



June 2, 2025

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

Re: Issue for Comment on Retroactivity of Drug Offenses Amendment,
Part A, Subparts 1 and 2

Dear Judge Reeves:

NACDL is pleased to respond to the Commission's request for comment on the retroactive application of the Drug Offenses Amendment, Part A, Subpart 1 (which reduces base offense levels for people previously granted a mitigating role reduction pursuant to USSG §3B1.2) and Subpart 2 (which adds an instruction to encourage broader application of the mitigating role reductions in drug cases). NACDL enthusiastically endorses retroactive application for both provisions without limitation. In addition to the foregoing, NACDL agrees with the analysis and positions set forth in comments submitted by the Federal Defenders and joins in the Federal Defenders' comments with respect to the Commission's other requests.

With retroactivity, hundreds or potentially thousands of incarcerated people will be eligible for release over the next several years. Without it, these same people will serve unnecessarily and disproportionately lengthy terms of imprisonment at enormous expense to the prisons that house them and to the integrity of the criminal justice system that needlessly detains them. By shortening the sentences of those drug offenders who occupy supportive roles, the Commission is enacting a required improvement identified in the Commission's own studies, stakeholders' critiques, and the congressional mandate that the drug guidelines appropriately reserve the highest sentences for the most culpable. People who will be eligible for reduced sentences pose little danger to the community, and because any reduction is accompanied by a judge's separate individual risk assessment,¹ their eligibility for release does not raise public safety concerns. Although the number of potentially eligible inmates for reduced sentences under both parts of the amendment may be significant, it is still modest compared to the number of incarcerated individuals who qualified for sentence reductions following previous retroactive amendments. The Bureau of Prisons, the United States Probation Office, the judiciary, and counsel on both

¹ See USSG §1B1.10, cmt. n. 1(B) (district court must apply 18 U.S.C. § 3553(a) factors as well as a separate "Public Safety Consideration" before deciding to grant any reduction and in determining the extent of the reduction).

sides are competent and equipped to implement retroactive application of the amendment.

The Commission has set forth its policy statement regarding retroactive application of amendments in §1B1.10 of the Guidelines and has specifically identified thirty amendments that may be applied retroactively.² The Commission has explained that in selecting these particular amendments, the Commission considered, among other factors, “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).”³ Examination of the Drug Offenses Amendment, Part A, Subparts 1 and 2, with regard to these factors unequivocally establishes the just conclusion that they be applied retroactively.

A. Purpose

Part A, Subpart 1, of the Commission’s Drug Offenses Amendment amends the mitigating role provisions in §2D1.1(a)(5) to further lower the base offense levels for individuals who receive a mitigating role adjustment under §3B1.2. The Commission’s stated reason for the Amendment was to “ensure appropriate penalties commensurate with an individual’s function in a drug trafficking offense” by reducing offense levels for people whose participation in the offense is less culpable.⁴

Part A, Subpart 2, of the amendment adds a new special instruction at §2D1.1(e) to encourage broader use of §3B1.2 in these cases by providing that an adjustment under §3B1.2 is generally warranted if the defendant’s primary function in the offense was performing a low-level trafficking function.⁵ As the Commission explained, the purpose of this amendment is to redress the Commission’s findings that its previous efforts in 2015⁶ to increase use of the mitigating role adjustment had not been effective. In fact, “Commission data show that when §3B1.2 is applied in §2D1.1 cases, the vast majority of these cases receive only a 2-level reduction; 3-and 4-level reductions are rarely applied” and, in addition, “Commission data shows variations across districts in application of §3B1.2 to §2D1.1 cases.”⁷

Although there has been near-consensus for decades that quantity-driven drug Guidelines routinely overstate criminal culpability,⁸ the Commission is only now emphasizing that the role adjustment should be more liberally and frequently applied and imposing a cap based on role in

² See USSG §1B1.10(c).

³ *Id.* cmt. background.

⁴ Reader Friendly Version of Final 2025 Amendments to the Sentencing Guidelines at 9, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202505_RF.pdf.

⁵ USSC’s [2025 Amendments to the USSG](#), at 10 (Apr. 30, 2015).

