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July 10, 2023

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Proposed Amendments

Re: Written Testimony Regarding Retroactive Application of
The 2023 Criminal History Amendments

To the Commission:

I submit this written testimony on behalf of the Center for Justice and Human Dignity (the "Center") in anticipation of my July 19, 2023 testimony regarding whether the 2023 criminal history amendments to the U.S. Sentencing Guidelines ("Guidelines") should be applied retroactively.

For the reasons set forth below, the Center enthusiastically supports retroactive application of the so-called zero-point amendment, providing a potential reduction in sentence for the least culpable first-time offenders who present a low risk of recidivism. The Center also supports retroactive application of the so-called status points amendment, based on its understanding that, as with the zero-point amendment, it will be applied with due regard for ensuring that the lowering of sentences for eligible defendants will not compromise public safety. Both of these amendments are data-driven, measured, and sensible reforms that will ensure greater fairness in the treatment of defendants in the federal system and help reduce the historical over-reliance on often-lengthy terms of incarceration as the preferred means of punishment in this country.

Introduction

The Center for Justice and Human Dignity (www.cjhd.org) is a 501(c)(3) nonprofit organization whose mission is to safely reduce incarceration in the United States while improving conditions for incarcerated individuals and correctional staff. The Center promotes values of human dignity, shared safety, and sensitivity to the needs of those most directly impacted by the criminal legal system – including victims, defendants, and society at large. It has a steering committee of 20 current and former federal and state court judges, and a board of directors that includes, among others, Larry Thompson (former U.S. Attorney for the Northern District of Georgia and Deputy Attorney General of the United States), Jeremy Fogel and Nancy Gertner (retired U.S. District Court judges), and me (former U.S. Attorney for the Eastern District of New York).

Retroactivity Standards

Guideline 1B1.10 sets forth criteria used by the Commission to determine whether to make retroactive a Guideline amendment that reduces an already-sentenced defendant's Guideline range. Among the relevant factors are "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." Applying such an amendment to already-sentenced defendants reflects a decision by the Commission that the lower Guideline range is "sufficient to achieve the purposes of sentencing" and enables a court, in its discretion, to decide whether a reduction in the defendant's sentence is appropriate. The reduction is not automatic; as with other sentencing-related decisions, the decision whether to grant such a reduction ultimately rests in the hands of district judges, who are called upon to decide not only whether a defendant is eligible for the reduction under the terms of the amendment but also whether, considering all of the 3553(a) factors, including public safety, such a reduction is warranted in each individual case.

We now review each of the two criminal history amendments, taking into consideration all of the aforementioned factors.

The Zero-Point Amendment

Each of the 1B1.10 factors supports retroactive application of the zero-point amendment.

Purpose. The purpose of this amendment is to recognize the need for lesser punishment for defendants with no criminal history points under the Guidelines – the lowest possible score. The Commission's data-driven analysis of this issue reveals that such defendants present a significantly lower risk of recidivism than others placed in Criminal History Category I – defendants with one criminal history point. A 2021 Commission report concluded that zero-point defendants are 37% less likely to be re-arrested than one-point defendants (26.8% compared to 42.3%).[1] This significant difference in recidivism represents the largest difference in recidivism rates among individuals within any Criminal History Category. This report was strikingly consistent with an earlier, 2016 Commission report, which concluded that zero-point defendants are 36% less likely to be re-arrested than one-point defendants (30.2% compared to 46.9%).[2] The Commission's reliance on this significant and consistent data to reform the federal sentencing regime is a highly commendable effort to imbue that regime with greater, empirically-based fairness.

This amendment is thus not designed merely to "simplify guideline application"[3] – a feature of non-retroactive amendments. To the contrary, it is a conscious effort to better tailor the amount of punishment to the history and characteristics of the defendant – in other words, a

[1] U.S. Sentencing Commission, *Recidivism of Federal Offenders Released in 2010* (Sept. 2021), at 26.

[2] U.S. Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview* (March 2016), at 18 Figure 6.

[3] U.S. Sentencing Commission, Public Meeting Minutes (Sept. 16, 2010), at 2.

substantive judgment that zero-point defendants should not be, because they do not need to be, punished as harshly as their one-point counterparts. It is consistent with the statutory command in 28 U.S.C. § 994(j) 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." It is similarly in line with the fundamental tenet of federal sentencing, embodied in 18 U.S.C. § 3553(a), that a sentence must be "sufficient, but not greater than necessary" to achieve the purposes of sentencing. It is, in short, an important improvement in sentencing policy that deserves the widest application – both prospectively and retroactively.

The consequent impact on our correctional system also supports retroactive application. This will help free up much-needed space and programmatic resources in a still-overcrowded federal prison system so that they can be devoted to serving those defendants who need them most. This, in turn, will enhance both public safety as well as rehabilitation, which will, in turn, help reduce recidivism.

