United States Sentencing Commission

2022-2023 Amendment Cycle

Public Comment on Criminal History
Amendment 8, Parts A and B
88 FR 28254

UNITED STATES SENTENCING COMMISSION

2022-2023 PUBLIC COMMENT ON CRIMINAL HISTORY AMENDMENT 8, PARTS A AND B

88 FR 28254

ISSUE FOR COMMENT: RETROACTIVITY

This document sets forth the unofficial text of an issue for comment promulgated by the Commission and is provided only for the convenience of the user. As with all amendments that the Commission has voted to promulgate but has not yet officially submitted to Congress and the Federal Register, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once the amendments have been submitted to Congress and the Federal Register, official text of the issue for comment will be posted on the Commission's website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register

Written public comment should be received by the Commission not later than June 23, 2023. Public comment received after the close of the comment period may not be considered. All written comment should be sent to the Commission via any of the following two methods: (1) comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov; or (2) comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Issue for Comment on Retroactivity. For further information, see the full contents of the official notice when it is published in the Federal Register (available at www.ussc.gov).

The issue for comment is as follows:

REQUEST FOR COMMENT ON PARTS A AND B OF THE CRIMINAL HISTORY AMENDMENT, RELATING TO "STATUS POINTS" AND CERTAIN "ZERO-POINT" OFFENDERS

On May 1, 2023, the Commission submitted to Congress amendments to the sentencing guidelines and official commentary, which become effective on November 1, 2023, unless Congress acts to the contrary. Such amendments and the reasons for amendment are included in this notice.

Section 3582(c)(2) of title 18, United States Code, provides 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), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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." Pursuant to 28 U.S.C. § 994(u), "[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."

The criminal history amendment has the effect of lowering guideline ranges. The Commission intends to consider whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. § 994(u), Parts A and B of this amendment, relating to the impact of "status points" at §4A1.1 (Criminal History Category) and offenders with zero criminal history points at new §4C1.1 (Adjustment for Certain Zero-Point Offenders), should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. In considering whether to do so, the Commission will consider, among other things, a retroactivity impact analysis and public comment. Accordingly, the Commission seeks public comment on whether it should make Parts A and B of this amendment available for retroactive application. To help inform public comment, the retroactivity impact analysis will be made available to the public as soon as practicable.

The Background Commentary to §1B1.10 lists 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 §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

The Commission seeks comment on whether it should list Parts A and B of the amendment, addressing the impact of "status points" at §4A1.1 and offenders with zero criminal history points at new §4C1.1, in subsection (d) of §1B1.10 as changes that may be applied retroactively to previously sentenced defendants. For each of these parts, the Commission requests comment on whether that part should be listed in subsection (d) of §1B1.10 as an amendment that may be applied retroactively.

If the Commission does list one or both parts of the amendment in subsection (d) of §1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced?

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

June 23, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002
Attention: Public Affairs

Re: Issue for Comment on Retroactivity of 2023 Criminal History Amendment

Dear Chair Reeves:

We were pleased to see that the Commission adopted Parts A and B of the 2023 Criminal History amendment, relating to “status points” and certain “zero-point” offenders respectively. Both are important improvements to the criminal history provisions of the Sentencing Guidelines. We write to express our view that both Parts A & B should be applied retroactively, i.e. should be added to subsection (d) of Policy Statement §1B1.10.

Part A and Part B both represent important steps forward in evidence-based sentencing policy. Crucially, they are informed by data collected by the Commission over more than a decade. The reasons for their adoption apply with equal force to individuals currently serving sentences as they do to future cases.

We noted in our March 14, 2023 comment letter[1] that Congress confronted the appropriate role of criminal history in sentencing, in a different context, when enacting sections 401, 402, and 403 of the First Step Act. Sections 401 and 403 tempered certain draconian prior-conviction enhancements; section 402 made individuals with more criminal history points eligible for safety valve relief. As we pointed out in our comment letter, one of the many problems with overreliance on criminal history in sentencing is that it exacerbates the effects of racially disparate arrest and prosecution rates. Because of this, we urged the Commission to move in the direction of assigning less weight to criminal history in the guidelines.

[1] United States Sentencing Commission, *2022-2023 Proposed Amendments Public Comment* 298, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

With regard to "status points" in particular, we noted that the current policy lacks evidentiary justification, and often results in what amounts to "triple-counting" of a prior conviction. We pointed to the Commission's conclusion, based on data from the cohort of individuals released in 2010 and tracked until 2022, that "[t]hose who received status points were rearrested at similar rates to those without status points who had the same criminal history score," and "[s]tatus points only minimally improve the criminal history score's successful prediction of rearrest—by 0.2 percent."[2] These data suggest that lengthening sentences based on this aspect of criminal history is not empirically justified. Part A is therefore an important step forward in evidence-based sentencing policy.

Retroactivity of Part A would also help redress the racially-disparate impacts of overreliance on criminal history in sentencing. According to the Commission's Retroactivity Study, 43 percent of individuals who would be eligible for resentencing under Part A are Black and 27.8 percent are Hispanic.[3] Additionally, the Commission's retroactivity analysis predicts that the average reduction in sentence under Part A would be 14 months,[4] well over the six-month threshold set forth in the Background commentary to Policy Statement § 1B1.10.

Part B is also an important, data-supported revision of Chapter 4. The same review of individuals released in 2010 shows that those with zero criminal history points at the time of sentencing had considerably lower recidivism rates than other individuals, even those with only one criminal history point.[5] Sixty-nine percent of those eligible for resentencing under retroactive application of Part B would be Hispanic.[6] The Commission's retroactivity analysis predicts that the average reduction in sentence under Part B would be 15 months,[7] again well over the six-month threshold in the § 1B1.10 Background commentary.

Moreover, <u>retroactive application of Parts A and B should not impact public safety</u>. The data which gave rise to these amendments demonstrates that eligible individuals' original sentences were longer than necessary to protect the public. Moreover, Commission data indicates that previous retroactive guideline changes did not compromise public safety—there is no statistically significant difference in the recidivism rates of individuals whose sentences have been reduced under retroactive guideline amendments and those of comparable people who have served their full imposed sentences.[8]

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[2] United States Sentencing Commission, *Revisiting Status Points* 2-3 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.

[3] *See* United States Sentencing Commission, *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* 13(2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf ("Retroactivity Analysis").

[4] Retroactivity Analysis at 9.

[5] *See* United States Sentencing Commission, *Recidivism of Federal Offenders Released in 2010* (2021), https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010.

[6] Retroactivity Analysis at 21.

[7] Retroactivity Analysis at 17.

[8] *See* United States Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* 6 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf; United States Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* 3 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf; United States Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* 3 (2014), https://www.ussc.gov/

In any resentencing under retroactive guideline amendments, the operative statute, 18 U.S.C. § 3582(c)(2), requires a court to consider all the 18 U.S.C. § 3553(a) factors, including those related to deterrence and protection of the public. This is emphasized in Application Note 1 to Policy Statement § 1B1.10, which specifically requires the court to consider the "nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment." Additionally, § 1B1.10(b) prohibits the court from reconsidering any other guideline application decision and from imposing a new sentence below the newly-calculated guideline range (except in substantial assistance departure cases).

With respect to Part B, the new guideline provides numerous exclusions from eligibility for the "zero-point" offense level reduction. These exclusions apply in areas which the Commission views as aggravated or otherwise appropriate for exclusion—offenses involving terrorism, violence, threats of violence, death or serious bodily injury, sexual violence, substantial financial hardship, firearms and other dangerous weapons, violations of individual rights, hate crimes or vulnerable victims, serious human rights violations, aggravating roles, or continuing criminal enterprises.

Finally, the retroactive application of Parts A and B will not unduly burden courts, United States Attorneys' Offices, or Federal Public and Community Defender Offices. Each institutional stakeholder in the process by now has substantial experience managing motions for resentencing under retroactive guideline amendments. Districts have in the past instituted review processes to determine who is eligible for relief and to prioritize cases based on the imminence of potential release dates.[9] They would undoubtedly bring this expertise to bear and develop similar processes for administering motions for retroactive relief under the Criminal History amendment.

The Commission estimates that 11,495 individuals would be eligible for retroactive relief under Part A, and 7,272 would be eligible under Part B, for a total of 18,767 people.[10] This figure is substantially lower than the 51,141 people whom the Commission estimated would be eligible for sentence reductions under Amendment 782,[11] and the 50,998 people who actually filed.[12] The administrative burden of retroactivity for Parts A & B would therefore be entirely manageable and eminently justified given the sound policy reasons for granting retroactive relief.

All of these reasons counsel in favor of allowing individuals currently serving sentences to apply for resentencing if the amendments would change their criminal history category (Part A), or render them eligible for a decrease in offense level (Part B).

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sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[9] *See, e.g.*, remarks of Commission Chair Patti B. Saris and testimony of Deputy Chief Probation Officer Quincy Avinger, Jr. and Assistant Federal Public Defender Sarah Gannett, *Public Hearing on Retroactivity of 2014 Drug Amend.*, at 80–100, 203–205 (June 2014), https://www.ussc.gov/sites/default/files/transcript_1.pdf.

[10] Retroactivity Analysis at 31.

[11] United States Sentencing Commission, *Analysis of the Impact of the 2014 Drug Guideline Amendment If Made Retroactive* 7 (May 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf

[12] United States Sentencing Commission, *Retroactivity Data Report on the 2014 Drug Guidelines Amendment* tbl. 1 (May 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf.

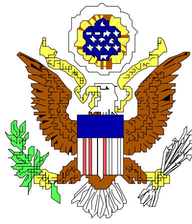
Thank you for considering our views.

Sincerely,

Richard J. Durbin
United States Senator

Cory A. Booker
United States Senator

Mazie K. Hirono
United States Senator



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States District Court
333 Constitution Avenue, N.W., Room 4317
Washington, DC 20001

Honorable Cecilia M. Altonaga
Honorable Kenneth D. Bell
Honorable Mark J. Bennett
Honorable Terrence G. Berg
Honorable Edmond E. Chang
Honorable Dee D. Drell
Honorable Katherine Polk Failla
Honorable Charles B. Goodwin
Honorable Joseph Laplante
Honorable Patty Shwartz
Honorable Charles J. Williams

TELEPHONE
(202) 354-3020

Honorable Randolph D. Moss, Chair

June 23, 2023

Hon. Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chairman Reeves and Members of the Sentencing Commission:

On behalf of the Criminal Law Committee (Committee) of the Judicial Conference of the United States (Judicial Conference), thank you for providing us the opportunity to comment on whether the U.S. Sentencing Commission (Commission) should give retroactive effect to Part A or Part B, Subpart 1 of the adopted criminal history amendment by listing it in §1B1.10(d). The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including

proposals that would increase the flexibility of the Guidelines."[1] Moreover, the Judicial Conference has resolved "that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2] Past testimony on behalf of the Committee has expressed support for Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity. The views expressed are those of the Committee, as we do not here speak for the entire judiciary or each of its judges.

This submission addresses the possibility of giving retroactive effect to Part A or to Part B, Subpart 1 of the adopted criminal history amendment. As you know, Part A would reduce the impact of "status points" in the criminal history calculation by removing the current two-point increase and adding a new one-point increase that applies only to defendants with seven or more criminal history points. Part B, Subpart I (hereinafter referred to as Part B) would create a new 2-level reduction in offense level for "zero-point offenders" who meet the criteria listed in §4C1.1(a).[3, 4]

The Criminal Law Committee's comments focus on administration of justice issues, especially on the potential impact of retroactivity on judicial resources.

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[1] JCUS-SEP 90, p. 69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." *See* 28 U.S.C. § 994(o).

[2] JCUS-MAR 2005, p.15.

[3] Part B of the adopted amendment has three subparts. The retroactivity issue and the discussion in this letter concern only the first subpart.

[4] The Commission's reasons for introducing the changes in Parts A and B are discussed in Section III.A, below.

I. General Comments on Retroactivity Determinations and Factors to Consider

The Committee is aware that the Commission's decision to make an amendment retroactive "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."[5] To assist in its decision, the Commission published a Retroactivity Impact Analysis on May 15, 2023.[6]

In addition to public comment, the factors the Commission considers in making the retroactivity decision include the:

1. Purpose of the amendment,
2. Magnitude of the change in the guideline range made by the amendment, and
3. Difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b).[7]

The Commission has asked that public comment, to the extent practicable, address each of these factors. For that reason, the Committee has largely organized this letter around those three factors.

II. Overview of Committee Comments on Potential Retroactivity of Parts A and B

In response to the Commission's request, the Committee has considered the three factors outlined in the guidelines, along with the data in the May 15 Retroactivity Impact Analysis. The Committee has also considered the nature of the changes in Parts A and B and the Committee's recommendations on prior questions of amendment retroactivity. Based on these considerations,

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[5] *See* USSG §1B1.10, comment. (backg'd.).

[6] The Retroactivity Impact Analysis can be found at this link: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.

[7] *See* USSG §1B1.10(b)(1).

the Committee is concerned about retroactive application of either part of the amendment. Retroactivity of either part would bring significant impacts on the courts, concrete workload implications for our probation and pretrial services offices, and a host of effects for other judiciary stakeholders. Our principal concerns, however, relate to the retroactive application of Part A given (1) the absence of the sort of countervailing, fundamental equity interests that have been addressed by past retroactively applied amendments, and (2) the burden that retroactive application would have on the limited resources of the pretrial and probation services system, and the reallocation or diversion of resources from other important duties that retroactive application will entail.

As detailed below, in the past the Committee has supported retroactive application for amendments that eliminated a fundamentally unfair aspect of sentencing. For example, the Committee supported retroactivity for amendments that reduced crack-offense sentences, reduced the crack-powder disparity, and reduced the influence of mandatory drug-sentence minimums. Here, however, the status-point amendment itself recognizes that accounting for risk of recidivism is not the only purpose served by status points. 2023 Guideline Amendments at 78 (status points "serve multiple purposes of sentencing, including the offender's perceived lack of respect for the law," citing 18 U.S.C. 3553(a)(2)(A)–(C)).[8] That assessment suggests that the amendment is not intended to correct a fundamentally unfair approach to sentencing. The Committee recognizes that all sentencing decisions raise questions of fairness; that courts are required to impose sentences that are "sufficient, but not greater than necessary, to comply with the purposes" of sentencing; and that the judiciary as a whole needs to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of

[8] Amendments to Sentencing Guidelines, Reader-Friendly Version (April 27, 2023).

similar conduct." 18 U.S.C. § 3553(a). But not all changes that lower the applicable guideline ranges implicate concerns of equal importance, and, here, the Part A and Part B amendments do not raise the same type of fundamental fairness issues that some past changes have raised.

In considering retroactivity here, especially regarding Part A and its status points changes, the Committee recognizes the judicial system's interest in promoting respect for the law and the finality of sentences. In addition, the Committee is concerned that retroactive application of the amendments, and particularly the Part A amendment, will impose significant burdens on the judiciary, including an increased workload for the probation officers who would be tasked with researching thousands of criminal histories, in some cases a fact-intensive effort, and developing new guideline calculations and reports. For purposes of anticipating officers' potential workload increase, if the amendment were made retroactive, it is likely that many inmates who received status points at sentencing (more than 50,000 people) and many inmates who had no criminal history points (more than 34,000) would seek reductions, even though only a fraction of them would be eligible for a reduction (11,495 inmates under Part A and 7,272 under Part B). Retroactivity also would introduce a sudden increase to the workload of supervision officers, who would be responsible for supervising thousands of additional people eligible for release on the amendment's November 1, 2023 effective date. The AO's Probation and Pretrial Services Office estimates that the probation and pretrial services system would require a significant increase in budget and staffing (up to 250 new officer positions) to handle the influx of motions for sentence modifications (from the pool of 80,000+ inmates),[9] and to

[9] Based on the current formula for probation staffing, if the amendment is made retroactive and there is a need to handle petitions filed by all status-point and zero-point inmates, regardless of their actual eligibility for a sentence modification, it is estimated that the probation system would require an additional 186 full-time officer positions Specifically, for every 431 petitions, the system requires one Authorized Work Unit (a full time officer). If every inmate who received status points at sentencing filed a motion for reduction, even if ineligible, approximately 50,000 inmates submitting a request under Part A would require an additional 116 Authorized Work

minimize the threat to community safety raised by the release of qualifying inmates without adequate planning and supervision resources.[10]

III. Purpose of Amendment and Prior Committee Retroactivity Recommendations

The Committee's views concerning the retroactive application of the amendment is informed by consideration of the Commission's purpose for the amendment, viewed in light of the Committee's prior decisions on retroactivity.

A. Purpose of Amendment

According to the Commission's Reasons for Amendment and its Impact Analysis, the purpose of Part A is to "limit the impact of status points" and the purpose of Part B is to reflect the Commission's determination that a reduction is appropriate for some zero-point offenders. The primary impetus for both parts of the amendment was Commission recidivism research on

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Units. If every inmate who had zero criminal history points at sentencing filed a motion for reduction, even if ineligible, approximately 30,000 inmates submitting a request under Part B would require an additional 70 officers.

The Committee focused on the potential workload associated with handling motions from the entire population of incarcerated status-point and zero-point inmates (rather than only those inmates projected to be eligible for a reduction) because of the likelihood that many ineligible inmates will nonetheless file motions for reductions. Commission reports on prior retractive amendments show that a significant portion of motions filed post-amendment were ultimately denied. *See, e.g.,* U.S. Sentencing Comm'n, *Final Crack Retroactivity Report – Fair Sentencing Act* (December 2014) (finding that out of approximately 14,000 motions filed, approximately 5,000 were denied); U.S. Sentencing Comm'n, *2014 Drug Guidelines Amendment Retroactivity Data Report* (May 2021) (finding that out of approximately 51,000 motions filed, approximately 13,000 were denied).

[10] If both parts of the amendment were made retroactive, an additional 64 officers would be required to handle supervision of the 3,000+ additional inmates projected to be released on November 1, 2023.

rearrest rates,[11] which are relevant to the sentencing goal of specific deterrence.[12] Thus, the amendment appears to focus on specific deterrence rather than other important statutory sentencing goals, such as promoting respect for the law, the seriousness of the offense, culpability, just punishment, or general deterrence.[13] According to the guidelines' background commentary, the Commission's retroactivity decision should reflect policy determinations that a sentence reduction sufficiently achieves *all* the purposes of sentencing.[14] The Committee

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[11] *See* U.S. SENT'G COMM'N, REVISITING STATUS POINTS (2022), https://www.ussc.gov/research/research-reports/revisiting-status-points. In its conclusion, that study acknowledged that, while status points may not improve the prediction of an offender's rearrest, "the criminal history score may address culpability and other statutory purposes of sentencing." *Id.*

It is worth noting that the changes to status points in Part A of the promulgated amendment do not appear to be precisely consistent with the results of the Commission's 2022 research study. Although the study concluded that status points "add little to the overall predictive value associated with the criminal history score," the study also found that offenders with status points who had one to four criminal history points for prior sentences had a statistically *higher* rearrest rate than offenders without status points who had the same number of points. Instead of reflecting the 2022 findings, which distinguished the rearrest rates for offenders with less than five criminal history points, the amendment removes the status point increase for offenders with fewer than seven criminal history points and it reduces but retains the status point increase for offenders with seven or more criminal history points.

[12] The Impact Analysis states: "The Commission continues to recognize that 'status points,' . . . reflect and serve multiple purposes of sentencing, including the offender's perceived lack of respect for the law, as reflected both in the offender's overall criminal history and the fact that the offender has reoffended while under a criminal justice sentence ordered by a court."

[13] The other purposes of sentencing include: (A) to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; (B) to afford adequate general deterrence to criminal conduct; and (C) to protect the public from further crimes of the defendant. *See* USSG Ch.4, Pt. A, intro. comment. (citing 18 U.S.C. § 3553(a)(2)).

[14] *See* USSG §1B1.10, comment. (backg'd.).

therefore questions whether the recidivism studies support such dramatic changes, especially given the large number of cases that would be impacted.

For these reasons, the Committee has concerns about retroactively applying the proposed 2023 criminal history amendment on status points or zero-point offenders.

B. Prior Committee Retroactivity Recommendations

The Committee has commented on the potential retroactivity of Sentencing Guideline amendments several times over the past 30 years. Generally, the Committee has considered whether the equities for amending the guideline at issue, like fundamental fairness or correcting a prior "wrong," outweighed the adverse impact retroactivity would have on the courts, the probation and pretrial services system, and community safety. Impacts on the judiciary considered have included increased workload, budget, resources, and staffing needs. In analyzing the retroactivity issue here, a brief review of the reasons the Committee has supported or opposed the retroactivity of earlier amendments is helpful.

In November 2007, the Committee submitted a letter recommending retroactive application of amendments to the Drug Quantity Table that lowered the guideline ranges for crack cocaine offenses.[15] Acknowledging the significant workload impact retroactivity would have on the courts and the probation and pretrial services system, the Committee cited the "corrosive effect" of the disparity between crack and powder sentences. Judge Reggie B. Walton, then-chair of the Committee, testified that, although concerned about the impact of retroactivity on the safety of communities, "fundamental fairness compels retroactivity."[16]

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[15] *See* Letter from Paul Cassell, Chair, Criminal Law Committee, to Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission (November 2, 2007).

[16] *See* Testimony of Judge Reggie B. Walton Presented to the United States Sentencing Commission on November 13, 2007, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearingsand-meetings/20071113/Walton_testimony.pdf.

In February 2011, the Committee again testified in favor of retroactive application of amendments that, pursuant to the Fair Sentencing Act, lowered the guideline ranges for crack cocaine offenses. Judge Walton testified that "equity and fundamental fairness" outweighed the burden that retroactivity would impose on the courts during a time of budget reductions.[17]

By contrast, in September 2010, the Committee opposed retroactive application of the amendment abolishing §4A1.1(e) (the "recency enhancement").[18] The Committee reasoned that the amendment did not address a matter of fundamental fairness and that the impact of retroactivity on the judicial system would be substantial. Specifically, it discussed the demand on the scarce time of courts and officers that would result from the large number of inmates who could seek a reduction if the amendment were made retroactive (approximately 43,000 had received a recency enhancement), even though only about 8,000 of those inmates would be eligible.[19] The Committee distinguished the 2010 recency amendment from the 2007 crack cocaine amendment, which addressed a disparity that had long-undermined public confidence in the federal criminal justice system.

More recently, in June 2014, Judge Irene M. Keeley, then chair of the Committee, testified at a Commission hearing in support of retroactive application, subject to several

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[17] *See* Testimony of Judge Reggie B. Walton Presented to the United States Sentencing Commission on June 1, 2011, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20110601/Testimony_Reggie_Walton.pdf. Judge Walton stated: "Equity and fundamental fairness suggest that a crack offender who committed a crime in 2009 should be treated the same under the guidelines as a crack offender who committed exactly the same crime in 2011."

[18] *See* Letter from Julie E. Carnes, Chair, Criminal Law Committee, to William K. Sessions, Jr., Chair, U.S. Sentencing Commission (September 10, 2010).

[19] *See id.* at 4 (adding that the burden would fall disproportionately on the Southwest border districts). The Committee also noted that the criminal history guidelines already explicitly invited a downward departure for a variety of reasons. *Id.* at 3-4.

conditions, of an amendment that lowered guideline ranges for most federal drug trafficking offenses (known as the "Drugs Minus Two" amendment).[20] Judge Keeley testified that the Committee had "wrestled with many difficult issues including how to balance fairness and public safety, and the reality of significant financial pressures on the judiciary and other components of the criminal justice system."[21] She stated that the Committee's ultimate decision was based on "fundamental fairness" and its long-standing support of efforts to reduce the influence of mandatory minimums on the guidelines and the disproportionate effect of drug quantity on sentence length.[22]

As with prior retroactivity questions, here the Committee has considered whether the purpose for amending the criminal history guideline outweighs the adverse impact that retroactivity would have on the courts, especially the probation and pretrial services system. The 2023 amendment is similar to the 2010 amendment abolishing the recency enhancement (in contrast to the drug amendments made in 2007, 2011, and 2014) insofar as it does not address an issue of fundamental fairness or an inequity. This is especially true given that status points do

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[20] *See* Testimony of Hon. Irene M. Keeley Presented to the United States Sentencing Commission on the Retroactivity of the Drug Guideline Amendment (June 10, 2014) (2014 Keeley Testimony), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_Keeley.pdf. The Committee asked: (1) for a delay in cases being released to supervision to "allow additional time for the system to be provided needed resources and fill probation officer vacancies;" and (2) that the Commission help coordinate a national training program to facilitate development of procedures "that conserve scarce resources and promote public safety." The Commission voted in July 2014 to give retroactive effect to the Drugs Minus Two Amendment and, among other things, to delay for a year the release of inmates whose sentences were reduced pursuant to the amendment. *See* JCUS-SEP 2014, p. 15.

[21] *Id.*

[22] Earlier in the amendment cycle, the Committee had supported the proposed amendment itself, citing the Committee's longstanding position that the guidelines should be set irrespective of any mandatory minimum, and that the amendment reflected the Committee's "continued commitment to delinking the Guidelines from mandatory minimums." *See* Letter from Hon. Irene M. Keeley, Chair, Criminal Law Committee, to Hon. Patti B. Saris, Chair, U.S. Sentencing Commission (March 11, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-CLC.pdf.

serve other sentencing goals, 18 U.S.C. 3553(a)(2)(A)-(C), beyond recidivism. Rather than addressing a fundamental unfairness, the changes made in Parts A and B reflect the evolving criminal history research on recidivism and the Commission's intent to refine the sentencing process/system.

IV. Magnitude of Change and Difficulty of Applying Amendment Retroactively

According to the Impact Analysis, there are 50,545 inmates with status points and 34,922 inmates with no criminal history points. Any of those 85,467 inmates could seek a sentence modification under a retroactive amendment, even though only some of them would be eligible. (11,495 inmates would be eligible under Part A and 7,272 would be eligible under Part B). [23] From the Committee's perspective, the large number of inmates who could seek a reduction regardless of their actual eligibility would make it difficult to apply the amendment retroactively. Motions for reduction filed by more than 85,000 inmates – more than half the Federal Bureau of Prisons population[24] – would significantly impact the workload of judges, probation offices, and others in the system tasked with reviewing and addressing the influx of motions for reduction. In addition, if Part A and/or Part B were made retroactive with no delays, thousands of inmates would be eligible for immediate release on November 1, 2023, at a time when halfway and transitional housing is in short supply and probation offices have limited supervision staff and budgets.

The Committee also notes that, according to the Impact Analysis, retroactivity would disproportionately impact the resources of some districts much more than others. If the

[23] For purposes of comparison, when the Commission was considering retroactivity of the 2014 Drugs Minus Two Amendment, it estimated that approximately 50,000 offenders could potentially benefit from retroactive application, with an average sentence reduction of almost 19 percent.

[24] As of January 2023, there were 158,949 offenders incarcerated in the Federal Bureau of Prisons. *See* QuickFacts, Federal Offenders in Prison, https://www.ussc.gov/research/quick-facts/federal-offenders-prison.

amendment were made retroactive, some districts are estimated to have fewer than fifty inmates eligible for a reduction while other districts would have more than a thousand inmates eligible. For example, the Western District of Texas is estimated to have 822 inmates eligible for a reduction under Part A and 695 inmates eligible under Part B; the Southern District of Texas is estimated to have 647 inmates eligible under Part A and 717 inmates eligible under Part B; and the Middle District of Florida is estimated to have 196 inmates eligible under Part A and 1,122 inmates eligible under Part B. Putting aside the thousands of non-meritorious motions that may result from retroactivity, the burden of resentencing and early release will disproportionately impact these and many other districts.

As for the interpretive difficulty of applying the amendment retroactively, Part A seems to require a relatively simple review of the defendant's criminal history points. Those who received status points at the original sentencing would be eligible for either a 1-level or 2-level reduction, depending on the number of their criminal history points under §4A1.1(a)-(d).
If Part B were made retroactive, however, application would be more difficult. In many cases, probation officers would have to conduct additional fact gathering and judges would have to engage in additional fact finding to determine whether an inmate met the long list of eligibility criteria set out in the new §4C1.1. Some of the facts needed for that determination may well not be available in the sentencing documents and some of the amendment's provisions include new terminology that has not previously been addressed in the Guidelines Manual. For example, additional facts would be needed in many cases to determine whether the offender "personally cause[d] personal financial hardship" or made "credible threats of violence," both of which are new requirements set out in the amendment's exclusionary criteria list. Victims or others may have to testify to determine whether the offender met the criteria at the time of original

sentencing. Making those determinations under retroactive application of Part B would place additional burdens on the victims and on the system as a whole.

Retroactive application of both parts of the amendment raises other issues as well. For example, an offender may attempt to argue that one or more prior convictions should no longer count for criminal history points and that, without those points, he is entitled to the reduction. Offenders also may attempt to achieve the same goal by arguing that they should receive downward departures for overrepresented criminal histories. Still other offenders who received downward departures of any sort at their original sentencings may seek additional reductions that could undercut the overall sentence the court intended to impose. Any of these issues would likely require a more involved resentencing proceeding, in some cases undoubtedly before probation officers and judges who were not engaged in the original sentencing proceedings, but who will be called upon to discern the original sentencing intent.

A. Part A (Status Points)

There are currently 50,545 inmates with status points in the custody of the Bureau of Prisons. According to the Impact Analysis, 11,495 of those inmates would be eligible for a sentence modification under a retroactive Part A, resulting in the need for probation officers to make additional calculations and draft new reports. Of course, *any* inmate who was assigned status points at sentencing could seek modification if Part A were made retroactive. The Committee is particularly concerned about the burden 50,545 potential motions could place on our courts and probation offices, operating under already-constrained budgets and expected to face additional budgetary hardships in the coming fiscal years. In addition, if Part A were made retroactive with no delays, 2,090 inmates would be eligible for immediate release on the amendment's November 1, 2023 effective date. Probation offices would have to shift their

limited resources to adequately supervise this influx of new cases and to help assure community safety.

B. Part B (Zero-Point Offenders)

There were 34,922 inmates with no criminal history points in the custody of the Bureau of Prisons as of January 28, 2023, many of whom are likely to seek a reduction if Part B were made retroactive. According to the Impact Analysis, 11,495 of those inmates meet the criteria in Part B and 7,272 of those inmates would be eligible for a sentence modification under 18 U.S.C. § 3582(c)(2). If Part B were made retroactive with no delays, an additional 1,198 inmates would be eligible for immediate release on November 1, 2023. The Committee does note that non-U.S. citizens comprise a significant majority of those inmates (73.5%). If the immigration system detains those inmates (or at least many of them) following their release from criminal custody, the immediate-release supervision burdens on probation officers would be more modest. It is for this reason that the Committee is somewhat less concerned about retroactive application of the Part B amendment than the Part A amendment.

C. Comparison with Prior Amendments

In considering the three factors the Commission has identified as relevant to the question of whether a guideline should be made retroactive (the purpose of the amendment, the magnitude of the change it makes in the guideline range, and the difficulty of application), the Committee compared the 2023 amendment at issue with prior guideline amendments. As to the purpose of the 2023 amendment, as discussed earlier, it is most similar to the purpose behind the 2010 recency amendment. Both of these amendments are intended to respond to evolving criminal history research on recidivism. Regarding the 2010 recency amendment, the Committee recommended that it not be given retroactive effect. In contrast, the purpose behind the drug

amendments of 2011 and 2014 was to address an inequity or matter of "fundamental unfairness" undermining the criminal justice system. That purpose is not present here. As to those amendments, the Committee supported retroactive application.

The Committee also considered the second and third factors: the magnitude of the change to the guideline range made by Parts A and B amendment, and the difficulty of retroactive application. In the past, the Committee measured the magnitude of the change to the guideline range by considering the average sentence reduction caused by the amendment. The difficulty of retroactive application, discussed earlier, is also impacted by the number of inmates who would be eligible for a reduced sentence relative to the number the number of inmates likely to seek relief if the amendment were made retroactive. If a relatively small number of inmates is actually eligible for relief when compared to the large number of inmates who could seek relief, such an impact has been considered by the Committee in the past to argue against retroactivity because of the substantial burden it would create for the judicial system.

During its deliberations, therefore, the Committee compared the projected magnitude and impact of the Part A and B amendment with the earlier recency and drug amendments. As to the magnitude of the change in the guideline range, the average extent of sentence reduction for Part A of the criminal history amendment is projected to be 11.7%, and the average extent of reduction projected for Part B is 17.6%. Comparing this reduction to the 2010 guideline amendment that eliminated the recency enhancement, the projected average extent of sentence reduction was 11.8%, which is similar to the 11.7% reduction projected for the Part A amendment.

As to the impact of the change on the inmate population and the difficulty of application, if both parts of the 2023 amendment were made retroactive, up to 85,000 inmates could file

motions for reduction (because they received status points or had no criminal history), with approximately18,000 of those inmates actually eligible for a reduction. An estimated 11,495 inmates would be eligible under a retroactive Part A amendment, and an estimated 7,272 inmates under a retroactive Part B. Comparing these numbers to the 2010 recency amendment, there were approximately 43,000 inmates who were likely to apply for a reduction (because they had received a recency enhancement), and only about 8,000 of those inmates were projected to be eligible for a reduction. In the cases of both the 2023 amendments and the 2010 amendment, a relatively small fraction of the inmates who were likely to apply for a reduction would be eligible to receive one. As noted, the Committee did not recommend retroactive application of the 2010 amendment and the Commission did not make that amendment retroactive.

The Committee also reviewed the magnitude of change in the guideline range made by the 2011 Fair Sentencing Act amendment and the 2014 Drugs Minus Two amendment. The Committee supported retroactivity for these amendments (with conditions as to the 2014 amendment) and the Commission made them retroactive. The average sentence reduction under the 2011 amendment was projected to be 22.6%, and the average sentence reduction under the 2014 amendment was projected to be 18.4%. The magnitude of these changes was significantly greater than the average reduction caused by the 2023 Part A amendment, which is 11.7%. They were also greater, but less so, than the average reduction caused by the 2023 Part B amendment, which is 17.6%.

The projected impact of the 2014 and 2011 drug amendments on the inmate population was relatively large. Approximately 50,000 inmates were projected to be eligible for a reduction under a retroactive 2014 amendment. A large number of inmates was also eligible for reduction under the 2014 Drugs Minus Two amendment. Under retroactive application of that amendment,

it was projected that approximately 12,040 inmates would be eligible for a reduction if the amendment were made retroactive.

Looking at the magnitude of change reflected by the average sentence reduction, Part A of the 2023 criminal history amendment is most similar to the recency amendment (11.7% compared to 11.8%). Although the extent of sentence reduction projected for Part B (17.6%) is closer to that of the 2014 amendment (18.4%), many fewer inmates are projected to be impacted by retroactive application of the Part B amendment: approximately 7,000 inmates eligible for reduction under Part B versus approximately 50,000 inmates who were eligible for reduction under the 2014 amendment.

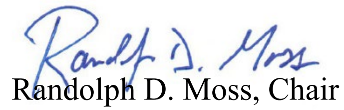
The Committee has considered these comparisons with prior amendments in weighing the retroactivity factors for the 2023 amendment — the purpose of the amendment, the magnitude of change to the guideline range, and the difficulty of application. For the 2023 amendment, the balance of factors tips against retroactivity for reasons similar to those that led the Committee to oppose retroactivity in 2010. When the Committee supported retroactivity of the drug amendments in 2011 and 2014, the balance tipped the other way.

V. Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on the issue of retroactivity for parts of the criminal history amendment expected to go into effect later this year. As discussed herein, the Committee believes the significant consequences of retroactivity for the judicial system here outweigh any equitable issues that retroactive application of the amendments would address (particularly with regard to Part A, which is projected to result in a larger workload burden). The members of the Criminal Law Committee

look forward to working with the Commission to ensure that our sentencing system is consistent with the tenets of the Sentencing Reform Act.

Respectfully submitted,



Randolph D. Moss, Chair

cc: Hon. Roslynn R. Mauskopf

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

District Judge Micaela Alvarez, Texas, Southern

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Despite the limited number of eligible defendants, if made retroactive, these amendments will result in an excessive number of motions by defendants even if not eligible. For border courts like mine, the waste of judicial resources will be great. Even today, I continue to get motions from ineligible defendants on the "drug minus two." I oppose retroactive application because any judge who understands the discretionary sentencing scheme could have sentenced to a lower sentence if that judge believed the case warranted regardless of status points/zero point.

Submitted on: June 23, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

District Judge Kathleen Cardone, Tennessee, Western

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I am very concerned for my District (TXWD) to have to deal with retroactivity of these two provisions. First, and most importantly, I would comment that part of the reason for these amendments is because studies of sentencing showed that judges were going below guidelines when these circumstances presented themselves in cases. Thus, it seems duplicitous to me to ask me to do it again when, at the time of sentencing, I probably used my best judgment to go below the guidelines. Second, I would assert that the great number of these cases would require already very busy border judges to have to reconsider a huge number of cases.

Submitted on: June 22, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

District Judge Benita Pearson, Ohio, Northern

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

The Commission's work is appreciated.   The amendment addressing status points and offenders with zero criminal history points should not be applied retroactively. Prior to those amendments, courts have had the opportunity to vary downwards when appropriate. We should presume that occurred when supported by the record. Understanding that, the sufficient not greater than necessary sentence was should have already been imposed, notwithstanding criminal history. Without retroactive application, the Commission's guidance on further reductions is always appreciated. Thank you

Submitted on: May 16, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

District Judge Stephanie Rose, Iowa, Southern

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I have grave concerns about the expanding erosion of the finality of federal sentences. It has grown increasingly difficult to justify sentences to defendants when the landscape upon which they are sentenced is so frequently changing. Shifting that landscape for relatively minor changes like this one increases feelings of unfairness and undermines the confidence defendants have in the federal sentencing structure.

Additionally, processing the hundreds of applications (approximately 188 of which USSC predicts would be from eligible defendants in this district, plus the several hundred applications we would likely receive from ineligible defendants whose motions must nonetheless be processed) will have a deleterious impact on my ability to timely process active defendant cases. This is especially true if additional staff is not provided to courts to address the new motions. Given the overall budget climate, there is no likelihood new staff will be approved. We simply do not have the resources to handle this change, and trying to do so will reduce services and responsiveness to current defendants.

Submitted on: May 31, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

District Judge Leonard Strand, Iowa, Northern

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

As a sentencing judge, I am opposed to granting retroactive effect to the criminal history amendments (both Part A and Part B). Making these changes retroactive is contrary to the important principle of finality. In addition, giving thousands of federal inmates another basis for seeking a sentencing reduction would add significant workload stress to district courts that are already struggling to deal with massive numbers of compassionate release motions and other pro se prisoner motions. Thank you for the opportunity to provide this comment.

Submitted on: June 22, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

District Judge Cj Williams, Iowa, Northern

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I'm opposed to retroactive application, not only because of the amount of work it will entail (despite the number of offenders who may be eligible, countless offenders will file motions) but also because finality in sentencing is important for public confidence in the judicial system.

Submitted on: June 23, 2023

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

June 22, 2023

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 Parts A and B of the recently promulgated criminal history guideline amendment addressing "status points" and "zero-point offenders" should be applied retroactively to previously sentenced offenders.[1]

As then-Commissioner Howell observed, "[t]he 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."[2] Pursuant to the commentary to §1B1.10, the Commission considers, 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," when selecting amendments included for retroactivity.[3] Historically, the Commission has reserved retroactive application for amendments that strive to correct a systemic wrong, such as then amendment that reduced crack

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[1] Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2023, and request for comment, 88 Fed. Reg. 28254 (May 3, 2023), available at https://www.federalregister.gov/documents/2023/05/03/2023-09332/sentencing-guidelines-for-united-states-courts. We use the term "offender" as the Commission did in the amendment and the issue for comment.

[2] *Sent'g Comm'n Public Meeting on June 30, 2011,* 22:15-21 (Statement of Comm'r Beryl Howell), available at available at https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.

[3] U.S. SENT'G COMM'N, *Guidelines Manual* §1B1.10, comment. (backg'd.) (hereinafter USSG).

cocaine penalties in 2011.[4] The Department has similarly supported retroactive application of guideline amendments in such circumstances.[5]

Retroactive application of the criminal history amendments, by contrast, would extend far beyond the Commission's past practice. The Department appreciates the Commission's interest in leniency for first-time offenders, as well as the concerns animating its amendment related to status points. These amendments, however, represent the type of "minor downward adjustment[s]" to the Guidelines that Congress did not intend for retroactive application.[6] At the same time, the burden posed by retroactivity would be immense. The Commission estimates that 50,545 individuals in BOP custody were assigned status points at sentencing,[7] and an additional 34,922 individuals are zero-point offenders.[8] The Department expects that nearly all of these 85,000 individuals would move for an adjustment, creating an unprecedented burden on courts and victims. The corresponding strain on reentry services also raises public safety concerns.

