1	0.2
Southern Texas	5	0.9	North Dakota	1	0.2
Western Washington	5	0.9	Eastern Oklahoma	1	0.2
Wyoming	5	0.9	Western Tennessee	1	0.2
Eastern California	4	0.7	Utah	1	0.2
Northern California	4	0.7			

Total percentages may not add to 100% due to rounding.

SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 2 provide the demographic characteristics of these individuals. Most were men (93.1%) and U.S. citizens (86.0%). Black individuals account for 37.6 percent of these persons, followed by Hispanics (31.1%), Whites (29.8%), and Other races (1.5%). The average age of these individuals on January 24, 2024 was 45 years.

Table 2
Demographic Characteristics of Potentially Eligible Incarcerated Individuals

DEMOGRAPHICS		
<u>Race/Ethnicity</u>		
White	160	29.8%
Black	202	37.6%
Hispanic	167	31.1%
Other	8	1.5%
Total	537	100.0%
<u>Citizenship</u>		
U.S. Citizen	461	86.0%
Non-Citizen	75	14.0%
Total	536	100.0%
<u>Gender</u>		
Male	501	93.1%
Female	37	6.9%
Total	538	100.0%
<u>Average Age</u>		
	45 years	35 years
	(as of 01/24/2024)	(at sentencing)

The analysis involves a total of 538 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages may not add to 100% due to rounding.
SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

Table 3 provides the average sentence imposed in these cases and an analysis of the position of the sentence imposed relative to the guideline range that applied in the case.

Table 3
Average Sentence Imposed and Position Relative to the
Guideline Range of Eligible Incarcerated Individuals

CHARACTERISTICS		
Average Sentence Imposed (in months)	252	
Sentence Relative to the Guideline Range		
Within Range	216	40.2%
Above Range	5	0.9%
Substantial Assistance §5K1.1	64	11.9%
Otherwise Below Range	252	46.9%
Total	537	100.0%

The analysis involves a total of 538 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages may not add to 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, FY 1991 through FY 2023 Datafiles, USSCFY91-USSCFY23, and Preliminary Data from FY 2024, USSCFY24.

III. CONCLUSION

The Commission staff estimate that if the Commission were to authorize the retroactive application of the 2024 acquitted conduct amendment, 1,971 persons currently incarcerated in the BOP would be eligible to seek a modification of sentence under 18 U.S.C. 3582(c)(2). Staff are unable to estimate the extent of any sentence reduction in those cases.

The Commission staff estimate that if the Commission were to authorize the retroactive application of the Part A of the 2024 circuit conflicts amendment, a maximum of 1,452 persons currently incarcerated in the BOP would be eligible to seek a modification of sentence under 18 U.S.C. 3582(c)(2). Staff are unable to estimate the extent of any sentence reduction in those cases.

The Commission staff estimate that if the Commission were to authorize the retroactive application of the Part B of the 2024 circuit conflicts amendment, a maximum of 102 persons currently incarcerated in the BOP would be eligible to seek a modification of sentence under 18 U.S.C. 3582(c)(2). Staff are unable to estimate the extent of any sentence reduction in those cases.

The Commission staff estimate that if the Commission were to authorize the retroactive application of the Part D of the 2024 miscellaneous amendment, a maximum of 538 persons currently incarcerated in the BOP would be eligible to seek a modification of sentence under 18 U.S.C. 3582(c)(2). Staff are unable to estimate the extent of any sentence reduction in those cases.