⁶ §3B1.2 (Mitigating Role) was amended in 2015 after a Sentencing Commission study “found that mitigating role is applied inconsistently and more sparingly than the Commission intended.” See United States Sentencing Commission, “Notice of Final Priorities,” 79 Fed. Reg. 49378 (Aug. 20, 2014). Moreover, in drug cases, the Commission’s study “confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions.” *Id.*

⁷ *Id.*

⁸ See, e.g., *United States v. Johnson*, 379 F. Supp. 3d 1213, 1220-22 (M.D. Ala. 2019) (“the offender’s role in the crime is more useful for determining culpability than the quantity of drugs involved”); *United States v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243 at *13 (E.D.N.Y. Jan. 28, 2013) (citing, *inter alia*, 1994 Department of Justice report).

the offense, limiting the effect of overall drug quantity where a person's role is reduced. This commonsense notion cries out for retroactive application to correct historic sentencing injustices. Judges who felt constrained by high Guidelines sentencing ranges imposed lengthy terms of imprisonment on low-level participants in the drug trade, many of whom are victims themselves. The purpose of the new Guidelines can only be achieved by applying them retroactively so that men and women *already* serving lengthy terms, whose role in the crime was limited, can benefit from the change to achieve proportionality in sentencing. NACDL cannot think of a more compelling reason for retroactivity than the data-supported conclusion that human beings may be serving unnecessarily lengthy prison terms that failed to reflect their actual criminal culpability.

B. Impact

On May 15, 2025, the Commission's Office of Research and Data submitted its Retroactivity Impact Analysis of the 2025 Drug Offenses Amendment.⁹ In it, the Commission estimated that 650 individuals will be eligible to seek a sentence reduction if Subpart 1 is applied retroactively, yielding an average Guidelines reduction of 12 months.¹⁰ These individuals would be released over a period of six years.¹¹ The Commission states that it cannot estimate the impact of Subpart 2 because it does not regularly collect information on a defendant's primary function in a drug trafficking offense.¹² The Commission notes that approximately 50,000 currently incarcerated drug offenders did not receive a mitigating or aggravating role adjustment, suggesting that 50,000 cases would need to be reviewed if the measure applies retroactively.¹³ But distinguishing from those thousands of cases the ones that involve only low-level conduct will have a uniformly positive effect, allowing shorter sentences for deserving incarcerated people while allowing the BOP to focus on those who are more culpable.

Additionally, retroactive application serves the Commission's important objective of minimizing the likelihood that prison populations exceed capacity. As of May 2025, more than 156,000 individuals were incarcerated in the Federal Bureau of Prisons and the numbers have been *increasing* since the 2020 COVID pandemic.¹⁴ With fewer inmates in February 23, 2023, the Bureau of Prisons was operating at six percent above rated capacity.¹⁵ In addition to assisting incarcerated people and their families, retroactive application of the role amendments could substantially alleviate the strains of overcrowding in BOP facilities.

Moreover, retroactive application of the drug role amendments comes with no risk of reducing public safety. The Commission's general studies on the recidivism rates of all federal prisoners who have been released as a result of retroactive application of other amended guidelines have confirmed that there is no statistically significant difference between the rearrest rates for offenders who received a sentence reduction under prior amendments and offenders who had

⁹ See [Retroactivity Impact of 2025 Drug Offenses Amendment](#).

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² *Id.* at 14.

¹³ *Id.*

¹⁴ https://www.bop.gov/about/statistics/population_statistics.jsp

¹⁵ U.S. Dep't of Justice, Federal Prison System, FY 2024 Performance Budget Congressional Submission, 12. See also OIG, Audit of the Federal Bureau of Prisons' Efforts to Maintain and Construct Institutions (2023), <https://tinyurl.com/59h3dync>.

served their full sentences before the guideline reductions took effect.¹⁶ In these circumstances, risk of serious re-offense will be even lower than with other amendments because the only people released will, by definition, be low-level participants in the crimes at issue. Accordingly, the overwhelmingly positive effects of retroactivity of these provisions on individuals and the federal prison system at large comes with virtually no risk of negatively impacting public safety.