This amendment is, in short, a quintessentially substantive and well-justified measure designed to bring about a smarter, better-tailored sentencing regime. Given that, it is entirely appropriate for the Commission to make the amendment applicable regardless of whether a defendant happens to have been sentenced before or after its adoption.

<u>Magnitude of the Change</u>. The degree of potential benefit to zero-point defendants also squarely supports making it retroactive. Here again, the Commission's own guidance is instructive. Under the Commentary to Guideline 1B1.10, the Commission recognizes that amendments that reduce the maximum of the guideline range by "less than six months" are generally not retroactive. This is consistent with the history underlying the Commission's enabling legislation, in which Congress stated that it did not expect the Commission to make a Guideline change retroactive if the Guideline was "simply refined in a way that might cause isolated instances of existing sentences falling above the [amended] guidelines or when there is only a minor downward adjustment in the guidelines."[4]

This amendment, in contrast, would confer a far more substantial benefit on many eligible defendants. According to the Commission's highly informative and thorough analysis of the potential retroactive application of this amendment, 7,272 defendants would, on average, be eligible for a 15-month reduction in their sentences, representing a 17.6% reduction in their overall sentence lengths.[5] The 15-month reduction is more than double the "less than six months" standard. From this perspective, the potential impact of the zero-point amendment on sentenced defendants is of more than sufficient magnitude to justify making it retroactive.

And this is not merely a mathematical point. The potential benefit of less prison, and greater freedom, is profound. Every day, every week, every month, and every year of incarceration, matters profoundly: not just to the defendants, who are deprived of the many features of normal

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[4] S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

[5] U.S. Sentencing Commission, *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* (May 15, 2023) ("2023 Retroactivity Analysis"), at 17.

lives, but their immediate families, other loved ones, and others who depend on them – all of whom suffer and often suffer greatly from their absence. For all of them, the "magnitude of the change" embodied in the zero-point amendment is huge indeed.

Difficulty in Applying the Amendment. Applying the zero-point amendment retroactively will not present an undue burden on the system.

The recalculation of an eligible defendant's Guideline range should be mathematically easy. All that is entailed is a two-level reduction in an eligible defendant's offense level and the consequent use of a reduced Guideline range. And determining a defendant's initial eligibility for the reduction should be similarly straightforward: a defendant's original sentencing judgment and pre-sentence report should reflect whether or not they had zero criminal history points.

The amendment's exclusions will of course add a step to the eligibility determination, but should not make implementation of the amendment particularly difficult. While a district judge will be required to determine whether any exclusion applies, the judge will have plenty of guidance to assist in that process. Some exclusions mirror already-existing Guideline provisions, for which there is a healthy body of precedent and guidance – including from the Commission's own analysis of retroactivity.[6] Many will already have been addressed at the original sentencing. Many will be able to be resolved on the existing factual record. And if not, judges can (as they have in the past, with a plethora of sentencing factors) still resolve them without the need for a full-blown evidentiary hearing. Indeed, to the extent that a defendant will have the burden of demonstrating their entitlement to this mitigating adjustment, any evidentiary gap precluding a district court from making a finding whether an exclusion applies will presumably result in the amendment not being applied.

Moreover, if history is any guide, the concerns expressed by some of an avalanche of meritless motions appear overstated. The Commission's experience with three significant retroactive amendments strongly suggests that retroactive application of the zero-point amendment will be manageable. For the 2007 "crack minus two" amendment, 19,500 motions were predicted and 25,736 were filed[7]; for the 2011 Fair Sentencing Act crack cocaine amendment, 12,040 motions were predicted and 13,990 were filed[8]; and for the 2014 "drugs minus two" amendment, 51,141 motion were predicted and 50,998 (a *lower* number) were filed.[9] Given that experience,

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[6] *Id.* (Appendices A-E).

[7] U.S. Sentencing Commission, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* (Oct. 3, 2007), at 4 (estimating 19,500 defendants eligible for reduction); U.S. Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report* (June 2011), Table 1 (25,736 motions filed).

[8] U.S. Sentencing Commission, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively* (May 20, 2011), at 10 (estimating 12,040 defendants eligible for reduction); U.S. Sentencing Commission, *Final Crack Retroactivity Data Report Fair Sentencing Act* (Dec. 2014), Table 1 (13,990 motions filed)

[9] U.S. Sentencing Commission, *Analysis of the Impact of the 2014 Drug Guidelines Amendment if Made Retroactive* (May 27, 2014), at 7 (estimating 51,141 defendants eligible for reduction); U.S.

retroactive implementation of the zero-point amendment – for which the Commission estimates there are 7,272 eligible defendants – should be well within the capacity of the criminal justice system to handle.

