U.S. Department of Justice

Criminal Division

Appellate Section

Washington, D.C. 20530

June 21, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the Sentencing Commission's request for comment on whether four recently promulgated amendments should be applied retroactively to previously sentenced defendants: the amendments to relevant conduct (§1B1.3) concerning the use of acquitted conduct under the guidelines, the four-level enhancement under the firearms guideline for altered or obliterated serial numbers (§2K2.1(b)(4)(B)), enhanced penalties under §2D1.1 for drug trafficking offenses involving death and serious bodily injury where the defendant was convicted of drug trafficking but not of the applicable statutory mandatory minimum, and grouping rules under §3D1.2 for defendants convicted of multiple firearms offenses.[1] The Department appreciates that the Commission narrowed the reach of the acquitted-conduct amendment from the language initially proposed. However, for the reasons set forth below, the Department opposes retroactive application of that amendment, as well as those for altered or obliterated serial numbers and enhanced penalties for drug offenders. We do not oppose retroactive application of the amendment relating to grouping (the interaction between §2K2.4 and §3D1.2(c)).

If the Commission proceeds with retroactivity, the Department requests that the Commission delay the effective date of any orders granting sentence reductions. Last year, the Commission delayed the effective date for Amendment 821 by three months to allow the Bureau of Prisons (BOP) and the U.S. Probation Office sufficient time to prepare and coordinate reentry services for eligible offenders. With the exception of the amendment on grouping, this year's amendments are very different from last year's amendments; involve more complex eligibility determinations; and would require at least as much, if not more, preparation time.

[1] NOTICE OF SUBMISSION TO CONGRESS OF AMENDMENTS TO THE SENTENCING GUIDELINES EFFECTIVE NOVEMBER 1, 2024, AND REQUEST FOR COMMENT, 89 Fed. Reg. 36853 (proposed May 3, 2024), https://www.federalregister.gov/documents/2024/05/03/2024-09709/sentencing-guidelines-for-united-states-courts.

I. Summary and Principles Guiding the Department's Position on Retroactivity

The Background to the Commentary under §1B1.10 states that, when determining whether to apply a guideline amendment retroactively, the Commission has been guided by "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."[2] As was true in the previous amendment cycle,[3] the Department has taken these same considerations into account in formulating its position on retroactivity, along with the justice system's strong interest in the finality of criminal sentences, public-safety concerns, and the burden that retroactivity would impose on courts and victims. We begin with a summary of the relevant considerations before providing detailed comments on each particular amendment.

a. Finality

Retroactive application of guideline amendments has historically been the exception, not the rule. As then-Commissioner Howell observed in 2011, "the Commission has over its history used its authority under 28 U.S.C. § 994(u) infrequently to [make] retroactive guideline amendments that reduce sentencing ranges."[4] That same year, then-Chair Saris explained that, "because of the importance of finality of judgments and the burdens placed on the judicial system when a change to the guidelines is applied retroactively, the Commission takes this duty very seriously and does not come to a decision on retroactivity lightly."[5]

Historical practice bears out those observations. Since the first guidelines took effect in 1987, the Commission has voted to make amendments retroactive on only about 30 occasions.[6] The Commission's own rules suggest caution in making amendments retroactive: the Rules of Practice and Procedure recognize that, "[g]enerally, promulgated amendments will be given prospective application only."[7]

That measured approach makes good sense. Finality is critical to criminal law—and, in particular, to ensuring that it has deterrent effect.[8] Making guideline amendments retroactive, however, undermines finality and other important tenets of the justice system. As Chief Judge

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[2] USSG §1B1.10, comment. (backg'd.).
[3] JONATHAN J. WROBLEWSKI, U.S. DEP'T OF JUST., LETTER TO HON. CARLTON REEVES, CHAIR (June 22, 2023), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=33.
[4] *Public Meeting, June 30, 2011*, *Before the U.S. Sent'g Comm'n*, 22:15-21 (statement of Beryl Howell, Comm'r) ("because the finality of judgments is an important principle in our judicial system, . . . we require good reasons to disturb final judgments."), https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.
[5] *Id.* at 3:12-17 (statement of Chair Patti Saris); *see also id*. at 13:5-9 (statement of Comm'r Ketanji Brown Jackson on retroactivity of amendments to implement the 2010 Fair Sentencing Act) ("The crack cocaine guideline penalty reduction is not some minor adjustment designed to facilitate efficient guideline operation, but it reflects a statutory change that is unquestionably rooted in fundamental fairness.").
[6] USSG §1B1.10(d) (Covered Amendments).
[7] U.S. SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE, RULE 4.1A (Retroactive Application of Amendments) (Aug. 2016).
[8] *See Teague v. Lane*, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect"); *see also United States v. Frady*, 456 U.S. 152, 166 (1982) (concluding that the federal government has an interest in the finality of criminal judgments).

Catherine Eagles recently put it in a letter to the Chair, "constant revisions to sentences undermine public trust and confidence in the system."[9] Such negative effects are of primary concern to the Department, which is responsible for enforcing federal criminal laws.

b. Public Safety

Section 3553(a)(2) of Title 18 requires courts to impose a sentence that, among other factors, promotes respect for the law, provides adequate deterrence, and protects the public.[10] The Department has supported retroactive application of guideline amendments in circumstances where doing so was consistent with those statutory objectives.[11] In the current context, however, making retroactive the 2024 amendments on acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenses would not only undermine finality; it would also do so in cases that risk undermining public safety.

For example, the Commission's own analysis of the acquitted-conduct amendment estimates that approximately 14.6% (1,971) of the 13,500 defendants in BOP custody who were convicted following a trial were also acquitted of one or more charges in their cases.[12] Then, among all of the 13,500 defendants convicted following a trial, the Commission estimates that:

- 35.3% were convicted of drug trafficking,
- 12.1% were convicted of murder,
- 11.2% were convicted of an offense involving firearms,
- 10.1% were convicted of robbery,
- 9.2% were convicted of sexual abuse,
- 3% were convicted of child pornography,
- 2.6% were convicted of assault, and
- 1.8% were convicted of kidnapping.[13]

These figures are important because, if it is the case that the 1,971 defendants acquitted of at least one charge are otherwise similar to larger group of 13,500 defendants convicted following a trial, then about 85% of persons currently incarcerated at BOP and eligible for this amendment were convicted in their instant offense for drug trafficking, murder, an offense involving a firearm, robbery, sexual abuse, child pornography, assault, or kidnapping.