For the reasons set forth below, the Department opposes retroactive application of both Parts A and B of the criminal history amendment. If the Commission nevertheless proceeds, the Department requests that the Commission delay implementation of retroactivity by at least nine months to allow the Bureau of Prisons (BOP) and the U.S. Probation Office sufficient time to properly prepare and coordinate reentry services for eligible offenders.

I. Burden on the courts and victims

Applying any guideline amendment retroactively imposes a burden on the courts and victims, and Congress has recognized that such burden is an important factor in evaluating the appropriateness of retroactivity. The Commission has recognized the same. Sentence reductions for eligible offenders are not automatic under §1B1.10. As then-Commissioner Brown Jackson observed during a public meeting on retroactivity in 2011, "in each case a federal judge must determine the appropriateness of a sentence reduction for that particular defendant, adjusting the sentence only if warranted and if the risk to public safety is minimal."[9]

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[4] *See, e.g.*, *Sent'g Comm'n Public Meeting on June 30, 2011,* 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.").

[5] *U. S. Sent'g Comm'n Public Meeting on June 1, 2011,* 14:6-13 (Statement of Att'y Gen'l Eric Holder) (supporting retroactivity of amendments to implement the 2010 Fair Sentencing Act) available at https://www.ussc.gov/sites/default/files/Hearing_Transcript_1.pdf; *see Public Hearing on Retroactivity of 2014 Drug Amendment on June 10, 2014 before the U.S. Sent'g Comm'n,* 105:15-21 (Statement of U.S. Attorney Sally Yates) (supporting limited retroactivity of the pending drug guideline amendments"), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf.

[6] *See* USSG §1B1.10, comment.

[7] SENT'G COMM'N, RETROACTIVITY IMPACT ANALYSIS OF PARTS A AND B OF THE 2023 CRIMINAL HISTORY AMENDMENT (May 15, 2023) at 9, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.

[8] *Id*. at 17.

[9] *Sentencing Commission Public Meeting on June 30, 2011,* 14:11-18 (Statement of Commissioner Ketanji Brown Jackson on retroactivity of the amendments to implement the 2010 Fair Sentencing Act), available at https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.

More specifically, offenders must move for a sentencing reduction; the government must respond to the motion; probation officers must review the application and determine if the amendment affects the offender's guideline calculation and meets the criteria of §1B1.10; the Bureau of Prisons must gather disciplinary and other prison records for the offender to be reviewed by the sentencing court; and the court must review all this information to evaluate the appropriateness of a reduction for each offender individually. The sentencing court is required to consider the factors listed in 18 U.S.C. § 3553(a) as well as the defendant's post-sentencing conduct to determine whether a reduction is warranted, the extent of any reduction, and "the nature and seriousness of the danger to any person or the community" that would result from a sentencing reduction.[10]

Here, the Commission estimates that 50,545 offenders in BOP custody were assigned status points at sentencing,[11] and 34,922 offenders in BOP custody are zero-point offenders.[12] The combined total of offenders potentially eligible for a sentencing reduction if the amendments are made retroactive – more than 85,000[13] – is more than half of all individuals housed in the Bureau of Prisons.[14] While the Commission estimates that only a fraction of those individuals would ultimately be eligible for a reduction (11,495 offenders for Part A, 7,272 for Part B),[15] those estimates understate the true number of offenders who might be eligible under Part B of the amendment. Part B contains several new and un-litigated exclusionary criteria that use novel legal concepts.[16] Because these criteria are new, the Commission used proxies from the current Guidelines to estimate offender eligibility to the extent possible. But many of the proxies are poor substitutes for these novel criteria and exclude many defendants who would be eligible for a reduction under Part B.

More fundamentally, regardless of how many individuals are ultimately eligible, the Department anticipates that most of the 85,467 individuals will move for a sentence reduction. Most motions will be made in good faith. Application of the Sentencing Guidelines – and of the criminal history algorithm in particular – is complex, and it will not be readily apparent to those in custody whether they qualify for a reduction. Part A of the amendment requires recalculation of a defendant's criminal history score; and both parts require review of the applicable guideline ranges, enhancements, and statutory minimum sentences.[17] The default will be to apply for a sentencing reduction. Experience teaches as much, as more than 13,000 *ineligible* offenders

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[10] USSG §1B1.10, comment. (n. 1 app. (B)).
[11] Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment (May 15, 2023) at 9.
[12] *Id*. at 17.
[13] *Id.* at 31.
[14] Estimate as of May 18, 2023. BOP: Population Statistics.
[15] Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment (May 15, 2023) at 31.
[16] *See supra* note 1 at 28271.
[17] In estimating the applicability of Part A, for example, the Commission excluded offenders for whom: (1) the change to the offender's criminal history score did not change the criminal history category to which they were assigned; (2) the offender's criminal history category was determined by another guideline provision; (3) the offender's current sentence is below the new guideline range and the offender did not receive a departure for substantial assistance when initially sentenced; or the offender was sentenced to a statutory mandatory minimum sentence.

sought sentencing reductions when amendments to the drug guidelines were applied retroactively.[18]

The Commission must carefully weigh this burden when considering retroactivity. As then-Commissioner Howell explained when considering the 2010 "recency amendments," "the potential burden on the courts would be substantial if the approximately 43,000 offenders who received recency points petitioned for review of their sentences when only a comparatively small number may be eligible to benefit."[19] Here, retroactive application would likely involve up to 85,000 sentence reduction motions. To put this number in context, in fiscal year 2022, there were approximately 64,000 defendants sentenced for felonies and Class A misdemeanors in the federal system.[20] Retroactive application of this amendment would more than double sentencing-related proceedings for courts. The burden on the courts – including prosecutors, defense attorneys, probation, and the Bureau of Prisons – would be overwhelming and weighs heavily against retroactivity.

Likewise, the Commission should strongly consider the immense burden of retroactivity on victims. During the Commission's February hearing, the Chair of the Victims Advisory Group highlighted in her written testimony the "suffering experienced by victims or families contacted about a motion for early release."[21] As she explained, "[s]uch events re-open the wounds of chapters they thought were long closed, cause extreme anxiety if they are fortunate enough to have some notice of a potential release, and instill unimaginable fear when they learn of an offender's unexpected release."[22] Every motion for a sentence reduction risks causing the victim to suffer again. Given the anticipated number of applications that would be filed under retroactive application of the criminal history amendment, retroactivity would, as the Chair of the Commission's Victim Advisory Group testified, "not [be] sensitive to the victim experience."[23]

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[18] SENT'G COMM'N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT (May 2021), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf.

[19] *U.S. Sent'g Comm'n Public Meeting on September 16, 2010,* minutes at 2 (Statement of Comm'r Judge Beryl Howell on retroactive application of the recency points amendment), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf; *see also* U.S. SENT'G COMM'N, ANALYSIS OF THE IMPACT OF AMENDMENT TO SECTION 4A1.1 OF THE SENTENCING GUIDELINES IF THE AMENDMENT WERE APPLIED RETROACTIVELY (September 1, 2010), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/recency/20100901_Recency_Retro.pdf.

[20] U.S. SENT'G COMM'N, TABLE OF FEDERAL OFFENDERS IN EACH CIRCUIT AND DISTRICT FOR FY 2022, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table01.pdf.

[21] *U.S. Sent'g Comm'n Public Meeting on February 2, 2023,* written testimony at 3 (Statement of Professor Mary Graw Leary), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/VAG1.pdf.

[22] *Id.*

[23] *Public Hearing on the Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sent'g Comm'n*, 222:17 March 8, 2023 (testimony of the Commission's Victim Advisory Grp Chair Mary Graw Leary), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/Transcript_Day2.pdf.

II. Magnitude of the change

Precisely because of the burden associated with retroactivity, the commentary to §1B1.10 reflects that Congress did "not expect that the Commission will recommend adjusting existing sentences under the provision . . . when there is only a minor downward adjustment in the guidelines."[24] The legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)) expressly states that Congress did not intend for "minor downward adjustments" to the Guidelines to be applied retroactively. Congress recognized that the decision to apply a guideline amendment retroactively involves a balancing of the burden of retroactivity on the courts and the magnitude of the sentencing change from the amendment, such that a "minor downward adjustment" in the Guidelines should not be applied retroactively.

That is the case here. With regard to Part A (status points), eliminating one or two status points from an offender's previously calculated criminal history score would, at most, move an offender down one criminal history category under the rules set out in Chapter Four of the Guidelines. Using the Sentencing Table in Chapter Five, such a move is generally equivalent to a reduction of one offense level, the smallest reduction the Commission can make through a guideline amendment and, by any definition, a "minor downward adjustment."[25] Part B of the amendment will have a similarly "minor" impact, resulting in a two offense-level reduction. In such circumstances, retroactive application would contravene congressional intent.

III. Public Safety

Retroactive application of the amendment would also raise public safety concerns. Section 3553(a)(2) requires courts to impose a sentence that, among other factors, promotes respect for the law, provides adequate deterrence, and protects the public.[26] In voting against retroactive application of the recency amendment in 2010, then-Commissioner Howell relied on similar public safety considerations, noting that "the majority of the 8,000 offenders who may be eligible to benefit are in Criminal History Categories IV, V, and VI, which raises public safety concerns."[27]

For Part A, status points reflect past recidivism while under a criminal justice sentence. These defendants, by definition, have already committed multiple crimes on multiple occasions, and according to the Commission's own research, are quite likely to recidivate again.[28] The data

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[24] S. Rep. 98-225, at 180 (1983), available at https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/legislative-history-of-the-comprehensive-crime-control-act-of-1983.pdf.

[25] There are a few cells in the Sentencing Table from which a one criminal history category reduction is between a one- and two-offense level reduction, or equal to a two-offense-level reduction. But in no case is the reduction greater than two offense levels.

[26] 18 U.S.C. § 3553(a).

[27] *U.S. Sent'g Comm'n Public Meeting on September 16, 2010,* minutes at 2 (Statement of Comm'r Judge Beryl Howell on retroactive application of the recency points amendment), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf;

[28] *See, e.g.,* U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW (March 2016) at 18, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

cited by the Commission in its retroactivity analysis underscores this concern – of the 11,495 sentenced defendants with status points that the Commission estimates would be eligible for retroactive relief, almost 60% are in criminal history categories IV, V, and IV.[29] Additionally, the Commission estimates that almost 40% of the individuals potentially eligible for a retroactive reduction were subject to either a weapon specific offense characteristic or a firearms mandatory minimum.[30] Many were sentenced for serious or violent crimes, including firearms (2,371, 20.6%); robbery (1,391, 12.1%); child pornography (325, 2.8%); assault (257, 2.2%); sexual abuse (250, 2.2%); murder (156, 1.4%); kidnapping (43, 0.4%); and manslaughter (35, .3%).[31]

As to Part B of the amendment, the Commission added ten new exclusionary criteria that will limit its application. However, the amendment – and the retroactive application of it – will still apply to many serious offenders, especially white-collar offenders, and will signal an inequitable benefit for such offenders. The amendment also sweeps in defendants who committed public corruption offenses, national security offenses, and serious economic and corporate crimes. As the Commission's Chair of the Victims Advisory Group (VAG) testified before the Commission, the amendment specifically rewards those who abuse a position of public trust and "are in a position in which they can offend for the very fact that they don't have prior criminal histories," including business leaders, prison guards, scout troop leaders, school principals or teachers, who "exploit" their lack of a prior criminal history to gain access to victims to harm them.[32]

These public safety concerns are particularly pronounced because retroactive application of amendments would place large burdens on transition services. As discussed in further detail below, thousands of defendants may become eligible for immediate or near-term release, without providing the Probation Office and the Bureau of Prisons sufficient opportunity to plan for such release or to provide the services critical for successful reentry to the community. It would be particularly unwise to release status-point offenders without essential services and support, because they are individuals who previously recidivated.

IV. Purpose

Historically, the Commission has believed that retroactive application of guideline amendments should be the exception and not the rule "because the finality of judgments is an important principle in our judicial system, and we require good reasons to disturb final judgments."[33] As the Supreme Court has repeatedly stated, the principle of finality is essential to the operation of our criminal justice system. "Without finality, the criminal law is deprived of much of its deterrent effect."[34] And as then-Chair Saris noted in 2011, "Because of the

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[29] *Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* at 14.
[30] *Id.*
[31] *Id.*
[32] *Public Hearing on the Proposed Amendments to the Federal Sentencing Guidelines Before the U.,S. Sent'g Comm'n*, 216:5-9 (March 8, 2023) (testimony of the Commission's Victim Advisory Group Chair Mary Graw Leary), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/Transcript_Day2.pdf.
[33] *Sent'g Comm'n Public Meeting on June 30, 2011,* 22:15-21 (Statement of Comm'r Beryl Howell), available at available at U.S. Sentencing Commission Public Meeting Transcript (June 30, 2011) (ussc.gov).
[34] *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989).

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."[35]

Hence, absent the need to correct systemic failures, finality in sentencing is "essential to the operation of our criminal justice system," helping ensure justice for victims, defendants, and participants in the criminal justice system.[36] In voting against retroactive application of the recency amendment, then-Commissioner Brown Jackson noted that, "the recency amendment was not intended to address the same types of fairness issues involved in the circumstances where retroactivity typically has been adopted in the past."[37] The same factors that weighed against retroactive application of the recency amendment in 2010, weigh against retroactive application here.[38] The amendment was the result of several Commission studies regarding the nature of the Guidelines' criminal history score and its ability to predict an offender's likelihood of rearrest.[39]

Moreover, Part B of the amendment reflects consideration of high departure and variance rates for zero-point offenders and seeks to bring the Guidelines more in line with existing practice.[40] This amendment's purpose thus falls into the category of amendments "designed to facilitate efficient guideline operation" for which the Commission has previously rejected retroactive application.[41]

V. Difficulty of applying the amendment retroactively

The Commission has previously disfavored retroactive application of amendments – like this one – that would require comprehensive fact-finding after a lengthy passage of time. As then-Commissioner Howell noted when voting against retroactive application of one part of a guideline amendment in 2010, such "time-consuming and administratively difficult-to-apply factors" not previously considered during the original sentencing would be challenging for courts to evaluate and fact-find retroactively and would likely lead to hearings and litigation.[42]

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[35] *Sent'g Comm'n Public Meeting on June 30, 2011,* 3:12-17 (Statement of Chair Patti Saris).
[36] *Teague,* 489 U.S. at 309 ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. 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).
[37] *Sent'g Comm'n Public Meeting on June 30, 2011,* 13:5-9. (Statement of Comm'r Ketanji Brown Jackson).
[38] *See supra* note 20, ("The purpose of the recency amendment was to simplify guideline application, not to correct a perceived fundamental unfairness with the application of recency points.").
[39] U.S. SENT'G COMM'N, ADOPTED AMENDMENTS TO THE SENTENCING GUIDELINES EFFECTIVE NOVEMBER 1, 2023 AT 49-50, May 1, 2023, ("AMENDMENTS"), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf.
[40] *Id.* at 52.
[41] *See supra* note 20 ("The purpose of the recency amendment was to simplify guideline application, not to correct a perceived fundamental unfairness with the application of recency points.").
[42] *Sent'g Comm'n Public Meeting on June 30, 2011* 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.").

Retroactive application of guideline amendments and statutory sentencing provisions is rarely simple and straightforward, but applying the status-points and zero-point-offender amendments retroactively will be particularly difficult. Courts will need to consider multiple novel legal principles to determine which defendants are eligible for a sentence reduction.

Part B is particularly difficult to apply retroactively, as it involves a long list of new, previously un-litigated, categories of exclusions. While some of the new exclusionary criteria may implicate information already available in the presentence report or elsewhere in the record, many of the criteria involve new, undefined, and un-litigated terms that will require new interpretation and fact-finding. The Commission itself recognized that "additional fact-finding relating to some of the exclusionary criteria under the new §4C1.1 is required to determine whether a 'zero-point offender' receives the two-level reduction."[43] For example, one new exclusionary criteria is that "the defendant did not use violence or credible threats of violence in connection with the offense."[44] These terms are similar, but not identical, to the definition of a crime of violence under §4B1.2, which includes offenses that involve the "use, threatened use, or attempted use of physical force against the person of another."[45] As the Commission is well aware, that definition has caused extensive litigation over its scope, including the meaning of the terms "use," "physical force," and "against the person of another." The new "did not use violence or credible threats of violence" exclusion is likely to generate similar litigation. Although many current sentencing enhancements address violent conduct, these enhancements do not cover the same scope of conduct as the new "did not use violence or credible threats of violence" exclusion. Thus, even in cases involving such enhancements, courts may need to engage in both legal analysis and fact-finding to determine whether the defendant qualifies for the two-level reduction.

Likewise, another new exclusionary criteria is that "the defendant did not personally cause substantial financial hardship."[46] That precise set of facts – that the defendant *personally* caused *substantial* financial hardship – does not form the basis of any current Guidelines provision. *Cf.* USSG §2B1.1(b)(2)(A)-(C) (providing for varying enhancements for economic offenses where "the offense . . . *resulted* in substantial financial hardship"). To determine whether a defendant personally caused "substantial financial hardship," the sentencing court will often need to elicit victim testimony or engage in additional fact-finding, often years after the original offense, when victims may be deceased or otherwise unavailable. As then-Commissioner Howell observed, amendments that "would likely require courts to engage in new fact-finding with the concomitant need for hearings" can "be administratively burdensome to the point of impracticality."[47]

VI. Operational and Reentry Concerns

Finally, we believe it is critical to consider the effects of retroactive application of the amendments on the ability of the Bureau of Prisons and the U.S. Probation Office to properly

[43] Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment at 8.
[44] *See supra* note 1 at 28271.
[45] USSG §4B1.2.
[46] AMENDMENTS at 45.
[47] *Sent'g Comm'n Public Meeting on June 30, 2011* 19:1-12.

prepare offenders for reentry back into the community. For the approximately 11,495 sentenced defendants[48] with status points that would have a lower guideline range if Part A of the amendment were applied retroactively, approximately 2,090 would be eligible for immediate release if retroactivity was effective November 1, 2023, and an additional 1,266 would be eligible for release within the first year.[49] For the approximately 7,272 defendants[50] who would have a lower guideline range under retroactive application under Part B, approximately 3,274 defendants would be eligible for immediate release if retroactivity was effective on November 1, 2023, and an additional 1,472 would be eligible for release within the first year.[51]

Generally, the Bureau of Prisons starts planning for release 180 days in advance.[52] 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. If retroactivity were to take place in November, the already overburdened probation system would be flooded with new cases and many offenders would be denied the benefit of proper reentry services and step-down transitioning to the community, unnecessarily increasing public safety risks.

If the Commission disagrees with our assessment of retroactivity and decides to apply either or both parts of the criminal history amendment retroactively, we recommend that it delay implementation for nine months to allow both the Bureau of Prisons and the Probation Office 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.

* * *

[48] Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment at 9.
[49] *Id.* at 17.
[50] *Id.* at 24.
[51] *Id.* at 25.
[52] *Sent'g Comm'n Public Hearing on Retroactivity of 2014 Drug Amendment (June 10, 2014),* 121:15-19 (Statement of Bureau of Prison Dir. Samuels).

For all the reasons discussed here – reasons based on Congress' and the Commission's own articulated criteria – we believe retroactive application of both Parts A and B of the criminal history amendment would be inappropriate, and we oppose it.

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions.

Sincerely,

Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

150 West Flagler Street, Suite 1500
Miami, Florida 33130-1556

Chair: Michael Caruso Phone: 305.533.4200

June 23, 2023

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

Re: Defender Comment on the Retroactivity of Parts A and B of the Criminal History Amendment

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to support the retroactivity of Parts A (status points) and B (zero criminal history points) of the criminal history amendment. By making Parts A and B retroactive, the Commission can better ensure that people already sentenced benefit from more equitable sentencing policies that reflect empirical data and national experience.

The Commission has identified three factors it considers when determining whether a guideline should be retroactively applied: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range; and (3) the feasibility of applying the amendment retroactively.[1] As explained below, each of these factors strongly supports retroactivity for Parts A and B. Both Parts are empirically based and target guidelines that recommend sentences greater than necessary.[2] The average change in the guideline range for both

[1] *See* USSG §1B1.10 cmt. background.

[2] *See* USSC, *Official Text Version of 2023 Amendments (Effective November 1, 2023)* 49–53 (Apr. 27, 2023), https://tinyurl.com/2p978wrt ("2023 Amendments and Reasons for Amendment") (citing USSC, *Revisiting Status Points* (2022), https://tinyurl.com/2pcz7mw3; USSC, *Recidivism of Federal Offenders Released in 2010* (2021), https://tinyurl.com/yhs3hwee).

Parts is anticipated to be well above the sixth-month threshold.[3] The vast majority of those eligible for retroactive relief are people of color—the people most harmed by our criminal justice policies.[4] And districts are well-prepared to implement retroactivity. Through previous retroactivity projects like the 2014 Drug Guidelines Amendment ("Amendment 782"), districts have established processes to streamline screening, filing, and resolving retroactivity motions. Defenders are confident that the processes used to implement Amendment 782—a project significantly larger than this one is expected to be[5]—could effectively be used if the Commission makes Parts A and B retroactive.

I. Part A: Status Points

Since the guidelines' inception, Chapter 4 has directed that two points be added to a person's criminal history score if they committed the instant offense while under a criminal justice sentence.[6] This year, the Commission amended this rule. People with six or fewer criminal history points will no longer receive status points.[7] People with seven or more criminal history points will receive one status point instead of two.[8]

Purpose. The Commission's stated purpose for Part A is two-fold: (1) Commission data confirms that status points lack an empirical basis; and (2)

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[3] *See* USSC, *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* 9, 17 (2023), https://tinyurl.com/7ckwwz99 ("Criminal History Impact Analysis").

[4] *See id.* at 13, 21.

[5] *Compare* USSC, *2014 Drug Guidelines Amendment Retroactivity Data Report* tbl. 1 (2021), https://tinyurl.com/y45yd5hm (reporting 50,998 motions filed), *and* USSC, *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* 7 (2014) https://tinyurl.com/yntaxjtp (estimating 51,141 individuals would be eligible), *with* Criminal History Impact Analysis at 31 (anticipating an eligibility group of 11,495 for Part A, and 7,272 for Part B).

[6] *See* USSG §4A1.1(d) (1987).

[7] *See* 2023 Amendments and Reasons for Amendment at 50.

[8] *See id.* at 44.

the current rule produces sentences greater than necessary to serve the purposes of sentencing.[9] Both reasons support retroactivity.

The Commission's longtime recognition that status points do not meaningfully contribute to the recidivism predictability of the criminal history score supports retroactivity. In 2005, the Commission recognized that including status points and the since-eliminated "recency points" in the criminal history score did not meaningfully add to the predictive quality of the criminal history score.[10] Last year, in *Revisiting Status Points*, the Commission reported that while status points regularly increase guideline ranges—and correlate with longer sentences—they improve prediction of rearrest "by only 0.2 percent."[11]

In addition to lacking an empirical basis, status points also produce sentences that are unnecessarily long. As the Commission acknowledged in its Reason for Amendment, people are sufficiently penalized for committing a new offense while under a criminal justice sentence. For those who violate federal supervision, the guidelines already "separately account[ ] for consecutive punishment imposed upon revocations of supervised release."[12] People who violate other criminal justice sentences would also likely be subject to a violation of that original sentence.[13] Further, it is "possible that [a person's] criminal history score would be independently increased as the result of additional time imposed as the result of a revocation of probation or

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[9] *See id.* at 50–51.

[10] *See* Revisiting Status Points at 4; *see also* USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 26 (2005), https://tinyurl.com/5fw3ezpw; Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, Washington, D.C., at 91–92 (Mar. 17, 2010), https://tinyurl.com/mr3bubjd. Recency points were removed from the criminal history score, in part, because of this data. *See* USSG App. C, Amend. 742, Reason for Amendment (effective Nov. 1, 2010).

[11] Revisiting Status Points at 3, 11–12.

[12] 2023 Amendments and Reasons for Amendment at 51.

[13] *See* Statement of Jami Johnson before the U.S. Sentencing Comm'n, Washington, D.C., at 27–28 (Mar. 8, 2023), https://tinyurl.com/4zt3wn7a (listing penalties that already apply for committing an offense while under a criminal justice sentence).

supervised release for the offense that also results in the addition of status points."[14] The Commission rightly determined that the "double penalty" of two status points is too severe a punishment in all cases.[15] Because status points were just as excessive when applied to past sentences as they are today, the Commission should make Part A retroactive.

By "balance[ing] [its] mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing," the Commission necessarily concluded that prospective application of Part A would not threaten public safety.[16] Neither would retroactive application. If past outcomes are any indication, retroactive applicability of guideline amendments does not result in an increased rate of recidivism.[17] And there is even more reason to believe that public safety would not be an issue with this amendment. Unlike Amendments 782, 750, and 706, Part A was promulgated, in part, because Commission data establish that status points do not meaningfully predict increased recidivism. Because these points never identified people more likely to be rearrested in the first place, there is no reason to believe that removing the effect of these points for people who have already been sentenced would be linked to

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[14] 2023 Amendments and Reasons for Amendment at 51.

[15] Transcript of Public Meeting of the U.S. Sentencing Comm'n, Washington, D.C., at 18 (Apr. 5, 2023), https://tinyurl.com/yc3uthan ("April 5 Public Meeting") (Chair Reeves).

[16] 2023 Amendments and Reasons for Amendment at 50; *see also* April 5 Public Meeting at 92 (Apr. 5, 2023) (Vice Chair Mate) ("This evidence-based guidance will improve the lives of thousands of people each year, strengthen communities, and serve public safety.").

[17] *See* USSC *Retroactivity & Recidivism: The Drugs Minus Two Amendment* 6 (2020), https://tinyurl.com/85r8sudu (reporting no statistically significant difference in recidivism rates of people released early from retroactive relief and comparable people who served full sentences); USSC, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* 3 (2018), https://tinyurl.com/f7bmu553 (finding that the recidivism rates "were virtually identical" for people who were released early from retroactive relief and people who had served their full sentence before retroactivity took effect); USSC, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* 3 (2014), https://tinyurl.com/z3t6kpry ("Retroactive sentence reductions did not result in higher recidivism rates. . . .").

increased rearrests. Indeed, there is ample reason to believe public safety would be enhanced by permitting people serving unnecessarily long sentences to return home sooner.[18]

Section 1B1.10 further ensures public safety. Courts would be required to leave all guideline calculations but those amended by Part A the same.[19] Mandatory minimums would still apply, as would other guideline enhancements (*e.g.*, for possession of a weapon or aggravating role).[20] And, before granting any sentence reduction, courts would be required to consider all § 3553(a) factors, including the seriousness of the offense, and the need to protect the public from further crimes.[21]

Impact. The "magnitude of the change in the guideline range" also supports retroactivity of Part A.[22] While amendments that "generally reduce the maximum of the guideline range by less than six months" are not typically

[18] *See, e.g.*, Don Stemen, Vera Evidence Brief, *The Prison Paradox: More Incarceration Will Not Make Us Safer* 2–3 (2017), https://tinyurl.com/5n933pvc (recounting the criminogenic effects of high rates of imprisonment including weakening of social and family bonds, deprivation of income and future income potential, disrespect for the law, and collateral consequences like loss of employment and stable housing); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049 (2008) (cataloging a host of crime-producing effects of imprisonment and estimating their aggregate impact on crime rates by drawing inferences from existing data and research); *see also* USSC, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 19 (1996), https://tinyurl.com/ywhttnec (acknowledging that alternatives to incarceration "divert [individuals] from the criminogenic effects of imprisonment which include contact with [people convicted of] more serious [crimes], disruption of legal employment, and weakening of family ties").

[19] *See* USSG §1B1.10(b)(1).

[20] *See id.*; Criminal History Impact Analysis at 9–10 & n.37.

[21] *See* 18 U.S.C § 3582(c)(2) (citing 18 U.S.C. § 3553(a)); *see also* USSG §1B1.10 cmt. n.1(B)(ii) ("The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction. . .").

[22] USSG §1B1.10 cmt. background.

eligible for retroactivity,[23] the Commission anticipates that if Part A was made retroactive, the average sentence reduction would be 14 months—far from "only a minor downward adjustment."[24]

Further, as part of its duty to establish uniform and fair sentencing policy, the Commission must consider *who* would benefit from this change in the guideline range as well.[25] The impact report anticipates that over 70 percent of people eligible for retroactive relief under Part A are classified by the Commission as Black or Hispanic[26]—the groups harmed most acutely by mass incarceration.

The reasons for this troubling impact are understood. As we stated in support of eliminating status points prospectively, research shows that Blacks and Latinos are more likely than whites to be on supervision, be subject to longer terms of supervision than similarly situated whites, and are more likely to be revoked at higher rates.[27] Indeed, at every stage of the criminal justice process, people of color fare worse.[28] Communities of color are more heavily policed, and people of color are stopped and searched more frequently than whites.[29]

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[23] *Id.*

[24] *Id.* (quoting S. Rep. No. 98-225, at 180 (1983)).

[25] *See* 28 U.S.C. § 991(b)(1)(B) (requiring the Commission to establish sentencing policies that are fair and avoid unwarranted disparities).

[26] *See* Criminal History Impact Analysis at 13.

[27] *See* Defenders' Annual Letter to the Sentencing Comm'n at 14 & accompanying notes (Sept. 14, 2022).

[28] *See, e.g.*, Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof.*, Wash. Post (June 10, 2020), https://tinyurl.com/3sd5n7b3 (collecting studies demonstrating racial bias at numerous stages in the criminal justice process); The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (Apr. 2018), https://tinyurl.com/mvrhnyt9 (collecting disparities between whites and communities of color in traffic stops, searches, arrests, pretrial release, sentencing outcomes, and appeals).

[29] *See, e.g.*, *id.*; Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736 (2020), https://5harad.com/papers/100M-stops.pdf; *see also* USSC, *What Do Federal Firearms Offenses Really Look Like?* 33 (2022), https://tinyurl.com/2tk26bed.

People of color are denied bail more often than their white counterparts.[30] They face bias in plea bargaining.[31] They are more likely to be wrongfully convicted.[32] And they serve more severe sentences.[33]

Retroactive application of Part A would not cure this systemic injustice. But denying judges the opportunity to reduce excessive sentences would surely perpetuate it. Granting judges the discretion to determine whether retroactive relief is appropriate in individual cases would go a long way towards promoting respect for the law and reuniting many of the 11,495 presently incarcerated individuals with their families and communities.

Administrability. Identifying a person's eligibility for retroactive relief under Part A would be straightforward.[34] Since courts are required to

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[30] *See e.g.*, *supra* note 28; NACDL, *Race and Pretrial* (Dec. 2022) (last accessed June 22, 2023), https://tinyurl.com/2tht2xxh; Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, Prison Policy Initiative (Oct. 2019), https://tinyurl.com/ycy7spy6.

[31] *See, e.g.*, *supra* note 28; Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. Crim. L. & Criminology 93 (2021); Alexander Testa & Brian D. Johnson, *Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution*, 31 Crim. Just. Pol'y Rev. 500 (2020); Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. Rev. 1187 (2018).

[32] *See, e.g.*, *supra* note 28; Samuel R. Gross, *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (Sept. 2022), https://tinyurl.com/28b4nkjf; *c.f.* Barbara O'Brien et al., *Latinx Defendants, False Convictions, and the Difficult Road to Exoneration*, 66 UCLA L. Rev. 1682, 1687–1705 (2019) (discussing ways in which Latino individuals accused of crime are uniquely vulnerable to wrongful conviction).

[33] *See, e.g.*, *supra* note 28; Erik J. Girvan & Heather Marek, *The Eye of the Beholder: Increased Likelihood of Prison Sentences for People Perceived to Have Hispanic Ethnicity*, 47 L. & Hum. Behav. 182, 191 (2023); Elizabeth Tsai Bishop et al., *Racial Disparities in the Massachusetts Criminal System*, Criminal Justice Policy Program, Harvard Law School 30–64 (Sept. 2020), https://tinyurl.com/22ukjc64; USSC, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* 32–33 (2018), https://tinyurl.com/yuffcf46; M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320, 1336–51 (2014).

[34] *See* USSG §1B1.10 cmt. background.

calculate and consider the guideline range in every case,[35] it would be readily apparent from the sentencing record whether someone received status points under §4A1.1(d) and, if so, whether those points increased the person's guideline range.[36]

Processing the sentence reduction motions would not be unduly burdensome, either. Districts have done this before. Defenders and probation have testified about the collaborative systems that judges, probation, defenders, and prosecutors already have implemented to successfully manage past guideline retroactivity projects.[37] Districts nationwide have fine-tuned these procedures to "efficiently and effectively review cases for eligibility, determine whether an individual should receive a sentence reduction, and plan for release."[38] This project is anticipated to be smaller in scale than past guideline retroactivity projects,[39] and thus likely to be even more manageable.

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[35] *See* 28 U.S.C. § 3553(a)(4)(A); Fed. R. Crim. P. 32(d)(1); (i)(3).

[36] *See, e.g.*, Criminal History Impact Analysis at 8 ("For the amendment made by Part A pertaining to status points, additional fact-finding is not required to determine the amended guideline range. . . .").

[37] *See, e.g.*, Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 80–100 (June 10, 2014) (Deputy Chief Probation Officer Quincy Avinger, Jr. testifying as to the District of South Carolina), https://tinyurl.com/5efzadrj; *id.* at 99–100 (Chair Saris); *id.* at 203–205 (Sarah Gannett); Statement of Sarah Gannett Before the U.S. Sentencing Comm'n, Washington, D.C., at 14–15 (June 10, 2014), https://tinyurl.com/2v5mp58t; Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington D.C., at 65–66; 68–69, 125–26 (June 1, 2011), https://tinyurl.com/4a932s8e (Michael Nachmanoff); Statement of Stephen Sady Before the U.S. Sentencing Comm'n, Washington D.C. (Nov. 13, 2007), https://tinyurl.com/2p8fezch.

[38] Defenders' Public Comment on Retroactivity of Amendments to Drug Quantity Table at 13 (July 7, 2014), https://tinyurl.com/mr387s8p.

[39] The Commission anticipates that 11,495 people would be eligible for retroactive relief under Part A. *See* Criminal History Impact Analysis at 9. The difference between the Commission's eligibility prediction and the number of motions actually filed has steadily decreased since Amendment 706—likely because districts have perfected successful systems to administer these projects. The Commission anticipated that 51,141 people were eligible for sentence reductions under Amendment 782 and reported that 50,998 people filed motions. *See supra* note 5. It anticipated that 12,040 people would be eligible for sentence reductions under Amendment 750 and reported that 13,990 people filed motions. *See* USSC, *Analysis*

Further, the number of people eligible for release within the first year should not be an obstacle. The Commission anticipates that 4,429 people would be eligible for release within the first year if Part A was made retroactive.[40] But 3,163 of those 4,429 are already scheduled to be released within the first year under their current, unamended sentence even without retroactive relief.[41] The additional 1,266 people—spread across all districts—should not prevent retroactivity. Many of these individuals would not require probation's resources. Almost a quarter of those eligible for immediate release and almost 13 percent of the total eligible for retroactive relief under Part A are non-U.S. citizens.[42] Upon release from federal custody, the vast majority of these individuals would likely be detained by Immigration and Customs Enforcement pending removal or removal proceedings and would not require probation's active supervision or release plans.

II. Part B: Zero Criminal History Points

In Part B of the criminal history amendment the Commission created a new guideline, §4C1.1, which provides a two-level offense level decrease for certain people with zero criminal history points.[43] As with Part A, each of the three factors outlined in §1B1.10 weigh in favor of retroactivity.

Purpose. The Commission promulgated §4C1.1 because longstanding data and judicial practice indicated that the guideline-recommended sentences for people with zero criminal history points were greater than necessary to serve

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of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively 10 (2011), https://tinyurl.com/yppk4pj8; USSC, *Final Crack Retroactivity Data Report Fair Sentencing Act* tbl. 1 (2014), https://tinyurl.com/cpcfyed3. And it anticipated that 19,500 people were eligible for sentence reductions under Amendment 706 and reported that 25,736 people filed motions. *See* USSC, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* 4 (2007), https://tinyurl.com/3tdxfxap; USSC, *Preliminary Crack Cocaine Retroactivity Data Report* tbl. 1 (2011), https://tinyurl.com/bdhfbvj5.

[40] *See* Criminal History Impact Analysis at 16–17.

[41] *See id.*

[42] *See id.* at 13 & 16, n.38 (reporting 12.8 percent of all persons eligible for Part A are non-U.S. citizens and that 23.7 percent of those eligible for immediate release are non-U.S. citizens).

[43] *See* 2023 Amendments and Reasons for Amendment at 45–46.

the purposes of sentencing.[44] The reasons the Commission promulgated this amendment are not new—and they apply equally to prospective sentences and sentences already imposed.

First, data. Commission data repeatedly indicates that people with zero criminal history points have a considerably lower rate of rearrest than other groups.[45] In promulgating this amendment, the Commission cited its recent data showing that people with zero criminal history points were substantially less likely to be rearrested than people with one criminal history point even though they are placed in the same criminal history category.[46] This trend is not new. Since 2004, Commission data has identified that "[the] zero point [ ] recidivism rate is substantially lower than the recidivism rates for [people] with only one criminal history point."[47]

Second, judicial practice. Section 4C1.1 reflects the Commission's "continuous evolution" of the guidelines to ensure they "embody the § 3553(a) considerations, both in principal and in practice."[48] Commission data show judges sentence below the guideline range more often for people with no criminal history points than for people with one point.[49] But while the higher rate of below-guideline sentences in zero-point cases prompted the

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[44] *See id.* at 52–53.

[45] *See, e.g.*, USSC, *Recidivism of Federal Offenders Released in 2010* 27, fig. 14 (2021), https://tinyurl.com/2p922sns ("2021 Recidivism Report"); USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 7, fig. 1 (2017), https://tinyurl.com/5n8hn77f; USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18, fig. 6 (2016) https://tinyurl.com/bdfr62f5.

[46] 2023 Amendments and Reasons for Amendment at 52 (citing 2021 Recidivism Report at 26, fig. 14) ("Among other findings, the report concluded that [people with zero criminal history points] were less likely to be rearrested than [people with one criminal history point] (26.8% compared to 42.3%), the largest variation of any comparison of offenders within the same Criminal History Category.").

[47] USSC, *Recidivism and the "First Offender"* 13 (2004), https://tinyurl.com/2sc6pbbn ("2004 First Offense Report").

[48] *Rita v. United States*, 551 U.S. 338, 350 (2007).

[49] *See* 2023 Amendments and Reasons for Amendment at 52.

Commission to act this year,[50] the Commission has acknowledged for decades that people with zero criminal history points may warrant different treatment.[51] Section § 994(j) requires the Commission to ensure the appropriateness of lesser sentences for certain people committing a first offense.[52] And, a version of §4C1.1—proposing a two-level reduction for certain people with zero criminal history points—was prepared by a staff working group and circulated to the Commission in 1991.[53]

Like Part A, retroactive application of Part B would not undermine public safety. In addition to only applying to people with zero criminal history points—a group the Commission has already established has a very low likelihood of rearrest—the Commission's added criteria are intended to further exclude people "in light of the seriousness of the instant offense of conviction or the existence of aggravating factors."[54] And, even if a person would be eligible for a sentence reduction, a reduced sentence is not guaranteed. Like with all guideline retroactivity, the court may grant a reduced term of imprisonment only after considering the factors in § 3553(a).[55]

Impact. The magnitude of the change in the guideline range if Part B was made retroactive is also significant. The Commission estimates an average sentence reduction of 15 months.[56]

Further, this is not a case where the guidelines were "simply refined in a way that might cause isolated instances of existing sentences [to fall] above the

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[50] *See* 2023 Amendments and Reasons for Amendments at 52.

[51] *See* 2004 First Offense Report at 2 ("The first offender adjustment was first studied at the Commission in late 1989. . . .").

[52] *See* 28 U.S.C. § 994(j).

[53] *See* 2004 First Offense Report at 3.

[54] 2023 Amendments and Reasons for Amendments at 53.

[55] *See* 18 U.S.C. § 3582(c)(2).

[56] *See* Criminal History Impact Analysis at 17.