Any incremental burden on the judiciary, moreover, must be viewed in context. Defendants who end up serving shorter sentences will, by definition, free up prison resources – with more space and programmatic resources for defendants who remain. This, in turn, will improve the experiences and well-being of both incarcerated defendants and correctional staff, in both measurable and immeasurable ways. The legitimate concern about having time to prepare for the earlier release of many defendants can easily be accommodated by the Commission delaying retroactive implementation of the amendment for a modest period. And, to ensure that victims have a voice in this process, a district court can provide them with reasonable notice and an opportunity to be heard before a motion is decided, just as courts are required to do under the recent amendment to the compassionate release guideline.[10]

In the end, if the system ends up temporarily working somewhat harder to implement a commendable sentencing reform that will improve the fairness of the criminal justice system and the lives of tens of thousands directly and indirectly affected by it, it is well worth it.

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Retroactive application of the zero-point amendment can, as with other retroactive amendments, be achieved consistent with the goals of sentencing. To be sure, even a first-time offender can present a risk to public safety and require incarceration. But this amendment, applied retroactively, does not undermine the legitimate interest in public safety. In order for a zero-point defendant's sentence to be reduced, a district judge will be required to conclude that (1) the defendant is eligible for the reduction, (2) none of the amendment's exclusions applies, (3) the defendant did not already receive credit (by way of a departure or variance) for the fact that they had no criminal record, and (4) reduction of their sentence is consistent with the 3553(a) factors, including providing just punishment and protecting the public from further crimes. This provides multiple layers of protection against the improvident reduction of a zero-point defendant's sentence.

These are not empty platitudes. Data support the fact that district judges frequently deny motions by already-sentenced defendants for reductions in their prison terms. For example, courts denied 36% of motions made by defendants seeking the benefit of the 2007 "crack minus two" amendment.[11] Similarly, courts denied 45% of motions made by defendants seeking the benefit of

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Sentencing Commission, *2014 Drug Guidelines Amendment Retroactivity Data Report* (May 2021), Table 1 (50,998 motions filed).

[10] Guideline 1B1.13, Application Note 2.

[11] U.S. Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 2014), at 2.

the 2011 Fair Sentencing Act crack cocaine amendment.[12] And in an analogous circumstance – application of the so-called compassionate release guideline (1B1.13) in the wake of the First Step Act of 2018 – the results are similar: in the last three years, of the more than 23,000 compassionate release motions that were denied, 3553(a) was a reason for the denial in over 12,000 of them and protection of the public was a reason for the denial in over 3,000 of them.[13] This is empirical proof of what is already understood to be true: that district courts can be trusted to implement the zero-point amendment responsibly, with due regard for the various competing considerations.

Additional data further support that retroactive application of the zero-point Guideline range reduction will not compromise public safety. Again, there is precedent to support this, as retroactive application of several notable Guideline range reductions has resulted in lower (or unaffected) recidivism rates among defendants who benefitted from the reductions versus those that did not. Defendants receiving the benefit of the "crack minus two" amendment's Guideline range reduction had a 43.3% recidivism rate, as compared to a 47.8% rate for similarly-situated defendants who did not receive the reduction.[14] Similarly, defendants who received the benefit of the "drug minus two" amendment's guideline range reduction had a 27.9% recidivism rate, as compared to a 30.5% rate for similarly-situated defendants who did not receive the reduction.[15] Likewise, defendants who received the benefit of the Fair Sentencing Act crack cocaine amendment's Guideline range reduction, and similarly-situated defendants who did not, had the same recidivism rate: 37.9%.[16] And with a somewhat analogous group – lower-risk defendants released early from 2020 to 2022 under the CARES Act – the recidivism rate has, so far, been stunningly low: as of August 2022, of the more than 11,000 defendants released early under the CARES Act, only 17 committed new crimes (and of those, only one committed a violent crime).[17] In short, retroactive application of the zero-point amendment can provide desirable benefits to thousands of justice-impacted individuals without compromising public safety.

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[12] U.S. Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (March 2018), at 2-3.

[13] U.S. Sentencing Commission, Compassionate Release Data Report (Dec. 2022), at Tables 11, 13, 15.

[14] U.S. Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 27, 2014), at 3.

[15] U.S. Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* (July 2020), at 6.

[16] U.S. Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: the 2011 Fair Sentencing Act Guideline Amendment* (Mar. 2018), at 3.

[17] C. Johnson, *Released during COVID, some people are sent back to prison with little or no warning* (NPR, Aug. 22, 2022), available at https://www.npr.org/2022/08/22/1118132380/released-during-covid-some-people-are-sent-back-to-prison-with-little-or-no-warn.

The Status Points Amendment

Each of the 1B1.10 factors also supports retroactive application of the status points amendment. The purposes and effects of the amendment – to eliminate an instance of excessive punishment and to reduce racial disparity in sentencing – justifies it; the magnitude of the change is substantial; and implementation of it will be even easier than the zero-point amendment, since it requires only a potential re-calculation of a defendant's Criminal History Category with no exclusions. For efficiency's sake, we do not repeat here the various justifications for retroactive application that apply to both amendments; instead, we focus on criteria particularly applicable to the status points amendment.