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[9] Hon. Catherine C. Eagles, Chief District Judge, Letter to Hon. Carlton Reeves, Chair (May 30, 2024).
[10] 18 U.S.C. § 3553(a).
[11] *See, e.g.*, *Public Meeting, June 1, 2011, Before the U.S. Sent'g Comm'n,* 14:6-13 (statement of Eric Holder, Att'y Gen.) (supporting retroactivity of amendments to implement the 2010 Fair Sentencing Act), https://www.ussc.gov/sites/default/files/Hearing_Transcript_1.pdf; *see also Public Hearing on Retroactivity of 2014 Drug Amendment June 10, 2014, Before the U.S. Sent'g Comm'n*, 105:15-21 (statement of Sally Yates, U.S. Att'y) (supporting limited retroactivity of the pending drug guideline amendments), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf.
[12] U.S. SENT'G COMM'N, RETROACTIVITY IMPACT ANALYSIS DATA REPORT OF CERTAIN 2024 AMENDMENTS (2024) (hereinafter RETROACTIVITY IMPACT ANALYSIS), at 7, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2024-amendments/2024_Amdts-Retro.pdf.
[13] *Id.* at 10-11.

Likewise, the vast majority of the offenders potentially eligible for relief under the amendment on altered or obliterated serial numbers are recidivists.[14] Since 2021, the President and the Attorney General have focused on combatting gun violence and other violent crime,[15] and Attorney General Garland has noted further that "an effective violent crime reduction strategy must also address the illegal trafficking of firearms and focus on keeping guns out of the wrong hands."[16] Figures from the FBI indicate a decrease in violent crime in communities across the country in 2024 compared to the prior year, including an approximately 26% decline in murder.[17] However, many jurisdictions are still struggling with guns and violence,[18] and it would be counter-productive to shift resources from "combatting the epidemic of gun violence and other violent crime" to having federal prosecutors revisit closed—and fairly adjudicated—gun cases.

The amendments on enhanced penalties for drug offenses also raise public-safety concerns. The affected cases all necessarily involve a victim who suffered serious bodily injury or death. The United States experienced more than 107,000 overdose deaths during 2023,[19] and more than 300,000 children lost a parent due to a drug overdose from 2011 through 2021.[20] Empowering courts to reduce sentences in cases where the defendant's drug trafficking caused a death or serious bodily injury sends the wrong message at the wrong time.

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[14] U.S. SENT'G COMM'N, WHAT DO FEDERAL FIREARMS OFFENSES REALLY LOOK LIKE? 4 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf ("The vast majority of the offenders sentenced under §2K2.1 were convicted under 18 U.S.C. § 922(g).").

[15] THE WHITE HOUSE, FACT SHEET: BIDEN-HARRIS ADMINISTRATION ANNOUNCES COMPREHENSIVE STRATEGY TO PREVENT AND RESPOND TO GUN CRIME AND ENSURE PUBLIC SAFETY (June 23, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/.

[16] WHITE HOUSE BRIEFING ROOM, REMARKS BY PRESIDENT BIDEN AND ATTORNEY GENERAL GARLAND ON GUN CRIME PREVENTION STRATEGY (June 23, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/.

[17] DEPARTMENT OF JUSTICE, ATTORNEY GENERAL MERRICK B. GARLAND STATEMENT ON FBI QUARTERLY UNIFORM CRIME REPORT (June 10, 2024), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-fbis-quarterly-uniform-crime-report.

[18] *See* Shaila Dewan and Robert Gebeloff, *How Gun Violence Spread Across One American City*, N.Y. TIMES (May 20, 2024), https://www.nytimes.com/2024/05/20/us/gun-violence-shootings-columbus-ohio.html; Soumya Karlamangla, *This Is How Close We Live to Gun Violence*, N.Y. TIMES (May 29, 2024), https://www.nytimes.com/2024/05/29/us/pandemic-gun-violence.html (mapping where and how the number of fatal shootings has grown since 2020).

[19] CENTER FOR DISEASE CONTROL, U.S. OVERDOSE DEATHS DECREASE IN 2023, FIRST TIME SINCE 2018 (2024), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240515.htm#:~:text=Provisional%20data%20from%20CDC's%20National,111%2C029%20deaths%20estimated%20in%202022; *see also* CENTER FOR DISEASE CONTROL, PROVISIONAL DRUG OVERDOSE DEATH COUNTS, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (showing that the United States experienced more than 100,000 overdose deaths per year for the last three years).

[20] NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL INSTITUTES OF HEALTH, *More Than 321,000 U.S. Children Lost a Parent to Drug Overdose from 2011 to 2021* (May 8, 2024), https://nida.nih.gov/news-events/news-releases/2024/05/more-than-321000-us-children-lost-a-parent-to-drug-overdose-from-2011-to-2021#:~:text=An%20estimated%20321%2C566%20children%20in,to%2063%20children%20per%20100%2C000.

c. Burden on the Courts and Victims and Difficulty of Applying the Amendment Retroactively

Retroactive application of all three of these amendments would pose a significant burden on courts and litigants, and in many cases victims, especially when combined with the significant burden imposed by the Commission's decisions last cycle to make the criminal history amendments retroactive and to expand the availability of compassionate release. Courts, United States Attorneys' Offices, Federal Defenders and defense attorneys, U.S. Probation Offices, and other litigants (for example, victims' representatives who must also be included where appropriate) are already devoting significant resources to evaluating and adjudicating retroactivity motions and compassionate release motions while operating under significant budgetary constraints.[21] Indeed, in FY 2024, the Department's budget was $816 million (or 2%) less than what the Department operated on last year ($37.5 billion in FY23). As it relates to U.S. Attorneys' Offices, the enacted budget was 0.8% less than the enacted FY 2023 budget and was $206 million less than what the offices need to maintain FY 2023 level services.