[amended] guidelines."[57] While Part B was promulgated, in part, to better align the guidelines to the downward variance and departure rates in cases involving people with zero criminal history points,[58] within-guideline sentences were far from rare: last year almost 40 percent of the sentences for people with zero criminal history points fell within the calculated guideline range[59] and over 55 percent of those anticipated to be eligible for a reduction under Part A were sentenced within the guidelines.[60] Indeed, *not* making this amendment retroactive, would perpetuate unwarranted disparities—not only between those sentenced prior to November 1, 2023, and those sentenced after—but also between the sentences imposed prior to November 1, 2023 where judges rejected the guideline range and those of the estimated 7,272 individuals currently serving terms of imprisonment who were sentenced consistent with a guideline range that was higher than necessary.[61]

Like Part A, retroactive relief under Part B would primarily benefit people of color—almost 70 percent of those anticipated to be eligible are classified by the Commission as Hispanic and approximately 80 percent are classified by the Commission as Hispanic or Black.[62] Retroactive application would provide a modest step towards reducing the staggering racial and ethnic disparities in the BOP population.[63]

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[57] USSG §1B1.10 cmt. background (quoting S. Rep. No. 98-225, at 180 (1983)); *see also id.* at * (acknowledging likely typographical error).

[58] *See* 2023 Amendments and Reasons for Amendment, at 52.

[59] *See id.* (reporting that "[in] fiscal year 2021, 39.2 percent of [individuals] with zero criminal history points received a sentence within the guidelines range").

[60] *See* Criminal History Impact Analysis at 22 (estimating 55.4 percent of people eligible for retroactive relief under Part B were sentenced within the guideline range).

[61] *See id.* at 17 (estimating 7,272 people would be eligible for a sentence reduction under Part B).

[62] *See id.* (reporting that 69.9 percent of those eligible under Part B are classified by the Commission as Hispanic and 9.9 percent are classified as Black).

[63] According to BOP data, 38.5 percent of its incarcerated population is classified as Black, and 30.1 percent is classified as Hispanic. *See* Fed. Bureau of Prisons, *BOP Statistics: Inmate Race* (last accessed June 22, 2023), https://tinyurl.com/5az7exbw; Fed. Bureau of Prisons, *BOP Statistics: Inmate Ethnicity* (last accessed June 22,

Administrability. Federal court stakeholders are well-equipped to handle the retroactive application of §4C1.1.

To be sure, determining eligibility for retroactive relief under Part B would be more involved than determining relief under Part A, but courts and stakeholders are prepared to navigate this analysis. In most cases, the §4C1.1 exclusions should be apparent from the record. Several exclusions would be gleaned from the statute of conviction.[64] Others would be clear from the original guideline calculation.[65] Any remaining exclusions should be discernable from the factual basis and offense conduct described in the sentencing record. Just as the Commission was able to quickly assess prospective eligibility through guideline-based proxies,[66] Defenders are confident that courts (with the help of probation officers, defenders, and prosecutors), would be able to manage eligibility determinations as well.

The processes implemented for past retroactivity projects, discussed above, also ease manageability concerns here. For example, the Middle District of Florida—the district expecting the greatest number of eligible cases under Part B[67]—already has a collaborative review process in place. Starting in 2008 with Amendment 706, the district adopted a standing order authorizing the federal defender's office to represent all people filing motions for a sentence reduction under that amendment. The federal defender's office, with the assistance of probation, identified the people eligible for relief. Probation prepared a memorandum identifying its position on eligibility and the amended guidelines. Through meetings with the court, defenders, and the

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2023), https://tinyurl.com/mccyw2v7. These groups are significantly overrepresented in the BOP as compared to the national population. *See* U.S. Census Bureau, *QuickFacts: United States* (last accessed June 22, 2023), https://tinyurl.com/7pt88z72 (reporting the nationwide population is 13.6 percent Black and 19.1 percent Latino or Hispanic).

[64] *See, e.g.*, 2023 Amendments and Reasons for Amendment at 45–46 (adopted USSG §4C1.1(a)(5) & (b)(2)).

[65] *See, e.g.*, *id*. at §4C1.1(a)(2), (8), (9), (10).

[66] *See* Criminal History Impact Analysis at 28–29; App'x A–E.

[67] *See id.* at 20, tbl. 2B (anticipating Middle District of Florida to receive 15.4 percent of the total eligible cases under Part B).

government, the parties were able to come to an agreement on most of the motions and almost all motions—even if opposed—were resolved on the papers. The district used this same process for resolving sentence reduction motions pursuant to Amendments 750 and 782. Defenders expect that the same process would apply again.

Other anticipated factors further confirm this project would be manageable. Like with Part A, the number of people expected to be released within the first year if Part B was made retroactive is not substantially greater than if Part B was *not* made retroactive.[68] And the number of people subject to active supervision would be far less than those receiving sentence reductions. Almost 75 percent of those anticipated to be eligible for immediate release are non-U.S. citizens and over half of all people eligible for Part B retroactivity are non-U.S. citizens.[69]

III. Conclusion

The Commission unanimously passed Parts A and B of the criminal history amendment not because facts changed, or new legal developments emerged. Rather, both parts of this amendment were passed because of what has always been true: status points are unnecessary and guideline-recommended sentences for people with zero criminal history points are too long. When the Commission amends the guidelines to better reflect advancement in knowledge of the criminal justice process,[70] the benefit of that knowledge should be shared among all to whom it applies.

Defenders recognize that retroactive application of these new provisions may require all federal court actors to temporarily shoulder an increased workload. But as Judge Walton testified before the Commission in 2007, we should not refuse to rectify unfairness in the sentencing process simply

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[68] *See id.* at 24–24 (anticipating 3,274 eligible people would be released within the first year if Part B is made retroactive. But 1,802 of those people will be released under their current, unamended sentence even without retroactivity).

[69] *See id.* at 21 & 24, n. 41 (reporting 73.5 percent of people eligible for immediate release are non-U.S. citizens and 53.2 percent of all people eligible for relief under Part B are non-U.S. citizens).

[70] *See* 28 U.S.C. § 991(b)(1)(C).

because "we're going to be . . . worked to a greater extent."[71] "[I]f we're going to do justice, that means not just justice in the future, but rectifying injustices that occurred in the past."[72]

We hope the Commission will do what is just and make both parts A and B of the criminal history amendment retroactive.

Very truly yours,

/s/ Michael Caruso
Michael Caruso
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

Jayme L. Feldman
Sentencing Resource Counsel
Federal Public and Community Defenders

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

[71] Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 17 (Nov. 13, 2007), https://tinyurl.com/yazzyuz5 (Hon. Walton).

[72] *Id.*

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

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June 23, 2023

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Parts A and B of the Criminal History Amendment, Relating to "Status Points" and Certain "Zero-Point" Offenders

Dear Judge Reeves:

The Practitioners Advisory Group ("PAG") submits the following comments on whether, under §1B1.10(d), the U.S. Sentencing Commission should list Parts A and B of its amendments, regarding "status points" at the new §4A1.1(e) (Part A), and defendants with zero criminal history points at the new §4C1.1 (Part B), as changes that may be applied retroactively to previously sentenced defendants. The PAG recommends that the Commission list **both** of these amendments under §1B1.10(d).

In determining whether an amendment should be included in the list of those amendments that may be applied retroactively under §1B1.10(d), the Commission considers: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively to determine an amended guideline range under [§1B1.10(b)(1)].[1] Ultimately, "[t]he listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guidelines range is sufficient to achieve the purposes of sentencing. . .".[2] The PAG submits that these three factors weigh in favor of retroactive application for both of these criminal history amendments and that retroactivity achieves the purposes of sentencing.

[1] §1B1.10. cmt. background.

[2] *Id.; see also United States v. Horn*, 679 F.3d 397, 409-10 (6th Cir. 2012).

I. Status Points (Part A)

A. The New §4A1.1(e)

Part A of the newly promulgated amendment reduces the number of criminal history points assigned to a defendant who committed the instant offense while under a criminal justice sentence, such as probation, parole, or supervised release. Currently, two criminal history points are assigned to all defendants whose current offense was committed while under a criminal justice sentence. Part A will eliminate the assignment of additional points to defendants who have six or fewer criminal history points and will assign only one additional point to defendants who have seven or more criminal history points.[3]

B. The Potential Impact of Retroactivity

According to the Commission's analysis, approximately 11,495 currently incarcerated defendants would have a lower guideline range if Part A is made retroactive. The average sentence for these defendants is 120 months, and if these defendants receive the full reduction, their sentences would be reduced by an average of 14 months.[4] Upon a retroactivity decision, 2,090 defendants would be eligible for immediate release, and 4,429 defendants would be eligible for release within the first year after the effective date of the amendment.[5]

C. Retroactivity is Warranted for Part A

Each of the three factors that the Commission considers when determining whether to apply an amendment retroactively supports making Part A of this amendment retroactive.

1. The purpose of the amendment. The Commission arrived at its decision to adopt this amendment based on evidence that status points "add little to the overall predictive value associated with the criminal history score,"[6] and that a sentence imposed upon revocation often also increases the points assigned to a particular conviction, thereby separately increasing a

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[3] *See* §4A1.1(e), Amendments to the Sentencing Guidelines, at 81-82 (Apr. 27, 2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

[4] *See* U.S.S.C., Memorandum, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment at 9 (May 15, 2023), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf (hereinafter "Retroactivity Analysis").

[5] *See id*. at 16.

[6] *See id.* at 3 (citing U.S.S.C., *Revisiting Status Points* (June 27, 2022), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220627_Status.pdf).

defendant's criminal history score.[7] As the PAG noted in its written comments and testimony supporting the elimination of status points, "[t]he assignment of status points simply punishes a defendant twice, by increasing the defendant's advisory guidelines range, in addition to the punishment a defendant will receive for the probation or parole violation."[8]

By adopting this amendment, the Commission has determined, based on empirical evidence, that an increase in the criminal history score due to status points does not serve the goals of sentencing because such increase produces a sentence that is lengthier than necessary. This amendment should apply retroactively to ensure that defendants whose sentences were increased by the assignment of status points now receive a sentence that achieves the purpose of establishing a sentence that is sufficient but not greater than necessary. *See* 18 U.S.C § 3553(a).

If the amendment does not apply retroactively, it will create unwarranted disparities between those defendants previously sentenced and those who are sentenced after this amendment goes into effect. A defendant's sentence should not be significantly impacted by the timing of when they are convicted of their offense. While this is true of any guideline amendment that reduces a sentencing range, here, where the guideline range potentially is being lowered based on empirical evidence that status points do not predict recidivism and therefore do not serve the purposes of sentencing, there is a compelling sentencing purpose to avoid unwarranted disparity. *See* 18 U.S.C § 3553(a)(6).

Further, the assignment of status points appears to disproportionately apply to defendants of color. Black defendants make up 43% of defendants eligible for a sentence reduction if Part A is applied retroactively. Similarly, Hispanic defendants are 27.8% of defendants eligible for a sentence reduction if Part A is applied retroactively.[9] This disproportionate racial impact is another strong reason to apply the amendment retroactively – first, to ensure that all defendants are treated equally, and second, to remedy the unfair effects of the former approach, which has unintentionally but empirically contributed to overly punitive sentences and systemic racial disparities. Such actions allow the public, including our communities of color, to have confidence in the fairness of our criminal justice system.

In determining whether retroactive application of the amendment would comport with the purpose of the amendment, the Commission generally considers whether the amendment is designed to address issues of fairness. If so, the Commission has tended to apply an amendment retroactively. If the primary purpose of the amendment is to address another issue, such as to simplify an administrative task, then the Commission has tended to deny retroactivity.

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[7] *See* §4A1.1(e), Amendments to the Sentencing Guidelines, at 78 (Apr. 27, 2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

[8] *See* Letter from PAG to U.S.S.C. at 29 (Mar. 14, 2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=844.

[9] *See* Retroactivity Analysis at 13, Table 3A.

For example, Amendment 750 was made retroactive, in part, because the purpose of the Fair Sentencing Act statutory changes on which Amendment 750 was based was to "restore fairness to federal cocaine sentencing."[10] Amendment 782 was made retroactive, in part, because the Commission determined that a higher base offense level was "no longer necessary."[11] Conversely, in the meeting minutes regarding the Commission's considerations for not making Amendment 742 retroactive, it was observed that "the purpose of [that] amendment was to simplify guideline application" and that the "amendment was not intended to address the same types of fairness issues involved in the circumstances where retroactivity typically has been adopted in the past."[12] Because Part A is based on principles of fairness and designed to correct a calculation that is not necessary, the PAG submits that the Commission's precedents support retroactivity.

Retroactive application of Part A also will help alleviate prison overcrowding. The Commission previously voted to make Amendment 782 retroactive because the sentence reductions that would result would help to alleviate "the overcapacity of the federal prisons."[13] Making Part A retroactive will have a similar effect and thus will be consistent with the statutory directive that sentencing guidelines be formulated to minimize federal prison overcrowding. *See* 28 U.S.C § 994(g).

2. The magnitude of the change in the guideline range. The Commission typically does not give retroactive effect to amendments that generally reduce the maximum of the guideline range by less than six months.[14] Here, however, the Commission's analysis finds that the average potential reduction is 14 months, and that nearly a third of eligible defendants could receive a reduction of greater than 12 months.[15] This is at least twice as long as the six months that appears to be the minimum for retroactive application of a guideline, and potentially greater. It also impacts a significant number of defendants, a majority of whom will benefit from a reduction of up to 12 months. The Commission has previously determined that when a substantial number of defendants are affected, retroactivity is justified.[16]

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[10] *See* U.S.S.G. App. C, Amendment 759, Reason for Amendment, at 419.

[11] *See* U.S.S.G. Suppl. to App. C, Amendment 788, Reason for Amendment, at 81.

[12] *See* U.S.S.C. Public Meeting Minutes, September 16, 2010, at 2 available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf.

[13] *See* U.S.S.C. Suppl. to App. C, Amendment 788, Reason for Amendment, at 81.

[14] §1B1.10 cmt. background.

[15] *See* Retroactivity Analysis at 9 and 16, Figure 1A.

[16] *See* U.S.S.G. App. C, Amendment 713, Reason for Amendment, at 253 & Amendment 759, Reason for Amendment, at 419; U.S.S.G. Suppl. to App. C, Amendment 788, Reason for Amendment, at 81.

These estimated sentence reductions will have a significant positive effect on our clients' lives. For the average sentence these defendants are serving (120 months), a 14-month reduction would be 11.7% of their sentence.[17] This time will allow our clients to reunite with their families and transition to their communities. Far too often, we have seen our clients miss the opportunity to see a child graduate or get married, or say good-bye to elderly loved ones, by just a matter of months or days. These milestone events have an impact on our clients' ability to maintain their relationships with their families and, in turn, successfully transition to their communities.

And a potential sentence reduction demonstrates the fairness of our criminal justice system, which help our clients and their families have confidence that our "criminal justice" includes "justice." When a defendant receives a lower sentence based on an amended guideline, it shows that our system of rules and laws has careful oversight and is not designed solely to be punitive. In our experience, clients have an easier time adjusting to supervised release when they see that the "system" is striving to be fair and just.

3. The difficulty of determining and applying the amended guideline range. The PAG submits that identifying the amended guideline range and applying it retroactively will not unduly burden the courts, prosecutors, defense counsel or probation officers who will be tasked with this exercise, for at least three reasons.

First, the impact of the amendment under Part A will be relatively straightforward to calculate. The Presentence Investigation Report (PSR) will reflect a defendant's criminal history score, and whether a two-level or one-level reduction impacts the guideline range. As the Commission's analysis notes, "additional fact-finding is not required to determine the amended guideline range" if Part A is retroactively applied; that is why " it was not necessary to make factual methodological assumptions in completing the analysis."[18] It will not, therefore, be "difficult" to apply the amendment retroactively and amend the guideline range.

Second, the Commission has identified 11,495 potentially eligible persons who would benefit from retroactive application of Part A.[19] While this is certainly a significant number of people whose overly lengthy sentences merit correction, it is not an unmanageable number. The criminal justice system efficiently handled more than 25,000 cases in connection with the crack-cocaine amendment,[20] and there is no reason that fewer than half that number of cases will cause

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[17] *See* Retroactivity Analysis at 9.

[18] *See* Retroactivity Analysis at 8.

[19] *See id*. at 9.

[20] *See* U.S.S.C., Preliminary Crack Cocaine Retroactivity Data Report, Table 1 (June 2011 Data) available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf

difficulties for the district courts to process. Most districts will have fewer than 200 eligible defendants.[21]

Third, the PAG believes that in many cases, motions for sentence reduction under this amendment can be decided without a hearing. And in districts with a larger number of cases, probation, prosecutors, defense counsel and the courts will likely work together to develop a streamlined process to vet and review cases of eligible defendants, as has occurred in connection with other amendments.

For all of these reasons, the PAG supports the retroactive application of Part A of the criminal history amendment.

II. Zero-Point Offenders

A. The New §4C1.1[22]

Part B of the newly promulgated amendment, to be set out in the new §4C1.1, provides for a two-level downward adjustment for certain defendants who have zero prior criminal history points, as calculated under §4A1.2. The amendment excludes certain zero-point offenders from eligibility for this downward adjustment when the presence of certain aggravating factors demonstrates the seriousness of the instant offense of conviction. In addition to having zero criminal history points, the following criteria must be met for a defendant to be eligible for the two-level downward adjustment:

- The defendant did not receive an adjustment under §3A1.4 (Terrorism), §4C1.1(a)(2);
- The defendant did not use violence or credible threats of violence in connection with the offense, §4C1.1(a)(3);
- The instant offense did not result in death or serious bodily injury, §4C1.1(a)(4);
- The instant offense of conviction is not a sex offense, §4C1.1(a)(5);
- The defendant did not personally cause substantial financial hardship, §4C1.1(a)(6);
- The defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense, §4C1.1(a)(7);
- The instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights), §4C1.1(a)(8);
- The defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense), §4C1.1(a)(9); and

[21] *See* Retroactivity Analysis at 12, Table 2A.

[22] *See* §4C1.1, Amendments to the Sentencing Guidelines, at 87-88 (Apr. 27, 2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

- The defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848, §4C1.1(a)(10).

B. The Potential Impact of Retroactivity

According to the Commission's analysis, approximately 7,272 defendants would have a lower guideline range if the new §4C1.1 is made retroactive. If these defendants receive the full reduction, their sentences would be reduced by an average of 15 months.[23] If the new §4C1.1 is made retroactive, approximately 1,198 defendants would be eligible for immediate release and 3,274 defendants could be eligible for release within the first year after the effective date of the amendment.[24] Notably, non-citizens comprise 73.5% (or 878) of the defendants eligible for immediate release.[25]

C. Retroactivity is Warranted for Part B

For many of the same reasons applicable to Part A, the factors that the Commission considers when determining whether to apply an amendment retroactively support making Part B of this amendment retroactive.

1. The purpose of the amendment. The Commission promulgated this amendment after conducting multiple recidivism studies which indicated that defendants with zero criminal history points have considerably lower recidivism rates than other defendants, including lower recidivism rates than the other defendants in Criminal History Category I with one criminal history point.[26] In its report published in 2021, the Commission found that the recidivism rate of zero-point offenders released in 2010 was 15.5% lower than the recidivism rate of those with one criminal history point (26.8% compared to 42.3%).[27] Similarly, in its report published in 2016, the Commission found that the recidivism rate of zero-point offenders released in 2005 was 16.7% lower than the recidivism rate of those with one criminal history point (30.2% compared to 46.9%).[28] The consistently lower recidivism rate for defendants with zero criminal history

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[23] *See* Retroactivity Analysis at 17.

[24] *Id.* at 24.

[25] *Id.* at 24 n.41.

[26] *See* U.S.S.C., Recidivism of Federal Offenders Released in 2010 (Sep 2021) at 26-27 & Figure 14, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf (hereinafter "2021 Recidivism Report"); *see also* U.S.S.C., Recidivism Among Federal Offenders: A Comprehensive Overview, (March 2016) at 18 & Figure 6, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf (hereinafter "2016 Recidivism Report").

[27] *See* 2021 Recidivism Report at 27, Figure 14.

[28] *See* 2016 Recidivism Report at 18, Figure 6.

points supports a lower sentence for these defendants, in order to achieve a sentence that is sufficient, but not greater than necessary. *See* 18 U.S.C. § 3553(a).

The Commission has been studying the recidivism rates of first-time offenders or defendants with zero criminal history points since shortly after its creation.[29] The current promulgated amendment is the result of decades of data collection, analysis and policy considerations. It balances the recognition that zero-point defendants have a significantly lower recidivism rate than other defendants with the understanding that certain offenses are so serious that a defendant's status as a "zero-point offender" deserves less consideration. This appropriately-struck balance holds true regardless of whether a defendant has been sentenced before or after November 1, 2023. Thus, retroactive application furthers the sentencing purpose of avoiding unwarranted disparity. *See* 18 U.S.C. § 3553(a)(6).

As with Part A, retroactive application of Part B also is consistent with Commission precedent since Part B is meant to further fairness in sentencing and is not an administrative amendment. Part B, like Part A, is grounded in fundamental fairness and a recognition that the prior criminal history calculation rules were resulting in unduly lengthy sentences. And retroactive application will be consistent with the directive of 28 U.S.C. § 994(g) to formulate sentencing guidelines that minimize the likelihood of creating a prison population that exceeds the capacity of the federal prisons.

2. The magnitude of the change in the guideline range. This factor weighs in favor of retroactive application. As previously stated, "[t]he Commission has not included in [§1B1.10(d)] amendments that generally reduce the maximum of the guideline range by less than six months."[30] Here, the Commission's analysis finds that the average sentence for eligible offenders who received the full reduction would be 15 months shorter, and that nearly half of the 7,272 eligible defendants would receive sentence reductions of greater than 12 months.[31] This is at least twice as long as the six months that appears to be the minimum for retroactive application of a guideline, and potentially greater. It also impacts a significant number of defendants, a majority of whom will benefit from a reduction of up to 12 months.

These estimated sentence reductions will have a positive effect on our clients' lives. Given the average sentence these defendants are serving, 85 months, a 15-month reduction is 17.6% of their sentence.[32] As previously stated, this time will allow our clients to maintain their relationships with their family and transition to their communities. Additionally, retroactive application serves to demonstrate the fairness of our criminal justice system.

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[29] *See* U.S.S.C., Recidivism and the "First Offender" (May 2004) at 1-4, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf.

[30] §1B1.10. cmt. background.

[31] *See* Retroactivity Analysis at 17 & 24, Figure 1B.

[32] *See id.* at 17.

Non-citizens make up 73.5% of the defendants eligible for immediate release if §4C1.1 is made retroactive.[33] It is likely that many of these defendants will be deported upon their release, thus reducing any concerns about the lack of re-entry planning on the part of the Bureau of Prisons, as many non-citizens are not eligible for such programs.

3. The difficulty of determining and applying the amended guideline range. The PAG submits that identifying the amended guideline range under the new §4C1.1 and applying it retroactively will not unduly burden the courts, prosecutors, defense counsel or probation officers. Defendants with zero criminal history points will be clearly identified in the PSR. The presence or absence of five of the nine disqualifying criteria also can be easily determined by reviewing the PSR to see which guideline sections applied or by looking to the offense of conviction.[34] The other four disqualifying criteria can be easily determined by a review of the "Offense Conduct" section of the PSR.[35] Given that a defendant's eligibility will likely be easily determined by a review of the PSR, the PAG anticipates that the vast majority of the motions for sentence reduction under this amendment will be decided without a hearing and may very well be unopposed.

The number of eligible defendants if this amendment is made retroactive is estimated to be 7,272.[36] This is a substantial number of persons whose existing sentences should be adjusted to achieve the purposes of sentencing. The positive impact of making these adjustments is well worth the effect. Even though a significant number of people will be impacted by retroactivity, the number is far less than the more than 25,000 cases our system processed when the crack-cocaine amendments were made retroactive. And almost all districts will have less than 200 eligible defendants.[37] Additionally, the release date for eligible defendants will be spread out over the course of several years, thus giving the system time to process the motions.[38]

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[33] *Id.* at 24 n.41.

[34] The applicability of §4C1.1(a)(2), (5), (8), (9) & (10) is determined by the offense of conviction or the application of other guideline sections.

[35] §4C1.1(a)(3), whether the defendant used violence or credible threats of violence in connection with the offense, §4C1.1(a)(4), whether the offense resulted in death or serious bodily injury, §4C1.1(a)(6), whether the defendant personally caused substantial financial hardship, and §4C1.1(a)(7), whether the defendant possessed, received, purchased, transported, transferred, sold, or otherwise disposed of a firearm or other dangerous weapon in connection with the offense, all describe offense characteristics that are typically included in the Offense Conduct section of the PSR and often correspond with the applicability of certain sentencing guideline provisions. The Commission itself looked to sentencing guideline sections in conducting its retroactivity analysis. *See*, *e.g.*, Retroactivity Analysis, Appendices A, B, D, & E.

[36] *See* Retroactivity Analysis at 17.

[37] *See* Retroactivity Analysis at 20, Table 2B.

[38] *See* Retroactivity Analysis at 25, Table 6B.

For all of these reasons, the PAG also fully supports the retroactive application of Part B of the criminal history amendment.

III. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding the retroactivity of these amendments. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

/s/ Natasha Sen
Natasha Sen, Esq., Chair
LAW OFFICE OF NATASHA SEN
P.O. BOX 871
MIDDLEBURY, VERMONT 05753
(802) 825-6385
nsen@senlawvt.com

/s/ Patrick F. Nash
Patrick F. Nash, Esq., Vice Chair
NASH ▪ MARSHALL, PLLC
129 WEST SHORT STREET
LEXINGTON, KENTUCKY 40507
(859) 254-3232
pfnash@nashmarshall.com

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

Jill Bushaw, Chair, 8th Circuit
Joshua Luria, Vice Chair, 11th Circuit

Circuit Representatives
Laura M. Roffo, 1st Circuit
Tandis Farrence, 2nd Circuit
Alex Posey, 3rd Circuit
Barbara Carrigan, 4th Circuit
Andrew Fountain, 5th Circuit
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Rebecca Fowlie, 7th Circuit
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Daniel Maese, 10th Circuit
Renee Moses-Gregory, DC Circuit
Amy Kord, FPPOA Ex-Officio
Carrie E. Kent, PPSO Ex-Officio

June 23, 2023

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

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following comment pertaining to the United States Sentencing Commission's request for comment regarding whether Parts A and B, relating to "status points" and certain offenders with zero criminal history points, should be included in the Guidelines Manual as an amendment that may be applied retroactively to previously sentenced defendants.

As public servants, probation officers fulfill their role within the justice system both at the time of sentencing, as well as during post-sentencing matters, including resentencing upon appeal, resentencing in response to case law, and resentencing based upon retroactive amendments. Our role related to a case after the initial sentencing hearing is part of the judicial process. As such, POAG does not take a position whether either amendment should be applied retroactively. POAG respectfully defers to the Commission's discretion on this matter after having considered testimony and comments from the public and various stakeholders, as well as their own expertise in this area.

Nonetheless, as the Commission formulates its decision on this matter, POAG provides the following analysis based upon the provisions under USSG §1B1.10, which provides that the retroactivity analysis should contemplate the purpose of the amendment, the magnitude of the change, and the difficulty in applying the amendment retroactively.

In the event either amendment is made retroactive, it would be essential that each district receive a list of incarcerated defendants who may be potentially eligible, as well as each defendant's anticipated discharge dates to assist districts in preparing and prioritizing their workload. Given the anticipated number of impacted individuals, as well as the number of anticipated motions filed by defendants who do not qualify under this amended guideline, and the need to allocate time and resources in assessing each case individually, POAG would respectfully request ample time before

retroactivity becomes effective. POAG suggests that, if retroactivity is adopted, the implementation of retroactivity be delayed by at least three to six months past November 1, 2023. Any such delay would not only assist with the resources needed to assess all of the motions while also maintaining their current caseloads, but it will allow for more time to prepare for the release of defendants with varying criminal histories as they transition to supervised release. The resources needed to incarcerate these individuals will transition to resources needed to safely supervise them in the community. The release planning includes identifying and verifying housing; coordinating any treatment needs, including sex offender treatment, mental health treatment, and substance abuse treatment; and assessing if any additional special conditions are relevant given the change in circumstances. Even temporary caseload swells of defendants on supervised release presents public safety concerns if it results in caseloads that exceed resource capacity.

Part A: Status Points

Part A eliminates status points under USSG §4A1.1(d) for those assessed with up to six criminal history points, that is, Criminal History Category II and III. Further, it reduces the status points from two points to one point for those assessed with seven or more criminal history points, that is, Criminal History Category IV, V, and VI. Therefore, this amendment will require all defendants still incarcerated to be assessed for potential impact, other than those assessed with a Criminal History Category of I. Of course, a reduction in criminal history points may not actually reduce the Criminal History Category. The reduction in points may not be sufficient to reduce the Criminal History Category or the Criminal History Category could be based on another consideration, such as USSG §4B1.1 (Career Offender) and USSG §4B1.4 (Armed Career Criminal). As such, the number of points assessed at sentencing regains new significance, but it presents a potential application issue in the event this amendment is made retroactive.

POAG identified a concern that such a retroactive amendment will result in requests for the court to consider objections to the probation office's original analysis and assignment of criminal history points, an issue that POAG anticipates will be litigated within each Circuit and potentially produce varying results. Declining to consider those arguments when addressing this matter on a retroactive basis takes away the opportunity for each party to advocate for their position based upon the current criteria, rather than the criteria that was in effect at the time of the original sentencing.

Further, either party may not have objected to, or may not have strongly pursued an objection to a particular scoring issue if it did not have an impact at that time. In fact, the guidelines are structured in such a way so as to reduce the amount of litigation at sentencing, allowing the court to decline to address objections in cases where it does not have an impact. Retroactive application of USSG §4A1.1(d) was not something the court could have foreseen when determining which objections to rule on at the time of the original sentencing hearing and in making the sentencing record. For example, consider a case where a defendant or the government objected to the scoring of one criminal history point, but the court either did not address the objection or did not make a finding on the matter because it did not have an impact on the determination of the Criminal History Category. This may also present as an issue in cases where there was a binding stipulation to a sentence that the court accepted or if the applicable mandatory minimum sentence was greater than the otherwise applicable guideline range. However, in the event this amendment is made

retroactive, because the sentencing court is responsible for resolution of any disputes which may impact the sentence imposed, resolution of this issue becomes relevant now that the number of points assessed within a category will impact application of USSG §4A1.1(d).

POAG also notes that, in the June 2022 Revisiting Status Points publication, the Commission determined that criminal history was cited as a reason in 13.3% of below range sentences and that there was no substantial difference in that statistic for offenders who received status points and those who did not. Given the limited details historically noted on the Judgment and Commitment Orders, absent the transcript from the original sentencing hearing and absent the court knowing this issue would be a relevant part of the record, POAG is concerned about the difficulty in discerning whether status points were already considered in the imposition of non-guideline sentences under 18 U.S.C. § 3553(a).

POAG also questions what the implication of the safety valve availability will be in cases in which one's criminal history category is reduced based upon the elimination of status points. POAG understands that, pursuant to USSG §1B1.10, proceedings under 18 U.S.C. § 3582(c)(2) do not constitute a full resentencing of the defendant. However, where safety valve eligibility is directly tied to the determination of one's criminal history category, POAG believes there will be litigation regarding safety valve for those persons whose criminal history is reduced to Criminal History Category I as a result of the retroactive application of this amendment. That litigation may be further complicated by the circuit split as to the interpretation of the First Step Act (FSA) statutory safety valve language, which will be incorporated into the corresponding guideline, USSG §5C1.2, via the November 1, 2023, amendment, as well as the fact that a defendant likely would not have engaged in a safety valve proffer prior to the original sentencing if he or she was not then eligible. Furthermore, there will likely be litigation relating to whether the safety valve criteria to be used should be that in effect at the time of the original sentencing or that in effect as a result of the First Step Act.

Furthermore, retroactive application of USSG §4A1.1(d) will also be relevant for those at the revocation stage. For those pending revocation, the parties may take the position that the criminal history computation would need to be re-calculated before USSG §7B1.4 could be applied to determine the correct imprisonment range that corresponds to the Grade of Violation. As a result, POAG also anticipates inquiries as to whether those presently incarcerated upon revocation are also eligible for retroactive application of USSG §4A1.1(d) to determine their amended imprisonment range and have their sentence adjusted accordingly. Given that revocation sentences are comparably shorter than sentences imposed at the original sentencing hearing, these cases would take precedence in the event the amendment is made retroactive. Additionally, while a retroactive effort is underway, individuals under supervision could commit violations of probation or supervision that necessitate a more immediate response on how a retroactive application of this guideline could impact them. Therefore, POAG recommends the Commission consider the above issues and provide guidance regarding whether this amendment would also pertain to those pending revocation and those currently incarcerated based upon a revocation proceeding.

And finally, POAG finds it highly relevant that, when the Commission eliminated a provision similar to status points, recency points under the former USSG §4A1.1(e), in 2010, based on a

similar study that focused on recidivism, that amendment was not made retroactive. POAG would suggest the basis for not making that amendment retroactive are likely equally relevant at this time in relation to USSG §4A1.1(d), weighing the minimum impact of this reduction, the fact that the 18 U.S.C. § 3553(a) factors were considered for those sentenced under an advisory guideline system, the resources needed to assess each motion and amend each sentence while maintaining the current docket, and the reason for the amendment all remain true. POAG recommends these factors be considered as the Commission makes their retroactivity determination.

Part B: Zero Point Offenders

With regard to Part B, POAG has identified the following practical obstacles that would result from retroactive application of USSG §4C1.1. While POAG also acknowledges there are certain exclusionary criteria under USSG §4C1.1 where additional fact-finding may not be necessary, one of the main challenges with applying the zero-point offender reduction under USSG §4C1.1 retroactively is that there would need to be additional fact-finding in relation to several of the exclusionary criteria.

The Sentencing Commission's Analysis of the Impact of the 2023 Criminal History Amendment (Parts A and B) if Made Retroactive report dated May 15, 2023 ("Impact Analysis Report"), presents information regarding the Instant Type of Crime for Offenders Eligible Under Part B that is found at Table 5B. This chart reflects that drug trafficking and fraud/theft/embezzlement were the most common offenses eligible for the reduction for zero-point offenders. In the Commission's Impact Analysis Report, certain methodological assumptions to approximate such fact-finding were used to determine the impact of this amendment if it was made retroactive. Appendices A through E reflect the various methodological assumptions used to determine to which offenders the reduction may apply. However, as the Commission notes in footnotes 55 through 59, "That methodology should not be considered as the Commission's interpretation of how this criterion should be applied in all cases. The courts may apply this eligibility criterion differently." As such, POAG notes that this notation seems to acknowledge the potential litigation and disparate application of the new criteria under USSG §4C1.1. This is further exacerbated by the fact that the provisions under USSG §4C1.1 are newly established criteria that will present the court with first impression issues, which ideally are addressed at the original sentencing hearing, rather than retroactively applied as part of a limited resentencing hearing and without the benefit of case law as guidance.

There are criteria where additional fact-finding will likely be necessary. These include the criterion at USSG §4C1.1(a)(3), if the defendant did not use violence or credible threats of violence in connection with the offense; USSG §4C1.1(a)(4), if the offense did not result in death or serious bodily injury; USSG §4C1.1(a)(6), if the defendant did not personally cause substantial financial hardship; and USSG §4C1.1(a)(7), if the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense. These criteria are usually more present in drug trafficking and fraud/theft/embezzlement cases, which were the most common offenses eligible for the reduction for zero-point offenders, based on the Commission's Impact Analysis Report.
In the Impact Analysis Report, the Commission applied the criteria in USSG §4C1.1(a) on existing guideline language and their correlating guideline subsections. However, the language does not

perfectly align with the existing language. These differences become important and require additional fact-finding in retroactivity. For instance, the criterion at USSG §4C1.1(a)(4) precludes the adjustment if "the offense did not result in death or serious bodily injury," meaning it encompasses relevant conduct. However, for drug trafficking offenses, this language differs from the language in USSG §§2D1.1(a)(1) through (4) where the "offense of conviction establishes death or serious bodily injury," meaning it only encompasses the offense of conviction. Consider a case where a defendant may have been identified as a drug trafficker after a victim died due to a fentanyl overdose. In this case, text message conversations may have alerted law enforcement to drug transactions between the defendant and the victim. Since the defendant was a zero-point offender, the defendant may have already received some consideration by being charged without the enhanced penalty where death or serious bodily injury was established in the count of conviction. Even if the presentence investigation report identified the victim's death as causal to initiate the investigation, additional fact-finding may be necessary to determine if the drugs that the defendant sold caused that death.

Further, the criterion at USSG §4C1.1(a)(7) allows for this adjustment if "the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." Appendix E of the Commission's Impact Analysis Report excluded the adjustment if an enhancement under USSG §2D1.1(b)(1) was applied. The enhancement under USSG §2D1.1(b)(1) is offense based and differs from the standard under USSG §4C1.1(a)(7), which is based on the defendant's conduct. An individualized assessment is necessary in these cases. Similarly, the criterion at USSG §4C1.1(a)(7) more closely, though imperfectly, tracks the "safety-valve" language referenced in USSG §§2D1.1(b)(18) and 5C1.2(a)(2), which provides that the "defendant did not… possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." However, USSG §4C1.1(a)(7) includes additional acts - receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) – which are not captured under USSG §§2D1.1(b)(18) and 5C1.2(a)(2). As such, an individualized assessment is necessary in these cases.

Regarding financial cases, the criterion at USSG §4C1.1(a)(6) allows for the adjustment if "the defendant did not personally cause substantial financial hardship." Appendix D of the Commission's Impact Analysis Report excluded the adjustment if an enhancement under USSG §§2B1.1(b)(2)(A)(iii), (b)(2)(B), or (b)(2)(C) was applied. The enhancement under these subsections is offense based and differs from the standard under USSG §4C1.1(a)(6), which is based on the defendant's conduct. Further, there may have been an enhancement applied under USSG §2B1.1(b)(2)(A)(i) for an offense involving 10 or more victims, but the offense may have also resulted in a substantial financial hardship to one or more victims. An individualized assessment is necessary to determine if the defendant personally caused this hardship. These individualized assessments will often be heavily reliant on information provided by the victim.

Moreover, prior to the November 1, 2015, edition of the Sentencing Guidelines, "substantial financial hardship" under USSG §2B1.1 was not included as a specific offense characteristic. The facts establishing this enhancement may not have been presented in the presentence report as such definition was not included in the applicable Guidelines. Thus, some courts may be having to consider this issue for the first time with regard to certain defendants.

POAG also acknowledges there are certain exclusionary criteria under USSG §4C1.1 where additional fact-finding may not be necessary. This is because certain factors at USSG §4C1.1 reference specific enumerated guidelines or statutes which exclude application of this adjustment. These include the following criteria at USSG §4C1.1(a), as follows: USSG §4C1.1(a)(2) if an adjustment under §3A1.4 (Terrorism) is applied; USSG §4C1.1(a)(5) if the instant offense is a sex offense; USSG §4C1.1(a)(8) if the instant offense is not covered by §2H1.1 (Offense Involving Individual Rights); USSG §4C1.1(a)(9) if the defendant did not receive an adjustment under §3A1.1(Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and/or USSG §4C1.1(a)(1) if the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaging in a continuing criminal enterprise, as defined in 21 U.S.C. § 848. In these circumstances, if the defendant was a zero-point offender, and the court already made a finding as to the enumerated guidelines or statutes listed in above-referenced sections, then additional fact-finding would not be necessary to preclude the defendant from this adjustment.

Additionally, there may be difficulty in applying this adjustment in cases where the parties entered into a binding plea agreement pursuant to Federal Rules of Criminal Procedure 11(c)(1)(C).

Another significant concern is that there will be disparities in the application, lack of certainty, and circuit splits when determining how the adjustment may be applied in cases where additional fact-finding is necessary. Applying an amendment retroactively does not constitute a full resentencing. Some districts may look solely at the information presented in the presentence investigation report, which may not have included these facts, while other districts may request a hearing regarding specific facts relevant to the criterion in question. In this regard, litigation of the facts at this juncture may not be possible given the unavailability of discovery or victim statements.

As another whole and separate consideration, the court may have already considered some of these factors enumerated under USSG §4C1.1 when determining the original sentence. The creation of USSG §4C1.1 appears to create a formalized assessment of what courts have historically considered at sentencing. As such, these are factors that very likely received weight at sentencing already. The record may not adequately reflect that these factors were or were not considered as part of the 18 U.S.C. § 3553(a) considerations. This may result in unintended outcomes based on whether a court already considered some of the factors at USSG §4C1.1(a) when determining the original sentence for a zero-point offender. If the court already weighed these factors when imposing a sentence, a defendant may receive an additional benefit that the defendant would not have otherwise received.

