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

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