The Commission's own *Retroactivity Impact Analysis* underscores the potential burdens. The Commission's analysis provides an estimate of the *maximum* number of individuals who may be eligible for a reduction if each of the amendments were made retroactive, while acknowledging substantial uncertainty about the number of individuals who would ultimately benefit from retroactive application.[22] For example, the Commission estimates that approximately 1,971 persons in BOP custody could have been sentenced based on an acquitted federal count but also notes that Commission 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."[23]

The Commission also estimates that 1,452 individuals could be eligible for retroactivity because they received an enhancement for altered or obliterated serial numbers (§2K2.1(b)(4)(B)), and 538 could be eligible because they were sentenced under the enhanced base offense levels at §2D1.1(a)(1)-(4), but not convicted of an offense carrying a mandatory minimum term of imprisonment of at least 20 years.[24] An additional 102 could benefit should the amendment on grouping be made retroactive (to which we do not object).

In total, the Commission's *Retroactivity Impact Analysis* estimates that as many as 4,063 defendants could be eligible for an adjustment if all four amendments are made retroactive. And, given past experience, many more incarcerated individuals will file even if they are not eligible. Although this number is lower than the estimated 18,767 defendants eligible to seek a modification of sentence following the 2023 amendments on status points and zero criminal

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[21] EAGLES, *supra* note 9 ("[T]he Commission should remember that anytime an amendment is made retroactive, there is a lot of extra work for many people in the justice system and that many defendants who are not eligible file these motions anyway.").
[22] RETROACTIVITY IMPACT ANALYSIS, *supra* note 12, at 6-7, 11, 14, 18, 21.
[23] *Id*. at 7.
[24] *Id*.

history points (11,495 and 7,272, respectively),[25] federal courts are *already* addressing 5,473 motions for a modification of sentence following last year's retroactive amendments on status points, and another 4,057 motions for a modification of sentence following the amendment on zero criminal history points.[26] In addition, the Commission reports that 603 defendants have moved for a reduction in sentence for extraordinary and compelling reasons in only the first three months of the 2024 Fiscal Year.[27] The latter estimate, in the Department's experience, may be conservative.[28] Neither the Executive Branch nor the Judicial Branch has unlimited resources, and delays in prosecuting and adjudicating other cases will necessarily result.

We applaud the dedicated and extensive work of the United States Attorney community, probation officers, BOP staff, defense attorneys, and in some cases victims, to provide courts the information needed to evaluate current retroactivity and compassionate-release motions in a principled and disciplined way. Their hard work furthers the cause of justice and ensures relief for eligible defendants while maintaining public safety. But adding retroactivity motions based on the amendments concerning acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenders would impose a significant burden on the criminal justice system. If the Commission disagrees with our assessment, we note that retroactivity would produce a corresponding strain on reentry programs and services, which help people successfully return to their communities after incarceration, which also raises concerns.[29] Research studies indicate, among other things, that successful reentry requires advanced planning and tailoring of programs and services to the needs of the individual, and that cognitive behavioral therapy should be made available to nearly all.[30] If retroactivity is rushed, many defendants would be denied the benefit of proper reentry services and step-down transitioning to the community, unnecessarily undermining public safety. Thus, if the Commission decides to apply these

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[25] U.S. SENT'G COMM'N, RETROACTIVITY IMPACT ANALYSIS OF PARTS A AND B OF THE 2023 CRIMINAL HISTORY AMENDMENT 9, 17 (predicting that 11,495 offenders will be eligible to seek a modification as a result of the amendment on status points, and 7,272 offenders will be eligible to seek a modification as a result of the amendment on zero points), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.

[26] U.S. SENT'G COMM'N, PART A OF THE 2023 CRIMINAL HISTORY AMENDMENT, RETROACTIVITY DATA REPORT tbl. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202405-CH-Retro-Part-A.pdf (5,473 motions received as of May 1, 2024); PART B OF THE 2023 CRIMINAL HISTORY AMENDMENT, RETROACTIVITY DATA REPORT, tbl. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202405-CH-Retro-Part-B.pdf (4,057 motions as of May 1, 2024).

[27] U.S. SENT'G COMM'N, FY 2024 FIRST QUARTERLY DATA REPORT ON COMPASSIONATE RELEASE MOTIONS tbl. 2(2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY24Q1-Compassionate-Release.pdf.

[28] For example, prosecutors report that, within the Eastern District of Pennsylvania alone, 51 compassionate release motions were filed during the last three months of 2023.

[29] OFFICE OF JUSTICE PROGRAMS, REENTRY, SPECIAL FEATURE (2024) ("Reentry programs give people the support they need to successfully return to their communities after incarceration and can greatly improve public safety. These programs can be delivered in a correctional institution or in the community upon release, but effective reentry planning should start long before release."), https://ojp.gov/feature/reentry/overview.

[30] *Five Things About Reentry*, NATIONAL INSTITUTE OF JUSTICE (Apr. 26, 2023), https://nij.ojp.gov/topics/articles/five-things-about-reentry (noting that programs and services should be tailored to the unique needs and risk factors of an individual, to the extent possible; that support services should be holistic in nature; that cognitive behavioral therapy benefits all facets of reentry-preparation and post-release programs; that community supervision works best when it includes robust support functions; and finally the need to employ more nuanced measures of recidivism that present the individual as a whole).

amendments retroactively, we recommend that it delay implementation for some reasonable period to allow BOP and Probation to make necessary preparations to ensure all defendants receive the services they need.

The Commission has previously disfavored retroactive application of amendments that would require additional fact-finding, particularly when the pertinent factors were not considered during the original sentencing. As then-Commissioner Howell stated when voting against retroactive application of one part of a guideline amendment in 2010, "time-consuming and administratively difficult-to-apply factors" not considered during the original sentencing would be challenging for courts to evaluate and would likely lead to hearings and litigation.[31] This year's amendments on acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenders involve just such inquiries. Courts would need to consider multiple novel legal principles to determine first which defendants are eligible, and then, which should receive a sentence reduction. Unlike other amendments in the Commission's recent history, the amendments on acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenders involve evidence-based determinations, and their application would require additional judicial fact-finding.[32]

As discussed in more detail below, for acquitted conduct, a reviewing court would need to determine whether a defendant's sentence was based on conduct for which the defendant was criminally charged and acquitted in federal court, and then further determine whether that conduct also establishes, in whole or in part, an offense of conviction. For many cases, that process would require the court to make *new* factual findings long after the original sentencing, possibly on a cold trial transcript and without the benefit of having presided over the trial or at the original sentencing. For altered or obliterated serial numbers, a reviewing court would need to determine whether a serial number was modified such that the original information is rendered illegible or unrecognizable to the naked eye. Information with that level of detail is not necessarily included in the Presentence Investigation Report ("PSR"), as such level of detail was not required for applying this guideline provision in several circuits. And in many cases, that information will be sought after the subject firearm has been destroyed or returned. For eligible drug defendants previously sentenced under §2D1.1(a)(1)-(a)(4), additional fact-finding would likely be necessary as well, as the district court would be required to determine the newly applicable base offense level under §2D1.1(a)(5) based on the attributable drug quantity—where previously that offense level would have been calculated based only on death or serious bodily injury and certain prior convictions.[33] The fact-finding that would be required if these amendments were made retroactive, in combination with the large number of potentially eligible defendants, would impose significant burdens on the courts.