In summary, POAG recognizes that if this adjustment is applied retroactively, the primary challenges include additional fact-finding, litigation of these facts, and determining the weight these factors had on the original sentence.

Other Considerations

In addition to the issues outlined above specifically for Parts A and B, this section addresses broader issues related to these amendments being made retroactive, such as the practical implications of implementation. These amendments do not intend to correct mistakes, but instead

attempt to make retroactive a new perspective based upon data that suggests that the factors are not as relevant (status points) or a way to account for no criminal history for a defendant beyond a departure or variance (zero point offenders). In that sense, prior retroactive amendments are not comparable to the present amendments as a majority of the cases resentenced as part of prior retroactive amendments were sentenced pre-*Booker*. In contrast, approximately 93% of the defendants potentially eligible under Part A and approximately 98% of defendants potentially eligible under Part B were sentenced within the last decade. During that period of time, application of 18 U.S.C. § 3553(a) evolved and continues to carry more weight at the time of sentencing. The sentences imposed for these defendants included an analysis of the facts and circumstances of the offense, the history and characteristics of the defendant, and the need to protect the public. POAG does not anticipate that minor adjustments to the offense level or criminal history score would have impacted the final sentences imposed.

As most impacted sentences are post-*Booker*, retroactivity could be incorrectly interpreted as suggesting that the original sentences were inherently unfair, although the court had the discretion to sentence as it deemed appropriate under 18 U.S.C. § §3553(a) since the guidelines were advisory during this time. POAG also believes the ultimate impact, if the amendments are made retroactive, would be minimal given the number of original sentences imposed based on variances.

POAG believes the judicial resources needed to implement these amendments will be substantial, especially considering if counsel will be appointed and the resulting appeal process. Part A will most likely impact those in Criminal History Category II through VI, while Part B will most likely impact those in Criminal History Category I, meaning essentially every defendant presently incarcerated will have the option of having their sentence reassessed and potentially amended. Further, the identified number of cases affected is not reflective of the number of cases that will need to be addressed. Based upon prior retroactive guideline and statutory experiences, a significant number of motions will be filed by ineligible defendants seeking the reduction. Each of these cases must also be researched, responded to, and adjudicated.

Another resource matter for the Commission to consider is if this retroactive amendment would go into effect at the same time as the new criteria under USSG §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)), which allows defendants to file compassionate release motions based upon non-retroactive changes to the law. This would essentially require courts to potentially address three different types of retroactive analysis during the same period of time. Specifically, Part A pertaining to status points, Part B pertaining to zero-point offenders, and the new criteria established under USSG §1B1.13 related to reductions in terms of imprisonment under 18 U.S.C. § 3582(c)(1)(A) (compassionate release), all while maintaining their current docket.

In addition to the issues mentioned above, *ex post facto* analysis will have to be made, regardless of the decision on these amendments, on many presentence investigations for sentencings occurring after November 1, 2023, to determine which version of the sentencing guidelines to apply given the numerous amendments this amendment cycle. The training, preparation, and implementation of these amendments alone is expected to require adjustments to the normal process. Therefore, aside from whether the changes are retroactive, the implementation of the changes may cause adjustments and delays.

As the Commission is certainly aware, workload impact varies by district. Some districts have expressed concerns that a retroactive sentencing process at this time would be debilitating based upon their current workload levels. Specifically, border districts would be some of the most impacted under both parts according to the Impact Analysis Report. While POAG understands workload concerns alone should not be a deciding factor for this issue, it is a reality and a serious consideration that affects other aspects of the judicial process. If the court is inundated with requests based on retroactivity, other pressing matters such as sentencing hearings, trials, and civil issues would be hindered from an expeditious resolution.

USSG §1B1.10

The end goal of any retroactive amendment is the reduction of the unwarranted disparity between those previously sentenced and those pending sentencing. POAG's comments and recommendations have historically favored the concept of reducing such disparity. For that reason, POAG offers the following additional comment regarding application of USSG §1B1.10 that may require clarification in order to avoid further disparity due to inconsistent or misapplication of a guideline that is seldomly applied.

For background, POAG notes that, on December 20, 2018, the Commission issued Proposed Amendments to the United States Sentencing Guidelines, which included two proposed revisions to USSG §1B1.10. Public comment was received, but there was not a hearing to address the 2019 proposed amendments and the amendment cycle was subsequently paused until 2022 pending the nomination of a full quorum of commissioners. The public comment submitted in response to the 2019 amendment, including POAG's prior written response, can be reviewed at the following link: Public Comment from February 19, 2019 | United States Sentencing Commission (ussc.gov). Now that the instant amendment cycle includes a potential retroactive amendment, the previously proposed amendments to USSG §1B1.10 have renewed significance.

Part A of the 2019 proposed amendments addressed a possible amendment to USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) in light of *Koons v. United States*, 138 S. Ct. 1783 (2018).

In summary, *Koons* addressed application of USSG §1B1.10(c), which was added to the 2014 version of the Guidelines Manual, and is as follows:

> Cases Involving Mandatory Minimum Sentences and Substantial Assistance. If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

Specifically, *Koons* addressed application of USSG §1B1.10(c) and held that defendants whose initial guideline ranges fell entirely below a statutory mandatory minimum penalty, but who were originally sentenced below that penalty pursuant to a government motion for substantial assistance, are ineligible for sentence reductions under 18 U.S.C. § 3582(c)(2). *Koons* found that, in these cases, the sentences were not "based on" their guideline ranges but were instead "based on" the statutory minimum penalties and the substantial assistance reduction pursuant to 18 U.S.C. § 3553(e). As such, POAG recommends the Commission address the *Koons* impact on USSG §1B1.10(c) and provide further application instructions prior to implementing any retroactive amendments.

The 2019 proposed amendments reflected that Part A would revise USSG §1B1.10(a) and its corresponding commentary to clarify that a defendant is eligible for a reduction under the policy statement only if the defendant was "sentenced based on a guideline range." The proposed amendment to subsection (a)(1) intended to closely track section 3582(c)'s requirement that the defendant must be "sentenced based on a guideline range." The proposed amendment also sought to revise subsection (a)(2) to state the requirements for eligibility rather than exclusions from eligibility. It also added a requirement for eligibility that the defendant was "sentenced based on a guideline range."

POAG submitted public comment during 2019, indicating it was in favor of Option 2, which provided that the amended guideline range is determined after operation of USSG §§5G1.1 and 5G1.2. As noted in *Koons v. United States*, applying USSG §§5G1.1 and 5G1.2 in this manner treats defendants whose sentences are being amended due to a retroactive amendment in the same manner as similarly situated defendants who are being sentenced for the first time. Option 2 would provide for a consistent process and avoid unwarranted disparity that would otherwise result solely based upon the date judgment was entered.

In contrast, the proposed Options 1 and 3 provided that straddle and/or above defendants be sentenced without regard to operation of USSG §§5G1.1 and 5G1.2. POAG commented that the provisions of Options 1 and 3 were inconsistent with USSG §1B1.10(b), which direct that, in determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, 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. The guidelines that would have been in effect at the time the defendant was sentenced would have included operation of USSG §§5G1.1 and 5G1.2. Further, USSG §1B1.10(c) directs that, in 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. POAG believes an amendment directing that USSG §§5G1.1 and 5G1.2 do not apply conflicts with the provision that all other guideline applications are unaffected when determining the term of imprisonment due to a retroactive amendment.

Part B of the 2019 proposed amendment sought to resolve a circuit conflict concerning the application of USSG §1B1.10, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991). For the same reasons as noted

above, POAG believes further direction on this issue is needed prior to implementing a retroactive amendment out of concern that failure to provide such direction will result in additional disparity the amendment is seeking to resolve.

POAG recommended Option 2, which provided that if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of the initial sentencing, the reduction under subsection USSG §1B1.10(b)(2)(B) may take into account any departures, including substantial assistance, or a variance that was imposed at the time of the initial sentencing. This is consistent with USSG §1B1.1(a), which provides that the first step in determining the appropriate sentence is to determine the defendant's offense level computations under Chapters Two, Three, and Four; consider any applicable departures under Chapter Five; and then consider "the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." Departures and variances are part of the process of sentencing, and POAG disfavors any amendments that would place arbitrary limits on judicial discretion to reimpose any departure or variance deemed appropriate at the initial sentencing. However, with that recommendation, POAG recommended limitations comparable to the guidance currently set forth in USSG §1B1.10(b)(2)(B) should be included in order to preclude additional litigation. Specifically, POAG recommended that USSG §1B1.10 be amended to include that any departure or variance from the amended guideline imprisonment range be based solely upon factors originally considered and shall not exceed the reduction imposed at the time of the initial sentencing. POAG took the position that consideration of new grounds for departure or variance in resentencing would produce sentencing disparity for defendants who are ineligible for resentencing and result in a proceeding that is more comparable to a full resentencing. Such a provision would give deference to original judicial intent, which is particularly relevant when the original sentencing judge does not preside over the resentencing. Further, the aforementioned establishes a procedurally consistent process that aligns sentencing with the determination of an amended sentence after application of a retroactive guideline amendment.

Notwithstanding POAG's previously submitted commentary supporting Part B of the 2019 proposed amendments regarding USSG §1B1.10(b)(2)(B), said amendment would have also reduced the impact of USSG §1B1.10(b)(2)(A), which as it is currently written, precludes a significant number of defendants from being eligible for retroactive relief. Specifically, USSG §1B1.10(b)(2)(A) provides that, with the exception for substantial assistance, the court shall not reduce the defendant's term of imprisonment under this policy statement to a term that is less than the minimum the amended guideline range. Well over 90% of those potentially eligible for the potential retroactive amendment were sentenced in the last decade. During that period of time, variances have become a staple part of the sentencing process, with only the extent of the variance being the primary variable. Knowing the minimal impact of one Criminal History Category or two offense levels upon the determination of the advisory guideline imprisonment range and knowing the regularity and extent that a variance has been imposed over the last decade, application of USSG §1B1.10(b)(2)(A) would result in resources being expended to assess a case, only to find that the original sentence imposed was lower than the amended guideline range, making them ineligible for retroactive relief. However, if the 2019 proposed amendment had been adopted, USSG §1B1.10(b)(2)(A) would not have the same limiting effect, thus making an additional approximately 4,300 defendants eligible for relief.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on behalf of the dedicated professionals who serve the court as United States Probation Officers.

Respectfully,

Probation Officers Advisory Group

United States Sentencing Commission
TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

Voting Members
Manny Atwal
Mark Echo Hawk
Winter Martinez
Honorable Mekko Miller
Tim Purdon
Tricia Tingle
Sam Winder

June 15, 2023

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

Re: Retroactivity of Parts A and B of the Criminal History Amendment, relating to "Status Points" and Certain "Zero-Point Offenders."

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the USSC's Call for Comment. After significant discussion and deliberation, a substantial majority of TIAG's members favor the Commission's listing of Parts A and B of the amendment as changes that may be applied retroactively to previously sentenced offenders. We would note that a smaller minority of TIAG would oppose such a listing. This written testimony will explain both the majority and minority views expressed in TIAG's discussions.

In our discussions, TIAG specifically discussed, addressed, and considered the traditional factors the Commission considers in making retroactivity determinations: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively to determine an amended guideline range. As the analysis of Part A and Part B are slightly different they are discussed in turn.

1. Retroactivity of Part A of the 2023 Criminal History Amendment—"Status Points" under §4A1.1

While a defendant's criminal history is strongly associated with the likelihood of recidivism, studies over time conducted by the Commission indicate that "status points" add little to the predictive impact of the offender's criminal history score. The Part A Amendments eliminate "status points" for offenders with six or fewer criminal history points and reduce from two points to one point the status points applicable to offenders with seven or more criminal history points.

The purpose of the Part A Amendment is to eliminate the increase in the guidelines range resulting from the application of "status points" because the points have little predictive value as to the risk for an offender to recidivate. The reduction from two points to one point for offenders with more than seven criminal history points reflects an understanding by the Commission that even if not predictive of an increased risk of recidivism, for individual offenders with greater than seven criminal history points the other purposes of a criminal sentence, such as punishment and deterrence, may be advanced by the inclusion of a status point.

The Impact Analysis prepared by Commission staff indicates that 22.7% of the Part A status offenders would be eligible to seek a modification under 18 U.S.C. § 3582(c)(2), amounting to approximately 11,500 individuals. The average sentence for these offenders is 120 months and the full impact of retroactive application of Part A would yield an average sentence of 106 months, for an average reduction in sentence of 14 months. It is worthy of note that most offenders (over 77%) would be ineligible for a reduction in sentence because: (1) the new score would not reduce the guidelines sentencing range; (2) the criminal history category was determined by another guideline; (3) the offender's sentence is below the newly calculated guideline range and the offender did not receive a departure for substantial assistance when initially sentenced; and (4) the offender received a mandatory minimum sentence.

A majority of TIAG recognized that even though the magnitude of the sentence reductions would be slight in many cases, the other factors favored retroactivity. Specifically, the majority believed: (a) that the lack of scientific reliability of the applications of status points to low level offenders did not generally comport with justice; (b) that the raw number of cases involved is substantially less than other amendments (such as the crack/powder cocaine amendment) that have been applied retroactively and would not unduly burden courts; (c) the calculations would not generally require evidentiary hearings or substantial fact-finding and could be more mechanically calculated than most amendments that the Commission has made retroactive; and (d) the general injustice of longer sentences than those which will be imposed under the Part A Amendment.

The majority believes that while the Part A Amendment is generally applicable to offenders, it will have a greater impact on Indian Country offenders. In looking at some of the numbers in Indian Country districts, it appears that a significant percentage of impacted cases will arise out of Indian Country prosecutions. Given the slight burden on court resources posed by the Part A Amendment, TIAG is concerned about the justice of not having the Amendment retroactively applied.

A minority of TIAG opposes retroactivity, primarily for four reasons. First, that given the slight impact on sentences, and the unpredictability of the workload burden retroactivity places on the judiciary, prosecutors, and probation officers, the risk of an unreasonable burden on resources outweighs the benefits of retroactivity. Second, the minority is of the opinion that, at least after the 2010 recidivism study, judges in many districts were taking into consideration the lack of scientific reliability of status points and many sentences included a downward variance taking this factor into consideration.

Third, the minority is concerned about the impact retroactivity will have on the victims of crimes, as they will have to go through yet another sentencing hearing on a case they thought was resolved. And finally, the minority believes retroactivity undermines the plea agreement process that was conducted based on the facts, law, and guidelines at the time a plea agreement was consummated to resolve a case. On the whole, the minority believes the risks of retroactivity outweigh the benefits.

In conclusion, TIAG is of the opinion that Part A can be retroactively applied with relative administrative ease, without necessitating complicated evidentiary hearings and findings, and because of a likely disparate impact on Indian people, the Commission should make Part A retroactively applicable.

2. Retroactivity of Part B of the 2023 Criminal History Amendment—Zero-Point Offenders.

New §4C1.1 defines "zero-point offenders" as those offenders who have no criminal history points, including both people with no criminal history whatsoever and those whose criminal history is no longer scoreable. Studies have shown that offenders with zero points are less likely to reoffend. Because sentences are driven by factors beyond mere recidivism, the Commission has established other criteria to define who is eligible to be treated favorably as zero-point offenders. These criteria take into account other serious conduct that would lead to a logical conclusion that the offense in question is such that no reduction in the guideline range is appropriate. Those who are eligible would receive a 2-level guideline history score reduction.

The number of people who would be eligible for retroactive sentence reduction under Part B is smaller than those in Part A, approximately 7,200 offenders as opposed to 11,500. The average length of sentences for those offenders is 85 months with the average maximum sentence reduction being 15 months. The considerations for the Part B offenders are similar. Of the Part B offenders who would not be eligible for relief, nearly 98% will be ineligible for one of two reasons: (1) the offender's current sentence is below the new guideline range and the offender did not receive a downward departure for substantial assistance when originally sentenced; and (2) the defendant was sentenced to a mandatory minimum sentence.

The biggest difference between the two groups in TIAG's view is that the Part B offenders will require slightly more work to identify, as there are more factors to consider than with the Part A offenders. While some of the criteria listed to be considered along with the zero-point status are capable of fairly mechanical application, others may require additional fact-finding on the part of the sentencing judge. That said, it appears that if any additional fact-finding is required, it would not unduly burden the system. Once again, given underlying scientific data, the length of sentence reductions, and the ability to efficiently process the claims, the TIAG urges that Part B be made retroactive.

A minority of TIAG opposes retroactivity for the same reasons as Part A. In the minority view, the difficulty of application of Part B and the possible necessity of

evidentiary hearings when coupled with the relative modest reductions in sentences point towards not making the Part B Amendments retroactive.

In conclusion, TIAG is of the opinion that Part B can be applied with relative administrative ease, will have a disparate impact on Indian offenders, and that as a matter of justice retroactive application of Part B is appropriate.

Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's actions may impact offenders who are tribal members. As always, we look forward to working with you on issues affecting Indian Country.

Sincerely yours,

Ralph R. Erickson
Chair

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

Mary Graw Leary, Chair
Colleen Clase
Shawn M. Cox
Margaret A. Garvin
Julie Grohovsky
Francey Hakes
Christopher Quasebarth
Theresa Rassas
Katie M. Shipp

June 22, 2023

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Inapplicability of Retroactivity of 2023 Criminal History Amendments

Dear Members of the Commission:

The Victims Advisory Group (VAG) opposes any retroactive application of the Commission's criminal history amendments. Based on the numbers and the type of offenders who would benefit from retroactive application of these provisions alone, such a retroactive application would be dangerous to both current and future victim survivors of crime. Additionally, this action would continue a disturbing pattern of disregarding the rights of victim survivors of crime in contravention of the law – both its text and spirit. Finally, the suggestion of the procedures that would be utilized for this path further demonstrate a repeated pattern of the Commission to a focus on streamlining processes in favor of offenders – in this case some of the most dangerous of offenders - in contravention to the law and recognized due process for victims.

Regrettably, but sadly predictably, almost nowhere in the amendment, notice of public comment on this issue, or text of the Impact Analysis are the words "victim" or "survivor" even mentioned. This wholesale exclusion of even a mention of persons impacted by the underlying crime and necessarily also impacted by sentence changes is of continued concern to the VAG. Because of the scope of retroactivity, the danger it will cause to the public, and the disregard of victims, victims' rights, and federal law generally, the VAG opposes such an application.

1. **Due to the volume and type of offenders, applying these provisions retroactively would endanger victim survivors of crime and the public.**

   a. The Commission underestimates the number of petitions to be filed.

If accepted, the application of these provisions will impact thousands of offenders and victims. While the Commission estimates 18,767 offenders will be eligible for this benefit, this figure grossly underestimates the number of offenders who will seek its application. By its own numbers 85,467 offenders received status points or had no criminal history at the time of their conviction.[1] The Commission and the courts should expect nearly all these offenders to apply for retroactive application; the conclusion that filings will be made by only a fraction of that number is flawed. Given the complexity of the Guidelines, offenders whose sentence considered either of the criminal history provisions at issue will likely submit filings in an attempt to lower their sentences. While the Commission's analysis now may indicate that few of those would be successful that does not mean they will not be submitted. Thus, the volume of applications will cripple the courts. Moreover, even if not all petitions will be successful, each petition filed represents a crime victim whose life will be upended by the filing; a victim who will experience

[1] United States Sent'g Comm'n, Memorandum on Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment (May 15, 2023) at 9, 17 (finding that 50,545 offenders received status points and 34,922 had no criminal history points).

the repeated yet unexpected trauma of destabilizing their expectations of finality and due process regarding their offender's sentence.

b. Even with the figures suggested by the Commission the numbers will overwhelm the justice system.

Whether it is 85,467 offenders or the underinclusive number of 18,767, such an increase in volume will overwhelm the courts, victim witness advocates, and prosecutor offices. Indeed, this Commission rejected such an effort with less stark figures in 2010 when it refused to apply the elimination of recency points amendment retroactively. In so doing, the Commission felt that the possibility of 43,000 offenders applying for and 8000 offenders being eligible for a retroactive application for their sentence would overwhelm the courts. These figures are nearly double that. Then Vice Chair and now Supreme Court Justice Brown Jackson noted that "more than 43,000 currently incarcerated defendants received recency points, but only 8,000 offenders actually would be eligible for a reduction as a result of the amendment. Thus, if the recency amendment were made retroactive, the courts could be overwhelmed with unsuccessful sentence reduction motions."[2] The situation before the Commission now is even more stark and the Commission should follow its own precedent.

In 2010, the Commission not only noted that retroactivity was not appropriate if it will overwhelm the court system, but it also noted that those who would benefit from the recency amendments retroactivity were among the most violent.[3] The Commission is facing a similar situation today – making these two criminal history amendments retroactive would be a benefit

[2] United States Sent'g Comm'n, Public Meeting Minutes (Sept. 16, 2010) at 2.
[3] Id. ("The potential burden on the courts would be substantial if the approximately 43,000 offenders who received recency points petitioned for review of their sentences when only a comparatively small number may be eligible to benefit. Commissioner Howell noted that the Criminal Law Committee of the Judicial Conference of the United States also shares this concern. Third, the majority of the 8,000 offenders who may be eligible to benefit are in Criminal History Categories IV, V, and VI, which raises public safety concerns.").

to offenders convicted of sexual offenses, murder, manslaughter, narcotics trafficking, and firearm trafficking. 91% of those offenders eligible for the Part A reduction have a criminal history category of III, IV, V and VI.[4] While, by definition, the beneficiaries of Part B have lower criminal history categories, 75.3% of them have convictions for drug trafficking, sex offenses, stalking/harassing, and manslaughter.[5] Although some of these offenders will fall within the exceptions included in 4C1.1, much litigation will ensue about the meaning of several of the terms within the new Guideline and will not exclude all dangerous offenders. Furthermore, the Guideline exceptions explicitly do not exclude many offenders who are dangers to the general public including those who committed national security offenses, significant corporate and financial crimes, as well as those engaged in public corruption.

Even if we were to accept the Commission's number of those expected to apply, the numbers of those affected remain staggering. This Commission proposes a retroactive application which would enable 18,767 offenders to obtain immediate or early release. With a re-arrest rate of 49.3% for most offenders and a more conservative 26.8% rate for zero point offenders, even with these underestimations, that would mean an expected commission of 7,616 future crimes, directly attributable to this Commission's actions.[6] That represents at least 7,616 future crime victims, a disproportionate number of whom are likely to be people of color.[7] It should of course also be noted that "recidivism" rates are, in actuality, re-arrest rates. Less than

[4] Retroactivity Impact Analysis, *supra* note 1, at 14.
[5] *Id.* at 23.
[6] *See* U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (2021), at 4.
[7] *See, e.g.,* Rachel E. Morgan & Alexandra Thompson, *Criminal Victimization, 2020 Supplemental Statistical Table*, United States Dep't of Justice (Feb. 2022) at 6 (finding that 2,599,620 people were victims of violent crime and 50.4% were people of color); Crime in the United States 2019, United States Dep't of Justice Federal Bureau of Investigation Expanded Homicide Data Table 1 (2019) (finding that of the 13,927 murder victims, over 7900 were people of color); *Gun Violence is a Racial Justice Issue*, Brady (finding that "[b]lack Americans are twice as likely as white Americans to die from gun violence and 14 times more likely than white Americans to be wounded."), available at https://www.bradyunited.org/issue/gun-violence-is-a-racial-justice-issue.

50% of crimes are reported to law enforcement.[8] Therefore, the number of victims who would be directly impacted by future crime attributable to the Commission's actions is likely significantly higher.

c. <u>The type of offender who will benefit from this action minimizes the victim survivor experience and further endangers the public.</u>

Not only the number of offenders and victims affected is of concern, but the type of offender is also shocking. The Commission identified 16 types of crime committed by eligible offenders under Part A. At a time when the nation is facing an epidemic of gun violence[9] and an opioid crisis[10], the two most frequent types of crimes committed by these offenders are drug trafficking and firearm offenses.[11] Of the remaining 14 types of crime, ten involve victims of crime including sexual abuse, sexual offenses, child sexual abuse material offenses, robbery, murder, kidnapping, and stalking.[12] Nearly 40% of these offenders will be released within the first year and 2,090 will be released immediately.[13] These crimes alone represent nearly thousands of victims of crime whose rights and expectations will be disregarded. Similarly, offenders affected under Part B include 1,198 offenders poised to be immediately released and within five years 91.6 % of eligible offenders will be released.[14] Again, over 75% of whom were convicted drug traffickers, sexual offenders, stalkers, or persons who committed manslaughter.[15]

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[8] Indeed, the numbers are much more stark. See Criminal Victimization Report, 2021, Bureau of Justice Statistics 1, 7 (2021) (finding that "[t]he rate of violent victimization reported to police fell from 33.8 victimizations per 1,000 persons in 1993 to 7.5 per 1,000 in 2021. During a more recent period, a greater percentage of violent victimizations were reported to police in 2021 (46%) than in 2020 (40%).").
[9] According to the Gun Violence Archive, in 2022 20,200 people in America died by gun violence, including 995 children. Over 38,000 people were injured by guns. *Gun Violence Archive*, https://www.gunviolencearchive.org/.
[10] *Provisional Data Shows U.S. Drug Overdose Deaths Top 100,000 in 2022*, Centers for Disease Control and Prevention (May 18, 2023), https://blogs.cdc.gov/nchs/2023/05/18/7365/. /
[11] Retroactivity Impact Analysis, *supra* note 1, at 15.
[12] *Id.*
[13] *Id.* at 16.
[14] *Id.* at 24.
[15] *Id*. 23.

2. In addition to the substantive problems with retroactivity, it is also procedurally an affront to the federal law and victims' rights.

The Commission's proposed action will cause this harm to future victim survivors while at the same time retraumatizing victim survivors of crime, all while violating the law. The Impact Analysis repeatedly stated that retroactivity will not create a resentencing. While under 18 U.S.C. 3582(c)(2) it may technically be correct to label the sentencing changes a modification and not a completely new resentencing, to the victim survivor of crime who has been traumatized by crime, retraumatized by a trial, and then told at sentencing that the sentence handed down was final, it certainly will feel as though it is a resentencing. Indeed, outside of this technical framing, a resentencing has been defined as "the act or instance of imposing a new or revised sentence."[16] These defendants, especially the over 3000 who will be immediately released, will also feel as though they have been resentenced. Regardless of the label, the result is a significant, substantive change in sentences – and, therefore, events that involve victim survivors.

The Commission's Impact Analysis suggests that such an egregious change in sentence could be done without notice to the victim survivor and an opportunity to be heard.[17] Such a step would violate both the text and the spirit of the law. Federal law confers to victims the right "to be reasonably heard at any public proceeding in the district court involving *release,* plea, *sentencing,* or any parole proceeding."[18] The CVRA established "substantive and procedural rights, including the right to notice of proceedings, presence, right to be heard, notice of release or escape, restitution, speedy trial, and safety for victims of crime."[19] Applying this provision

[16] *Resentencing*, Black's Law Dictionary (11th ed. 2019)
[17] The Impact Analysis notes that such a resentencing could occur without the offender present, thus suggesting that a victim survivor would not need to be present either. Retroactivity Impact Analysis, *supra* note 1.
[18] 18 U.S.C. 3771(4) (emphasis added).
[19] Hon. Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston,*

retroactively would mean that offenders under Part A whose average sentence is 120 months would have their sentences reduced by an average of 14 months.[20] Meaning that in more than half of even these conservative estimates the Commission will be sanctioning the reduction of sentences of greater than 14 months. Indeed, the Commission's own research indicates that over 3000 offenders would be immediately released and almost all released within five years.[21] While this may be the ultimate goal of the Commission - the release of convicted violent offenders prior to the completion of their legally imposed and publicly noticed sentences - without a notice to the victims and without a hearing it is at best an end run of victims' rights and at worst an intentional suppression of their rights under the Crime Victims' Rights Act. To the victims of crime who have been retraumatized by this measure, it is a violation of their basic right to both protection and "right to be treated with fairness and with respect for the victim's dignity."[22] What the Commission will say to the estimated thousands of new victims of crime committed by these offenders with a recidivism rate of over 40% remains to be seen.

In addition to violating both the letter and spirit of victims' substantive rights under the law, it violates victim due process. The Federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, "is the most sweeping federal victims' rights law in the history of the nation."[23] It affords victims numerous rights including the right "to be treated with fairness." [24] As the lead sponsor of the law made clear, this right includes the right to due process.[25] The intent of the CVRA was

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Louarna Gillis, And Nila Lynn Crime Victims' Rights Act, 9 Lewis & Clark L.R. 581, 583 (2005).

[20] Retroactivity Impact Analysis, *supra* note 1, at 9.

[21] *Id*. at 16, 24.

[22] 18 U.S.C. 3771(8).

[23] Kyl, *supra* note 19 at 593.

[24] 18 U.S.C. § 3771(a)(8).

[25] 150 Cong. Rec. S 4269 (Apr. 22, 2004) (statement of Sen. Kyl explaining that the right to be treated with "fairness" under the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, "includes the notion of due process").

"to transform the federal criminal justice system's treatment of crime victims…."[26] Victims' rights are "intended to reestablish the important and central role of victims, to humanize and individualize the victims of crime, and to recognize that victims also have rights to fair treatment and due process in criminal proceedings."[27]

The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[28] As the Supreme Court has noted, "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"[29] It is equally fundamental that "the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded."[30] The CVRA provides victims of federal crimes due process by paving the way for victims to participate and to be heard in a meaningful way.

The retroactive application of these amendments violates all the above rights of victim survivors and to do so without notice or a hearing is an unconscionable violation of their due process.

3. There is a general presumption against retroactivity of laws.

Given the purposes of these amendments, there is a background principle applicable here. In general, there is a presumption against retroactivity. "[T]he 'principle that the legal effect of

[26] Kyl, *supra* note 19 at 593.
[27] Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421, 424 (2015).
[28] *Mathews v. Eldridge*, 424 U.S. 319, 333, (1976); *accord Hamdi v. Rumsfeld*, 542 US 507, 533 (2004).
[29] *Hamdi*, 542 U.S. at 596.
[30] *Id*.

conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'"[31]

Although the law does afford the Commission the authority to apply certain amendments retroactively, courts have still noted that this is disfavored. "[R]etroactive lawmaking (whether by legislation or regulation) typically risks unfairness . . . [Retroactively applied statutes and regulations] frequently upset settled expectations by imposing burdens and disabilities with respect to completed transactions and actions. . . And they may undermine rule-of-law values that enable people to know what the law is, and to have confidence about the legal consequences of their actions."[32] In this instance, applying these provisions retroactively would upset the settled expectations of the victim survivors and undermine the rule of law values of finality of sentencing which were once the bedrock of federal sentencing.

Conclusion

Given the breadth of these numbers and the type of offenders who will seek a shortened sentence, retroactivity is not appropriate. The sentences received were legal and the amendment to the Guidelines was not driven by equities. Rather, just as with recency points – which the Commission declined to make retroactive – the Commission concluded status points "had limited impact on the predictive ability of an offender's criminal history score."[33] Similarly, the Commission concluded that zero point offenders were also less likely to be re-arrested than other

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[31] *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990) (Scalia, J. concurring). Additionally, "prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations." Id. at 272-73.
[32] *City of N.Y. v. Permanent Mission of India*, 618 F.3d 172, 195 (2d Cir. 2010); *Deal v. Coleman*, 751 S.E.2d 337, 342 (Ga. 2013) ("Generally speaking, the retroactive application of statutes has long been disfavored in the law, even if it is not always forbidden."). *See also Landgraf*, 511 U.S. at 265 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine older than our Republic.").
[33] Retroactivity Impact Analysis, *supra* note 1, at 3.

offenders.[34] Such instances do not compel retroactive application – particularly when it will result in thousands of petitions of offenders who committed serious offenses being released without notice to and an opportunity for input from their victims.

For the foregoing reasons the VAG opposes a retroactive application of these amendments.

Respectfully yours,

The Victims Advisory Group
Mary Graw Leary
Chair

cc: Advisory Group Members

[34] *Id*. at 4.

June 23, 2023

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: ***<u>Public Comment on the Retroactivity of the 2023 Criminal History Amendment</u>***

Dear Judge Reeves and Members of the Commission:

The Conservative Political Action Coalition ("CPAC") is the nation's original grassroots advocacy organization. Founded over 50 years ago by William F. Buckley as the American Conservative Union, CPAC has a track record of advancing policies that reduce the size of government, protect liberty, and reduce burdens on families.

We appreciate the opportunity to comment on the Commission's proposed amendments exploring the possible retroactivity of reducing criminal history points within the Federal Sentencing Guidelines.[1] As an organization with a steadfast commitment to protecting public safety, CPAC advocates for advancements to the justice system that promote proportional punishment, accountability for both individuals and the government, and economic growth. As such, we believe that applying retroactive reforms for certain zero-point offenders would serve as a positive step in attaining these crucial objectives.

I. Background

On April 27, 2023, the Commission presented Congress with amendments to the Federal Sentencing Guidelines, set to take effect on November 1, 2023.[2] Following submittal of the initial amendments, the Commission provided a second round of guidance using its statutory authority to retroactively apply these changes.[3] The new amendments grant current inmates the opportunity to seek sentence reconsideration based on the updated guidelines from April. The criminal history amendments, Parts A and B, are particularly significant as they reshape the assessment of criminal history.

Notably, there is a particular focus on the treatment of "zero-point offenders" – individuals without any prior criminal history points. Previously, these zero-point offenders were categorized alongside one-point offenders, despite significant differences in their recidivism rates (26.8% compared to

[1] U.S. SENTENCING COMM'N, *Amendments to the Sentencing Guidelines* 1-3 (April 2023).
[2] *Id.*
[3] *See* 28 U.S.C. § 994(u); *see also* 18 U.S.C. § 3582(c)(2).

1199 NORTH FAIRFAX STREET, SUITE 500, ALEXANDRIA, VIRGINIA 22314
(202) 347-9388 WWW.CONSERVATIVE.ORG

42.3%).[4] In recognition of this striking disparity, the amendments establish a clear distinction between zero-point offenders and one-point offenders, granting a two-level reduction for zero-point offenders. As a result, sentencing will better reflect the unique circumstances of each case, ensuring that the severity of the punishment aligns appropriately with the risk posed by the relevant offender.

II. Benefits of Tailored Retroactive Application

The limited retroactive application of sentencing reductions holds the potential to strengthen public safety by effectively reallocating resources to more proven crime prevention efforts. By focusing limited resources on higher-risk offenders and facilitating successful reintegration, we can ultimately foster safer communities.[5] Moreover, it is crucial to emphasize that these amendments do not establish a blanket sentence reduction for all applicants, like the retroactive application of the 2007 Crack Cocaine Amendment.[6] Here, only 64.2% of reduction requests were granted, demonstrating that retroactivity simply provides a pathway for individuals who genuinely merit a reduction based on their demonstrated eligibility and conscientious efforts.[7] We strongly support the individualized review of each case to ensure that public safety is properly considered before a reduction is granted.

Furthermore, the data following the 2007 Crack Cocaine Amendment exemplifies the relationship between retroactivity and recidivism.[8] The Commission reported that those offenders who received shorter sentences under the retroactive 2007 amendment did not show higher recidivism rates compared to a comparison group.[9] This showcases that retroactivity can be successfully implemented without jeopardizing public safety when cases are properly reviewed and evaluated with input from all parties in the criminal justice community.

By implementing retroactive application, we can also achieve significant cost savings within the federal prison system, this allows the government to better allocate resources towards proven crime prevention efforts. The Commission estimates that retroactive application could result in an average sentence reduction of 15 months for nearly 9,000 zero-point offenders.[10] Considering that each federal inmate costs taxpayers nearly $40,000 per year, retroactive application presents a substantial opportunity to save taxpayers *millions* of dollars.[11]

III. Conclusion

Keeping people in prison when current offenders receive less time undermines the public's confidence in the criminal justice system. When the public believes the system is unjust, they are less willing to work in it, and are more skeptical of law enforcement in general, thereby

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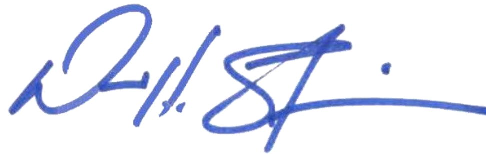
[4] U.S. SENTENCING COMM'N, *supra* note 1, at 3.
[5] Lois M. Davis, et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults,* 18, 77-78 (2013) (estimating $1 spent on correctional education programming saves $4-$5 on reincarceration costs, in part due to the 43% lower recidivism rate observed among inmate participants).
[6] U.S. SENTENCING COMM'N, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment,* 2-3 (May 2014).
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] U.S. SENTENCING COMM'N, *Analysis of the Impact of 2023 Criminal History Amendment (Parts A and B) if Made Retroactive*, 9-10 (May 2023).
[11] *See* U.S. BUREAU OF PRISONS, *Annual Determination of Average Cost of Incarceration Fee* (Sept. 2021).

undercutting public safety. This is especially true when offenders who get retroactive application of sentencing reductions are no longer dangerous.

As an organization that believes in second chances and values the dignity of the human, CPAC endorses a pathway for retroactive application of sentencing reductions for deserving zero-point offenders to have the chance to seek a reduction in their sentences. By adopting this approach, we can promote public safety, proportionality, accountability, and fiscal responsibility. We thank the Commission for acknowledging our input and look forward to continued collaboration in our shared mission of advancing a just and efficient criminal justice system.

Respectfully,



David H. Safavian
Senior Vice President and General Counsel

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

FAIRMOUNT BAPTIST CHURCH

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

We are in agreement with retroactivity for both part A status points and part B adjustment for certain zero point offenders

Submitted on: April 19, 2023

June 23, 2023

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.W., Suite 2-500
Washington, D.C. 2002-8002

Re: Comments on Retroactivity of Criminal History Amendment

Dear Judge Reeves,

We are pleased to respond to the request for comment on whether the Commission should make parts A and B of the Criminal History guideline amendments retroactive. FAMM wholeheartedly endorses the proposal. Retroactivity is clearly warranted in light of the factors the Commission considers when determining whether to make an amendment retroactive, and in the interest of justice.

FAMM unites currently and formerly incarcerated people, their loved ones, and many others to promote reforms in sentencing and corrections policies and practices. We elevate the voices of people whose lives have been altered by the criminal justice system so that they are heard by policy makers and other key actors in the system. Advocacy to ensure that ameliorative guideline changes reach people incarcerated under now-abandoned schemes is unquestionably a FAMM cause. Among our 70,000 members are many individuals and families who benefitted from prior retroactivity decisions. Our interest in this topic flows from our work over more than three decades to lessen the impact of unjustifiably long sentences. FAMM wholeheartedly endorses the proposal.

I. Retroactivity is Warranted in Light of the Relevant Considerations

Section 1B1.10 directs the Commission considering retroactivity to assess "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 . . . ."[1] These considerations support retroactivity.

[1] USSG §1B1.10, comment. (backg'd).

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Families for Justice Reform

A. The Purposes of the Amendments Support Retroactive Application

a. Status Points

The Commission made significant changes in Part A to the coverage and extent of so-called "status points," by limiting their use to those with serious criminal histories as indicated by their criminal history score. The amended guideline curtails the application of two additional points for defendants whose instant offense was committed while under any criminal justice sentence. Individuals with six or fewer calculated points will no longer receive status points. Those with seven or more points will be assessed one rather than two additional criminal history points. The change reflects the agency's recognition, based on empirical research, that status points do little to enhance the predictive accuracy of the criminal history score. According to the Commission, the use of status points "only minimally improved the criminal history score's successful prediction of rearrest—by 0.2 percent."[2] Status points improve the predictive accuracy in only 15 of 10,000 defendants.[3] Nonetheless, they were assessed in 37.5 percent of cases in the last five years and in 61.5 percent of those cases, status points led to a higher Criminal History Category.[4]

b. Zero Points

Part B creates a new guideline, §4C1.1 (Adjustment for Zero-Point Offenders), providing for a two-level decrease for defendants who received no criminal history points and whose offense did not include specific aggravating factors. As with the status points amendment, the Commission relied on its empirical research on recidivism. In this instance, it shows that defendants with zero calculated criminal history points "have considerably lower recidivism rates" than other defendants, including those with one criminal history point with whom they share Criminal History Category I.[5] Those defendants were 15.5 percent less likely to reoffend than their one-point counterparts.[6] In recognition of the difference between zero and one-point defendants, courts grant the former higher rates of variances and departures.