Purpose. As with the zero-point amendment, the status points amendment is a data-driven adjustment to the federal sentencing regime. A 2005 study showed that there is only a 0.1% difference in the extent to which status points improve a criminal history score's successful prediction of re-arrest.[18] Similarly, a 2022 study revealed only a 0.2% difference.[19] And yet status points were included in 37.5% of all federal sentencings in the last five years, with defendants placed in a higher Criminal History Category in 61.5% of those cases.[20] This translates into a lot of additional prison time, which – from a recidivism perspective – is unjustified.

Two additional objectives of the status points amendment make it even more deserving of retroactive application. First, it eliminates the multiple penalties imposed when a defendant commits a crime while under a particular status (for example, while on probation or supervised release): in such a circumstance, the defendant faces (1) punishment for that crime, (2) more criminal history points (and, oftentimes, a higher Criminal History Category) for committing the crime while under a particular status, and (3) separate punishment for violating the terms of their status (e.g., a violation of probation or supervised release). Avoiding multiple punishments for the same conduct is a worthy objective, and one that ought to be pursued equally for defendants regardless of when they were sentenced.

Second, the amendment addresses the fact that the impact of status points falls heavily on minorities, who reportedly experience a disproportionate amount of over-policing by law enforcement. For example, Black defendants are 1.4 times as likely to have status points assigned to them as other defendants – consistent with the fact that they are far more likely to be targeted for criminal law enforcement, to be under criminal justice system supervision, and to serve much longer supervision terms. Retroactive application of the status points amendment will help rectify that: of the expected beneficiaries, 43% are Black and 28% are Hispanic.[21] Retroactive application of this amendment – as with the Commission's 2007 and 2011 amendments to the crack cocaine guideline (both of which were retroactive) – will therefore help further the compelling objective

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[18] U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 2005), at 26.

[19] U.S. Sentencing Commission, *Revisiting Status Points* (June 2022), at 3.

[20] U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index* (May 1, 2023), at 50.

[21] 2023 Retroactivity Analysis, at 13.

of reducing unwarranted racial disparities in sentencing. This is (or should be) a high priority for all criminal justice stakeholders – including the Executive Branch. It is evidenced boldly by the President's May 25, 2022 Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, in which President Biden recognized that "[i]t is time that we acknowledge the legacy of systemic racism in our criminal justice system and work together to eliminate the racial disparities that endure to this day." Sentenced defendants should have the opportunity to benefit from this well-supported reform, just as much as individuals who have yet to be sentenced.

Magnitude of the Change. As with the zero-point amendment, the magnitude of the status points amendment is substantial. The average reduction in sentence is estimated to be 14 months – again, more than double the Guidelines' "less than six months" standard – and will result on average in a 11.7% reduction in a defendant's sentence.[22] And the Commission estimates that 11,495 defendants stand to benefit from the reduction – thus improving the lives of the tens of thousands of individuals directly and indirectly affected by these defendants' imprisonment.

Difficulty in Applying the Amendment. Retroactive implementation of this amendment should not present particular difficulty. Determining whether status points were added to a defendant's criminal history score, and whether elimination or reduction of them would place the defendant in a different Criminal History Category (with a different Guideline range), should both be relatively straightforward tasks. Unlike the zero-point amendment, nothing further would be required to render a defendant eligible (or ineligible) for the reduction. And, as discussed above, the potential burdens arising from retroactive application are either overstated or can be readily addressed.

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As with the zero-point amendment, retroactive application of the status points amendment can be achieved without sacrificing the goals of sentencing. To be clear, there is an obvious distinction between the two categories of defendants potentially covered by these amendments – status point defendants, by definition, have lengthier criminal records generally involving at least two criminal convictions, if not more. Because of this, district courts will need to exercise particular care in determining whether reduction of such a defendant's sentence is justified and can be accomplished with due regard for the need for a sentence to promote respect for the law and to constitute just punishment. But as noted above, district courts have a well-established track record of determining whether to grant a sentence reduction to an already-sentenced defendant and to deny them the reduction if the 3553(a) factors do not support it. There is no reason to believe they will not continue to do so with respect to the status points amendment.

[22] *Id.* at 9.

Conclusion

I appreciate the opportunity to submit this written testimony to the Commission as it considers this timely and important topic. By making the 2023 criminal history amendments retroactive, the Commission can take meaningful and positive steps to implement improvements to our federal criminal sentencing system.

Respectfully,

/s/ *Alan Vinegrad*

Alan Vinegrad

cc: Kathleen Cooper Grilli, Esq.
General Counsel