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[31] *Public Meeting*, *supra* note 4, 19:1-12 (statement of Comm'r Beryl Howell) ("These are new factors . . . that were not formerly considered by judges as part of the original guideline calculations, and consideration now, if we were to consider making that [part] of the amendment retroactive, would likely require courts to engage in new fact-finding with the concomitant need for hearings . . . And this process to my mind would just be administratively burdensome to the point of impracticality.").

[32] *See* Public Comment submitted by Charles Williams, District Judge of Northern Iowa, to U.S. Sent'g Comm'n (June 5, 2024) ("[T]he difficulty of applying the acquitted conduct and altered serial number amendments retroactively cannot be overstated.").

[33] §2D1.1(a)(1)-(4).

II. Detailed Comments on Retroactivity for Amendment on Acquitted Conduct

The amendment on acquitted conduct excludes from the definition of relevant conduct under §1B1.3 "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."[34] The amendment, however, acknowledges the court's authority to consider acquitted conduct under 18 U.S.C. § 3661.[35] The Department opposes retroactive application of this amendment. In our view, applying the amendment retroactively will impose significant burdens on courts and the criminal justice system as they seek to apply the change to closed cases. It will also result in litigation as courts attempt to parse acquitted conduct from (a) conduct that also formed the basis for a conviction, which remains relevant conduct under the guidelines as amended; and (b) information about the defendant's background, character, and conduct, which may be considered under 18 U.S.C. § 3661.

In particular, applying this amendment retroactively would require a district court to review the substantive evidence at the defendant's past trial to determine whether the movant is even eligible for an adjustment. Courts will have to engage in a complex and fact-dependent analysis for each case to determine whether a defendant was "criminally charged and acquitted" of specific conduct in federal court; how to disentangle such "acquitted" conduct from uncharged conduct or conduct that was not offered in evidence at trial at all; *and then* whether that "acquitted" conduct "also establishes, in whole or in part, the instant offense of conviction" and may be appropriately considered as relevant conduct.[36] Lastly, courts would have to consider whether the "acquitted" conduct represents conduct of the defendant that is permissibly considered under 18 U.S.C. § 3661. Although the Department appreciates that the final amendments promulgated by the Commission include a narrowed definition of acquitted conduct,[37] the application of that standard nonetheless raises novel issues that will need to be litigated and decided.

The Commission has already acknowledged the administrability concerns that the amendment presents, even when applied *prospectively*. In the Reasons for Amendment, the Commission explained that, to lessen workability issues and "ensure that courts may continue to appropriately sentence defendants for conduct that establishes counts of conviction," rather than define "the specific boundaries of 'acquitted conduct' and 'convicted conduct,'" the Commission "determined that the court that presided over the proceeding will be best positioned to determine which conduct can be properly considered as part of relevant conduct based on the individual

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[34] U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 4 (Apr. 30, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

[35] *Id.* at 5 ("Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661.").

[36] *Id*.

[37] *Compare id*. at 4, *with* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY 51 (December 22, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20231222_fr-proposed-amdts.pdf ("Option 1 (Acquitted conduct excluded from guideline range)… 'Acquitted conduct' means conduct (i.e., any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.").

facts in those cases."[38] The Commission also included a similar note in the new Application Note 10 to §1B1.3.[39]

The Department agrees that a judge who recently presided over a trial is best situated to distinguish "acquitted" from "convicted" conduct at sentencing, and thus to apply the amendment coherently and fairly. Although jury verdicts are sometimes inscrutable, the judge who presided over a trial is likely to have some insight as to why a jury returned a partial acquittal and to understand what conduct the jury found unproven. But when the amendment is applied retroactively, that critical feature of the amendment does not necessarily operate as the Commission intended. Instead, the "court that presided" over the original proceeding may not be the same court reviewing a retroactivity motion, especially for older cases. Even if the court remains the same, the judge's memory of the trial evidence will necessarily have faded, and the judge will need to undertake the same time-consuming and cumbersome review.

Determining, on a cold trial record, what specific "conduct" establishes acquitted and convicted counts will be challenging in many cases. Indeed, the acquitted-conduct amendment is significantly more difficult to apply than previous amendments because it will require a reviewing court to make *new* findings of fact and conclusions of law that were never discussed at the original sentencing. Such a complex and time-consuming evaluation will require not only a review of the sentencing documents (which could include a request to the court for disclosure of documents under seal), but also the charging documents, trial transcripts, and exhibits, to understand what evidence or conduct "establishe[d]" each count. Trials that lasted for multiple days or weeks, as well as multi-defendant or complex cases, will present additional operational and workability burdens. And for older cases, of which there may be a large number,[40] transcripts, exhibits, and rulings on motions may be difficult to obtain, complicating the analysis. These burdens will not fall on judges alone. Each motion for retroactive guidelines relief requires careful consideration by the defendant (and defense attorney) filing, the government responding, the probation officer reviewing, the BOP gathering and contributing records, and the court ultimately evaluating and deciding the appropriateness of a reduction for each individual defendant.[41]

For these reasons, the acquitted conduct amendment is unlike other amendments that the Commission has applied retroactively in its recent history. In voting for retroactive application of the drug amendments in 2010, for example, then-Commissioner Fredrich referenced the Commission's understanding "that the vast majority" of retroactivity motions "can be handled on