While eschewing the use of uncountable priors to limit the adjustment,[7] the Commission nonetheless placed guardrails around the adjustment depending on the nature of the instant conviction and aggravating factors associated with it. Those exclusions are informed by statutes such as 18 U.S.C. § 3553(f) and recent firearms changes based on the Bipartisan Safer Communities Act. In appendices to the impact analysis, Commission staff identified some

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[2] U.S. Sentencing Comm'n, *Revisiting Status Points* at 3 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220627_Status.pdf.
[3] *Id.* at 18.
[4] U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index* at 50 (May 1, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf.
[5] *Supra* n. 4 at 52.
[6] *Id.*
[7] *Id.*

specific guidelines that, if present in the instant sentencing calculation, could exclude application of the adjustment.[8]

Amendments to §5C1.1 also provide that a sentence other than incarceration is generally appropriate for defendants receiving a §4C1.1 adjustment and whose new guideline range is in Zones A or B. It also counsels that defendants receiving zero-point adjustments may be eligible for a departure if the calculated guideline range overstates the gravity of the offense.[9]

B. Retroactivity of the amendments advances the purposes of punishment.

The Commission explained that the changes to criminal history scoring were made to ensure that calculated guidelines result in penalties that reflect the statutory purposes of sentencing.[10] Those purposes include (1) ensuring the sentence reflects the seriousness of the offense, promotes respect for the law, and provides just punishment; (2) adequately deterring criminal conduct; and (3) protecting the public from further crimes by the defendant. Criminal history scores should account for culpability, deterrence, and recidivism risk.[11]

a. The amendment aims to end the use of status points as a proxy for risk of recidivism.

The Commission has determined that, while status points *may* address blameworthiness and other purposes of punishment, they do not fulfill their primary function – that of advancing the sentencing purpose of predicting recidivism.[12] Moreover, the Commission pointed out in its reason for amendment that other sentencing enhancements, including consecutive punishment upon revocation of supervised release and/or the imposition of additional time based on revocation of probation or supervised release would remain available to the court.[13] Should omitting status points fail to address the seriousness of the offense or adequately deter conduct, those enhancements can help judges impose a sentence that meets those aims of criminal history scoring.

b. The amendment aims to mitigate the over-sentencing of defendants with zero criminal history points.

As with status points, zero criminal history points result in sentences that are longer than warranted. Defendants with zero criminal history points are scored the same way as those with

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[8] U.S. Sentencing Comm'n, Memorandum to Chair Reeves and Commissioners from Office of Research and Data, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment, Appendices (May 15, 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.
[9] *Supra* n. 4 at 53.
[10] *Id.* at 50.
[11] U.S. Sentencing Comm'n, *Revisiting Status Points* at 9 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.
[12] *Id.* at 18.
[13] *Supra* n. 4 at 51.

one criminal history point, although they pose a significantly lower risk of recidivism. Defendants with zero points were much less likely to be rearrested than those with one criminal history point. The delta, 26.8 percent compared to 42.3 percent, is the widest difference in recidivism rates of any comparison of defendants with different criminal history points in all other Criminal History Categories.[14]

The amendment addresses this failure to appropriately reflect lower recidivism in the calculated sentence by providing for a two-level adjustment for certain zero-point defendants. This adjustment provides that defendants with zero points receive sentences that advance the purpose of just punishment. To further ensure, however, that the recommended final range appropriately accounts for the seriousness of the instant offense, the amendment carves out several exceptions from eligibility for the adjustment based on the nature of the convicted offense and/or aggravating factors.

The amendment balances the need for the sentence to reflect the anticipated risk of recidivism, which is demonstrably lower for zero-point defendants, with the goals of ensuring the sentence reflects the seriousness of the offense and protects the public. The adjustment, combined with the guidance in §5C1.1 directing the court to a sentence of non-incarceration in certain cases, helps avoid unwarranted severity. It also complies with Congress's mandate that the Commission ensure "that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[15] Meanwhile, targeted exclusions will provide for appropriately longer sentences for that account for the seriousness of the offense, deterrence, and the need to protect the public.

Going forward, the amendments will help ensure that criminal history scoring will be consistent with the purposes of sentencing. Unless made retroactive, however, thousands of people whose sentences were increased by the addition of status points or whose zero-point status was not adequately accounted for, will be forced to serve sentences that do not advance those purposes. Failure to make the amendments retroactive will undermine the core congressional directive that sentences be sufficient but no longer than necessary to meet the purposes of punishment.[16]

c. Retroactivity of parts A and B will advance just punishment and confidence in the fair administration of justice by ensuring that criminal history enhancements do not fall disproportionately on defendants of color.

The Commission has found that status points are disproportionately assessed on people of color. Demographic data on incarcerated people who would be eligible for status point retroactivity reveal that 43 percent are Black and almost 28 percent are Hispanic.[17] Of defendants assessed status points between fiscal years 2017 and 2021, 32.7 percent were Black,[18] but only 20.5

[14] *Supra* n. 8 at 4.
[15] 28 U.S.C. § 994(j)
[16] 18 U.S.C. 3553(a)
[17] *Id.*
[18] *Supra* n. 2 at 7.

percent of all defendants sentenced in that period were Black.[19] Similarly, demographic data demonstrate that people of color make up 83.1 percent of individuals eligible for the zero-point adjustment; nearly 70 percent are Hispanic.

Commendably, the Commission has repeatedly adopted, and then made retroactive, guideline amendments to combat structural demographic disparity, beginning with the so-called crack minus two amendment in 2007. In its 2007 report to Congress on the sentencing of crack and powder cocaine defendants, the Commission pointed out that the glaring disparity in sentences imposed on crack cocaine defendants drew widespread criticism[20] and undermined confidence in the fair administration of justice and respect for the law.[21]

The Commission's work in this area undoubtedly led to passage of the Fair Sentencing Act of 2010, narrowing the delta between powder and crack mandatory minimum triggering quantities to 18:1. The agency's commitment to making ameliorative changes to the crack guideline retroactive led Congress to follow suit with the First Step Act of 2018 when it made the new ratio retroactively applicable.

Among the reasons for disparate status points outcomes based on race is the over-policing of communities of color. Those practices set the frame for disparity in prosecutions and sentencing as cases progress through the system. As one analyst explained: "Police were more likely to stop [B]lack and Hispanic drivers for investigative reasons," and "[o]nce pulled over, people of color are more likely than whites to be searched, and [B]lacks are more likely than whites to be arrested."[22] Nationwide surveys analyzed by the Bureau of Justice Statistics revealed that "[t]he cumulative effect of these policies is that 49 percent of African American men reported having been arrested by age 23, in contrast to 38 percent of their non-Hispanic white counterparts."[23] Once arrested, people of color were more likely than their white counterparts to "be detained, to receive custodial sentence plea offers, and to be incarcerated."[24]

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[19] U.S. Sentencing Comm'n, *Interactive Data Analyzer* (select "Sentencing Outcomes" from the top bar; select "2017" through "2021" in the "Fiscal Year" dropdown), *https://ida.ussc.gov/analytics/saw.dll?Dashboard*.

[20] *See*, U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* at 2 & Appendix B (May 2007), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

[21] *See id.* at 121 n.195, citing Brief of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Respondents ("It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, and as a result has undermined public confidence in the criminal justice system.") https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

[22] *See, e.g.*, Nazgol Ghandnoosh, *The Sentencing Project, Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 4 (2015), https://www.sentencingproject.org/app/uploads/2022/08/Black-Lives-Matter.pdf.

[23] *Id.* at 11 (citing Brame, R., Bushway, S. D., Paternoster, R., & Turner, M. G. (2014). Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23. Crime & Delinquency, 60(3), 471–486).

[24] Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and*

The demographic disparity in status and zero-points is not nearly as well-known as was the disparity in powder and crack cocaine sentencing. But, that it exists and is an unwarranted disparity (as its predictive value is unsupported by data), should compel the Commission to provide that those sentenced using now repudiated guidelines who are eligible for a reduction be given the opportunity to secure one. Doing so will support the fair treatment of people, no matter when they are sentenced, and will also advance respect for the law, which is a core purpose of punishment.

II. Retroactivity is Warranted Given the Magnitude of the Guideline Change Made by the Amendment.

There is no question that retroactivity is warranted given the extent of the average reduction and the number of people who would be eligible. Nearly 11,500 people could benefit if the status points amendment was made retroactively available. Beneficiaries of Part A retroactivity would enjoy an average reduction of 14 months, and 7,272 individuals eligible for Part B would average 15 months off their sentences were their motions granted.[25] Taken together, the changes would have a significant impact on nearly 18,000 individuals incarcerated in the federal Bureau of Prisons, significantly shortening sentences for up to 12 percent of the current population of 144,448.

The Commission has explained that it made the change to Part A because assessing status points did not comport with the purposes of sentencing. They did not correlate with increased recidivism. Thus, people are serving sentences increased for no discernible reason and certainly not one that can be justified by the purposes of punishment. Similarly, the change made by Part B for zero-point defendants corrects for the over-incarceration of individuals who have distinctly lower rates of recidivism than others, including those with one criminal history point with whom they share Criminal History Category I.[26]

Putting the question of magnitude in context, 18,000 people are currently serving sentences averaging 14 and a half months longer than the Commission can justify. These excessive sentences do not punish justly, deter conduct, or protect the public.

The magnitude of the change can also be measured at the most intimate and human level. In the year plus that retroactivity can restore to eligible people, families will be reunited to restore continuity and healing; babies will be born to formerly incarcerated parents; children will promote from kindergartens, graduate law schools, or begin their own families. First steps, first bike rides, first beaus, all will be celebrated with a loved one home. Aging parents will have an extra set of hands for support. Individuals will contribute to their families and communities.

Sentencing, 52 CRIMINOLOGY 514, 534 (2014), https://heinonline-org.proxygt-law.wrlc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/crim52&men_hide=false&men_tab=toc&kind=&page=514.

[25] *Supra* n. 8 at 9, 17.

[26] *Supra* n. 4 at 50, 52.

Giving a year plus back to an individual whose sentence was unnecessarily enhanced is of a magnitude that defies cost savings or bed space analysis. Our system's interest in keeping people incarcerated is fulfilled only up to the moment when incarceration has served the ends of punishment. Anything more is counterproductive and damaging.

III. Retroactivity is Appropriate in Light of the Ease of Retroactive Application.

FAMM cannot speak with greater credibility than those on the front lines of retroactivity – Probation Officers, Assistant U.S. Attorneys, judges, and defense counsel – about what they may encounter handling §1B1.10 motions under this proposal. We do know that those actors worked together to apply three rounds of retroactive guideline applications, including the massive drugs minus two undertaking. Making this amendment retroactive will involve parties deeply familiar with motions practice under 18 U.S.C. § 3582(c)(2).

Assessing status points, as the staff memo points out, is a relatively straightforward exercise. The zero-point adjustment is not as straightforward, because the court must engage in some fact finding to determine whether the defendant is included or excluded from eligibility. Many of the exclusions will be readily apparent from the sentencing record by examining the counts of conviction, guideline calculations, and adjustments. The Commission has also provided a list of guideline provisions that could aid courts in determining which first offenders are not eligible for reduction.[27]

Retroactivity may present implementation challenges. We believe the Commission and the parties can take steps to mitigate those challenges. But, at the end of the day, those challenges are outweighed by the opportunity the Commission could provide to people who are serving sentences that, according to the Commission, are unjustifiably long. Individualized justice can never turn on convenience

IV. Retroactivity is the Right Thing to Do

It is in the Commission's power to provide 18,000 people whose sentences it has found are longer than necessary an avenue to sentences that more closely align with just punishment, deterrence, protection of the public, and rehabilitation. FAMM is confident the Commission will not lose sight of the very real human component to the decision before it. Thousands of individuals are serving sentences inflated by excessive adjustments or the failure to credit their lack of criminal history. The retroactivity analysis relies on deep examination and interpretation of cumulative data. But that data is drawn from the individual experience of thousands of people, who, were they sentenced today, unquestionably would receive shorter terms. It would be unjust to change policy in recognition of that injustice they suffered and then deny them an avenue to relief. One of the most difficult questions we face from FAMM members is why policy makers decide to make ameliorative changes prospective only. They do not understand a justice system that requires them to serve a longer sentence than they would today simply due to the fact they

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[27] *Supra* n. 8 at *Appendices*. Note that the staff analysis contains this caveat: "the methodology should not be considered as the Commission's interpretation of how this criterion should be applied in all cases. The courts may apply this eligibility criterion differently." *Id.* at 28, n. 55.

were sentenced before policy makers realized their mistake. Neither do we. There is no defensible answer.

V. Conclusion

We urge the Commission to make Parts A and B of the Criminal History amendment retroactive. Thank you for your work in this area and for your attention to our comments.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

June 23, 2023

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008

Re: Retroactive Application of the Criminal History Amendment, Relating to "Status Points" and People with Zero Criminal History Points

Dear Judge Reeves:

FWD.us is a bipartisan organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, FWD.us is committed to ending mass incarceration, eliminating racial disparities in the criminal justice system, expanding opportunities for people and families impacted by the criminal justice system, and data-driven approaches to advancing public safety. These commitments led FWD.us to support the Sentencing Commission's adoption of the Criminal History Amendment in April of this year.[1] For the same reasons, we now write to urge the Commission to exercise its authority pursuant to 28 U.S.C. § 994(u) to apply Parts A and B of the Criminal History Amendment (together, the "Criminal History Amendment") retroactively.[2]

The Commission's adoption of Parts A and B—eliminating "status points" for people with fewer than seven criminal history points (the "Status Points Amendment") and providing a two-point offense level reduction for people with zero criminal history points (the "Zero-Point Amendment"[3]), respectively—reflect the Commission's recognition that the current method of

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[1] U.S. Sentencing Commission [hereinafter "U.S.S.C"], *Amendments to the Sentencing Guidelines, April 27, 2023,* p. 77 (2023) [hereinafter "*2023 Amendments*"], https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

[2] Because Parts A and B of the Criminal History Amendment reduce the sentencing range for certain categories of offenses, 28 U.S.C. § 994(u) requires the Commission to determine whether the changes should be applied retroactively. Federal judges may not apply changes to the Guidelines retroactively absent the addition of the amendment to the list contained in the formal policy statement located in § 1B1.10 of the Guidelines. 18 U.S.C. § 3582(c)(2). Sentence reductions under § 3582(c)(2) do not constitute a full resentencing.

[3] The Commission uses the term "Zero-Point Offender" to describe the proposed amendment. Formerly incarcerated people and advocates, however, have long called for replacing labels, such as "offender," that stigmatize and pre-judge individuals. Our research found that such labels elicit biased reactions compared to more neutral terminology such as "individual with a criminal record." FWD.us, "People First:

calculating a person's Guidelines range does not further the Commission's mission of "implementing data-driven sentencing policies."[4] Specifically, the Commission determined that status points "add little to the overall predictive value associated with the criminal history score" and that people assessed zero criminal history points have far lower rates of recidivism than even people with a single criminal history point.[5]

Because these two current guidelines are not supported by the Commission's own data analysis, the Criminal History Amendment should be applied retroactively to reduce sentences that can no longer be justified on policy grounds. Specifically, retroactive application of the Criminal History Amendment:

- Is similar in size, scope, and process to other changes that have been successfully implemented retroactively, such as the Drugs Minus Two Amendment in 2014;
- Will not compromise public safety; and
- Represents a principled and data-driven application of the Commission's authority.

We commend the Commission's continued commitment to reevaluating the Guidelines in light of new data. Retroactive application of the Criminal History Amendment will both further the Commission's central mission and advance public safety.

1. The Courts' Experience with the Drugs Minus Two Amendment in 2014 and Other Recent Amendments Provides Clear Precedent for the Successful Retroactive Application of the Criminal History Amendment

While the scope and magnitude of the changes represented by the retroactive application of the Status Points Amendment and the Zero-Point Amendment are significant, the federal courts have successfully implemented previous retroactive amendments on an even larger scale. In April 2014, the Commission adopted an amendment that reduced the base offense level derived from the Drug Quantity Table for all drug quantities across all drug types.[6] Three months later,

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Drop the Harmful Labels From Criminal Justice Reporting," https://www.fwd.us/criminal-justice/people-first/.

[4] *2023 Amendments*, p. 77.

[5] U.S.S.C., *Memo re: Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment*, p. 3 (2023) [hereinafter "*Retroactivity Memo*"], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf (citing U.S.S.C., *Revisiting Status Points* (2022) [hereinafter "*Revisiting Status Points*"], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf).

[6] *See* U.S.S.C., *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, *passim* (2020) [hereinafter "*DMTA Recidivism Report*"],

the Commission voted unanimously to make the amendment retroactive, allowing incarcerated people to file, and courts to consider, sentence reduction motions beginning in November of that year.[7] According to the Commission's own statistics, as of July 2020, federal courts had granted 30,852 retroactivity motions out of the 50,676 that had been filed—significantly more than the number expected for the Criminal History Amendment—resulting in an average reduction in incarceration of 25 months (17.2% average reduction).[8]

The Drugs Minus Two Amendment followed on the heels of two other successfully implemented retroactive Guidelines amendments: the Crack Minus Two Amendment[9] and the FSA Guideline Amendment.[10] In the three years after the Crack Minus Two Amendment became effective, the courts granted 16,511 of 25,736 motions for retroactive sentence reductions, resulting in an approximately 20% average sentence reduction in successful motions.[11] Similarly, in the years following the adoption of the FSA Guideline Amendment, courts granted 7,748 of the 13,990 retroactivity motions, resulting in an average sentence reduction of 30 months (19.9% average reduction).[12]

The Criminal History Amendment, submitted to Congress in late April 2023, makes two critical changes to the way the Guidelines calculate criminal history points: The Status Points Amendment would eliminate so-called "status points" for people with six or fewer criminal history points and impose only one point for people in higher criminal history categories.[13] The Zero-Point Amendment, meanwhile, would give people who are assessed zero criminal history points under the Guidelines a two-level reduction in their offense level calculation, with certain

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https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

[7] The effective date of any resulting reduction in sentence was delayed until November of the following year. *Id.*, p. 1.

[8] *Id.*, p. 5. This average sentence was reduced from 146 months to 121 months. *Id.*

[9] The Crack Minus Two Amendment resulted in a two-level reduction in the base offense levels derived from the Drug Quantity Table for each quantity of crack cocaine. U.S.S.C., *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, p. 1 (2014) [hereinafter "*CMTA Recidivism Report*], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[10] *See* U.S.S.C., *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment*, p. 1 (2018) [hereinafter "*FSAA Recidivism Report*"], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf. The FSA Guideline Amendment incorporated the reduced statutory sentences for crack cocaine offenses in the Fair Sentencing Act of 2010. *Id.* at p. 1. While Congress did not make the statutory sentence reductions retroactive, the Commission nevertheless gave the corresponding Guidelines amendment retroactive effect. *Id.*

[11] *CMTA Recidivism Report*, p. 2.

[12] *FSAA Recidivism Report*, pp. 2-3.

[13] *See 2023 Amendments*, p. 77. Under the current Guidelines, people are assessed two additional criminal history points where the person was under a criminal justice sentence (i.e., parole, probation, supervised release, etc.) when they committed the instant offense, known as "status points."

exceptions.[14] In reaching its decision whether to apply the amendment retroactively, the Commission must consider, among other things, "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."[15]

The federal courts are well equipped to apply both components of the Criminal History Amendment retroactively under § 1B1.10 of the Guidelines. Retroactive application of the Status Points Amendment is mechanical—that is, a person's eligibility for resentencing may be determined by reference to the original guideline calculation. While determining the impact of the Zero-Point Amendment requires courts to take an additional step to determine whether any of the guideline's exclusions apply, many of the exclusions will be readily apparent from the sentencing record.

According to the Commission, almost 19,000 people currently serving federal sentences would be eligible to file motions for a sentence reduction were the Criminal History Amendment to be applied retroactively:[16]

- **Status Points Amendment** – Retroactive application would likely impact 11,495 people currently serving federal sentences, 43% of whom are Black and 28% of whom are Hispanic, with an average sentence reduction of 14 months.[17]

- **Zero-Point Amendment** – Retroactive application would likely impact 7,272 people currently serving federal sentences, 10% of whom are Black and 70% of whom are Hispanic, with an average sentence reduction of 15 months.

As the Commission's analysis shows, retroactive application of the Criminal History Amendment would prevent thousands of currently-incarcerated people from serving sentences that can no longer be supported by data and allow them to be released without compromising public safety (see more below). The federal courts' experience with the retroactive application of the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments shows that changes to the Guidelines of this scope and magnitude can be applied retroactively without massive disruptions to the operations of the federal courts or significant litigation.

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[14] *See Id.* at pp. 78-80. The proposed amendment carves out cases with specific "aggravating factors," including cases involving: terrorism, the use or credible threat of violence, death or serious bodily injury, sex offenses, substantial financial hardship, firearms, offenses involving "individual rights," hate crimes and serious humans rights offenses, or a continuing criminal enterprise. The amendment also gives judges sentencing people under the new § 4C1.1 regarding when a non-incarceratory sentence may be appropriate.
[15] *Retroactivity Memo,* p. 8.
[16] *Id.,* pp. 1-31.
[17] It should be noted that the effective date of previous retroactive applications of amendments to the Guidelines have been delayed in order to facilitate the orderly administration of the changes in court and to allow Bureau of Prisons officials to make appropriate preparations. *See, e.g., DMTA Recidivism Report*, p. 1.

2. Retroactive Application of the Criminal History Amendment Will Not Compromise Public Safety

In adopting the Criminal History Amendment, the Commission relied, in large part, on its findings that the imposition of status points and the current treatment of people with zero criminal history points can not be justified on public safety grounds. Specifically, the Commission's 2022 report on status points found that people "who received status points were rearrested at similar rates to those without status points who had the same criminal history score."[18] Similarly, the Commission found that people assessed zero criminal history points have far lower rates of recidivism (26.8% rearrest rate) than even people with a single criminal history point (42.3% rearrest rate), representing the largest difference in rearrest rates when comparing people with the same criminal history category.[19]

Again, the courts' experience with the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments provides the clearest support for the retroactive application of the Criminal History Amendment. In each case, the Commission evaluated whether the retroactive application of the changes to the Guidelines impacted recidivism, and in each case the Commission reached the same conclusion: there was no statistically significant difference between the recidivism rates of people who received a sentence reduction and those who had served their full sentence before the changes became effective:[20]

- **<u>Drug Minus Two Amendment</u>** – The Commission found no statistically significant difference in the recidivism rates of people who were released an estimated average of 37 months early through the retroactive application of the Drugs Minus Two Amendment (27.9%) and people who served their full sentences and were released prior to the amendment (30.5%).[21]

- **<u>Crack Minus Two Amendment</u>** – The Commission found that the recidivism rate for people who received an average retroactive sentence reduction of approximately 20% was similar to the rate for people who had been released prior to adoption of the Crack Minus Two Amendment. Indeed, as with the Drug Minus Two Amendment, the recidivism rate was actually lower (43.3%) for the retroactivity cohort than for the control group (47.8%).[22]

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[18] *Revisiting Status Points*, p. 3.
[19] *Retroactivity Memo*, p. 4.
[20] *DMTA Recidivism Report*, p. 1. The average expected sentence reductions under the Status Points Amendment and the Zero-Point Amendment—14 months and 15 months, respectively—are shorter than the reductions under the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments.
[21] *Id.* at p. 6. It is also worth noting that the study found that one-third of the recidivism, for both the study group and the control group, was attributable to court or supervision violations. *Id.*
[22] *CMTA Recidivism Report*, p. 3.

- **FSA Guideline Amendment** – The Commission reached a similar conclusion in its study of the retroactive application of the FSA Guideline Amendment, finding that recidivism rates were "virtually identical" for people who received retroactive sentence reductions averaging 30 months compared to people who had served their full sentences before the amendment took effect.[23]

These studies are in line with a growing body of research that shows that the marginal benefit of lengthier sentences is minimal at best—and counterproductive at worst. Traditionally, proponents of longer sentences have relied on three theoretical public safety justifications: general deterrence (preventing crime by instilling fear of punishment in the general population), specific deterrence (deterring an individual from committing further future crime through the imposition of punishment), and incapacitation (keeping people in custody to prevent them from committing offenses in the community).[24] Here, general deterrence is not a consideration, as the Commission has already adopted the Criminal History Amendment for prospective application. The studies cited above also show that prior retroactive sentence reductions have not resulted in any decrease in specific deterrence, as recidivism rates for people released early were the same or lower than for those released after serving their full original sentences.[25]

Moreover, recent literature strongly calls into question the viability of incapacitation as a public safety strategy. Drug trafficking and sale offenses, for instance, are subject to the replacement effect—that is, while specific individuals may not commit further crime while in prison, the volume of drug trafficking is unlikely to decline overall.[26] Similarly, extensive study of the age-crime curve suggests that individuals age out of criminal behavior over time, meaning the marginal value of incarceration also declines over time.[27] Indeed, a recent study by the Council on Criminal Justice of the public safety impact of shortening lengthy prison terms in Illinois found that 1) "modest reductions in the length of long prison stays would likely result in relatively few additional arrests," and 2) "the additional arrests likely to result from reductions in time served would constitute a virtually undetectable increase in the annual volume of arrests in the state."[28]

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[23] *FSAA Recidivism Report*, p. 3.
[24] *See* Laura Bennett and Felicity Rose, Center for Just Journalism and FWD.us, "Deterrence and Incapacitation: A Quick Review of the Research," https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research.
[25] The Commission has also released studies on sentence length and recidivism that purport to show that longer sentences have a specific deterrent effect and are associated with lower recidivism. Those studies, however, were based on artificially constructed matched cohorts rather than the stronger quasi-experimental design of the retroactivity studies cited above.
[26] Mark A.R. Kleiman, *Toward (More Nearly) Optimal Sentencing for Drug Offenders, 3* Crim & Public Policy 3 (2006).
[27] Michael Rocque, Chad Posick, and Justin Hoyle, *Age and Crime*. (2015) In The Encyclopedia of Crime and Punishment, W.G. Jennings (Ed.). https://doi.org/10.1002/9781118519639.wbecpx275
[28] Avinash Bhati, *The Public Safety Impact of Shortening Lengthy Prison Terms* (2023), https://counciloncj.foleon.com/tfls/long-sentences-by-the-numbers/the-public-safety-impact-of-shortening-lengthy-prison-terms.

fwd.us

Research across the field shows that any contested and minimal benefits of increased sentence lengths, and incarceration generally, are far outweighed by the harms to individuals, communities, and public safety as a whole. All of the available data suggests that retroactive application of the Criminal History Amendment will not have a negative effect on recidivism rates or public safety.

3. Applying the Criminal History Amendment Retroactively Furthers the Commission's Commitment to Principled, Data-Driven Policymaking

The Criminal History Amendment reflects the Commission's recognition that certain current sentencing practices neither serve the underlying purposes of punishment nor advance public safety.[29] Its retroactive application will continue the Commission's "tradition of data-driven evolution of the Guidelines."[30]

In 2018, the Justice Lab at Columbia University launched the Square One Project, an effort to reexamine the fundamental underpinnings of the criminal justice system that brought together "abolitionists and reformers; optimists and skeptics; Republicans and Democrats; community organizers, academics, and government officials; formerly incarcerated leaders and law enforcement professionals."[31] In a recent collection of essays edited by Jeremy Travis and Bruce Western, Square One resurrected the concept of "parsimony" as the central organizing principle for criminal justice policy decisions:

> *The cornerstone proposition of the parsimony principle is that the state is entitled to deprive its citizens of liberty only when that deprivation is reasonably necessary to serve a legitimate social purpose. Any liberty deprivation beyond that minimum is gratuitous and constitutes state cruelty. A parsimonious approach to justice therefore insists on the least restrictive intervention to achieve societal goals. This core value then has implications for every aspect of the criminal justice system.*[32]

The parsimony principle provides both a metric for evaluating the Commission's policy decisions and an important framework for organizing future efforts. Through this lens, the Commission's acknowledgement that the imposition of status points and treatment of people with zero criminal

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[29] With regard to the Status Points Amendment, the Commission also recognized the risk that people would be punished twice for the same behavior: "In taking these steps, the Commission observed that the operation of the Guidelines Manual separately accounts for consecutive punishment imposed upon revocations of supervised release, a likely occurrence if [a person] was under a criminal justice sentence during the commission of another offense." *2023 Amendments, p. 78*

[30] *Id.*, p. 80.

[31] Jeremy Travis and Bruce Western, ed., *Parsimony and Other Radical Ideas About Justice*, p. 321 (2023).

[32] *Id.,* pp. 3-4.

history points cannot be justified by the Commission's own recidivism data makes retroactive application of the Criminal History Amendment not only good policy, but a moral imperative.[33]

We urge the Commission to retroactively apply the Criminal History Amendment and continue to reevaluate the basic assumptions underlying the Guidelines given the growing research that longer sentences do not advance public safety.

Sincerely,

Scott D. Levy
Chief Policy Counsel
FWD.us

[33] While FWD.us wholeheartedly supports the adoption and retroactive application of the Criminal History Amendment, we note that the carve-outs and exemptions contained in the proposed amendment—namely, the preservation of status points for people with seven or more criminal history points and the exclusion of people with "aggravating factors" (particularly any case involve the use or threat of violence) from the Zero-Point Amendment—are not supported by data and fall afoul of the parsimony principle. Rather, the exceptions seem to be rooted in a desire for retribution or punishment for the sake of punishment. *See, e.g., 2023 Amendments,* p. 78 (the preservation of status points certain people "serve[s] multiple purposes of sentencing, including the [person's] perceived lack of respect for the law…"). Looking forward, the Commission should hold to the parsimony principle and reject practices and guidelines that are not supported by data and do not advance the public good.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

H.O.T Hear Our Tears

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Looking into what is mass incarceration in the USA . Why are there moe prisons and so many migrants/ minorities in prison why?

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Illinois Alliance for Reentry & Justice

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

We support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that currently incarcerated people who would receive a lower guideline range today can make their case to court and benefit from the Commission's important amendments.

In making these guideline changes, the commission intended to lower sentences for people with the minimum criminal history, and for people whose criminal history was unfairly inflated. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending the court's approval. The court system is no stranger to having to process motions for other retroactive changes rendering any argument against making it retroactive moot.

The Commission's ability to update guidelines to reflect best practices on what works and what does not work is a true hallmark of the agency. And when changes are made that allow people an opportunity to reunite with their families sooner, making those changes retroactive is not only the moral thing to do, but it also infuses hope into these institutions which ultimately increases institutional safety.

For the reasons outlined above, we urge you to make these changes retroactive.

Stay safe,

Avalon Betts-Gaston, JD (she/her)

Project Manager

IL Alliance for Reentry & Justice

Submitted on: June 16, 2023

Justice Advocacy Group LLC

Joel A. Sickler, Founder
jsickler@justiceadvocacygroupllc.com

May 23, 2023

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 2002-8002
Attention: Public Affairs - Issue for Public Comment on Retroactivity

Re: Support for the retroactive treatment of parts A and B of the Criminal History Amendment, relating to "Status Points" and certain "Zero-Point" offenders, and that such retroactive treatment be provided to defendants eligible for the First step Act ("FSA')

To Whom it May Concern:

I am writing to express my support for the United States Sentencing Commission (USSC") parts A and B of the criminal history amendment ("the Amendment") relating to "status points" and certain "zero-point" offenders to be applied retroactively to currently sentenced and presently incarcerated defendants. I further recommend that the Amendment be applied retroactively based on such defendants' eligibly for the First Step Act ("FSA") relief, which is administratively simple and which the Bureau of Prisons currently has a system in place to monitor defendants'/inmates' FSA eligibility and earned time credits. Finally, I recommend that restitution not make a defendant ineligible for retroactive treatment under the Amendment, given that restitution does not render a defendant ineligible under the FSA.

Thank you for your consideration.

Respectfully submitted,

/s/ Joel A. Sickler

Joel A. Sickler, Founder
Justice Advocacy Group, LLC

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Kingdom Towers Estates Inc

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Life After Release

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here

Submitted on: June 14, 2023

June 23, 2023

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 Criminal History Amendment

Dear Judge Reeves:

NACDL hereby responds to the Commission's request for comment on the retroactive application of Part A of the 2023 Criminal History Amendment which limits, and, in some cases, eliminates status points under USSG § 4A1.1(d), and Part B, Subpart 1 of this year's Criminal History Amendment, which amends USSG § 4C1.1 to provide for a two-level downward adjustment for "zero-point offenders." NACDL endorses retroactive application for both provisions without limitation. In addition to the forgoing, NACDL agrees with the analysis and positions set forth in comments submitted by the Federal Defenders.

With retroactivity, thousands of people will be eligible for release over the next several years. Without it, these same people will serve what may be unnecessarily lengthy terms of imprisonment at great cost to the prisons that house them and to the integrity of the criminal justice system that unfairly detains them. By limiting the impact of status points, the Commission is enacting into policy what several studies have already shown: that status points do not meaningfully increase the criminal history score's successful prediction of rearrest and, as such, these additional points serve no legitimate sentencing purpose. Similarly, those who will be eligible for reduced sentences for being zero-point offenders are the least likely to reoffend and pose the least danger to the community. As such, their eligibility for release does not trigger meaningful public safety concerns. Although the number of potentially eligible inmates for reduced sentences under both parts of the amendment is not insignificant, it is modest compared to 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 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 twenty-nine amendments that may be applied retroactively.[1] 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)."[2] Examination of the amendments through the lens of these factors unequivocally establishes the just conclusion that they be applied retroactively.

Part A of the Commission's amendment to the criminal history rules limits the impact of status points to a defendant's criminal history score. Under the current §4A1.1(d), two points are added to a person's criminal history score if they committed the instant offense while under a criminal justice sentence, including parole, probation, supervised release, imprisonment, work release, or escape status.[3] The Commission originally "envisioned status points as consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior and therefore envisioned status points as being reflective of, among other sentencing goals, the increased likelihood of future recidivism."[4] However, several Commission studies have revealed that the addition of status points to a defendant's criminal history does not, in fact, meaningfully improve the criminal history score's prediction of rearrest. The Commission's 2005 study of status points and recency points – which assigned additional criminal history points under § 4A1.1 if the instant offense was committed less than two years after release from a prior term of imprisonment – concluded that they improved the prediction of rearrest by only .1 percent.[5] The Commission subsequently eliminated recency points—but not status points—from § 4A1.1

[1] *See* USSG § 1B1.10(c).

[2] *See id*. cmt. background.

[3] USSG § 4A1.1(d). Under Part A of the 2023 criminal history amendment, status points will no longer apply to defendants with six or fewer criminal history points under subsections (a) through (d)—even if the instant offense was committed while the offender was under a criminal justice sentence. U.S. Sent'g Comm'n, *Adopted Amendments to the Sentencing Guidelines*, 78-85 (Apr. 27, 2023), available https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf ("Adopted Amendments"). Defendants under a criminal justice sentence with seven or more criminal history points under subsections (a) through (d) will be assessed one additional criminal point under amended § 4A1.1(e), rather than the two points previously assigned. *Id.*

[4] Adopted Amendments, *supra* n. 6 at 78 (citing USSG Ch.4, Pt.A, intro. comment.) (quotations omitted).

[5] U.S. Sent'g Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, 26 (Jan. 2005) available https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf (finding that the full criminal history score, with all components included, successfully predicted rearrest 69.9% of the time but, if status points and recency points were removed, the score would still successful predict rearrest 69.8% of the time).

in a 2010 amendment to the sentencing guidelines.[6] In 2022, however, the Commission's study on status points confirmed, once again, that status points do not increase the prediction of recidivism, improving the prediction of rearrest by only .2 percent.[7] This finding dovetails with the Commission's acknowledgment that prior convictions are often already accounted for in a defendant's criminal history score, making status points an unnecessarily harsh measure that do not serve any sentencing goals.[8]

Moreover, far from furthering the purposes of sentencing, the Commission's data also demonstrates that status points have a disparate impact on people of color.[9] This is no surprise as research shows that people of color—particularly Black people—are far more likely than whites to be targeted by law enforcement, be on supervision, and be subject to longer terms of supervision than whites.[10] By applying Part A retroactively, the Commission would help alleviate this disparity and the disproportionate impact it has had on the sentences of Black and Hispanic defendants.[11]

Accordingly, the Commission's empirical data supports the conclusion that status points do not meet the sentencing goals of providing just punishment, specific deterrence, or protecting the public, and instead perpetuate racial disparities.[12] By limiting the impact of status points and

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[6] USSG App. C, amend. 742 (effective Nov. 1, 2010).

[7] U.S. Sent'g Comm'n, *Revisiting Status Points*, 3 (June 2022) available https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf. (finding that a full criminal history score correctly predicts rearrest 65.1% of the time while the criminal history score with status points removed predicts rearrest 64.9% of the time—a difference of only .2%) ("Revisiting Status Points").

[8] Adopted Amendments, *supra* n. 6 at 78 ("The Commission further recognized that it is also possible that an offender's criminal history score would be independently increased as a result of additional time imposed as the result of a revocation of probation or supervised release for the offense that also results in the addition of status points.")

[9] *Id.* at Table 1 (finding the demographic breakdown of status offenders to be 41.1% Hispanic; 32.7% Black; and 22.7% White, and 3.5 % Other).

[10] *See* Statement of Jami Johnson on Behalf of the Federal Public and Community Defenders, 30-31 (March 8, 2023) available https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/FPD5.pdf.

[11] U.S. Sent'g Comm'n, *Memo From The Offices of Research and Data and General Counsel, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* (May 15, 2023), 13 Table 3A (May 15, 2023) available https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf (finding the demographic characteristics of those defendants eligible for retroactive application of Part A to be: 43% Black, 27.8% Hispanic, 25% White and 4.2% Other) ("Retroactivity Impact of 2023 Criminal History Amendment").

[12] *Id.* at 2 ("Accounting for a defendant's criminal history in the guidelines addresses the need for the sentence "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of

applying the amendment retroactively, the Commission would improve the accuracy and reliability of the guidelines and help reduce unwarranted disparities.

Part B, Subpart 1 amends criminal history calculations to ensure that recommended sentences under the guidelines are no greater than necessary to serve the statutory purposes of sentencing. "Zero-point offenders" have considerably lower recidivism rates as compared to other offenders with more significant criminal histories. In fact, the Commission's recent recidivism data reports that "zero-point offenders" recidivate at rates nearly half as frequently as "one-point offenders" (26.8% compared to 42.3%).[13] Informed by this data, the Part B, Subpart 1 amendment—which enjoyed overwhelming support during the public comment period—acknowledges that the goals of specific deterrence and incapacitation are achieved with reduced sentences for "zero-point offenders." Conversely, without the amendment, "zero-point offenders" would face—*and did face*—greater than necessary recommended sentences.

As the Commission has been tasked by Congress to establish sentencing policies that reflect "the advancement in knowledge of human behavior as it relates to the criminal justice process,"[14] the Commission's recent studies make clear that including status points and over-punishing zero-point offenders do not further the purposes of 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 without it.

Additionally, retroactive application serves the Commission's laudable goal to minimize the likelihood that prison populations exceed capacity. As of February 23, 2023, the Bureau of Prisons was operating at six percent above rated capacity.[15] Although in 2019 and 2020 the Bureau of Prisons' inmate population declined as a result of the First Step Act and COVID-19 related policies, the BOP currently projects the inmate population to swell again in 2023 and 2024.[16] Retroactivity of the 2023 Criminal History Amendment will help alleviate the costs and strains of an overcrowded prison system.

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the defendant."). NACDL believes the Commission's data supports elimination of status points in all cases. However, to the extent the Commission believes status points serve any statutory purposes of sentencing, it should be noted that defendants in Criminal History Categories IV and above may still be eligible for one additional criminal history point if under a criminal justice sentence.

[13] U.S. Sent'g Comm'n, *Recidivism of Federal Offenders Released in 2010*, 26 (Sept. 2021), available https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf.

[14] *See* 28 U.S.C. § 991(b)(1)(C).

[15] U.S. Dep't of Justice, Federal Prison System, *FY 2024 Performance Budget Congressional Submission*, 12, available https://www.justice.gov/d9/2023-03/bop_se_fy_2024_pb_narrative_omb_cleared_3.23.2023.pdf.

[16] *Id.*

And retroactivity's significant positive impact comes with no meaningful cost to public safety. The Commission's extensive studies on the recidivism rates of all federal prisoners who have been released as a result of retroactive application of amended guidelines confirm 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 served their full sentences before the guideline reductions took effect. [17] Here, especially, retroactive application raises no meaningful public safety concern. Two decades of Commission data has made clear that status points do not impact the predictive ability of a defendant's criminal history score. With regard to "zero-point offenders," *all* individuals eligible for a sentence reduction belong to the group of offenders who are least likely to recidivate when released as compared to offenders with more significant criminal histories.