C. Implementation

As to both amendments, the significant benefits of retroactive application outweigh the costs of implementing these changes retroactively. While implementation of a retroactive amendment necessarily requires resources, here we submit the costs are modest and manageable. Retroactive implementation of Subpart 2 would require the review of 50,000 cases (most likely handled by a screening review of the presentence reports to determine the role the defendant played in the offense), but experience has shown that such reviews can be conducted expeditiously through district committees comprising prosecutors, federal defenders and probation officers.¹⁷

In comparison, retroactive application of the last three significant amendments to the drug guidelines qualified several tens of thousands of inmates for potential sentence reductions in the first few years. For example, in the first three and a half years following retroactive application of the 2007 crack cocaine amendment, federal district courts processed 25,515 motions (almost one and a half the projected number of all potential applications under retroactive application of Part A and Part B, Subpart 1 of this year's amendment).¹⁸ In 2014, the Commission's unanimous vote to apply retroactive treatment to the Drugs Minus Two Amendment qualified an estimated 46,290 inmates for judicial review of their sentences (nearly two and a half times more than Part A and Part B, Subpart 1 eligibility).¹⁹ Notably, despite the volume of eligible inmates, retroactive application of the amended drug guidelines has been smooth and well-coordinated among the courts, probation officers, U.S. Attorney offices, and the defense community. The system has likewise seamlessly processed retroactivity applications under the 2023 Criminal History Amendments.

In short, the factors the Commission considers when selecting amendments for retroactivity—the purpose of the amendment, the magnitude of the change made by the amendment, and the difficulty, or lack thereof, of applying retroactivity—all weigh in favor of retroactive application of both subparts of Part A of 2025's Drug Offenses Amendment. Retroactivity is fundamentally fair and a well-supported, sound sentencing policy.

¹⁶ See, e.g., U.S. Sent'g Comm'n, *Retroactivity and Recidivism, The Drugs Minus Two Amendment* 1, 6 (July 2020), available https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

¹⁷ See Caryn Davis, *Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782*, 10 Fed.Cts.L.Rev. 39, 71, 74 (2018).

¹⁸ U.S. Sent'g Comm'n, News Release, U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively, June 30, 2011, <https://www.ussc.gov/about/news/press-releases/june-30-2011>.

¹⁹ U.S. Sent'g Comm'n, News Release, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences, July 18, 2014, https://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf.

D. Finality

Lastly, we wish to add a comment about finality. While we acknowledge the benefits of finality to victims and other stakeholders in the criminal justice system, research has shown that long sentences do not deter.²⁰ It is more costly to incarcerate people than it is to release them and provide support. For the clients of our members, the possibility of a retroactive reduction in sentence provides hope, which translates into good conduct in prison and a powerful incentive to seek rehabilitation. Especially for clients who receive below-Guidelines sentences in the first place, the judge's discretion in evaluating the sentence under the newly calculated Guideline will typically hinge on the person's conduct while incarcerated, which strongly motivates these clients to achieve provable steps towards rehabilitation while imprisoned.

Finally, a victim's need for closure is real and deserving of respect, but broader humanitarian and societal interests should not be overlooked. As we wrote in our report in support of our model second look legislation: "Part of being human is the capacity to make conscious choices, including to adopt new paths in life, to admit we were wrong, to forgive. When society consigns prisoners to long sentences – often decades-long sentences – without any recourse, it undermines not only their humanity, but that of victims and others affected by the sentence. and our own. Making these amendments retroactive is to acknowledge and, where appropriate, reward an incarcerated person's personal transformation, thereby consciously achieving the most important purpose of criminal sentencing."²¹

Respectfully submitted,

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Chair, NACDL Sentencing Committee

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²⁰ Michael Tonry, *Remodeling Am. Sent'g: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 *Criminology & Pub. Pol'y* 503, 507 (2014).

²¹ NACDL Report, [Second Look = Second Chance: Turning the Tide Through NACDL's Model Second Look Legislation](#) at 18 (2021).