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[38] AMENDMENTS TO THE SENTENCING GUIDELINES SUBMITTED TO CONGRESS, *supra* note 34, at 2.
[39] *Id.* ("There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.").
[40] U.S. SENT'G COMM'N, QUICK FACTS, INDIVIDUALS IN THE FEDERAL BUREAU OF PRISONS (2024) ("the average guideline minimum for individuals in federal prison was 169 months. The average length of imprisonment imposed was 149 months."), https://www.ussc.gov/research/quick-facts/individuals-federal-bureau-prisons.
[41] *See also* EAGLES, *supra* note 9 (noting that "[c]ourts receive no additional probation staff or law clerk assistance to divide the wheat from the chaff."); Public Comment of Chief Probation Officer Warren Little, Eastern District of Kentucky (June 5, 2024) (stating that, "[i]f the acquitted conduct amendment is made retroactive[,] it will require more extensive work from the Probation Office than past retroactive changes," at a time when Probation faces difficulties from "understaffing").

the papers, without the need for hearings or the presence of the defendant."[42] At the same hearing, then-Commissioner Jackson noted that "the federal officials who testified at our hearing about their experience with having administered the applications for retroactive penalty reductions before, after the crack cocaine guideline was reduced in 2007, said that these guideline changes, if made retroactive[,] would not be particularly burdensome."[43] By contrast, when then-Commissioner Howell voted against retroactive application of part of the crack cocaine amendments to implement the Fair Sentencing Act in 2010, she stressed that the amendment involved "new factors . . . that were not formerly considered by judges as part of the original guideline calculations," potentially "requir[ing] courts to engage in new fact-finding with the concomitant need for hearings."[44] Retroactive application of the acquitted-conduct amendment would require similar and even more difficult fact-finding.

Additionally, retroactive application could place added burdens on crime victims. Cases in which defendants were convicted on some counts and acquitted on others may present complex factual and legal questions regarding how to apply the Commission's definition of acquitted conduct, including whether courts may continue to rely on portions of a previous victim statement. The court deciding the sentence-reduction motion also may have to consider how adjudication of the motion and potential adjustment of the sentence will affect victims' rights to "notice," "to not be excluded from any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding," and to be "reasonably heard" at any such "public proceeding."[45] Resolving those questions and conducting any further sentencing proceedings may retraumatize victims who testified at trial or provided statements during the original sentencing and relied on the sentencing court's determinations. For example, consider a defendant who was charged with both child sex trafficking and production of Child Sexual Abuse Material (CSAM), and was convicted following trial of production of CSAM but acquitted of the sex-trafficking count.[46] Questions would arise over whether, in any sentencing-reduction proceedings, the victim should be asked to provide new testimony in order to distinguish the harm from the CSAM from the sex trafficking.

As we noted during the March 2024 public hearing, juries generally do not acquit defendants of conduct, but rather of charges. Specific acts or omissions will often "establish[], in whole or in part" both an acquitted count, and a count for which the defendant was convicted. Although we accept that the Commission has made changes to the guidelines to address acquitted conduct going forward, we urge the Commission to avoid this murky area going backwards in time.

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[42] *Public Meeting*, *supra* note 4, at 32:11-14 (statement of Dabney Friedrich, Comm'r).
[43] *Id.* at 14:4-10 (statement of Ketanji Brown Jackson, Comm'r).
[44] *Id.* at 19:1-12 (statement of Beryl Howell, Comm'r).
[45] Crime Victim's Rights Act, 18 U.S.C. § 3771(a).
[46] Victims Advisory Group, Comment on Proposed Amendments to Sentencing Guidelines (Feb. 22, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=309.

III. Detailed Comments on Retroactivity for Amendment on Altered or Obliterated Serial Numbers

The second recently promulgated amendment concerns the four-level enhancement in firearms cases for trafficking or possession of a firearm that "had an altered or obliterated serial number."[47] The Commission amended the relevant language to limit the enhancement's application to "any firearm [that] had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye."[48]

We appreciate that, in promulgating this amendment, the Commission sought to "resolve the circuit split" as to how to define "altered or obliterated" and to "ensure uniform application" of this guideline.[49] The Commission, however, should not retroactively apply this amendment, which adds new terms replacing the existing "altered-or-obliterated" language.

To begin with, applying the change retroactively will impose a significant burden. As noted above, the Commission estimates that up to 1,452 offenders would be eligible to file a motion for a reduced sentence as a result of receiving an enhancement under §2K2.1(b)(4)(B) for an altered or obliterated serial number.[50] In cases where the movant makes an initial showing that the amendment may be applicable, a reviewing court would then need to determine whether a serial number was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. But only two circuits used this naked-eye test before the amendment. Because this test was not the law in all circuits, the information will not necessarily be in the PSR, and the court will most likely be required to conduct a factual inquiry. As the Commission's *Retroactivity Impact Analysis* explains, "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."[51]

A factual inquiry would involve locating the gun, or photographs of the gun (to the extent that photographs are sufficient), and analyzing those materials, years after sentencing. The gun, or photos of the gun, may not exist years later. Guns are typically destroyed after sentencing and, if they are kept, they are often kept only for a period of a year and a day after the sentence is final (when the period for collaterally attacking the sentence expires). In the case of a stolen gun, an attempt may have been made to return the weapon to the rightful owner. Or, agents may have used physical or chemical means to restore an obliterated serial number from a firearm.

Another hurdle is that the evidence now required may never have been made part of the record—and may thus be unavailable in sentencing-reduction litigation in some circuits. For example, the Eleventh Circuit has held that, in considering motions under § 3582(c)(2), district

[47] USSG § 2K2.1(b)(4)(B)(i) (2021).
[48] AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 34, at 20.
[49] *Id.* at 18.
[50] RETROACTIVITY IMPACT ANALYSIS, *supra* note 12, at 12.
[51] *Id*. at 11.

courts "should not consider any evidence or materials beyond those that were before [them] at the time of the original sentencing proceeding."[52] Consistent with that understanding, in recent litigation involving the zero-point-offender provisions of Amendment 821, the government has sought new factual findings based only on the existing record.

Here, if the government is required to show that the serial number is rendered illegible or unrecognizable, such evidence would not necessarily have been included in the PSR in at least the Fourth, Fifth, and Eleventh Circuits, because such evidence was not required to support the enhancement's application in those jurisdictions. The result could very well be a difficult and unsuccessful effort by the prosecutor to track down evidence; a bar on evidence that was not previously put on the record because it was not required at the time; and the movant-defendant's receiving a windfall through retroactive relief because the government cannot prove that the firearm meets a test announced long after sentencing. In our view, a reduced sentence for an amendment applied retroactively should be reserved for defendants who do not satisfy the Commission's newly issued substantive criteria, not the happenstance of physical-evidence availability.