As to both amendments, the costs of implementing these changes retroactively do not outweigh the significant benefits of retroactive application. While implementation of a retroactive amendment necessarily involves time and resources, here the costs are relatively modest and manageable. On May 15, 2023, the Commission's Office of Research and Data submitted its Retroactivity Impact Analysis of the 2023 Criminal History Amendment.[18] In it, the Commission estimated that 11,495 individuals will be eligible to seek a sentence reduction if Part A is applied retroactively, and 7,272 individuals will be eligible to seek a sentence reduction if Part B, Subpart 1 is applied retroactively.[19] 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).[20] 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).[21] Notably, despite the

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[17] *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.

[18] *See* Retroactivity Impact of 2023 Criminal History Amendment, *supra* n. 14.

[19] *Id*. at 31.

[20] Press Release, U.S. Sent'g Comm'n, *U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively* (June 30, 2011), available https://www.ussc.gov/about/news/press-releases/june-30-2011.

[21] Press Release, U.S. Sent'g Comm'n, *U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences* (July 18, 2014), available

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 can seamlessly process retroactivity of 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 Part A and Part B, Subpart 1 of 2023's Criminal History Amendment. Retroactivity is fundamentally fair and a well-supported, sound sentencing policy.

Respectfully submitted,

Julia Gatto
Member, NACDL Sentencing Committee

Elizabeth Blackwood
Director, NACDL First Step Act Resource Center

JaneAnne Murray
Chair, NACDL Sentencing Committee

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https://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf.

NATIONAL CENTER ON SEXUAL EXPLOITATION

June 23, 2023

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002

RE: Public Comment in Opposition to Proposed Retroactivity of Parts A and B of the 2023 Criminal History Amendment

Dear Chairman Reeves and Members of the Commission:

The National Center on Sexual Exploitation ("NCOSE") respectfully submits the following comment to the Sentencing Commission ("Commission") in opposition to its proposed amendments to the Sentencing Guidelines ("Guidelines"), specifically on the Retroactivity of Criminal History Amendment. NCOSE does not support making parts A and B of the criminal history amendment available for retroactive application for the reasons discussed below.

NCOSE is a nonprofit, nonpartisan organization, founded in 1962, that combats sexual exploitation and abuse by advocating in state and federal courts for survivors, engaging in corporate advocacy to encourage companies to adopt responsible and safe practices, and advocating for legislative change that protects survivors and promotes human dignity.

The proposed retroactive application of this legislation will have a profound negative impact on survivors of sexual offenses by releasing many of their perpetrators before their criminal sentences are fully served. This retroactive application is concerning because it uproots the concepts of finality and uniformity of sentences, and in effect will erode congressional authority to establish sentencing guidelines. The purpose of the federal sentencing guidelines is to "provide a uniform sentencing policy for criminal defendants convicted in the federal court system," but this retroactive application will undermine that purpose.

The sentencing guidelines are also purposefully designed to be flexible and customizable at the time of sentencing, accounting for mitigating and aggravating factors, the type of crime committed, the harms suffered, and often allowing for early release based on good behavior. Retroactive application of Parts A and B will undermine the authority of the sentencing court's initial determination by uprooting its finality, minimizing the severity of the crimes committed, and trivializing the suffering of thousands of victims whose perpetrators will now become eligible for early release.

If Part A is retroactively applied, offenders with more serious criminal histories under the guidelines, including those convicted for child pornography, sexual abuse, obscenity, and other

1201 F St NW, Suite 200, Washington, DC 20004 • Office: 202.393.7245 Fax: 202.393.1717 • endsexualexploitation.org • public@ncose.com

NATIONAL CENTER ON SEXUAL EXPLOITATION

sexual offenses, will be categorized as eligible for a reduction in sentence. At the same time, Part B specifically denotes that a "zero-point offender" (offenders with zero criminal history points) must meet numerous factors, including that the instant conviction is *not* for a sex offense, before receiving eligibility for a reduction.

Part B's exclusion from retroactive sentence reduction for offenders convicted of a sex offense is appropriate. Part A should have a similar categorical exclusion for offenders convicted of a sex offense. As the Staff Memo discloses, the offenders standing to gain from Part A's proposed retroactivity include 325 offenders convicted of abusing children through child pornography, as well as over 300 other offenders who have harmed others in a sexual offense.[1] Further, Part A applies to those who already have more status points, defined under the new amendment, as "offenders with more serious criminal histories under the guidelines."[2] With this proposal, this would mean that more violent, aggravated offenders, perhaps those who have committed similar crimes in the past, will not be exempt from a sentencing reduction, but those who have zero criminal history points will. NCOSE urges the Commission to prevent ALL individuals convicted of crimes of a sexual nature from having a retroactive reduction in their sentences.

In conclusion, we respectfully request that the Commission does not approve Parts A and B of the 2023 Criminal History Amendments for retroactive application. However, should the Commission choose to list one or both parts of the amendment in subsection (d) of §1B1.10, the Commission should provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced, including:

- If Part A is applied retroactively, it should include an exception, similar to the one found in Part B, so it will not apply to any crimes of a sexual nature, including child pornography, sexual abuse, obscenity, or other sex offenses.
- Requiring offenders of crimes of a sexual nature to participate in rehabilitative services and therapy after their release.
- The Commission should track and report the number offenders that engage in repeat offenses after being released early through retroactive application of Parts A and B.

Sincerely,

Dawn Hawkins, CEO | Victoria Hirsch, Esq., Legal Counsel

[1] United States Sentencing Commission, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment at 15 (May 15, 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.
[2] Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment, p. 3.

1201 F St NW, Suite 200, Washington, DC 20004 • Office: 202.393.7245 Fax: 202.393.1717 • endsexualexploitation.org • public@ncose.com

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Neighbor to Neighbor MA

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Oregon CURE May. 23, 2023

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

We at Oregon CURE support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive.
It is the right thing to do. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.
Karen Cain,

President, Oregon CURE

Submitted on: May 23, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Productive Offenders of Society

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

We support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive.
We believe that the criminal history points need to be reevaluated. With all due respect we feel they are unjust and unfair. Someone can have non violent offenses that add months and years to their sentence. If anything they should receive more treatment and programs for rehabilitation as opposed to more prison time. I have faith in the new US Sentencing Commission to make changes made in good faith.
It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that

would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Submitted on: June 22, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Traffick Refuge

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I am a volunteer with TEAM Mentoring and the representative of Reentry Intervention and Traffick Refuge in Montana. Since 2013 I have been part of a reentry team surrounding men and women in the return to citizenship. Our focus has been neurodevelopmental factors surrounding intervention at 3 minutes, 3 hours, 3 days, 3 weeks, 3 months and 3 years. The neurological piece - making 2,000 decisions a day to the 20,000 per day outside has proven by itself a factor and has resulted in meltdowns and relapse in especially the visual field (CSAM/pornograpy) at many of those pivotal points to self medicate the neurological surges and malformed responses. The trauma these men and women have experienced create fragility during the reentry process. They have neurological vulnerabilities that are exacerbated upon exit. It is not safe for any to be released without neurological intervention. This retroactivity will put many in a heightened and vulnerable state - which creates an unsafe situation for them, their families, victims and the public.

Submitted on: June 2, 2023

UNITED STATES GOVERNMENT

memorandum

DATE: June 22, 2023

REPLY TO
ATTN OF: Parker D. Anderson
Assistant Deputy Chief Probation Officer

SUBJECT: **Comment on Retroactivity of Criminal History Amendment**

TO: United States Sentencing Commission
via - https://comment.ussc.gov

The Commission seeks comment on whether it should list Parts A and B of the amendment, addressing the impact of "status points" at §4A1.1 and offenders with zero criminal history points at new §4C1.1, in subsection (d) of §1B1.10 as changes that may be applied retroactively to previously sentenced defendants. For each of these parts, the Commission requests comment on whether the part should be listed in subsection (d) of §1B1.10 as an amendment that may be applied retroactively.

The Probation Office in and for the Middle District of Florida provides the following in response to the Commission's request for comment, with discussion of Parts A and B of the amendment addressed separately. Among other factors, the comments provided are advised by the *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment*; the Probation Office's experience with developing, implementing, and navigating processes to address prior amendments listed in subsection (d) of §1B1.10; and the Probation Office's experience in conducting eligibility assessments of defendants and supporting the court in relation to amendments that may be applied retroactively.

In addition to the Probation Office's comments on whether Parts A and B of the amendment should be applied retroactively, the Probation Office separately responds to the request for comments about "guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced."

Part A of the Amendment – "Status Points"

The Commission's studies have repeatedly reached the conclusion that status points add little to the overall predictive value associated with the criminal history score, and Part A of the amendment seeks to refine the treatment of "status points" under Chapter Four. Specifically, Part A of the amendment would reduce the assessment of status points from two points to either one point or no points.

The Probation Office provides the following comments:

1) The sentencing court fully considered each defendant's criminal history, including the defendant's status, when determining a sentence that is sufficient, but not greater than necessary, to address the statutory purposes of sentencing. Applying Part A of the amendment retroactively could result in duplicative consideration of the defendant's status at the time of the federal instant offense.

    a) Anecdotally, when sentencing a defendant who committed the instant federal offense while under a criminal justice sentence, the court frequently comments on the status of the defendant. The defendant's status is considered in relation to multiple factors set forth at 18 U.S.C. § 3553(a), to include: the personal history and characteristics of the defendant, the need to promote respect for the law, the seriousness of the offense, the need to provide just punishment, the need to afford adequate deterrence to criminal conduct, and the need to protect the public from further crimes of the defendant. Frequently, even when "status points" are assessed pursuant to USSG §4A1.1(d), the court cites a defendant's status as a sentencing factor it has considered. Accordingly, there is abundant anecdotal evidence indicating sentencing courts appropriately consider the defendant's status when determining a sentence that is sufficient but not greater than necessary to achieve the statutory purposes of sentencing. Retroactive application could result in guideline ranges that are below what the sentencing court determined to be an appropriate imprisonment term when weighing a multitude of sentencing factors, including whether a defendant was under a criminal justice sentence when he/she committed the instant federal offense.

    b) The sentencing court frequently imposes a sentence outside the applicable guideline range. In FY2022, nationally, the sentencing court imposed a variance sentence below the guidelines 29.8% of the time. In the Middle District of Florida, during FY2022, the sentencing court imposed a variance sentence below the guidelines 38.6% of the time. The Court is clear in its authority to sentence below the applicable guideline range after considering relevant sentencing factors. Retroactive application of the Guideline Amendment could disturb the sentencing court's judgment and could lead to the court twice considering the same sentencing factor.

2) The assessment of status points does not apply when a defendant is under a criminal justice sentence for a minor offense; and therefore, it is unlikely sentencing courts overweighed this factor at the time of sentencing.

    a) Pursuant to USSG §4A1.1, comment. (n.4), for the purpose of determining whether the defendant was under a criminal justice sentence at the time he/she committed the instant federal offense, a "criminal justice sentence" means a sentence countable under §4A1.2. Accordingly, sentences for minor misdemeanor and petty offenses that are excluded for the assessment of criminal history points pursuant to §4A1.2(c) cannot trigger status points under §4A1.1(d). Therefore, defendants who received status points had more significant criminal histories, even if they were assessed six or fewer criminal history points. The sentencing court would have adequately considered and weighed the seriousness of each defendant's criminal history when determining a sentence that was sufficient but not greater than necessary, and sentencing court's determinations should remain undisturbed. If the sentencing court, in considering and weighing a defendant's criminal history determined it

was overstated, the court could have departed downward pursuant to §4A1.3 or could have imposed a sentence below the otherwise applicable guideline range.

3) The assessment of status points is directly linked to recidivist behavior, a lack of respect for the law, and the need to protect the public from future criminal conduct of the defendant. While the Commission's studies address the recidivism component, the studies do not weigh the latter two sentencing considerations. In relation to the recidivism factor, it is noted, a defendant who is assessed status points was under a criminal justice sentence for a serious offense (scorable under §4A1.1(a)-(c)) and recidivated by committing a new felony offense.

4) Retroactive application of Part A of the amendment would pose a significant burden on District Courts and United States Probation Offices. According to the Commission's retroactivity study, "[s]taff estimates that approximately one-quarter (22.7%, n = 11,495) of the 50,454 status points offenders would have a lower guideline range…and, therefore, would be eligible to <u>seek</u> a modification of sentence under 18 U.S.C. § 3582(c)(2)" (emphasis added). While the Commission's study indicates that "eligible" defendants would "seek" a modification of sentence, experience indicates otherwise. It is likely that all, or nearly all, of the status point offenders (n=50,454) will seek a modification of their sentence, regardless of whether they are eligible or not. Further, if Part A of the amendment is made retroactive, sentencing courts will want to ensure each eligible offender is identified. Accordingly, it is likely sentencing courts will require an assessment of each offender who received status points. Assessing the eligibility of 50,454 offenders would create a workload that could cripple sentencing courts and probation offices. When considered in conjunction with the knowledge that the sentencing courts already fully considered the defendant's personal history and characteristics, including his/her criminal history, the burdensome workload outweighs the need to provide retroactive relief to any single defendant. Further, the commitment of limited available resources from reentry and supervision activities to retroactivity assessments could negatively impact supervision practices, creating the unintended consequence of increased recidivism rates.

<u>Part B of the Amendment – "Zero-Point Offenders"</u>

The Commission's analysis of recidivism data suggests that offenders with zero criminal history points ("zero-point offenders") have considerably lower recidivism rates than other offenders, including offenders in CHC I with one criminal history point. Part B, Subpart 1 of the 2023 criminal history amendment creates a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders), which provides an offense level decrease for offenders who did not receive any criminal history points and whose instant offense did not involve specified eligibility criteria.

The probation office provides the following comments:

1) Identifying eligible offenders and applying Part B of the amendment retroactively would be extremely difficult because of the need for post-sentencing litigation. Part B of the amendment includes the creation of §4C1.1, which denotes ten disqualifying criteria. Going forward, applying §4C1.1 will allow the Court to properly consider each of the disqualifying criteria and the parties to present evidence and make argument regarding the same. Unfortunately, retroactive application will not allow for the same prudent approach, making identification of eligible offenders difficult and retroactive application of Part B of the amendment inconsistent.

a. The disqualifiers at §4C1.1(a) include: the defendant did not use violence or credible threats of violence in connection with the offense; the offense did not result in death or serious bodily injury; the defendant did not personally cause substantial financial hardship; and the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense. These (and perhaps other disqualifiers) will trigger litigation when determining retroactive eligibility.

    i. For example, at the original sentencing hearing, whether a defendant used violence or credible threats of violence would have only been determined in conjunction with §2D1.1 and §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). If another factor set forth at §5C1.2 (such as truthfully providing to the Government all information and evidence the defendant has concerning the offense) disqualified the defendant from consideration, the Court might not have made any finding regarding the other criteria (including those that will now be present at §4C1.1). Accordingly, to determine retroactive eligibility, the Court will need to engage in post-sentencing fact finding.

    ii. Additionally, some of the disqualifiers set for that §4C1.1(a) would not have been considered at the original sentencing because of the guideline used to determine the Chapter Two and Three offense level. For example, when sentencing an offender for a fraud offense and determining the Chapter Two offense level under §2B1.1, the Court would have no cause to make a factual finding about whether the defendant possessed a firearm in connection with the offense, regardless of whether the defendant did or did not. That, however, would become an issue subject to litigation should Part B of the amendment be applied retroactively.

b. The disqualifiers set forth at §4C1.1 are not wholly consistent with the corresponding Chapter Two and Chapter Three guidelines. For example, §4C1.1(a)(6) indicates, "the defendant did not personally cause substantial financial hardship." In contrast, §2B1.1(b)(2) notes, "[i]f the offense resulted in substantial financial hardship." Accordingly, even if the Court determined that §2B1.1(b)(2) applied at the time of sentencing, to determine retroactive eligibility, the Court will need to engage in post-sentencing fact finding to determine if the defendant personally caused financial hardship.

c. The difficulties of post-sentencing fact finding can be exacerbated by several factors. Agents and other witnesses might not be available to the Court. The original prosecutor or defense counsel might not be available to the Court. In the Middle District of Florida, for prior retroactive eligibility assessments, the Court has appointed the Federal Public Defender to represent offenders (barring any conflicts of interest). The Assistant Federal Public Defender assigned might have no prior knowledge of the offender's case, and it is unlikely he/she would have access to file materials if the offender was originally represented by CJA or retained counsel.

2) The sentencing court already fully considered each defendant's criminal history, including the lack of criminal history points, when determining a sentence that is sufficient, but not greater than necessary, to address the statutory purposes of sentencing. Applying Part B of the amendment retroactively could result in duplicative consideration of the absence of criminal history points.

a. Anecdotally, when sentencing a defendant who has zero criminal history points and who is a true first-time offender, the court frequently comments on the same. The defendant's lack of criminal history is considered in relation to multiple factors set forth at 18 U.S.C. § 3553(a), to include: the personal history and characteristics of the defendant, the need to promote respect for the law, the seriousness of the offense, the need to provide just punishment, the need to afford adequate deterrence to criminal conduct, and the need to protect the public from further crimes of the defendant. Frequently, when the defendant has zero criminal history points, the court notes the same as a sentencing factor it has considered. Accordingly, there is abundant anecdotal evidence indicating sentencing courts appropriately consider the defendant's lack of criminal history points when determining a sentence that is sufficient but not greater than necessary to achieve the statutory purposes of sentencing. Retroactive application could result in guideline ranges that are below what the sentencing court determined to be an appropriate imprisonment term when weighing a multitude of sentencing factors, including a defendant's lack of criminal history points.

b. As noted above, the sentencing court frequently imposes a sentence outside the applicable guideline range. In FY2022, nationally, the sentencing court imposed a variance sentence below the guidelines 29.8% of the time. In the Middle District of Florida, during FY2022, the sentencing court imposed a variance sentence below the guidelines 38.6% of the time. The court is clear in its authority to sentence below the applicable guideline range after considering relevant sentencing factors. Retroactive application of the Guideline Amendment could disturb the sentencing court's judgment and could lead to the court twice considering the same sentencing factor.

3) Retroactive application of Part B of the amendment would pose a significant burden on District Courts and United States Probation Offices. According to the Commission's retroactivity study, "[s]taff estimates that there are 34,922 offenders in BOP custody as of January 28, 2023, for whom no criminal history points were assigned under Chapter Four, Part A of the *Guideline Manual* when sentenced for their instant offense" Further, "[s]taff estimates that slightly more than half (57.8%, n = 7,272) of those offenders…would be <u>eligible</u> to <u>seek</u> a modification of sentence under 18 U.S.C. § 3582(c)" (emphasis added). While the Commission's study indicates that "eligible" defendants would "seek" a modification of sentence, experience indicates otherwise. It is likely that all, or nearly all, of offenders with zero criminal history points (n=34,922) will seek a modification of their sentence, regardless of whether they are eligible or not. Further, if Part B of the amendment is made retroactive, sentencing courts will want to ensure each eligible offender is identified. Accordingly, it is likely sentencing courts will require an assessment of each offender with no criminal history points. Assessing the eligibility of 34,922 offenders would create a workload that could cripple sentencing courts and probation offices. Further, because an offender with zero criminal history points could not have received "status" points, if both Part A and Part B of the amendment are made retroactive the courts and probation offices might be required to determine the eligibility of approximately 85,467 offenders. When considered in conjunction with the knowledge that the sentencing courts already fully considered each defendant's personal history and characteristics, including his/her criminal history, the burdensome workload outweighs the need to provide retroactive relief to any single defendant. Further, the commitment of limited available resources from reentry and supervision activities to retroactivity assessments could negatively impact supervision practices, creating the unintended consequence of increased recidivism rates.

Guidance or Limitations on Reductions

Should the Commission list one or both parts of the amendment in subsection (d) of §1B1.10, the Commission should provide further guidance or limitations regarding the circumstances in which the sentence may be reduced. Specifically, as it did with Amendment 782, the Commission should provide a special instruction at USSG §1B1.10(e). Such an instruction should note the court shall not order a reduced term of imprisonment based on the amendment unless the effective date of the court's order is on or after a specified date that will provide ample time to assess eligibility and engage in pre-release preparations. Such will provide the greatest opportunity for a successful transition from Bureau of Prisons custody to community supervision. Additionally, a delayed effective date will avoid overwhelming probation offices with immediate releases without a preparation period.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PROBATION OFFICE

Joshua Sparks
Chief
U.S. Probation Officer

Elisa Martinez
Sr. Deputy Chief
U.S. Probation Officer

Jovanna Calderon
Deputy Chief
U.S. Probation Officer

Kyle Crayton
Deputy Chief
U.S. Probation Officer

Michael Dorra
Deputy Chief
U.S. Probation Officer

New York, NY
June 23, 2023

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002

Comments re: Retroactivity of Criminal History Amendments

Thank you for the opportunity to submit comments regarding the proposed retroactivity of the pending status points and zero-point offender amendments to the guidelines.

Status Points (Part A)

When the Commission removed the recency points subsection in USSG §4A1.1, it did not make that amendment retroactive, and I encourage the USSC to follow the same course of action with this amendment. Like recency points, the research into status points indicated that their application added little to the predictive ability of a defendant's criminal history score, and the USSC should be consistent in its treatment of these criminal history amendments.

Moreover, prior retroactive amendments have been revisions to the guidelines that affect the offense level, not the Criminal History Category. This is important because making Criminal History Category amendments retroactive presents a different set of issues, as the category has a more far-reaching effect after initial sentencing and it appears that the Impact Analysis did not consider cases involving violations of probation or supervised release.

When a defendant violates probation or supervised release, the guideline range of imprisonment they face is based on the grade of revocation and the criminal history category at the time of original sentencing. USSG §7B1.4. Thus, if a change to the way criminal history points are calculated is made retroactive, this will affect not only initial sentencings, but also sentencings for violations of probation and supervised release; this would require an examination of not just the original sentences identified by the USSC, but also the violation sentences of imprisonment imposed by courts around the country, as those respective guideline imprisonment ranges for violations would have to be recalculated.

Although USSG §1B1.10(b)(2)(C) states that a reduced term of imprisonment (based upon the retroactivity of a guideline amendment) may not be less that the term of imprisonment a defendant has already served, given the ranges found in USSG §7B1.4, there could be a multitude of individuals on supervision who will have served more time than the amended

New York City Office:
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007
212-805-0040
212-805-0047 - Fax

White Plains Office:
United States Courthouse
300 Quarropas Street
White Plains, NY 10601-1901
914.390.4040
914.390.4055 - Fax

guideline imprisonment range or amended violation guideline imprisonment range would have called for.

Defendants who are already released from their original sentence but face a violation of supervision can argue that they had served more time on their original sentence than warranted, given the retroactive amendments, and that this additional time should be considered by the court in imposing a violation sentence. Not covered by USSG §1B1.10, as the defendant would have been released from custody, this line of argument would be a variance from the revocation range and courts would be involved in conducting a recalculation of a previously completed sentence. A similar argument applies to cases with multiple revocation sentences. This may impact courts' sentencing decisions in subsequent violation proceedings and lead to a never-ending calculus regarding amended imprisonment ranges, custodial time served, and custodial time to be imposed in the future.

Zero-Point Offenders(Part B)

I also encourage the USSC to not make the zero-point offender section retroactive. Initially, this amendment introduces a brand new section into the sentencing guidelines manual, as opposed to revising an already existing one. Moreover, the new section, USSG §4C1.1, contains a detailed list of factors that must be considered in every case to determine if it applies. As opposed to prior retroactive amendments, such as the amendments to the drug quantity table in the past, the analysis of whether a defendant meets the criteria involved in the new guideline is not a simple process. There are 10 different criteria that must be met for a defendant to qualify for the offense level reduction under the new USSG §4C1.1, and this will involve not only a thorough re-examination of the details of every case to determine if a defendant is eligible for a reduced sentence, but will also likely involve litigation by the parties as to whether a defendant meets, or does not meet, the new criteria. This can lead to extensive filings and hearings which will consume the courts' and probation officers' time.

For the reasons above, I urge the USSC to not make the criminal history amendments retroactive. Thank you for your time and consideration.

Sincerely,

Michael Dorra
Assistant Deputy Chief U.S. Probation Officer
U.S. Probation Office
Southern District of New York

UNIVERSITY OF MINNESOTA

Twin Cities Campus

The Law School Clinics
Walter F. Mondale Hall

Room 95-H
229–19th Avenue South
Minneapolis, MN 55455

612-339-5160
Fax: 612-625-2011
murrayj@umn.edu

June 23, 2023

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

Re: University of Minnesota Law School Clemency Project Comment on the Retroactivity of Parts A and B of the Criminal History Amendment

Dear Judge Reeves:

The University of Minnesota Law School Clemency Project is pleased to support the retroactivity of Parts A (status points) and B (zero criminal history points) of the criminal history amendment and appreciates the opportunity to submit these comments.

Over the past nine years, our Project has filed over 80 clemency petitions at the state and federal level on behalf of incarcerated individuals serving long sentences and has obtained representation for and/or consulted with hundreds of additional similarly-situated individuals. As such, we are familiar with the lives, hopes and everyday stresses of our nation's long-term prisoners and their families. We participate in this comment process to transmit the perspectives of our Project's clients and to set forth why these perspectives, likely emblematic of the views of many more incarcerated individuals, are relevant to the Commission's decision-making process on retroactivity.

Part A of the criminal history amendment reduces the number of points added to a person's criminal history score if they committed the instant offense while subject to another criminal justice sentence ("status" points), thus potentially lowering their criminal history category and their applicable sentencing guideline range.[1] The Commission has estimated that if Part A was made retroactive, the average sentence

[1] *See* USSC, *Official Text Version of 2023 Amendments (Effective November 1, 2023)* 49–53 (Apr. 27 2023) at 44, 50, https://tinyurl.com/2p978wrt ("2023 Amendments").

reduction would be 14 months.[2] Part B of the criminal history amendment creates a new guideline, §4C1.1, which provides a two-level offense level decrease for certain people with zero criminal history points, thus lowering their adjusted offense level and their applicable sentencing guideline range.[3] The Commission estimates that making Part B retroactive will result in an average sentence reduction of 15 months.[4]

The Guidelines set forth the factors to be considered in making an amendment retroactive, including its purpose, magnitude and feasibility of implementation.[5] Ultimately, the designation of an amendment as one with retroactive effect "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing."[6] Several organizations have submitted comments to the Commission addressing the relevant factors, including the National Association of Criminal Defense Lawyers and the Federal Defenders, and we join in those analyses. In this letter, we address how retroactivity advances the purposes of sentencing, in particular the goal of promoting respect for the law.[7]

We contacted our clients – all serving lengthy sentences for non-violent drug offenses – and asked them if they would like to submit a response to the following question (without attribution): what would a modest reduction in your sentence (one to two years) mean to you? The responses we received reveal how significant even a relatively small reduction would mean to them – hastening their reunion with their families, providing them with one or two more years of family memories, and restoring to them a sense of dignity and humanity.[8]

Again and again, our clients wrote that even a modest reduction in their sentence would translate into precious quality time with aging or ill parents. For example, Z (serving a sentence of 15 years) writes:

> *My father was diagnosed with brain cancer four months ago. And while the removal of the tumor was a successful surgery, the average life expectancy of patients with his particular diagnosis is three to five years. With a projected release date of 2030, I could get out in 2028 with halfway house and the year off for completing drug treatment, but that just barely puts me within the upper range of his projection.*
>
> *What would an additional year with my father mean to me? I lack the words to explain what comfort a single additional hug would bring to him*

[2] *See* USSC, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment at 9 (2023), https://tinyurl.com/7ckwwz99 ("Criminal History Impact Analysis").
[3] *See* 2023 Amendments at 45–46.
[4] *See* Criminal History Impact Analysis at 17.
[5] *See* USSG §1B1.10 cmt. (backg'd.).
[6] *Id.*
[7] *See* 18 U.S.C. § 3553(a)(2)(A).
[8] The excerpts reprinted in this letter come from currently incarcerated individuals who would not necessarily be eligible for a sentencing reduction if the criminal history amendment were made retroactive. Nonetheless, the reflections on the significance of a one- or two-year sentencing reduction illustrate the significance that long-term prisoners attach to the potential for a modest reduction in their sentences.

or I. After watching me struggle with drug addiction since the age of thirteen, having him see me living a sober and productive life would mean everything to him, as well as myself. To witness the manifestation of all his prayers over the last 20 years, and to see that he no longer has to worry about me, would be a gift beyond words.

I haven't been able to speak to him on the phone for longer than 15 minutes since 2016 due to the time limits on the phone system, and being able to talk at our leisure, not having to dread the beeps that signal our final two minutes, would be incredible. Not feeling that urgency of a timer, allowing us to enjoy the comfort of idle conversation.

Being able to hear more of the stories of his life. Those stories that one can treasure forever. Those stories that dissolve into the ether if left untold.

Similarly, J1 (serving a sentence 188 months) writes:

A one- or two-year reduction would mean so much to me. It would allow me time with my parents, my son, all my family. My parents are both elderly and are struggling with severe health issues. I had a really huge scare [when] my mom was admitted to ICU. . . . Thank God that she came out of it. She is home, however you know the worries that she is still trying to heal and the problems she is having don't just go away. So to have those year/years off would mean so much simply so I can be there and share and make some memories with them before they do pass. Since being incarcerated for so long and losing my brother and all the things I've missed out on.

S1 (serving a sentence of 20 years) writes:

Words cannot truly express how much it would mean to me and my family to receive a sentence reduction. It might give me the chance to care for and spend time with my mom before she passes away, as well as being able to show my children that I am dedicated to my sobriety and to being the mother that they deserve and that they can be proud of. It would mean a chance to watch my grandchildren grow up and be present for their important moments. I can never undo my past mistakes but I can be an example of someone who has learned from them. It would mean the world to me.

A1 (serving a sentence of 23 years) writes:

Any amount of a reduction that could get me closer to seeing my father before he passes, possibly seeing my son graduate high school or even getting to watch my son get married would mean the world to me. 8 years is more than enough time to rehabilitate me.

J2 (serving a sentence of 15 years) writes:

For me a modest reduction in my sentence would mean the opportunity to go home sooner and get the chance to know my grandson who was born since my incarceration and whom is already 5 years of age. It would mean being able to go out sooner and live with my father who just turned 80 years old and be able to help care for him. It would mean that I could become an active member of my community and become a productive citizen. To show that I have been rehabilitated since being incarcerated and what it means to live a clean and sober life. To still be young enough to be able to make a life for myself.

S2 (serving a sentence of 15 years) writes:

For me to get a modest sentence reduction would mean the world to my family as well as myself. With a reduction in my sentence, I could be there for my children's high school graduations. I would not miss out on any more of the kids' school functions along with the social interactions that go along with raising children, especially young boys. I would be able to care for my aging father who suffers from Muscularly Dystrophy. I would be able to take my father on outings to the park or just the simple task of getting him grocery's and cooking a meal. The time I have spent incarcerated has taught me many things. I participated in every class that was available to me so I could better my life on the outside. To wake up in the morning and get my boys off to school then go to work. Come home to see the boys out of school and then go and help my father would mean more to me then anything. I would not take that for granted.

S3 (serving a sentence of 20 years) writes:

I've already been down 8 years and it would mean I could get home to my mom (70 yrs) before she passes and be able to help my kids out of their situations before they end up in prison or dead...I am all they really have left ..... their dad died 3 years ago and we have very little family left alive.... I would be grateful...1 or 2 years off is better than no years off !!!!!!!!

As with many of the above, several of the responses also focused on the opportunity to amass a year or more of family memories and shared milestones, good and bad.

F (serving a life sentence) writes:

A reduction in my sentence would be drastic even if it was only for a year. In 1 year out, there so many things can happen. My family is expanding and I've also had losses, there's a lot of things that I miss being in this

place. I would be able to see my family and start my life again with a chance like this.. . . .I think so often they see us as just a number in here, and that there's no such thing as rehabilitation.. which is absolutely not true. I fully believe that if people take advantage of the opportunities they provide in here, all is possible.

M1 (serving a sentence of 19 years) writes:

It would mean a fresh start with my mother, children, grandbaby and family. It would mean I have the opportunity to be the mature and sober woman I've learned to be and create memories with my family that matter, break the cycle, enjoy my grandson. Let my story show and encourage other women and men who came from where I came from that we matter and you can change you just have to want it and put in all the hard work go through the good and bad to get to the better version of yourself.

J3 (serving a sentence of 188 months) writes:

It would mean everything to me. I would give me time in my son's childhood years, whom I left at 3 weeks old, with my daughter, my family and loved ones and [allow me] to restore my law as a law abiding citizen.

R (serving a sentence of 30 years) writes simply:

Every single day I receive off my sentence puts me one day closer to my family.

For female clients, an extra year or two of freedom could translate into an opportunity to have children. As K1 (serving a sentence of 14 years) writes:

A reduction of one or two years would be huge for me. I'm 40 years old and have never had kids because of the lifestyle I was living. A shorter sentence would give me the chance to have children now that I have my life in order. It also gives me a chance to spend precious time with my family that I have missed on for years. Time is precious and we need a chance to start enjoying life again, even if it's only a year or two earlier.

Several described a modest reduction as something to give them hope. K2 (serving a sentence of 220 months) wrote that it would allow her to get First Step Credits applied, thus speeding up her release date:

If I were to get a modest sentence reduction that would mean I could cash in my FSA credits and go to halfway house NOW. It would mean I could begin to rebuild my life and care for my children. That's HOPE!!!

A2 (serving a sentence of 17 years) writes:

> *It would mean the world, it would bring a little hope to a sentence that makes me feel hopeless. Anything to help keep that hope alive helps me survive. There is nothing I wouldn't do, classes, programming, treatment, correspondence courses, etc. Whatever the stipulation to earn that time is what I would do. It would help me feel like I am not completely just discarded and that there are things I can do to help redeem myself, so that I can prove that I am worthy of another chance.*

For some, a sentence reduction would act as personal validation, restoring a sense of dignity and self worth. T (serving a sentence of 210 months) states:

> *It [a modest sentence reduction] would mean the absolute world to me. To be able to receive a sentence reduction, large or small would be a chance to prove that I am still a woman of integrity, a woman with values, with morals. It would mean that I could walk out of this place and hold my head high and show that I am more than my crime. I could become a productive member of society once again.*

Finally, some of our clients have highlighted the fundamental fairness of granting retroactivity. As L (serving a sentence of 20 years) writes:

> *[E]ven a REDUCTION is better than just being stuck with what I have. A modest reduction shows that they are trying to make changes for the better. Retroactivity, to me, should be a given. It shouldn't be something that everyone has to fight for and take years to achieve if you ever do. What it says is this: the people who are being sentenced now matter more than the people who have been sentenced years before. There is no difference in whether I committed my crime today or ten years ago. It's the same crime and if it's not fair today for one, then it's not fair for people who have already done many years – in a lot of cases, they've already served more time than a person sentenced today would get in total and they have many more years to go. To top it off, they have to fight for the right to be held to the same standard. A year or two is a year or two closer to home with my family, my friends, my life. I've realized that I have to plan for the future because I won't be young forever. With a year or two off my sentence, I could be that much closer to beginning my career and planning for my life, my NORMAL life.*

M2 (serving a sentence of 25 years) writes:

> *It would mean my hopes of coming home to assume my dreams and purpose would be expedited and my faith in the judicial system would definitely improve drastically. My stress level would be reduced knowing I would be that much closer to the dinner table with my family. I'm*

already realizing the importance "present living," that is, staying in the now – not being shackled to the past, or projecting myself too far into the future. Just appropriating the present. I've learned everyday has redemptive value. The temptation to be discouraged would definitely turn to encouragement. I've never ceased to believe that the judicial system would eventually, ultimately, adjust sentences to be commensurate, equal to the offence. Giving men and women another opportunity to assume their place in society.

***

As the above quotations demonstrate, the sentencing reductions possible by making Parts A and B of the criminal history amendment retroactive – even if relatively short and not resulting in release from custody – would be extremely impactful to eligible individuals. The latter will view an opportunity to seek the guideline range that similarly-situated defendants automatically receive today as validating, humane and fair. Needless to say, so too will their family members and loved ones, who in many ways serve these sentences with them.

Conversely, there is a substantial risk that *not* making the amendment retroactive will be viewed as unfair and inhumane. As L stated above, "if it's not fair today for one, then it's not fair for people who have already done many years."

There is a robust social science literature linking respect for – and obedience to – the law with perceptions of the law's fairness. As Tom Tyler has demonstrated in several experimental studies, people are far more willing to accept adverse legal outcomes if they perceive the legal system as treating them fairly and respectfully.[9] Put simply, procedural justice in all its forms, including treating likes alike and respecting the dignity of all petitioners, promotes the law's legitimacy. As Tyler explains, "[people] depend heavily upon their inferences about the intentions of the authority. If the authorities are viewed as having acted out of a sincere and benevolent concern for those involved, people infer that the authorities' actions were fair."[10]

And if people believe that they have been treated fairly in the criminal process, they are far more likely to be law-abiding in the future. As one scholar summarized: "The lesson is that society as a whole benefits in terms of law-abidingness (and presumably lower recidivism rates) from procedures that are oriented around fairness to the defendant – procedures that, among other things, respect the defendant's dignity, ensure equal treatment and maintain the appearance of fairness."[11]

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[9] Tom R. Tyler, *What is Procedural Justice? Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 L. & Soc Rev. 103 (1998); Tom R. Tyler & Yuen J. Huo, TRUST IN THE LAW, 101 (Russell Sage Foundation 2002); Tom R. Tyler, WHY PEOPLE OBEY THE LAW (1990).

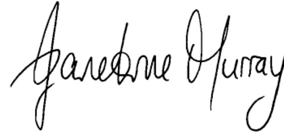
[10] Tom R. Tyler, *Enhancing Police Legitimacy*, 593 Annals Am. Acad. Pol. & Soc. Sci. 84, 95 (2004).

[11] Margaret L. Paris, *Why It Matters*, 45 St. Louis U. L.J. 495, 503 (2001); *see also* Adam Lamparello, *Social Psychology, Legitimacy, and the Ethical Foundations of Judgment: Importing the Procedural Justice Model to Federal Sentencing Jurisprudence*, 38 Colum. Hum. Rts. L. Rev. 115, 121-22 (2006) ("[O]ur system of criminal sentencing should be keenly aware of and responsive to [the importance of procedural justice] when striving to create a sentencing structure that engenders valuations of legitimacy,

Making Parts A and B of the criminal history amendment retroactive is fundamentally fair. As L and M note above, it is dismaying and demoralizing for incarcerated individuals to see similarly-situated prisoners get shorter sentences simply because of the luck of timing. To promote respect for the law, we urge the Commission to make Parts A and B of the criminal history amendment retroactive.

Thank you again for the opportunity to submit this comment.

Respectfully submitted,



Prof. JaneAnne Murray
Associate Clinical Professor of Law

credibility, and fairness. More specifically, the empirical evidence overwhelmingly suggests that fair procedures, rather than outcomes, should be the foundation upon which our system of sentencing originates and evolves”).

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

David Ashkenaze

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I am writing in support of Parts A and B of the criminal history amendment, relating to "status points" and certain "zero point" offenders. I am in favor of including parts A and B in the subsection (d) of paragraph 1B1.10(b)-reduction in terms of imprisonment as a result of amended guideline range, which may be applied retroactively to previously sentenced defendants. I am also in favor of the Commission providing further guidance or limitations regarding the circumstances in which, and the amount by which, sentences may be reduced. I have a young friend who was sentenced unfairly for a white collar crime to 7 years in prison. This young lady provided for her elderly mother after losing her professional healthcare license, creating a productive small business run out of her home, and agreeing to pay restitution for her offense. She and society would have been better served with a sentence that included probation, so that she could continue to provide community services as well as support her family.

Thank you for considering my comments.

David M. Ashkenaze, M.D., F.A.A.O.S.
Diplomate, American Board of Orthopaedic Surgery
Fellow, American Academy of Orthopaedic Surgeons

Submitted on: June 10, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Brian Aus, CJA Panel Attorney

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

It is my position as a CJA Panel Attorney that Due Process should afford retroactive USSG changes to defendants' current sentences. It would make no sense that a defendant who was sentenced prior to the effective date of a specific amendment to the USSG should be denied any benefit simply because of when the sentence was rendered.