Finally, as noted above, resources are not infinite. Shifting resources from "combat[ting] the epidemic of gun violence and other violent crime,"[53] to having federal prosecutors re-analyze old cases makes our communities less safe, undermining public safety. In our view, it would be a poor public policy choice to promulgate a rule that would permit judges to return dangerous criminals to our communities, the vast majority of whom are recidivists,[54] because the government cannot re-locate newly relevant evidence years after their convictions.

IV. Detailed Comments on Retroactivity for Amendment on Enhanced Penalties for Drug Offenders / §2D1.1

The Department also urges the Commission not to make retroactive the amendment to §2D1.1(a) regarding Enhanced Penalties for Drug Offenders. As noted in the Reason for Amendment sent to Congress, this amendment is intended to "clarify the Commission's original intent that the enhanced base offense levels apply because the statutory elements have been established and the defendant was convicted under the enhanced penalty provision provided in sections 841(b) or 960(b)."[55] The Commission promulgated this amendment in response to "public comment and testimony that it was unclear whether the Commission intended for §§2D1.1(a)(1)–(a)(4) to apply only when the defendant was convicted of one of these crimes or whenever a defendant meets the applicable requirements based on relevant conduct."[56]

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[52] *United States v. Hamilton*, 715 F.3d 328, 340 (11th Cir. 2013).
[53] REMARKS BY PRESIDENT BIDEN AND ATTORNEY GENERAL GARLAND ON GUN CRIME PREVENTION STRATEGY, *supra* note 16.
[54] WHAT DO FIREARMS OFFENSES REALLY LOOK LIKE?, *supra* note 14, at 11.
[55] AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 34, at 29.
[56] *Id*.

Applying the changes retroactively may disrupt numerous sentences imposed following charging decisions premised upon prior interpretations of the guidelines. Yet, these cases all necessarily involved a victim who suffered serious bodily injury or death. For eligible drug defendants, if the defendant was not in fact charged and convicted of the statutory offense carrying the mandatory minimum term (of at least 20 years), and if the parties did not stipulate to the death or serious bodily injury, the defendant's guideline range would drop dramatically, and the new applicable guideline range would be calculated as if no victim suffered death or serious bodily injury, even though the original sentencing court found that the defendant was responsible for a death or serious bodily injury to a victim. The fact that the defendant could be sentenced as if no death or serious bodily injury occurred could be very upsetting to the family of the victim in and of itself. And even if the court ultimately considers the victim in evaluating the § 3553 factors, it may be traumatic on the family to revisit these difficult issues.

Making this amendment retroactive, in short, has the potential to allow certain defendants to be sentenced without regard to the death or serious bodily injury that resulted from their drug trafficking, and to provide a significant number of defendants with a substantial and unwarranted sentencing-reduction windfall. Given the serious potential consequences and the challenges arising from applying the amendment retroactively, the Department urges the Commission not to do so.

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Burden on the courts. The amended version of §2D1.1(a)(1)-(4) clarifies how these provisions are linked to certain mandatory minimum sentences. In many instances, applying the amendment to §2D1.1(a)(1)-(4) retroactively may be a straightforward exercise that courts would be a capable of performing based on sentencing and charging documents.

Even when that is the case, however, courts would still have to apply a different guideline provision to those defendants who are eligible for resentencing. And that process will create significant administrative burdens and potentially lead to disparate results. Specifically, if the amendments are applied retroactively, defendants who are no longer eligible for sentencing under death-resulting or serious-bodily-injury guideline provisions will need to be sentenced based upon the drug quantity attributable to them under §2D1.1(a)(5). Although some PSRs may contain drug-quantity calculations, others will likely require additional fact-finding to determine the quantity of drugs attributable to the defendant. Such determinations may require additional judicial fact-finding about events that occurred over a decade ago.

Making those determinations in a case that was prosecuted in the past raises significant challenges. As noted above, the law in some jurisdictions may limit the ability of district courts to take or consider new evidence in a sentence-reduction proceeding. And even where no such legal impediment exists, exhibits and other information that would have been available at the time of the sentencing may no longer be available. For example, evidence may have been destroyed. Investigating agents may be long retired. Memories will have faded. As a result, some defendants may receive an additional sentencing windfall because the existing record may not contain sufficient evidence to determine—and the government may no longer have sufficient evidence to demonstrate—the drug quantity that would have been appropriately attributable to

the defendant. In such cases, the defendant would then receive two windfalls. Not only would the death-resulting or serious-bodily-injury guideline no longer apply, but the offender also would be held accountable for a drug quantity that was far lower than the one that would have been provable at the time of sentencing. Such a result would be deeply troubling—including for the surviving family or friends of victims of the defendants' drug trafficking.

Magnitude of the Change. The potential implications of retroactivity on defendants who were subject to the provisions of §2D1.1(a)(1)-(4) may be substantial in some cases, generating a significant unwarranted sentencing reduction for some defendants and creating substantial sentencing disparities based upon prosecutors' prior charging decisions. Sentences could also be affected by factors having little or nothing to do with the original sentencing process or the appropriateness of the original sentence, such as the recency of the conviction, which in turn may affect the availability of relevant evidence, including laboratory and toxicology reports, and the availability of witnesses. Although several circuits had held that §2D1.1(a)(1)-(4) applied only when a defendant had been charged and convicted of a statutory death-resulting offense,[57] clear case law on that point did not exist throughout the country.[58] As a result, prosecutors in some districts who could have charged a mandatory minimum sentence chose to forego doing so based upon an understanding that the provisions of §2D1.1(a)(1)-(4) would apply. In some instances, prosecutors entered into a plea agreement in which they chose to forego a 20-year mandatory minimum sentence based upon an understanding that §2D1.1(a)(2), for example, would apply and that the defendant's base offense level would be 38.

If the amendment to §2D1.1(a) is made retroactive, the defendants in such cases would no longer be eligible to be sentenced under §2D1.1(a)(2), but rather under the drug quantity table pursuant to §2D1.1(a)(5). For a defendant who distributed a relatively small quantity of fentanyl that proved to be lethal or for whom the government can no longer prove a significant drug quantity, the effect of the change would be dramatic. For example, the base offense level for a defendant who distributed less than four grams of fentanyl that resulted in a death or serious bodily injury would go from 38 to 12—meaning that, for a defendant in criminal history category I, the applicable guideline range would drop from 235-293 months to 10-16 months.[59] Such a result would send a disturbing message to the friends and family members of the victim whose life was cut short or adversely affected as a result of the defendant's conduct.