Submitted on: June 5, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Donald Bailey, Don Bailey, Attorney at Lw

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Both the status provision and the zero criminal history provision should be retroactive. Criminology data shows that persons with no criminal history are less likely to recidivate and the Commission should be cognizant of the factors that lead to recidivism and use rewards and punishment to lessen repeat offenders. The status provision alleviates double counting of previous convictions. Yes, someone on parole or probation should not be re-offending but there is no justification for counting the same offense against someone multiple times. I have represented criminal defendants in federal court of most of 30 years and it is a positive development to balance sentencing.

Submitted on: April 20, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Barnes Maria, Attorney

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive.

Submitted on: June 23, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Valena Beety, Office of Valena Beety

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Henry Beun, Anabaptist

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Please give consideration to section 4C.1(a)(5) in regard to removing it completely. With regard to strong research conclusions that first time sex offenders, those with no previous criminal history, have a significantly lower recidivism rates.

Additionally, in comparision to other criminal offenses it is apparent that sex offenders are sentenced much more severally.

Thank you for consideration of this adjustment for
zero-point" offenders.

Submitted on: June 13, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Carolyn Blue, Church

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

There has been a change to retroactively reduce sentences for inmates with little or no criminal history, and/or those with ridiculously huge sentences for nonviolent offenses...(like my brother, James Thomas Webb-27 years for one nonviolent offense).

Submitted on: June 15, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

John Brocard, Private attorney

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Please make the adopted amendment for Parts A and B retroactive.

Submitted on: May 23, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Michael Cohen, JHM

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Making sentencing guidelines retroactive has several potential benefits.
Firstly, retroactive application allows for fairness and equity in sentencing. Sentencing guidelines evolve over time as society's understanding of justice, rehabilitation, and proportionality improves. By making new guidelines retroactive, it ensures that individuals who were previously sentenced under outdated or harsher guidelines have an opportunity to benefit from more lenient or rehabilitative approaches. This promotes consistency and avoids situations where similar offenders receive significantly different sentences solely based on the timing of their convictions.

Secondly, retroactive application acknowledges the potential for rehabilitation and positive change. Over time, evidence-based practices and research may reveal that certain penalties or sentencing practices were overly punitive or ineffective in achieving their intended goals. By allowing retroactivity, individuals who have demonstrated significant personal growth and rehabilitation while serving their sentences can be given a chance for resentencing. This promotes the notion of second chances and recognizes that people can change over time.

Moreover, retroactivity can contribute to reducing prison overcrowding and alleviating the burden on the criminal justice system. By reassessing sentences and potentially reducing them, it allows for a more efficient allocation of resources and focuses efforts on individuals who pose a higher risk to public safety. This approach can help address the issue of mass incarceration and allow the system to better prioritize rehabilitation and community reintegration.

Submitted on: June 6, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Sandra Collins, Counselor

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Sentencing Commission members:

I am very much in favor of the proposed amendments that will reduce sentencing enhancements. Retroactive status will assist prisoners who would not otherwise benefit.

Sincerely,
Sandra Collins, Esq.

Submitted on: May 24, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Susan Conforti, Jewish

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make both these amendments retroactive.

It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated.

The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Thank you for your consideration May you and your family and friends enjoy health, happiness, and prosperity.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Joseph Cragian, Saint Louis Police Department

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Augustine David, Augie David International Ministries

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Please make this retroactive for my friend Scott Farah Thanks Augustine David

Submitted on: June 16, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Sakinah Davis, W.E.B. Development Cooperative Corporation

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I, Sakinah Davis, support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Kimberly Decker, paralegal

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

It is of the highest importance that any and all potential sentence reduction amendments be applied retroactively. This would ensure equality and provide fairness amongst inmates and offenders across the board. The United States incarcerates more people than any country in the world. Prisons in America are overcrowded and under staffed. Many low level non-violent offenders are the subject of this issue. Currently, Courts have allowed prosecutors to label offenders and over-reach their crimes leading them to be incarcerated for far longer than they should by labeling many as "Dangerous" peoples. Not only should all amendments that provide further relief to offender be retroactive. But we also need to look into the definition of "Dangerous Persons" and how that very label carries longer undue sentences for those that have never been found guilty of a true hands on violent crime.

Submitted on: April 28, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Kenneth Fechner, Christian

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here. Upon listing of both parts of the amendment in subsection (d) of §1B1.10 to be applied retroactively, the Commission should not limit the amount by which sentences may be reduced, allowing the courts to apply the new guidelines accordingly, including allowing the courts to sentence by the same percentage of reduction from the new guideline ranges, if done so previously.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Pastor Ken Fechner

Submitted on: May 29, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Diane Fischer, Attorney

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here. In the same vein as those prior amendments, it would be fundamentally unfair to those currently serving inflated sentences not to apply these amendments retroactively.

Submitted on: June 16, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Antonio Grace, Clergy

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Please make this a Retroactive A & B.

(I am not a Robot)

Submitted on: June 15, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

George Hall, Harris-Stowe State University

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Submitted on: June 9, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Allen Hardy, Church Of God In Christ

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Non violent inmates should qualify for this program .

Submitted on: June 15, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Arthur Immerman, Aleph Institute

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Jeffrey Ingram, Catholic Church

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 21, 2023

Arnall Golden Gregory LLP

Washington D.C. Office
2100 Pennsylvania Avenue, N.W., Suite 350S
Washington, D.C. 20037
Direct phone: 202.677.4056
Facsimile: 202.677.4057
E-mail: jeffrey.jacobovitz@agg.com

June 20, 2023

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Issue for Comment on Retroactivity

Dear Chairman Reeves and Respected Members of the United States Sentencing Commission:

I write in response to the United States Sentencing Commission's (the "Commission") request for comment on whether Part B, Subpart 1 of the 2023 Criminal History Amendment (regarding zero-point offenders), should be included in the Guidelines Manual as an amendment that may be applied retroactively to previously sentenced defendants. Specifically, I write to express my support of retroactively applying Part B, Subpart 1, which provides a two-level downward adjustment for zero-point offenders.

By way of introduction, I am an experienced white collar criminal defense lawyer. My expansive criminal defense practice has allowed me to defend white-collar prosecutions involving, inter alia, antitrust, money laundering, fraud, perjury, forfeiture, and tax evasion charges. In short, much of my career involves the study and implementation of sentencing policy, and I greatly commend the Commission for taking steps to better reflect the importance of providing a fair and equitable sentencing process for first time offenders.

Indeed, if applied retroactively, the criminal history amendment applicable to zero-point offenders would positively affect those inmates with the least criminal history, and whose sentences were unfairly inflated. The Commission estimates that 12,574 zero-point offenders meet the criteria in Part B, Subpart 1 of the 2023 Criminal History Amendment. Slightly more than half (57.8%, n = 7,272) of those offenders would be eligible to seek a modification of sentence under 18 U.S.C. § 3582(c)(2) and receive a reduction of their sentence up to 15 months. The magnitude of these changes is significant, but not unmanageable.

Our justice system is more than capable of managing retroactive sentence reductions as demonstrated by the retroactive application of the 2007 Crack Cocaine Amendment, 2011 Fair Sentencing Act Guideline Amendment, First Step Act of 2018, and 2014 Drug Guidelines Amendment, often referred to as "Drugs Minus Two." In fact, according to data from the Commission, offenders who were released early through retroactive application of the previously mentioned guideline amendments did not have higher recidivism rates than offenders who served their full sentences.[1]

Retroactive application of the proposed 2023 sentencing guidelines for zero-point offenders represents a significant step forward in making the criminal justice system more just and equitable, and would take an active approach at correcting unfair harsh sentences for defendants with no criminal history points. Indeed, zero-point offenders should be distinguished from career offenders relative to their sentencing, particularly for their low-level and nonviolent offenses. For these reasons, I strongly support the principles and goals emphasized by retroactive application of the sentencing amendments to zero-point offenders and look forward to the positive impact the Commission has sought to achieve.

Thank you for the opportunity to present my views.

Sincerely,

ARNALL GOLDEN GREGORY LLP

/s/ *Jeffrey S. Jacobovitz*

[1] U.S. Sentencing Comm'n, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* (July 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf; U.S. Sentencing Comm'n, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (Mar. 18, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf; U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf; *see generally* U.S. Dep't of Justice Office of the Attorney General, *First Step Act Annual Report, Part IV. The Rates of Recidivism Among Individuals Who Have Been Released from Federal Prisons* (April 2023), https://www.ojp.gov/first-step-act-annual-report-april-2023.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Richard Keller, Baptist

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here. Upon listing of both parts of the amendment in subsection (d) of §1B1.10 to be applied retroactively, the Commission should not limit the amount by which sentences may be reduced, allowing the courts to apply the new guidelines accordingly, including allowing the courts to sentence by the same percentage of reduction from the new guideline ranges, if done so previously.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Submitted on: May 30, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Christopher Kozak, CJA-Appointed Counsel

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

As a compliment to my civil practice, I accept about one CJA appellate appointment per year.

I do not see a significant net benefit in making Part A retroactive. On one hand, it will benefit some parties, and the recalculation is not that difficult. But on the other hand, I do not see many district courts changing their minds about the sentence, even if the recalculation would allow it. The court may well believe the defendant needs the added deterrence anyway, since they disregarded the terms of the underlying criminal justice sentence. Retroactivity seems likely to lead to a lot of fruitless efforts by FPDs/CJAs whose time is sorely needed elsewhere. Even though this is a good adjustment, it seems like a matter of fine-tuning that should simply apply going forward.

However, Part B's adjustment for zero-point offenders should, without question, be made fully retroactive--or at least partially retroactive to the date of the Commission's last quorum in 2018. Nearly all two-level OL reductions have a serious impact on the guidelines range. The criteria are straightforward and easy for lawyers to evaluate. And if it applies, the likelihood of a reduction is comparatively high. For obvious reasons, most courts are inclined toward leniency with true first-time offenders (as opposed to those whose offenses are not counted for some technical reason). Pursuing these reductions would be worth the time/money investment required from attorneys and clients' families.

It also has the additional effect of increasing confidence in the criminal-justice system. A person's first encounter with the criminal-justice machinery is usually the most painful for their family and children. In general, the less time they spend out of that community, the less likely they are to reoffend. The amendment recognizes this, and making it retroactive will be met with gratitude and goodwill from people who understand that their mom or dad made a mistake, but just need them to come home.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Tamara Kurfiss, Registered nurse

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Christine Lamonica, CSUN

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Erik Larsen, Presbyterian

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

While I'm guessing taking this step even toward 'well-behaved' offenders is politically sensitive, I agree that supplying a retroactive adjustment for certain 'zero-point' offenders makes sense now. Thank you for considering this step.

Submitted on: June 15, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Bishop Joseph Mcneal, Christian

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Sentencing reform is long over due!!!

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Suzanne Miles, uTA

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Support making these changes retroactive.

Submitted on: June 7, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Miguel Miranda, PGBC

Topics:

Retroactivity of Part A - "Status Points"

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 21, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Sean More, Not For Profit Inmate Outreach

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Sir/ Ma'am - For these past 5 years I have been reaching out to inmates in facilities throughout The United States and teaching life skills via correspondence and phone calls. I have worked with more than 100 inmates. Many of my inmates have disabilities such as wheelchair bound and bipolar. 2 of my inmates are in prison serving more than 10 years for a sex crime in which there was a 5 year age difference at 16 years and older. These 2 inmates are first time offenders and have been changing their lives through behavioral programs, therapy and medications. Both the Status Points and Zero-Point adjustments would most likely get these men home to their families. In addition, these men could continue their behavioral changes outside of the prisons via mental health clinics or mental hospital to ensure continued growth and change. One of my inmates who suffers from Schizo-Affective Disorder, Bipolar and drug addiction has been put in a wheelchair and cannot walk anymore. He is in one of the most violent facilities in California. He has completed every behavioral class and drug addiction course. He has also completed several vocational job training courses. Recidivism happens to 96% of inmates. Many of these inmates just lack the I.Q. and schooling to make a better life once they get out of prison. These adjustments that you are looking into would help many men and women in the prison system. Thank you for your time! - Respectfully - Sean More.

Submitted on: April 27, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Michael Morisi, Family Foundation

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

John Muhammad, Community Temple

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear distinguished commission members;

I urge you to psupport retroactivity. Making this amendment retroactive will allow for more appropriate sentencing for those who are already convicted, and will provide direct relief for incarcerated individuals and even more importantly, their families that areimpac5ed by their incarceration. It must be acknowledged that doing this will also be a huge benefit to taxpayers by saving taxpayer money, time, and resources while achieving better assessed results. By giving low risk or first time offenders evere sentencing, they are more likely to fall into recidivism. I humbly and optimistically implore you to also support §4A1.1 (Criminal History Category) retroactivity. I ask you to please promote alternatives to incarceration such as: probation, monetary penalties, community service, partial confinement, and home confinement. Thank you for your consideration.

Submitted on: May 23, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Roger Munchian, Prison Ministry, Second Chance Advocacy

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here. Upon listing of both parts of the amendment in subsection (d) of §1B1.10 to be applied retroactively, the Commission should not limit the amount by which sentences may be reduced, allowing the courts to apply the new guidelines accordingly, including allowing the courts to sentence by the same percentage of reduction from the new guideline ranges, if done so previously.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Sincerely,
Roger Munchian
CEO & Founder
Rescued Not Arrested

Submitted on: May 30, 2023

Joseph Parampathu
Fellow, Center for a Stateless Society
25 Golden Star
Irvine, CA 92604

June 12, 2023

United States Sentencing Commission
One Columbus Circle, NE
Unit 2-500, South Lobby
Washington, DC 20002-8002
public_comment@ussc.gov

Subject: Comment on Document Number 2023-09332, Federal Register Pages 28254-28282, published 05/03/2023, titled Sentencing Guidelines for United States Courts

Dear Commission,

Please consider the following comments regarding your submission to Congress of amendments to the sentencing guidelines effective November 1, 2023 as published in the Federal Register on May 3, 2023. These comments are submitted on my own behalf. I am a researcher and Fellow at the Center for a Stateless Society and also serve as a member of the Taxpayer Advocacy Panel to the Internal Revenue Service.

Under Executive Order 12866 (EO 12866), Executive branch agencies must assess all costs and benefits of proposed rules and feasible alternatives. (Reference 1)

The Department of Justice's 2019 memorandum titled "Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies", states that status as an independent agency does not "preclude the full application of EO 12866." (Reference 2)

Your submission for amendments considers retroactively applying changes to Parts A and B of Amendment 8, relating to "status points" and certain offenders with zero criminal history points to previously sentenced defendants. The Commission must consider the costs and benefits of this proposal, in accordance with EO 12866.

The Commission should retroactively apply these changes because reducing these incarcerated populations is the only economically feasible solution consistent with the changes to Parts A and B of Amendment 8 already made. Denying retroactive relief to previously sentenced defendants economically burdens taxpayers without statutory or administrative basis, in light of Amendment 8.

Failing to apply the changes to Parts A and B retroactively would be more costly because it would require the continued incarceration of those affected previously sentenced defendants.

The defendants likely to be affected by a retroactive application would be those meeting the categories for "extraordinary and compelling reasons" due to medical circumstances, family circumstances, victim of abuse (if the defendant was victimized), and unusually long sentence. These categories of defendants are more likely to be costly to incarcerate and less likely to be able to offset the costs of their incarceration through functions such as prison labor, maintenance, or production tasks. Thus, the continued incarceration of these defendants is likely to represent a larger proportion of prison costs and a lower proportion of financial benefits to the federal government.

Keeping people who meet these criteria imprisoned runs counter to the statutory duty of the Bureau of Prisons to "provide suitable quarters and provide for safekeeping, care, and subsistence of all" prisoners and to "provide for [their] protection, instruction, and discipline." (18 USC § 4042 (a)(2)-(3))

It is not possible for the BOP to stay within budget while incarcerating individuals who fail to offset prisons costs through prison labor, maintenance, or production tasks. (Attachment 3) The defendants who would be eligible for release under retroactive application of the rule change are likely to be less able to perform work within prisons which would offset the costs of their imprisonment because of their medical status, old age, or victim status (which often is accompanied by heightened security which precludes participation in prison labor schemes). (Reference 3, at page 40)

Reducing inmate populations reduces prison costs. When these costs are reduced to such a level as to allow reductions in prison personnel or closing of facilities, potential savings can be even higher. A 2014 GAO study on prison costs suggested both additional use of "compassionate release" and reduced sentences as potential cost savers for BOP. (Reference 4)

BOP's health care costs have ballooned along with aging populations. (Reference 5) Applying the rule change retroactively would control these health care costs by reducing populations of aging prisoners.

If the agency neglects to apply the rule change retroactively, it must show how continuing to incarcerate those individuals is economically preferable under a cost-benefit analysis to the alternative of retroactive release.

References:

(1) Executive Order No. 12,866 (1993)
(2) Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies. Page 30. https://www.justice.gov/olc/file/1349716/download

(3) Parampathu, J. (2022) *Prison Labor: Capitalism without Markets, Understanding the Economics of Totalitarian Institutions*. Center for a Stateless Society. https://c4ss.org/content/56388
(4) Government Accountability Office. (2014). Bureau of Prisons: Information on Efforts and Potential Options to Save Costs. (GAO Publication No. 14-821). Washington, D.C.: U.S. Government Printing Office.
(5) Government Accountability Office. (2000). Federal Prisons: Containing Health Care Costs for an Increasing Inmate Population. (GAO Publication T-GGD-00-112). Washington, D.C.: U.S. Government Printing Office.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Jayson Peppas, Mountainburg Public Schools

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Please do not reduce sentences for sex offenders.

Submitted on: April 20, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Nora Privitera, Retired

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Suzanne Ramos, Church

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I am against reducing points for 1st time offenders or for reciprocity. It's been my experience that if first time offenders are not made to accept the consequences of their actions they tend to reoffend, and unfortunately their victims very often don't get a second chance

Submitted on: May 2, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Rawlings T, Church

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Kristin Reed, Virginia Commonwealth University

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Bonnie River, Gradalis Consulting and Educational Services

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I am writing on behalf of Ruby Montoya, a colleague and teacher within the Waldorf School Movement for over 10 years. Ruby is a talented and loving teacher, an organized and careful colleague in leadership teams and a gifted artist and poet. She is incarcerated for her activities at Standing Rock in attempting to protect her homeland of her tribe. She was acting under the guidance of a more experienced elder. Ruby has never been a person to disobey any laws, rules or regulations in any of the organizations and teams in which she has served. While, the purpose of her tribe's organization was noble, and Ruby deeply believed in it. The actions required her to go against her normal nature and she regretted doing so. When working with Ruby, I am aware of her willingness to work within a group for the purpose of serving children and their education. She is very thoughtful and loving in her nature. Ruby is a first offender, she has never been brought before the law before and she does not deserve such a long sentence that keeps her from giving her great gifts of teaching and leading from the children in her school. She would be hired immediately upon release, would work gainfully and give her great gifts to society. Please pass this Part A and Part B and bring Ruby back to us. Thank you for this consideration and I remain available and would guarantee Ruby's employment in my organization.

Submitted on: June 5, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Thomas Ruby, Asst General Counsel

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Equal Justice for All. If Part B is a just and equitable standard for current offenders, the same is true for past offenders. Justice should not depend on the date of the offense. Please apply Part B retroactively. Thank you for your consideration.

Submitted on: June 19, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Zamle Samo, The art institute

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I lend my support to the Commission's modifications regarding status points and zero-point defendants. I urge you to apply these amendments retroactively, ensuring that individuals who would now fall under a lower guideline range have the opportunity to present their case to the court and benefit from these significant changes. The Commission's intention was to reduce sentences for those with minimal criminal history and those who were unfairly burdened by an inflated criminal history. Approximately 18,775 individuals would be eligible for retroactivity, with an estimated 3,288 individuals immediately qualifying for release pending court approval. The justice system has demonstrated its ability to handle retroactive decisions in the past, as evidenced by the successful resolution of over 50,000 motions during crack minus two and drugs minus two cases, thanks to the collaboration of the courts, parties, and U.S. Probation. Courts and attorneys are well-equipped to effectively manage these types of motions once again in this situation.

Submitted on: June 21, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Kevin Scott, AME

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I would like these amendments to be made retroactive

Submitted on: April 26, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Clarence Smith, Frederick Douglass Academy

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I request that this change be made retroactively.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Tammy Smith, Non-denominational

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants
and urge you to please make these amendments retroactive. It is important that people who
would
receive a lower guideline range today have the opportunity to make their case to the court and
benefit from the Commission's important amendments. In making these guideline changes, the
Commission intended to lower sentences for people with the least criminal history, and for
people whose criminal history was unfairly inflated such as a family member of mine (my son).
He has spent 15 years because of these unfair inflated sentences. He was unable to bury his son
who was killed. His judge refused to send him for medical help when he contracted COVID 2xs.
The magnitude of these changes is very
significant. In total, around 18,775 people would be eligible for retroactivity and of those, an
estimated 3,288 people would be immediately eligible for release pending court approval. The
justice system has proven it can manage retroactivity as demonstrated by its treatment of
retroactivity decisions from crack minus two through drugs minus two which saw over 50,000
motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and
attorneys know how to handle these types of motions, and are well equipped.
Again I humbly ask to support these changes. Send these men and women back to their awaiting
children and families.
I personally thank you in advance for your support.
Thank you very so much, from a mom whose broken heart can finally heal.
Regards,
Rev. Tammy Smith

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Solomon David, Christian

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Blessings to all these two amendments are the core and the living reality of a lot of defendants who for a mistake in there lives they fall in a web that for some time has lost is purpose and the focus has been on punishment. I congratulate this committee for passing this amendment and beg you to please take it to the end zone by making them retroactive.

Please we need our family back. God is good!

Submitted on: April 11, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Elizabeth Stanley, Court Administrator

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated especially those with conspiracy charges for quantities of drugs that only existed based on hearsay testimony. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Louise Stark, retired Deputy Public Defender

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I was a prosecutor for 2 years, and criminal defense lawyer for her 30. Mandatory minimums for drug offenses decimated lives that could have been helped. I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Dana Vaughan, mental health specialist and justice advocate Jun. 14, 2023

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Roger Vaughn, Orthodox Catholic Church of America

Topics:

1. Bureau of Prisons Practices

Comments:

My nephew has been in prison for several years. He needs to be released so he can be a productive member os society.

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 19, 2023

To Whom it May Concern,

I write to submit a public comment with regard to the Commission's question of whether Parts A and B of the Criminal History Amendment should be available to apply retroactively for previously sentenced defendants with no prior criminal history. My name is Melissa Whatley, Ph.D., and I am an Assistant Professor of International and Global Education at the School for International Training's Graduate Institute. I am a social scientist, and I work primarily in statistical analysis of equity issues. Although I write as an individual, my professional context provides important background for my thinking on this issue. Most notably, I study community colleges, which are institutions that often provide a second chance for individuals who have come into contact with the criminal justice system.

I write in full support for retroactive application of this Amendment with no exclusions based on offense group. My motivation for submitting this comment is twofold. First, I find the United States' exceptionally high incarceration rate to be problematic, which goes hand in hand with the increasingly long sentences that are imposed through our judicial system. Current decarceration efforts in the United States will only be successful to the extent that they are coupled with similar efforts to reduce the length of prison sentences, particularly for first-time offenders. My understanding of current research across a number of offenses is that long prison sentences do very little to deter future criminal activity and that, for many first-time offenders, the mere experience of arrest and incarceration is enough to reduce their chance of recidivism to essentially zero. Longer sentences do very little to reduce this already small chance of recidivism. The opportunity to be resentenced with the potential for a shorter sentence will provide the opportunity for a second chance for many currently incarcerated individuals, who are often eager to invest in education and other opportunities to demonstrate that they have reformed themselves and can become valuable, contributing members to our society.

Second, I am concerned that if such a policy were not available retroactively, this would be in violation of the Due Process Clause of the Fifth Amendment. This clause calls for all currently incarcerated individuals to receive the same treatment under law. In applying Parts A and B of the Criminal History Amendment in the future, but not retroactively, essentially creates two classes of inmates in federal prisons. One group that was sentenced under current, longer sentence guidelines, and another sentenced under the new, shorter sentence guidelines. This amounts to unequal treatment under law. Retroactivity regardless of offense class would address this potential violation of the Due Process Clause.

I am grateful to the Commission for considering this comment and am hopeful for future sentencing reform that both ensures justice for victims of crimes and affords opportunity for reform and rehabilitation for those who commit them.

Sincerely,

Melissa Whatley, Ph.D.
Athens, GA

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Pandora Withers, Loretto

Topics:

Retroactivity of Part A - "Status Points"

Comments:

upport the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 15, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Alberta Wynne, COGIC

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments. In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

Submitted on: June 14, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Arshak Zakarian, Attorney

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

To whom it may concern,

As someone who is directly impacted by outdated, useless sentencing laws and guidelines and who seems the impact it has on families and society, I STRONGLY, support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Spencer Adams

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I strongly believe the Commission should list 4A1.1 in subsection (d) of Section 1B1.10 as an amendment which SHOULD be applied retroactively. As an inmate of the BOP for the last 27 years, I speak with a unique perspective of being an eyewitness to the slow and inexorable decline of the BOP as an institution, which is now constitutionally incapable of operating a humane and safe prison system due to a variety of problems, the most immediate of which are understaffing and overpopulation due to excessively long sentences.

The sentences meted out in federal courts are, on average, far longer than any other western democracy, and longer even than autocratic countries like China and Russia. As you probably know, while the United States has only 5 percent of the world's population, it incarcerates 25 percent of the world's prisoners. One can gather from these numbers that either this country has an inordinate amount of criminals, or something is amiss in its criminal justice system.

Here too, I speak from experience. For a non-aggravated (no gun involved) bank robbery with a note, involving a single teller, in which $1,800 was taken (and recovered the same day by police), I have now been incarcerated over 18 years. Many murderers get less time than I did for stealing $1,800. Much of this excessive sentence can be attributed to "Status Points".

Status points were obviously designed to punish "repeat offenders," who are already harshly punished as it is. Those on the punishing side so often seem to forget that most defendants have already served time for that PRIOR offense. To be asked to come back and serve that time all over again, and be re-punished a SECOND time, begs the question—what did that first sentence accomplish in terms of paying ones debt to society, if in fact we're forced to come back and serve it all over again?

What seems to have been forgotten in the "tough-on-crime" mentality that has seized politicians for the last forty years, is any sense of proportionality when it comes to making the punishment fit the crime. Eliminating "status points" is a modest step in the right direction—a step that brings a modicum of sanity back into the sentencing process. It is therefore only right for the Commission to make this amendment retroactive and bestow the benefits (of elimination of status points) to everyone still burdened with an excessively long sentence. For, if such an amendment is considered to be fair and just for some, then let that fairness and justice benefit ALL. Especially those still inside, whose families outside still suffer every day from the loss of their loved ones.

DIFFICULTY OF RETROACTIVITY - Yes, it is true making these amendments retroactive will mean a good deal of time-consuming red tape. But by refusing to make these amendments retroactive now, the Commission would be ignoring an opportunity to lift a significant portion of the burden now carried by an overworked and understaffed Bureau of Prisons, and would thus be kicking the can down the road to some future point in time. It is obvious that SOMETHING will have to be done to ease the problem of overcrowding/understaffing in the system. If not now, WHEN? Until a measure of reason and fairness in sentencing return, stop-gap measures such as this will have to suffice to keep the system from imploding, or—God forbid—exploding. While the BOP may have the facilities to house its current population (and even THIS is doubtful), it does not have the staff to operate a safe and humane system.

If, in its infinite wisdom, the Sentencing Commission has found that elimination of status points is the RIGHT AND PROPER THING to do moving forward, then, by all means, let the Commission use the powers vested within it to ensure that the RIGHT and PROPER be applied to ALL, by therefore making this amendment retroactive.

Submitted on: April 22, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Mouaz Allababidi

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I hope this letter finds you in good health and high spirits. I am writing to you as a concerned citizen and advocate for criminal justice reform to strongly urge your support for the retroactive application of the recently enacted 2-point drop in sentencing guidelines for inmates.

Our criminal justice system, although striving to administer justice, has often been marred by harsh and outdated sentencing practices that fail to acknowledge the potential for rehabilitation and the pursuit of a second chance. The introduction of the 2-point drop represents a significant step towards rectifying these injustices and aligning our system with principles of fairness and compassion.

However, it is imperative that this change is not limited to only future cases but is extended retroactively to those individuals who have already been impacted by the previous guidelines. Retroactivity serves as a beacon of hope, allowing us to correct past wrongs and address the systemic disparities that have plagued our society for far too long.

Granting retroactive relief to inmates who were sentenced prior to the implementation of the revised guidelines will not only restore a sense of fairness and equity, but also provide an opportunity for redemption and rehabilitation. It recognizes that punitive measures must be tempered with the understanding that people can change and deserve a chance to reintegrate into society.

Moreover, retroactivity acknowledges the evolving understanding of justice and the need to continuously improve our legal system. It demonstrates that we are not bound by the limitations of the past, but rather driven by a commitment to fairness, humanity, and the pursuit of a more just society.

I kindly request your support in championing the cause of retroactivity for the 2-point drop in sentencing guidelines for inmates. By advocating for retroactive relief, you will join the ranks of those striving for meaningful reform and help ensure that the benefits of this progressive change are not limited to future cases, but extended to those who have already borne the weight of excessive sentencing.

Please consider the profound impact retroactivity can have on the lives of inmates who have long awaited a glimmer of hope and a chance for redemption. I trust in your commitment to justice and your dedication to making our criminal justice system a fairer and more compassionate one.

Thank you for your time and attention to this urgent matter. I look forward to your favorable response and the positive changes it will bring.

Yours sincerely

Submitted on: June 12, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Amber Bruey

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I believe the criminal history amendments should all be retroactive to stop discrimination in sentencing. It's unfair for already sentenced inmates to not gain the benefit of the sentencing commission's changes. For fairness it should be retroactive and it only benefits those who were not much of a threat in the first place. Some people are serving long, unfair sentencing based on the guidelines and all should be able to benefit from a change in the guidelines.

Submitted on: April 20, 2023

Charles Burgess [redacted]
FCI Sheridan Satellite Camp
Federal Correctional Inst
PO Box 6000
Sheridan, OR 97378

Esteemed Members of the U.S. Sentencing Commission

The following is written in response to a request for comment on parts A and B of the Criminal History Amendment, relating to "Status Points" and certain "Zero Point Offenders" that was promulgated by the commission, then submitted to Congress on May 1, 2023 to become effective on November 1, 2023.

It is the intention of the signee to state for the record in regard to the issue of "Retroactivity" pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994 (u) Parts A and B; 4A1.1 (Criminal History Category), and 4C1.1 (Adjustment for Certain Zero Point Offenders). That issue should be voted on and included in the above stated ammendment.

Nearly 31% of incarcerated individuals in the B.O.P. have little or no cirminal history. The issues addressed in this amendment including retroactivity are paramount in the discussion of "Recidivision Reduction".

To state it plainly: The longer the term of initial incarceration the more likely the individual is to reoffend.

Evidence suggests the longer a person is removed from society the more difficult it is to reacclimate that person into a healthy social environment. Getting those people out of Prison and active in their communities is essential to their future recovery.

Sincerely,

Charles Burgess

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Tyrese Byron, None

Topics:

Retroactivity of Part A - "Status Points"

Comments:

I think this should become law with removing the status points because it has created longer sentence based on enhancement for a crime that punishment has already been served on and should be made retroactive to grant a departure to people already serving a sentence where the 2 points where added because some was on probation already they were already punished for this crime beforehand and the enhancement in some cases has given more time added than the original probation sentence .yes I agree this should be law and also retroactive to give relief to those incarcerated under this rule currently.thank you

Submitted on: April 16, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Kiana Dancie

Topics:

Retroactivity of Part A - "Status Points"

Comments:

I mentor a group of incarcerated writers incarcerated in the FBOP. These individuals, some being incarcerated as long as (29) twenty-nine years, maintain an incredibly unique air of optimistic perseverence.
The changes made to the sentencing structure of the sentencing guidelines afford these individuals another chance at life, furthering their potential and injecting that much needed potential in our communities. I would like to see these group of men released due to their crimes being non,-violent.

Submitted on: April 24, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Kaylee Diaz, Mom incarcerated

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I would like for y'all to make this retro active so my mother and other inmates can qualify

Submitted on: June 5, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Alice Dolopei

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I do not support retroactivity adjustment for anyone above 1 point

Submitted on: April 13, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Denise Echevarria

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Members of the United States Sentencing Commission,

I am writing to express my strong support for the Criminal History and Compassionate Release Amendments to the Federal Sentencing Guidelines, which are critical steps towards ensuring fairness and compassion in the criminal justice system, especially for young incarcerated adults.

The Criminal History Amendment is a crucial measure to alleviate the impact of non-violent prior offenses on sentencing outcomes, which is particularly important for young adults who have made mistakes earlier in life but have not had the opportunity to fully transform and reintegrate into society. This amendment ensures that individuals are not unfairly penalized for past mistakes, and provides a pathway to successful reintegration and a brighter future.

The Compassionate Release Amendment is also essential, particularly during the ongoing Covid-19 pandemic, as it would enable incarcerated young adults to seek early release if they pose no threat to public safety and their continued incarceration would cause undue suffering. This would help to protect their health and well-being while providing them with the resources and support they need to successfully transition back into their communities and families.

I strongly believe that adopting these amendments would demonstrate a commitment to creating a fair and compassionate criminal justice system for young adults, who face unique challenges and deserve to be given a chance to grow, transform, and contribute to society. I urge the United States Sentencing Commission to support the Criminal History and Compassionate Release Amendments to the Federal Sentencing Guidelines, and to continue pursuing policies that prioritize fairness, compassion, and equity for all.

Thank you for your attention to this important matter.

Sincerely,
Denise Echevarria

Submitted on: May 3, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Marisol Forrester, Parents of Incarcerated Individual

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

April 29, 2023

United States Sentencing Commission Office of Public Affairs
One Columbus Circle, NE Suite 2-500, South Lobby
Washington, DC,
20002

Re: Comments to the Proposed 2023 Amendments to the Federal Sentencing Guidelines; specifically:

7. Criminal History

Dear Members of the United States Sentencing Commission:

I'd like to comment on the recommendations for a reduced sentence through Amendment Proposal #7 Criminal History on behalf of my son, who was sentenced to 20 years as a first time non-violent drug offender.
His rehabilitation began as soon as he left a one month in house rehab, cutting off ties with old friends and acquaintances and thrusting himself completely into restoring relationships with family, working, and going to school. He has approached this first and last sentence with courage and determination to better himself and right his wrongs by looking outside of himself daily.

The proposed change of making the 2-point departure for zero-criminal history offenders would afford him the opportunity to pursue the path that God intended for him much sooner and enable him to apply the technology he went to school for while it is still relevant.

He is making strides everyday and we are continually proud of him and all the accolades we receive from other inmates we've met through visits that have gone out of their way to give US thanks for raising such a caring and kind son. I've had the privilege of serving the facility where he started and getting to know the staff. They miss him and ask about him every time I visit. He has been a motivator and encourager everywhere he's been. His motivation to learn Spanish fluently stemmed from the desire to help those who desperately needed a translator. He landed his second job at MCFP Springfield BOP's dental office because of his translation abilities. He now has an official certification as a dental assistant where he goes to work with outside citizens daily who treat him as one of their own. He is working towards completing his Bachelor's in Business Administration from Adams State University's Prison Correspondence Program. He is also coaching softball. He can be a total workaholic completely isolating himself from everyone to accomplish his goals of writing his book, succeeding in his studies, learning Spanish, reading, working out and listening to music but he forces himself to interact with others because he recognizes the need for community and balance. Others have consistently relied on him for advice, diversion, companionship and help with Spanish since he started his one and only "bid" since 4/16/19. He has also gained skills and credits by learning to sew and taking any and every educational class offered that fits in his schedule as well as reestablished his faith.

Thank you for taking the time to read these comments and doing what is possible to help a positively rehabilitated non-violent first time offender restart his adult life renewed and reformed as soon as possible.

Thank you and God bless,
Marisol and Brice Forrester

Submitted on: April 30, 2023

From: ~^! FORTINO, ~^!MICHAEL
Subject: [External] ***Request to Staff*** FORTINO, MICHAEL, [redacted]
Date: Wednesday, April 19, 2023 9:20:05 AM

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To: Comment
Inmate Work Assignment: Unit Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To the Sentencing Commission:
NO. Do Not Apply Retroactivity To This Amendment. In Fact, Do Not Lift Any Of the 1B1.1 Enhancement! No Violent Offenders Need Be Given 3582(c) Relief! Thank You For Your Consideration.

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Jon P. Frey
3049 Almond Street
Philadelphia, PA 19134

RE: Public Comment on Retroactivity, Part A and B Criminal History Amendment

The following comments are regarding the U.S.S.C.'s proposed retroactivity of Parts A and B of the Criminal History Amendment, relating to "Status Points" and certain "Zero-Point" offenders under 18 U.S.C. 3582(c)(2) and 28 U.S.C. Section 994(o). I request that this be placed as a retroactive amendment that will allow those within BOP confinement to have the same treatment as other pre-trial detainees.

The proposed amendment in subsection (d) of Section 1B1.10, which adds a new Section 4C1.1 (Adjustment for Certain Zero-Point Offenders) is discriminatory and is an inequitable proposal if not made retroactive. I request that the USSC revise the proposed amendment by removing the exclusion of former sex offenders. The U.S. Constitution guarantees equal protection of all citizens under the 14th Amendment. As proposed, the changes to Section 1B1.10 violate the 14th Amendment. Specifically, the proposed amendment to Part B Zero-Point Offenders discriminates against all sex offenders without differentiation of violent, contact offenders from non-violent, zero-contact offenders. The statutory exclusion of all sex offenders from the proposed amendments results in disproportionally higher sentences and provides no relief in cases where mitigation is warranted. This is not an equitable solution and I request that the USSC remove this exclusion from the proposed changes to Part A and Part B of the amendment.

The proposed amendment violates Pepper v. United States, 562 U.S. 476, 131 S Ct 1229, 179 L Ed 2d 196, 2011 US LEXIS 1996,(U.S.S.C.), Koon v. U.S. 518 US 81, 113 (1996); Williams v. New York, 337 US 241, 247(1949); and Sullivan v. Ashe, 302 US 51, 55 (1937)) which affirmed the U.S. judicial tradition of "punishing the offender and not merely the crime." The proposed exclusions do not give district judges the latitude to grant downward changes to a defendant's guidelines based only on a defendant's crime, with no provision for mitigating circumstances and relief that may be warranted for a first time offender and the characteristics of the whole person. This is supported by Congress through 18 U.S.C. 3661.

In 2021, the U.S.S.C. concluded that the guideline structure for Child Sex Abuse Material (CSAM) cases is outdated and disparities among similarly situated non-production CSAM offenders has become pervasive. The U.S.S.C. recommended to Congress that reform was needed to more accurately reflect the lesser culpability of non-production offenses. See: Federal Sentencing of Child Pornography Non-Production Offenses, at *7 (June 2021). With this disparity in mind, the exclusion of the entire class of offenders, without differention of more or less culpable offenders (i.e. production vs. non-production offenses) from the proposed Part A and Part B Amendments files in the face of the reforms recommended by the Commission. This contradiction guarantees that an entire class of offenders with mitigating circumstances who received excessive sentences will be denied fairness and equality.

For the above reasons I ask the U.S.S.C. to make the above amendment retroactive and reconsider the blanket exclusion of entire classes of offenders.

Respectfully submitted,

Jon P. Frey

cc. Senator Robert P. Casey
cc. Senator John Fetterman
cc. Senator Corey Booker
cc. Congressman Brendon Boyle
cc. Women Against The Registry (WAR)
cc. Pennsylvania Association for Rational Sex Offense Laws (PARSOL)
cc. National Legal Aid Defender Association (NLDA)
cc. The Appeal

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Ramiro Gaxiola

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I strongly support the approval of Parts A and B of the Criminal History Amendment for retroactive application. The reasons for my support are as follows:

Fairness and Equity: The retroactive application of the amendment promotes fairness and equity in the sentencing process. By allowing previously sentenced individuals with "status points" and zero criminal history points to benefit from the changes, it ensures that they are not disadvantaged simply because they were sentenced before the amendments came into effect.

Reduction in Disparities: The amendments to the guidelines could lead to a reduction in sentencing disparities, particularly for those with non-violent offenses and minimal criminal history. Retroactive application would further enhance this effect by addressing past disparities as well.

Limited Difficulty in Application: Applying the amendment retroactively should not be unduly burdensome for the courts. It is a relatively straightforward calculation to determine the amended guideline range for those eligible for a reduction in their sentences.