In the examples set forth above, the retroactive application of the amendment would provide significant potential sentencing reductions to defendants who already benefited from a prosecutor's decision to forego seeking the highest available mandatory minimum sentence. Retroactive application of this amendment thus would send a message to prosecutors and victims that they cannot rely upon the finality of sentences that are imposed under the guidelines. By

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[57] *See United States v. Lawler*, 818 F.3d 281, 283-285 (7th Cir. 2016); *United States v. Greenough*, 669 F.3d 567, 573-76 (5th Cir. 2012); *United States v. Rebmann*, 321 F.3d 540, 543- (6th Cir. 2003). Dicta in another circuit expresses the same view. *See United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d Cir. 2001).

[58] *See, e.g.*, *United States v. Shah*, 453 F.3d 520, 524 (D.C. Cir. 2006) (finding no plain error in applying §2D.1.1(a)(2) without charging death-results element when plea agreement and government proffer stated that defendant was accountable for the death); *United States v. Rodriguez*, 279 F.3d 947, 950-51 (11th Cir. 2002) (upholding sentencing court finding of death resulting under preponderance standard and rejecting *Apprendi* claim because sentence did not exceed 20-year maximum under 21 U.S.C. § 841(b)(1)(C)).

[59] *See* U.S.S.G. §2D1.1(c)(14).

reducing the sentences only for defendants who already benefited from prosecutors' decisions to take a measured charging approach, applying this amendment retroactively may serve to encourage prosecutors to seek more mandatory minimum sentences in the future because such sentences are more likely to provide finality and closure for the victims and their families.

Public Safety. Retroactive application of this amendment would also discourage respect for the law and would detract from Congress's purposes in enacting and amending the Controlled Substances Act: to protect the public by deterring would-be drug traffickers. The need to deter drug traffickers has become ever more pressing in recent years, as the number of children aged 12-19 suffering overdose deaths has tripled since 2019.[60] At the same time, as noted above, more than 300,000 children lost a parent due to a drug overdose between 2011 and 2021.[61] Reducing the sentences for offenders whose drug trafficking caused such deaths—and were either proven to cause such deaths or admitted by the defendant to have caused such deaths – would undermine, rather than promote, deterrence.

Purpose. Because the purpose of the amendment is to clarify a perceived ambiguity in the interpretation of the guidelines, it is far preferable for all participants in the sentencing system to move forward with the same understanding of the law, rather than imposing that interpretation on past sentencings. As noted above, applying this clarifying amendment retroactively would be disruptive to the status of many significant cases that were charged and resolved based upon a different understanding of the law, which the Commission has now reformulated. That is particularly true in cases where prosecutors could have sought mandatory minimum sentences or statutory sentencing enhancements but chose not to do so in reasonable reliance on their understanding of the law and how it would apply in these very serious cases.

In addition, making the amendment retroactive would run contrary to one of the Commission's duties under 28 U.S.C. § 994(f): namely, the requirement that the guidelines it promulgates "shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." For example, if the amendment is applied retroactively, a defendant who was charged with the 20-year mandatory minimum for death resulting, and then sentenced to a 20-year term, would not be eligible for sentencing relief. However, a similarly situated defendant who was sentenced under §2D1.1(a)(2) as part of a plea agreement where a prosecutor chose to dismiss a 20-year mandatory minimum count and rely instead on the advisory guidelines could potentially receive a substantial sentencing reduction, with the new guideline calculation based primarily on the now-provable drug amount.

Retroactive application of this amendment, and the potential windfall it would provide to certain defendants but not others, would undermine public confidence in the rule of law. Prosecutors make charging decisions and enter into plea agreements based upon their reasonable understanding of how the law applies to a particular case at that time. As prosecutors pursue a

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[60] CENTERS FOR DISEASE CONTROL AND PREVENTION, DRUG OVERDOSE DEATHS AMONG PERSONS AGED 10–19 YEARS — UNITED STATES, JULY 2019–DECEMBER 2021 (Dec. 16, 2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7150a2.htm; *see also* Jenna Portnoy and Dan Keating, *Fentanyl is Fueling a Record Number of Youth Drug Deaths*, WASH. POST (May 22, 2024), https://www.washingtonpost.com/dc-md-va/2024/05/22/fentanyl-youth-overdoses-increase/.

[61] *More Than 321,000 U.S. Children Lost a Parent to Drug Overdose from 2011 to 2021*, *supra* note 20.

criminal case, they also must consult with victims and provide them with information about potential charges, plea agreements, and sentencing recommendations, among other requirements. As part of that effort, prosecutors seek to ensure that victims' families understand how the law applies to the case and that the families' views have been considered and communicated in the process. Retroactive application of §2D1.1(a)(1)-(4) would upend the reliance that prosecutors and victims rightly have placed on how the law applies and send a message to these victims that their losses did not matter. It would also undermine any sense of finality or closure that the defendant's sentencing may have provided regarding the loss of their loved ones.

From our review of prior amendments that have been made retroactive, only Amendment 591 is somewhat analogous. That amendment addressed the question of whether the enhancements under §2D1.2 (applying to drug offenses occurring near protected locations or involving underage or pregnant individuals) were applicable to drug prosecutions under § 841 or only when the defendant was prosecuted under other specific statutory provisions. Although the Commission applied that provision retroactively, the effect of the decision in many cases was to reduce defendants' sentences by only one or two levels.[62] Moreover, the triggering statutory offenses carried mandatory minimum sentences of one year.[63] In this case, the stakes are much more substantial. As noted above, retroactive application of these provisions may result in dramatic reductions in some defendants' offense levels and would completely remove the victim's death from consideration in the guidelines calculations.

To the extent that the guideline amendment was motivated by concern about the length of sentences for death- or serious-bodily-injury resulting offenses when mandatory minimums did not apply, the Commission's own data do not suggest a need for retroactivity. Nearly 47 percent of defendants sentenced under §2D1.1(a)(1)-(4) received a sentence *below* the applicable guideline range.[64] In other words, in the absence of mandatory minimum sentences, district judges already used their authority to make adjustments when they deemed it appropriate. Requiring judges to revisit these decisions and to conduct further judicial fact-finding to calculate the relevant drug quantity would create a substantial burden that undermines the finality of sentences without significantly furthering the amendment's purpose.

Finally, the Department notes that the amendment specifically states that the parties may stipulate to the application of §2D1.1(a)(1)-(4). As several witnesses at the Commission's hearing on this amendment discussed, this has been an accepted practice in some districts for quite some time. Should this amendment be made retroactive, the Commission should make clear that any sentence that was based upon a stipulation regarding the application of §2D1.1(a)(1)-(4) is not entitled to resentencing.

V. Detailed Comments on Retroactivity for Amendment on Grouping

The Commission amended the grouping rules under §3D1.2(c) to resolve a difference among the courts of appeals concerning whether a count under § 922(g) should group with a drug trafficking count where the defendant also has a separate count under § 924(c). Generally,

[62] *See* U.S.S.G. §2D1.1.2(a)(1)-(2).
[63] *See* 21 U.S.C. §§ 859-861.
[64] RETROACTIVITY IMPACT ANALYSIS, *supra* note 12, at 21 tbl. 3.

§3D1.2 permits grouping of closely related counts of conviction, including "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts."[65] In contrast with other circuits, the Seventh Circuit held that §2K2.4 did not permit grouping of felon-in-possession and drug-trafficking counts when the defendant is also convicted of a count under § 924(c).[66] In its "Reason for Amendment" the Commission explains that it has resolved the spit in favor of the majority rule in the Sixth, Eighth, and Eleventh Circuits.[67]

The Department did not oppose this amendment during the regular amendment cycle, and we do not oppose it being made retroactive. Several considerations inform that view.

First, applying the clarified grouping rule retroactively should not present administrability concerns. As we understand it, the process will involve recalculating the final guideline range to apply the clarified rule on grouping. That process should require little or no additional fact-finding and can likely be accomplished using information available on the face of sentencing documents. Accordingly, the process should not impose an undue burden on the courts, nor on the resources of the Executive Branch. Moreover, the Commission has provided an impact analysis showing that a maximum of only 102 defendants nationwide would be eligible for a reduction if the amendment is made to apply retroactively. And given the prevalence of downward variances in the districts that would be most affected,[68] as well as the existing limitations on the extent of the sentencing reduction authorized by the guidelines,[69] there is reason to believe that the number could be even lower.

Second, any public-safety concerns arising from the characteristics of affected defendants (individuals who used or possessed guns in connection with serious crimes) are allayed by the anticipated magnitude of the change. As we understand it, in many cases the amendment will result in only a single offense-level reduction—a relatively small change. That was the case, for

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[65] USSG §3D1.2(c) (2023).

[66] AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 34, at 21 ("The Sixth, Eighth, and Eleventh Circuits have held that such counts can group together under §3D1.2(c) because the felon-in-possession convictions and drug trafficking convictions each include conduct that is treated as specific offense characteristics in the other offense, even if those specific offense characteristics do not apply due to §2K2.4. By contrast, the Seventh Circuit has held that felon-in-possession and drug trafficking counts do not group under these circumstances because the grouping rules apply only after the offense level for each count has been determined and "by virtue of §2K2.4, [the counts] did not operate as specific offense characteristics of each other, and the enhancements in §§2D1.1(b)(1) and 2K2.1(b)(6)(B) did not apply.") (citations omitted), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

[67] *Id*.

[68] For example, in the two districts with the highest number of cases according to the Commission's *Retroactivity Impact Analysis*, district courts imposed downward-variant sentences in more than 50 percent of cases sentenced during Fiscal Year 2023. *See* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2023, CENTRAL DISTRICT OF ILLINOIS tbl. 8 (53.4 percent), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/ilc23.pdf; U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2023, NORTHERN DISTRICT OF ILLINOIS tbl. 8 (55.4 percent), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/iln23.pdf.

[69] U.S.S.G. §1B1.10(b)(2) ("Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.").

example, in *United States v. Sinclair*,[70] the Seventh Circuit decision that adopted the interpretation of the grouping rules abrogated in the Commission's amendment.

Third, we agree that a basic guidelines provision such as this grouping rule should be applied evenly, uniformly, and should not depend on the defendant's geography. The Commission's *Retroactivity Impact Analysis* shows that 38 of the 102 potentially eligible defendants were sentenced in only three districts: the Central District of Illinois, Northern District of Illinois, and Northern District of Indiana.[71] These districts will be most burdened by the change, but that fact underscores that guideline ranges were not being calculated the same way across different judicial districts. Making this amendment retroactive would therefore be consistent with the Commission's duty to promulgate guidelines that provide "certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities."[72]

VI. Operational and Reentry Concerns

It is also critical to consider the effects of retroactive application of the amendments on the ability of BOP and the Probation Office to properly prepare offenders for reentry into the community. Generally, BOP starts planning for release 180 days in advance.[73] Transition planning includes securing beds in residential reentry centers and providing other programs that require space, resources, re-computation of release dates, and coordination with Probation. It also involves working with Probation to develop release and supervision plans. As noted above, if the Commission disagrees with our assessment of retroactivity and decides to apply these amendments retroactively, we recommend that it delay implementation by several months, a period that will (among other things) allow both BOP and Probation to make the necessary adjustments and preparations to ensure that all offenders receive the reentry and supervision services that they need and so that the reentry proceeds in an orderly and effective way.

* * *

For all the reasons discussed above, retroactive application of the amendments concerning acquitted conduct, altered or obliterated serial numbers, and enhanced penalties for drug offenders would not be in the interest of public safety or justice. The Department therefore opposes retroactive application of those three amendments. We do not, however, oppose retroactive application of the amendment on grouping.

We appreciate the opportunity to provide the Commission with our views.

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[70] 770 F.3d 1148, 1153 (7th Cir. 2014) (inapplicability of grouping rule resulted in an offense level of 17, not 16).
[71] RETROACTIVITY IMPACT ANALYSIS, *supra* note 12, at 15.
[72] 28 U.S.C. § 994(f).
[73] *Public Hearing on Retroactivity of 2014 Drug Amendment*, *supra* note 11, at 121:15-19 (statement of Charles Samuels, Director of the United States Federal Bureau of Prisons).

Sincerely,

/s/ Scott Meisler
Scott Meisler, Deputy Chief, Appellate Section
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
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