Positive Impact on Incarceration Rates: The retroactive application of the amendments could contribute to a decrease in the prison population, which in turn could alleviate overcrowding and the associated costs for taxpayers.

In conclusion, I believe that Parts A and B of the Criminal History Amendment should be listed in subsection (d) of §1B1.10 for retroactive application, as this would promote fairness, equity, and a reduction in sentencing disparities. I also recommend that the Commission provides further guidance or limitations to ensure that the retroactive application is implemented consistently and effectively.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Richard Geiger

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

To the Sentencing Commission,

I can't believe all the exclusions you have created for being able to get the 2 point reduction for Zero-Point offenders. Very few inmates will benefit for this. I hope you rethink this before submitting it to Congress. It was very disappointing.
Of course all amendments should be retroactive. It the right thing to do.
Sincerely,

Rich Geiger

Submitted on: April 16, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Abbigayle Grace

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I'm commenting about the retroactivity of the Criminal History Amendment. In my opinion, without retroactivity, the amendment becomes ineffective towards genuine improvement in justice system because it will only provide benefit those who have not yet been sentenced, thus condemning the already sentenced to unfairly and unjustly prolonged terms, which are the ones contributing to the necessity of this amendment in the first place. Those previous sentences which would be affected towards sentence term reduction by retroactivity should be the first cases amended by the justice system. These sentences are people's lives, years that could be spent by many of them in spending meaningful time with their families and contributing positively to their communities. To withhold the retroactivity of this amendment would be, to those serving prolonged terms, extremely unjust, and, in my further opinion, overwhelming evidence of the criminal amount of laziness prevailing among the workers in the United States justice system.

Submitted on: April 20, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

David Green, We really must do all we can to get these young men and women out of prison to join society and become productive members of society as soon as possible

Topics:

Retroactivity of Part A - "Status Points"

Comments:

We really need to do all we can to get these young men and women into society working to be productive members of the society as soon as possible allowing these points retroactivity will only shorten their sentences if they are compliant with programming and if they're compliant with programming is our belief that they are ready for release from prison and reunification with their families and society.

Submitted on: April 21, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Steve Gregory

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Criminal history status points should be applied retroactively to those previously sentenced.

The zero criminal history status points should be applied TO ALL first time offenders without excluding certain offenses.

Submitted on: April 19, 2023

Dear Judge Reeves,

We have come to terms with being known as 'the Incarceration nation' with 5% of the world's population and 25% of the world's incarcerated therefore it is imperative that we make considerable changes to for various reasons. It has been clearly demonstrated that prisons are not functioning as designed. We can't keep throwing human beings away in substandard facilities where they are poorly cared for, fed and protected. We care more about illegal immigrants than our own citizens. It is time to correct what we know is not working.

My loved one was excited to do the delayed entry program in high school where he scored very high on a MAPS test and received an award. He went to Marines boot camp where I was certain he would not graduate. I was wrong. According to the drill sergeant he pushed others up the crucible hill. When in Iraq two other Marines broke into his laytop to see if he had child pornography. They informed the gunny sergeant who asked him about it. He said he didn have child pornography and needed help. He was told they would get him help when they got stateside. Back in San Diego he was arrested and spent 357 days in the brig before the court martial. The initial prison time went from 24 months to 36 and finally to 48 months. The JAG (judge) was infuriated that he could not sentence him to 15 years. He gave up earned time to take a 48 month treatment program at the San Diego base which was their new state-of-the-art treatment facility for sexual offenses. The therapist they worked with and liked retired and the replacement, Denise Boychek was mean and not professional. She started sending guys home on probation. He was attending the required classes and finally found a job by looking through the yellow pages and cold calling. He began working for a lawncare company weed eating for ten hours a day. The federal PO was certain he had CP on the computer and ran a report. A group of 20-25 law-enforcement entered our home swat style. My son passed out. Two Marshals caught him. They were SURE there was CP on the computer. They took him, the CPU two magazines they said he should not have had. In the lower right hand of them was a designation from the San Diego brig where he had gotten the magazines. Three months later my cpu was returned with the final report the Virginia Military board was waiting on indicating there was NO child pornography. On the advise of my husband, former law enforcement and our attorney he stayed and finished his last eleven months so the federal PO

couldn't try to get him on anything else. When he got home he finally found love with a lady who didn't care about the "sex offender" stigma. He treated her better than her ex-husband. He found a job working on aircraft. He was military trained to work on helicopters. She had two minor daughters and I informed him she could lose her girls 9 and 11 due to his status.

Several months later her ex-mother-in-law was looking for a house to buy in the same neighborhood. She clicked on the link 'See if a 'sex offender" lives nearby. Everything in his world fell apart. They send a copy of his registry picture to where he worked. At the end of his work day when in the office completing paperwork one of the supervisors said to two employees, "If I put a 9MM to his head which way would I need to point it to keep from making a mess?" One said, "Turn it this way and it wouldn't get on the computers. He completed his work. He reported the incident and the supervisor told the temp agency they didn't need him any longer. The ex and his mother filed an anonymous child abuse report. A social worker had to investigate. She interviewed the two girls and their mom. She closed the case as there was nothing going on. Then the ex-husband filed for a 500-foot protection order. He willingly signed a 2-year agreement when only asked to sign one year in hopes she would not lose her daughters because of him. He had two weeks to move in with me. He said, "I am 31 years old and have to live with my mother!" So, his girlfriend, my other son help move everything to my home.

He found another job working on aircraft and when being interviewed by a reporter here who we met at a registrant family conference that if his fellow employees found out he was a 'sex offender" he would have an 'ACCIDENT'.

So within a short period of time he lost the three things that academics and researchers say are needed to successfully reintegrate; a job, place to live and a POSITIVE support system. He reoffended on-line. The suspicious thing is two-fold; I had participated in a peaceful protest two years earlier in Tallahassee and Ron Book is an influential attorney/lobbyist told the producer he hated our organization, Women Against Registry because we did the protest at the end of his daughter's annual Walk a Mile in My Shoes. Also, three months prior to the re-offense I and two directors were in St. Petersburg, FL where we displayed at a Federal

Sentencing Guidelines Seminar. One lady got visibly angry that we were there and stormed out of the room. The re-offense occurred three months later in the same county of Hillsboro and it appeared to be a sting. The federal public defender said it didn't matter if it was because he participated. He did and it was wrong. Again, he never got the treatment he had requested years earlier.

The FBI had been monitoring my residence as well as his girlfriend's to see if he was breaking the 500 foot agreement. He was not. I was in South Carolina when they came to the door swat style. He panicked and got my gun which I didn't even think about having or that he knew where it was. He didn't threaten anybody but the gun was visible. There was a 12-hour standoff and his words before they shot him with bean bags were , "This is my last chance to die!" and he surrendered.

The feds in our are were not going to charge him with the gun because it was apparent he meant no harm to anybody but himself as he could not deal with it any longer. They were going to charge him for having child pornography on his phone. The Federal Prosecutor's boss made him charge for the gun as well as the CP. He got ten years in Missouri then was transferred to Florida where he was transferred to four different county jails. When I asked the FL public defender why they did that with covid and him having to go in and out of their protocols. She said it was their belief that the Marshals wanted to spread the federal money around. How nice. Their first FL fed prosecutor said he would work with MO on the charges and move him back to MO. He left then another one came in. She said show would only combine the charges and move to MO if he plead to 25 years. She got promoted to the DC office and the third one would hear nothing but he will be brought here and stand trial here. When asked by the judge why she insisted on that she said she didn't know how the judge in Missouri would rule. She also said the victim was there. He got 29 years instead of life that the judge could have given him.

Lastly, the mother of the girl involved was a former assistant attorney for the FL attorney general and the Federal judge was the father of the current attorney general of Florida.

This is what occurred from my point of view.

Vicki Henry

ip upport the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated*. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.*

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Deborah Holladay

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Thank you for your work to continue prison reform in the United States: it is greatly needed. I feel that the social climate today demands this.
Please consider making both Part A and Part B retroactive for the already incarcerated. Studies show that persons with a low recidivism point score are less likely than others to reoffend. Also, the offer of alternate forms of punishment is needed now more than ever due to the anticipated increase of offenders because of abuse of government programs enacted for relief of the pandemic and lack of people entering the prison guard workforce. One example of the latter is Talladega Federal Prison which normally runs with a staff of one-hundred-twenty guards but is down to only eighty at this time and has little hope for relief. The anticipation of guard burnout due to overwork is justified. Please help these prisons get relief by using alternate forms of punishment when warranted.
Thank you for your consideration.

Submitted on: April 26, 2023

From: ~^! JOAQUIN-LOPEZ, ~^!MIGUEL
Subject: [External] ***Request to Staff*** JOAQUIN-LOPEZ, MIGUEL, [redacted]
Date: Monday, May 1, 2023 4:06:21 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To:
Inmate Work Assignment: 2 point reduction

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Q) should the two point reduction apply retoactively?
A) "yes" to bring fairness to the already sentenced and reduce prison population.

Q) who should if apply to?
A) it should be applied to zero and one point offenders, allowing a second chance to the already incarcerated

Q) should 924(c) offenders be considered?
A) "yes" depending on the nature of the offence. however, offenders who recived an enhancement, under U.S.S.G. 2D1(b)(1). constructive possession under 924(c) or if they are not a criminal enterprize (rico). if death does not result of th possession (actual or constructive) and (brandishing). should be considered for this two point reduction

Q) how much time should be awarded?
A) two levels off the final level inmate was sentenced to.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Josefina Juarbe

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Retroactivity for zero point offenders is a crucial issue that demands our attention. Zero point offenders are individuals who have committed non-violent and minor offenses that do not pose any threat to society. These offenders have been unfairly punished by the criminal justice system, which has resulted in disproportionate sentences and lifelong consequences. Retroactivity is the only way to rectify this injustice and provide relief to those who have been affected. It is time for us to recognize the harm caused by our flawed justice system and take action to rectify it. By allowing retroactivity for zero point offenders, we can ensure that justice is served, and those who have been wrongfully punished can finally have a chance to rebuild their lives. It is the right thing to do, and we must act now to make it a reality.

Submitted on: April 19, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

William Karp, Concerned Citizen May. 15, 2023

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

At no point should the sentencing of a convicted felon have his or her sentence be shortened. This will only increase the number of crimes committed, if the person committing the crime knows the judges and courts will be instructed to give lesser sentencing.

Submitted on: May 15, 2023

From: ~^! KNAPP, ~^!K JEFFERY
Subject: [External] ***Request to Staff*** KNAPP, K, [redacted]
Date: Sunday, April 23, 2023 12:35:07 PM

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To: Sentencing Commission
Inmate Work Assignment: Chapel Orderly

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Inmate Message Below

To The Honorable Sentencing Commission:

I am an inmate in the Federal Bureau of Prisons that would be effected by a retroactive application of your proposed guideline changes involving "zero point" offenders. While I have a criminal history incident from 30 years ago, not only does that history not count after 15 years, but I was a juvenile at the time of the commission of the crime (16 years old). 30 years later, I am sentenced in Federal Court and receive no benefit for the lawful and positive life I led in my community for so many years. Surely, if I had led a negative lifestyle, there are plenty of guidelines to punish for such a lifestyle. Why is there nothing to promote law-abiding citizenship?

While I disagree with your proposed amendments limiting the application to so few people by means of disqualifying offenses, the issue here is retroactivity. For that, I pray that you will continue to press that issue and submit it to Congress.

I am also aware of a large number of individuals who would benefit from the retroactive application of the "status-points" removal. For those individuals, they were already punished once, then received punishment again for a violation of the rules. Since their issue involves a new crime, they will be punished a third time, and will receive an already heightened score for their criminal history, to which they have already been sentenced. To increase that criminal history score just because they were on some type of supervision should constitute a double jeopardy issue. For that reason, I would also ask that you press the retroactive application of the "status-points" removal.

Thank you for all the hard work you have done and continue to do. May the Lord direct your work for His purposes and will.

Sincerely,

K. Jeffery Knapp [redacted]
Federal Correctional Institution-2
FCC Butner
P.O. Box 1500
Butner, N.C. 27509

From: ~^! LAUBACKER, ~^!TIMOTHY
Subject: [External] ***Request to Staff*** LAUBACKER, TIMOTHY, [redacted]
Date: Wednesday, April 19, 2023 5:34:23 PM

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To:
Inmate Work Assignment: Medically Idle

ATTENTION

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Inmate Message Below

I believe that parts A and B of the proposed amendment to Sentencing Guidelines should be made retroactive on the simple grounds of historical relativism.

Historical Relativism is a philosophy that, put simply, states that if something is wrong, then it has, and will always, be wrong. If the Commission has found cause to believe that past practices have had negative consequences on those subject to said practices, the remedy to such practices should extend to all who were subject to them.

The institution of slavery in the United States is often used as an example. Slavery used to be a common practice in this nation, but most everybody now believes that slavery is (and was) a heinous crime. We do not absolve those who enslaved people by stating "it was a different time," but recognize that it was wrong then, it is wrong now, and it will always be wrong.

After the Emancipation Proclamation and the ratification of the 13th, 14th, and 15th amendments, all slaves were freed in the United States. Imagine if it had been questioned whether or not to apply these changes retroactively...Maybe all slaves then currently in slavery should not have been granted their freedom, but only those born of enslaved persons after the changes had been made.

From: ~^! LAUREANO, ~^!ARON MICHELE
Subject: [External] ***Request to Staff*** LAUREANO, ARON, [redacted]
Date: Wednesday, April 19, 2023 3:20:05 PM

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To: councel
Inmate Work Assignment: orderly

ATTENTION

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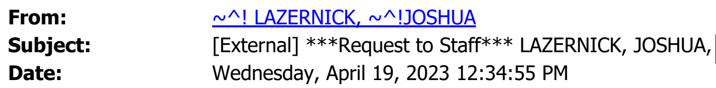
Inmate Message Below

i think its a great idea as long as the charges are not violent or a child crime .....it will help with the over crouding in the BOP



From: ~^! LAZERNICK, ~^!JOSHUA
Subject: [External] ***Request to Staff*** LAZERNICK, JOSHUA,
Date: Wednesday, April 19, 2023 12:34:55 PM

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To: Amendment Input
Inmate Work Assignment: Unicor 4

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Inmate Message Below

Yes, the Amendments for time reduction for zero-point offenders should be applied retroactively.
Exceptions should be made for crimes of Murder and Grand Theft.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Gwendolyn Levi, Formerly incarcerated

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Retroactivity is a must to render this effective

Submitted on: May 24, 2023

From: ~^! MALDONADO, ~^!KOWOKY
Subject: [External] ***Request to Staff*** MALDONADO, KOWOKY, [redacted]
Date: Friday, April 21, 2023 1:06:17 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: to public hearing amendment a/b
Inmate Work Assignment: kitchen

ATTENTION

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Inmate Message Below

Iam recommending that the commission should make the amendement a,b retroactive for the following reason.

1.per the 3553(a)(6), it requires the sentencing judge to ensure the sentencing judge to ensure the sentence inposed does not create un warranted disparity and if amendments in question are not retroactive will difinitely result to sentencing disparity

2.it is just fair that an offender who comit a particular offense today should be treated similarly from an offender who committed similar offense yesterday and fall under similar circunstances.

3.retroactivity of the amendments will help a lot of inmates who are serving longer sentence today and are affected by those amendments.

4.more important it will reduce prision population for those who have already serverd longer sentences and are not a threat to the society

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Kimberly Mccloud

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Very interested in lowering time on non violent offenders. The violent offenders need to be there to do all required time. Non violent and some that need another chance in life deserve nothing less than to prove themselves again. Everyone deserves another chance. We all make bad choices and deserve to prove ourselves once again.

Submitted on: April 19, 2023

From: ~^! MELLEN, ~^!BENJAMIN
Subject: [External] ***Request to Staff*** MELLEN, BENJAMIN, [redacted]
Date: Thursday, April 20, 2023 8:06:16 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: Sentencing Commission
Inmate Work Assignment: New Guidelines

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Members of the Sentencing Commission:

Thank you for updating the antiquated sentencing guidelines. It is a step in the right direction toward just and reasonable sentencing reform. I am also grateful that you are considering making the new guidelines retroactive. And, thank you for accepting public comment.

I am 58 years old and have been dealing with the sentencing guidelines for the past four years. Prior to 2019 I had zero criminal history; not even a traffic violation. Earlier this year I pled guilty to a Class C felony that occurred in April of 2019. I take full responsibility for the stupid thing I did. My sentencing was just a few weeks ago.

All of our negotiations with the US District Attorney were based on the old guidelines. Even though the base number on the Zero-Criminal History column seemed very unreasonable I felt that I had few options. I accepted a plea based on the old guidelines. Even Judge Teeter made it clear that the plea and guidelines were too harsh.

For me, and the thousands of other inmates that were sentenced based on the outdated chart, please rule that the new guidelines will be applied retroactively; especially for those in the Zero-Criminal History column. And, allow this ruling to include those that accepted a plea that was strongly influenced by the old sentencing guidelines chart.

Thank you,

Ben Mellen
[redacted]

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Denise Miller

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I do not agree with the retroactivity for offenders with points at and also inmate 65229-066 Raphael D. Ross of FDC is paying people to vote against the law so that his sentence could be lowered. He deserves to do his time along with anyone else who committed crimes repeatedly

Submitted on: April 14, 2023

From: ~^! MONOGAN, ~^!JAMES EDWARD III
Subject: [External] ***Request to Staff*** MONOGAN, JAMES, [redacted]
Date: Sunday, May 7, 2023 8:05:32 AM

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To: comment.ussc.gov
Inmate Work Assignment: L Educ

ATTENTION

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Inmate Message Below

Dear Members of the U.S. Sentencing Commission:

I write regarding your question as to whether your recent proposed criminal history amendment ought to be retroactive and whether there ought to be limits in to whom it applies. I write in favor of retroactivity with no exclusions. To offer context for my position: I currently am a federal inmate at the FSL Jesup. Although I had no criminal history prior to this offense, I doubt a retroactive policy would affect my own sentence. The judge in my case granted a downward variance from the guidelines that was significantly greater than 12 months, so the proposed reduction likely could not have any bearing on me. Nevertheless, I strongly believe that a retroactive and non-exclusive policy is right for other first offenders.

First off, I applaud your recent proposal, submitted May 1, to lower sentencing guideline ranges for those with zero criminal history points. Speaking to other inmates here at the FSL Jesup, I consistently hear first-time offenders like myself say that the mere event of arrest was all they needed to change their ways and avoid re-offense, much less any prison time. I have heard this from inmates across a variety of offense classes, including financial and sex offenses. Besides my anecdotal observation that many first offenders express this sentiment, research shows that long sentences are not significantly more effective in reducing recidivism than short sentences. Thus, offering those with no criminal history shorter sentencing guidelines allows them more of a second chance in which, earlier in life, they can prove that they really have reformed.

One reason this policy ought to be retroactive is that this dynamic of first offenders who need little reprimand would not vary based on whether they were sentenced before or after this policy change. Many of those sentenced under the old regime merely would have received a longer sentence than necessary, which retroactivity can remedy. In fact, judges would have more information while resentencing those under a retroactive rule because the inmates' records from the Bureau of Prisons (B.O.P.) would be available. Whether an inmate has changed his or her ways is likely to be seen in whether he or she has any incident reports and whether the inmate has participated in programming. This information could help the judge determine whether either extreme of the revised guideline range would be more just in a given case.

A second reason for retroactivity, and a key reason for not making exclusions to the policy, is that the Due Process Clause of the Fifth Amendment would call for all prisoners to receive the same treatment. For some inmates in B.O.P. custody to have been sentenced under one set of guidelines while others were sentenced under another would not be equal treatment under the law. Thus, to make this new policy consistent with the Fifth Amendment, it should become retroactive and have no exceptions for offense class or any other criteria.

Thank you for considering my comment. Thank you for your efforts in guaranteeing justice here in the United

States.

Sincerely,
James Edward Monogan III, Ph.D.

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Jacqueline Morrison, Former inmate

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Judge Reeves,

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here. Upon listing of both parts of the amendment in subsection (d) of §1B1.10 to be applied retroactively, the Commission should not limit the amount by which sentences may be reduced, allowing the courts to apply the new guidelines accordingly, including allowing the courts to sentence by the same percentage of reduction from the new guideline ranges, if done so previously.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Submitted on: June 1, 2023

From: ~^! NOAH, ~^!ALEXANDER DEWAYNE
Subject: [External] ***Request to Staff*** NOAH, ALEXANDER, Reg# [redacted]
Date: Tuesday, May 2, 2023 8:20:11 PM

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To:
Inmate Work Assignment: ind ba

ATTENTION

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Inmate Message Below

hello my name is alexander Noah and i am currently in federal prision for a sentence of 10 years with a 0 criminal history score. i first want to applaud you for the strides you have made in the regard of criminal justice reform however, it is a mere step in the direction we need to take. I thank you for taking the time to read and consider the folling statements.

As you are aware justice is a complicated concept its literal translation is to get what one deserves. Justice also is about fairness but is also blind and balanced as evidenced by the famous lady justice. I asset then that we as a nation have lost our way when it comes to justice we pass acts with so many exclusions that nobody gets it. We single out specific crimes until we cant anymore then moving on until nobody can benefit, this is not justice this is undue punishment and cruelty to not only the inmates but society at large. We miss out on our family's and those who contribute to society we move farther and farther from our true concept on rehabilitation we have lost our way the balance is tipped the blindfold removed. As a U.S. Army veteran i am appalled at the state of things however there is hope.

We are using false statistics, bias tactics, and convoluted methods to keep the largest number of people incarserated possible. the descripsey between state and federal is so egregious that i cannot overstate the gravity of it. this is not to say that no punishment is necessary however the reasoning behind it is just wrong proven by the DOJ itself. In particular Sex Offenders are the most hard hit with no viable proof that it is necessary, we have the lowest recidivism, for the most part nonviolent and the definition is so broad that almost anyone can be charged and when they are done being hit another charge will again i assert justice is blind meaning what's done for one should be done for all.

i have heard the argument many times "what about those that will just go out and reoffend or are dangerous" and i cannot deny this argument has merit or that these people do not exist. however when i worked as an EMT-B the moto was i can only save as a result of direct intervention maybe 40 of people of that i will have a direct result is saving maybe 20 percent. This however did not stop me from trying i imply the same here those that are worth saving should be. We should be focusing on reintegrating as many as humanly possible instead of making sure they stay locked up.

i know this is a long and difficult process and i do not envy the work you must do. but this act which could benefit so many reunite family's boost the workforce show that we as a nation are willing to give a second chance to do and make right. people like me who with other factors could move down significantly to a 6-9 year guideline others may be more or less. We should be ashamed at the abysmal rate that this act applies to 3024 people out of the entire BOP i was shocked that any were excluded. i beg you to reconsider and not for one but for all, extend that olive branch.

There are plenty of people in here genuinely trying to better themselves i am working to earn a bachelors in Biasness administration with a legal studies focus with plans to attend law school upon release. I implore all of you rethink your stance for those who would be most helped the family's business's as a society to see you are listening and that you remember what justice is. Thank you for you time and reguard.

Yours,
Alexander dewayne Noah

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

George Parker

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I would like to comment on the proposed sentencing guidelines.
I was sent to federal prison in 1992. I was in minimum security prison in Las Vegas.
It seemed like an absolute lifetime. Even though my sentence was 18 months long.
What I noticed about the sentences being served by other inmates, was this.
1. First offenders were sentenced to what I considered extremely long periods based on their crimes.
2. Those who were serving a sentence for second and third offenses. Were generally serving less time than first offenders.
3. I took it upon myself to spend time with 1 young man who was sentenced to a long sentence for his offense.
4. Before his release, I spent time looking into why he would have received such a long sentence for a first offense.
5. After his release, we continued to stay in touch. Today he is the proud father of 4 children and has been at the same company for over 20 years.
The point I'm trying to make is this:
1. Taking so much time from a young persons life is a very real detriment to that person turning themselves into a productive member of society.
2. Non violent crimes should carry a greater importance in sentencing.
3. First time offenders are to heavily sentenced.

My conclusion is, taking in consideration the above mentioned factors. These factors must be part and parcel of any future sentencing program
Respectfully
George Parker

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Individual

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support the changes that the Commission made to status points and zero-point defendants and urge you to make these amendments retroactive. It is important that people who would receive a lower guideline range today have the opportunity to make their case to the court and benefit from the Commission's important amendments.

In making these guideline changes, the Commission intended to lower sentences for people with the least criminal history, and for people whose criminal history was unfairly inflated. The magnitude of these changes is significant. In total, around 18,775 people would be eligible for retroactivity and of those, an estimated 3,288 people would be immediately eligible for release pending court approval. The justice system has proven it can manage retroactivity as demonstrated by its treatment of retroactivity decisions from crack minus two through drugs minus two which saw over 50,000 motions handled by the courts with collaboration by the parties and U.S. Probation. Courts and attorneys know how to handle these types of motions, and are well equipped to do so here.

The Commission's ability to update guidelines to reflect best practices on what works and what doesn't work is a true hallmark of the agency. When the Commission finds that a factor that increases a guideline range doesn't work and should be changed, people serving sentences that would be lower today should get the benefit of that change, if they are eligible.

Thank you for addressing retroactivity on these two provisions, and thank you for considering my views.

Nicole Pham

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Anthony Pistillo

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Sentencing Commission,

I am submitting comments on retroactivity regarding Criminal History amendment to federal sentencing guidelines.
Parts A and B of the Criminal History amendment relating to Status Points and Zero-Point offenders should be made retroactive. It is the right and fair thing to do for currently incarcerated inmates. Part B Zero Point-Offenders has 10 criteria requirements added for those with no criminal history that are too restrictive and make it very rare for many Zero-Point offenders to be eligible for this reduction in sentences. I believe all Zero-Point offenders should be given the decrease of 2 levels from the offense level. If there is to be exceptions it should only be (3) the defendant did not use violence or credible threats of violence in connection with the offense, and (4) the offense did not result in death or serious bodily injury. I hope these changes can be made to the amendments before finally submission to Congress.

Thank you.
Anthony J. Pistillo

Submitted on: April 13, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Jennifer Puana

Topics:

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I am writing on behalf of my husband, Dr. Rudolph Puana, inmate #11178-122. In April of 2022 my husband was convicted of crimes related to controlled substance distribution. He has had no prior state or federal offenses.

He has been an upstanding citizen both in our community and while imprisoned. Over the last year at FDC Honolulu, he has assisted the education department in helping multiple inmates attain their GED. He has helped the medical department, responding immediately to warning signs ignored by other staff who did not possess the level of medical training he has received. He has urged inmates to seek immediate hospital care when necessary and has assisted in various critical times of need.

In our community, he has saved multiple lives. He has worked at elite hospitals such as the Mayo Clinic and MD Anderson. Throughout his career has had an profoundly positive impact on thousands and thousands of patients. There is no question in my mind that this man is needed on the outside. In his lifetime, we will not train another physician at his level.

However, upon sentencing, he received a much lengthier sentence than multiple physicians convicted of these offenses. HIs case involved only three patients, a few thousand pills and no deaths. He did not run a pill mill and his prescription history was far less than those in his specialty. He is currently serving a 90 month sentence and does not qualify for RDAP, First Step Act or any type of sentence reduction.

Our own Supreme Court has sided with doctors in cases involving hundreds of thousands more pills than my husband's case. Following that Supreme Court ruling in the summer of 2022, upon appeal, Dr. Xiulu Ruan had his conviction overturned.

Dr. Paul Kaiwi, in our own district court, is serving a far shorter sentence for a case involving

multiple patients and undercover DEA involvement. He was even allowed to self surrender, an option not given to my husband.

Other doctors have received only probation and been able to retain their medical licenses.

I wholeheartedly believe this range of punishment regarding doctors comes down to one thing - that the war on the opioid crisis has been gravely misconducted. While it is no secret the fentanyl and opioids coming across our border are the clear issue, we have instead targeted people who are easier to take down than a cartel. Our nation has gone against doctors who have completed United States accredited medical schools, passed licensure boards, attained state licensure, been fingerprinted and obtained DEA licenses specifically for prescribing controlled substances with their prescription history tracked. The FDA has approved the pharmaceutical grade prescriptions which they are giving out. They are not a threat to our society and yet they have become a target for a crisis that does not involve pharmaceutical grade medication. It is a crisis of street drugs which have been made to look like real medications when in fact they may have lethal doses of fentanyl in a single pill. These are not the drugs coming out of doctors offices and yet we are treating them in the same way.

As you decide on how to proceed with sentence reduction for those without previous offenses, I hope you consider cases like my husband's, cases of those with no prior criminal history, with no violence, where recidivism is not an issue at all. In fact, I am certain that a lengthier sentence negatively impacts not only those individuals, but their families and their communities as well.

In my year of experience with the BOP, it is obvious that the system is overwhelmed and understaffed. My husband has been designated to a camp and yet a year in, he is still at the federal detention center in Honolulu. He is with criminals of all custody levels and has never even seen sunlight. Visits have only been open since September and remain non contact. All of these things are counterproductive to what this system is designed to do for not only my husband, but all inmates. Sentence reduction for those who do not possess a criminal past is essential. There have been multiple studies show showing strong family support and close relationships greatly reduce recidivism. Shorter sentences ensure those relationships can survive the duration of incarceration.

Those who have not had a history of violence or criminality should be given priority for sentence reduction. My husband should be amongst those. As you look at retroactively adjusting sentences for those in this position, I hope you think of this case specifically as he is more than deserving.

Consider the profound success of the CARES Act, placing many inmates on home confinement. This type of sentence reduction would have the same benefit and could easily extend beyond a year of sentence reduction. Reducing sentences or allowing inmates to serve the duration of their sentences at home with their families under close supervision is beneficial for all. The daily cost of keeping an inmate confined in a facility is an extreme burden on our country. That cost is not

only financial but there is an incredible toll taken on families of those who are incarcerated as well as on the inmates themselves. Those who are able to be gainfully employed and contribute to society should be allowed to be there. A shorter sentence allows them to get back on their feet more easily and it allows families to stay connected.

Submitted on: April 19, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Cathleen Reese

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Hello;
As an interested citizen, I am making comment on A & B. In my opinion, federal adjustments, etc., should always strongly consider offender record...repeat offender vs first offense. A federal offense such as pre-meditated murder, whether first offense or with lengthy criminal history, should not constitute ANY consideration/adjustment. I stand as a supporter of the death penalty for murder...there is NO EXCUSE for taking a life! I am disgusted with the slap-on-the-wrist type, bleeding hearts, murderers' rights baloney. Whatever happened to the right to a life/the victim's rights??? Tax payers are already taking care of too many offenders! Thank you'all for your time and best regards.

Submitted on: May 15, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Michael Riley

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I do not support the retroactivity for offenders who has multiple convictions

Submitted on: April 13, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Richard Samperisi

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support that the new law be retroactive. The science has proved that zero point offenders have very low recidivism. The BOP is way overcrowded and they should allow zero point offenders reduction in their sentences so they can get home to their loved ones and work to be productive citizens. Not only do the incarcerated suffer but even worse the wives and children suffer. Research shows children in two parent households have higher success in life and lower chance of being involved in criminal activity. Not to mention it's a huge savings to the BOP.

1. I am in support of making 4C1.1 RETROACTIVE.

2. Research has shown that Zero Point offenders have a very low recidivism risk.

3. Research has shown that the longer someone is incarcerated the more likely they will be to reoffend.

4. Allowing a Zero Point offender a sentence redution will allow the offender to be reunited with their loved ones and give them an opportunity to get back to work more quickly and to become a valuable US citizen.

5. The Zero Point offenders sentences should be reduced by (at least) two levels.

6. Parts A and B of the Amendment addressing the impact of status points at 4A1.1, and offenders with zero criminal history points at new 4C1.1 listed in Subsection (d) of 1B1.10 as an amendment that should be applied Retroactively to previously sentenced defendants.

Please consider reducing the overcrowding in our prison system by allowing some alternatives for those inmates with low likelihood to repeat offense so they can get back to the community

and rebuild their lives and families.

Respectfully,
Richard and Patricia Samperisi

Submitted on: May 6, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Rhonda Schmidt

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

YES! I have been keeping on eye on our criminal justice system for the past 3 years because my fiancé is incarcerated at FCI Texarkana on NONVIOLENT drug charges in 2020. Learning the ways of the federal bureau of prisons is very complex due to the fact that the BOP makes up their own rules that do not necessarily flow with federal or state laws and there seems to be a concerning amount of nonviolent drug offences that have been punished more severely than actual violent crimes. If we are looking to thin out our problem of mass incarceration as a whole, then we need to look at the 44.7% of all federal incarcerated individuals that are serving time for nonviolent drug offences. We as a country need to understand that our federal and state correctional institutes are a necessity for order in the world, but to use it for unnecessary crimes committed is counter productive. First, solely in the name CORRECTIONAL facility, we should be vigilant in REHABILITATIVE programs, but as it stands now, our system fails more individuals by unnecessary long sentences without any rehabilitative services at all. Second, I feel that if an amendment is made to any law, unless it is a brand new law completely, should be retroactive for all that are charged with the same charges that have been amended. I truly feel that we as a society need to rethink the way we punish people for the crimes they commit. We are supposed to be "Land of the free"..but we have the most incarcerated fellow humans in the entire world! And almost half of those individuals are incarcerated for nonviolent drug offences. Please consider this as a key factor when making your decision to retroactively amend "Status Points" and "Zero Point offenders". Thank you for your time and consideration of my opinion. I hope you honestly with integrity help fix our broken system as to where we can sleep more peacefully at night knowing the real violent offenders are locked away and our nonviolent offenders get a fair chance at rehabilitation. Thank you again..Rhonda Schmidt

Submitted on: April 20, 2023

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Gwendolyn Stone

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

Dear Committee members,

I urge you to please support §4C1.1 (Adjustment for Certain Zero-Point Offenders) retroactivity. Making this amendment retroactive will provide more appropriate sentencing for those who are already convicted, and will provide relief for incarcerated individuals and their families. If §4C1.1 (Adjustment for Certain Zero-Point Offenders) is made retroactive, it will also save the government money, time, and resources that can achieve much better results if used elsewhere. When low risk offenders are given severe sentencing, they are more likely to fall into recidivism. A first time offender must possess great fortitude of character in order to not join in with gangs and drug use that are often all too prevalent in US prisons. Thank you for working to reform the sentencing guidelines to give first time offenders a better chance at success!

I compel you to also support §4A1.1 (Criminal History Category) retroactivity. I ask you to please promote alternatives to incarceration such as: probation, monetary penalties, community service, partial confinement, and home confinement. It is utterly shameful that the United States of America has the highest number of incarcerated people in the entire world. We have more than a million more prisoners than China, a communist country with a population over one billion. Making this amendment retroactive will help fight the problem of mass incarceration. Individuals who are in trouble with the law need to be connected with a loving community instead of being separated from their families and thrown into an environment that is basically a house of corruption where they will be encouraged to learn new criminal techniques. As Mother Teresa wisely stated, "What can you do to promote world peace? Go home and love your family."

Thank you for your consideration.
Sincerely ~ Gwendolyn Stone

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Yahminah Suber

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

To whom it may concern,

As law abiding citizen,I feel that it's important that we continue to review and revise legislation to ensure our legal system is fair and equitable for all. I personally know several individuals who have made a difference in our communities after serving prison sentences. I believe all criminals should pay their debts to society.
However , I also believe taking a closer look at our federal sentencing guidelines is the right thing to do.

Submitted on: June 12, 2023

FROM: [redacted]
TO: Bardas, Anthony
SUBJECT: US Sentencing Commission
DATE: 06/11/2023 01:52:15 PM

June 12, 2023

United States Sentencing Commission
Public Affairs
One Columbus Circle NE
Suite Z-500, South Lobby
Washington, DC 20002-8002

RE: Public Opinion for proposed amendment for retroactivity to FSA

To the Honorables of this Committee,

I pen this letter with grave underpinnings. As of this writing, just two days ago, we had lost an inmate to an overdose on drugs. An inmate whom it was reported had only 2 months left on his sentence. As the investigation now ensues, the age old question always befuddles inquiring minds, "Why did he do it?" Such an inquiry has now become universal as American society appears to struggle with its own growing social ills. There is only but one True answer...people have just lost hope.

I wish to submit these words to your minds, to your hearts, and to your consciences, as an open comment of 'public' opinion concerning whether current (or any future) proposed changes to the First Step Act (FSA) should or should not be made retroactive. My opinion will reflect a 'pro-stance' rather than an 'anti-stance' on this issue. Clearly, a man such as myself whom has made horrendous and soul-grieving decisions that had caused the life of another to be extinguished should have no say at all, let alone to have been spared the Mosaic edict of "Anyone that sheds the blood of man will have his blood shed by man,..." (Gen. 9:6) Yet, even so, I was spared the consequences of such an edict. NOT by man himself, but by the Higher Power that destines each of us to rise up greater than our (lowly) selves that enslave us.

Having endured a convicting conscience that had come to crucify my-'self', I have chosen to make a 180-degree change of course in my life. This being so, I have chosen NOT to waste the next 30 years I had received as a sentence to be served by wallowing in self-pity, sorrow and hopelessness only to stare mindlessly into a TV screen that only 'programs' an otherwise idle mind with graphic violent and sexual imagery. As an awakened soul, I have charted a course of redemption, of rehabilitation within these walls of concrete, steel and mountains of razor wire to literally utilize what "tools" are offered by the Federal Bureau of Prisons (FBOP) to lay before me the stepping stones of hope. To literally rewire my brains' old habitual thinking; to think rationally and not react emotionally, all products of prison programs -- whether they fall inside or outside the scope of the FSA requirements -- to become a new and refined manner of man.

I have come to witness that many in prison have no hope. The world lacks it. Incarcerated adults starve for it. Many seek what little 'credits' they may receive from programming in hope of knocking a few days, a few months and maybe one day, a few years off their sentences. Yet there are many whom have no faith in the 'system'; in the courts; in people in general, and; even in themselves. They struggle to find purpose, to find reason for their living. They have no hope. Outcast as social lepers. And thus, lack of hope births no desire, only suffering.

This letter is to hopefully enlighten this Committee with the human sufferings and struggles both victims of crime and the violators deal with on a regular basis. For this Committee to find that delicate balance between justice and compassion for all parties is required for the very foundation of humanity to be upheld.

I saying so, it is hoped that this Committee may consider exercising its authority to make retroactive changes to the accreditations that can be applied to ones own efforts to rehabilitate him or her self while incarcerated. While there are those who will abuse the System thru the manipulations thereof, there are those who truly are making the change in earnest. The change that, by chance, someone may take notice of their efforts and incentivize them in continuing to strive with greater effort. And for this Committee to take the position and review whether to make the new amendments to the guidelines concerning criminal history points prospectively or reactively should hinge upon its own foundation of ensuring that justice for ALL be fair and partial. Is there but no other way?

By choosing the side of retroactivity to the amendments concerning criminal history points injects hope into the lives of those whom will be eligible -- whether they may be aware of them or not, or even deserving of them or not. (This author is ineligible.)

I have been compelled by Spirit to scribe these words. Now it is my hope that they may inspire the Honorables before which this has been presented to to fulfill their appointed oath to this office and comfort their conscience with fairness and impartiality that compassion can honor and magnify the dignity of its standing position within the Department of Justice.

Respectfully submitted,

Timothy Suckow
[redacted]
Federal Correctional Institution
P.O. Box 420
Fairton, NJ 08320

Public Comment - Issue for Comment on Retroactivity of Criminal History Amendment

Submitter:

Crystal Zusmer

Topics:

Retroactivity of Part A - "Status Points"

Retroactivity of Part B - Adjustment for Certain "Zero-Point" Offenders

Comments:

I support that the new law be retroactive. The science has proved that zero point offenders have very low recidivism. The BOP is way overcrowded and they should allow zero point offenders reduction in their sentences so they can get home to their loved ones and work to be productive citizens. Not only do the incarcerated suffer but even worse the wives and children suffer. Research shows children in two parent households have higher success in life and lower chance of being involved in criminal activity. Not to mention it's a huge savings to the BOP.

1. I am in support of making 4C1.1 RETROACTIVE.

2. Research has shown that Zero Point offenders have a very low recidivism risk.

3. Research has shown that the longer someone is incarcerated the more likely they will be to reoffend.

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Please consider reducing the overcrowding in our prison system by allowing some alternatives for those inmates with low likelihood to repeat offense so they can get back to the community

and rebuild their lives and families.

Respectfully,
Crystal Zusmer

Submitted on: May 2, 2023

UNITED STATES SENTENCING COMMISSION
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
www.ussc.gov