UNITED STATES SENTENCING COMMISSION

Public Hearing on Retroactivity of Criminal History Amendment to United States Sentencing Guidelines, July 19, 2023

Written statement of
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On behalf of
Federal Public and Community Defenders

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Before the United States Sentencing Commission

Public Hearing on Retroactivity of Criminal History Amendment to §4A1.1 (Status Points) and §4C1.1 (Zero-Point Offenders)

July 19, 2023

Thank you for inviting me to share the Federal Public and Community Defenders' views on whether the Commission should give retroactive effect to Parts A and B of the 2023 criminal history amendment. Part A of that amendment eliminates or reduces status points under USSG §4A1.1 and Part B provides a two-level decrease for qualifying individuals who have zero criminal history points under the newly-promulgated guideline, §4C1.1.

The defenders commend the Commission for amending the guidelines to better reflect the empirical data linking the recommended ranges with the goals of sentencing identified in 18 U.S.C. § 3553(a). We firmly believe the Commission should use its authority under 28 U.S.C. § 944(u), guided by the three-part standard set forth in the background to USSG §1B1.10 (purpose, manageability, and magnitude), to apply Parts A and B retroactively to individuals who are serving sentences longer than necessary to achieve the purposes of sentencing.

Purpose. The reasons this Commission promulgated Parts A and B of the criminal history amendment—to align the guidelines' criminal history calculations with empirical data about recidivism risk to better reflect the purposes of sentencing—also warrant applying it retroactively. If the Commission restricts the revised guideline to prospectively-sentenced individuals only, it will be leaving in place thousands of empirically flawed sentences. It would force roughly 18,500 individuals—the vast majority of whom are either Black or Hispanic—to spend an average of an additional 14 or 15 unnecessary months behind bars. Proportionality, equity, and fairness in sentencing demand that the amended guidelines be given retroactive effect. And the Commission should seize this opportunity to right this systemic wrong.

Manageability. The criminal justice system has the benefit of lessons learned from previous work on retroactive amendments and, more recently, sentence modifications necessitated by the pandemic. Compared to those projects, giving Parts A and B retroactive effect will entail far less work. The number of potentially eligible individuals is far smaller than prior amendments. Plus, every district already has in place a system for streamlining the review of motions. And all the relevant stakeholders—courts, probation officers, prosecutors, defense counsel, and incarcerated individuals—know what to do. As with prior retroactivity cycles, relief will be strictly limited by §1B1.10. It will also be based on the record as it existed at

the time of sentencing, without additional hearings, investigations, or fact-finding. As for the purported flood of motions that could be filed by non-eligible individuals, the Commission's own data shows that these concerns are overstated. Based on the most recent retroactive drug amendment, it is unlikely that these predictions will come to pass.

Magnitude. The magnitude of the potential relief—which will allow courts to reduce roughly 18,500 sentences by an average of 14 or 15 months apiece—further warrants retroactivity. As we know from past retroactivity cycles, granting the benefit of the 2023 amendment to those who are currently incarcerated will reunite thousands of families earlier than expected, mitigate the racially-disparate effects of unnecessarily harsh sentences, promote respect for the law, and save millions of dollars that can be directed to improving the safety and conditions of inmates living, and staff working, in the Bureau of Prisons.

A. The Commission should retroactively apply the data-driven 2023 criminal history amendment, which addresses issues of equity and fairness in sentencing to correct a systemic wrong that disproportionately impacts Black and Hispanic individuals.

Parts A and B of the 2023 criminal history amendment address issues of equity, proportionality, and fairness in calculating an individual's guideline range based on their criminal history (or lack thereof). They respond to and correct a systemic wrong: the excessive sentencing ranges that result from unjustly inflated and empirically unsound guideline calculations for two categories of mostly Black and Hispanic people[1]—groups that have historically borne the brunt of this country's punitive criminal justice policies and are overrepresented in prisons.[2] Parts A and B are the result of the Commission's data-driven work to craft sentencing guideline ranges that are "sufficient, but not greater than necessary" to satisfy the purposes of sentencing under 18 U.S.C. § 3553(a).[3] Namely, the

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[1] The Commission's data show that the flawed criminal history calculations, though neutral on their face, produced stark racial disparities at sentencing. Of those who would benefit from giving retroactive effect to the 2023 amendment, a disproportionately large percentage are either Black or Hispanic. Together, the two racial groups make up nearly 71 percent of those who would benefit from the retroactivity of Part A, and they make up nearly 80 percent of those who would benefit from the retroactivity of Part B. *See* USSC, *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* 13, tbl. 3A & 21, tbl. 3B (2023), https://tinyurl.com/bdhfen2h (hereinafter "2023 Criminal History Amendment Impact Analysis").

[2] *See, e.g.*, Statement of Jami Johnson Before the U.S. Sent'g Comm'n, Washington, D.C., at 30–31 & n. 113 (Mar. 8, 2023) (hereinafter "Johnson March 2023 Statement").

[3] *See* 28 U.S.C. § 991(b)(1)(A).

Commission relied on empirical data that disproved long-held presumptions about the likelihood of recidivism and the risk to public safety posed by recipients of criminal history status points, and individuals with zero criminal history points. With the Commission's data, we now know that tens of thousands of individuals who fell into those groups were effectively assigned the wrong criminal history category and faced a disproportionately high guideline range as a result. This range served as the "lodestar" at sentencing—anchoring judges' decisions, even when those judges varied below the guidelines.[4] And today, roughly 18,500 people are still serving sentences that are longer than necessary under § 3553(a).

Opponents of retroactivity attempt to distinguish this amendment from Amendments 706 and 782, which mitigated some of the effects of unjustifiably lengthy sentencing ranges for crack and other drug offenses, and alleviated well-documented racial disparities in drug sentencing.[5] Opponents argue those amendments addressed a "fundamental unfairness,"[6] and "systemic wrong"[7] not present with this amendment. As an initial matter, their reliance on the purported absence of a "fundamental unfairness" to oppose retroactivity is misplaced. While

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[4] *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 520–21 (2014) (discussing the "gravitational pull" of the guidelines); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 Hastings L. J. 423, 463 (2013) ("Requiring courts to begin and end sentencing analysis with the Guidelines calculations is a doctrinal barrier that may impede the exercise of discretion under § 3553(a)."); Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 Duq. L. Rev. 675, 689 (2011) ("[T]he guidelines' recommendation serves as a psychological 'anchor,' which appears to simplify or obviate the daunting task of evaluating . . . considerations relevant to the statutory purposes."); *Peugh v. United States*, 569 U.S. 530, 541 (2013) ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review.").

[5] Roughly 96 percent of those who benefitted from retroactive application of Amendment 706, and roughly 74 percent of those who benefitted from retroactive application of Amendment 782, were Black or Hispanic. *See* USSC, *Final Crack Retroactivity Data Report* tbl. 5 (2014), https://tinyurl.com/3krf298t; USSC, *2014 Drug Guidelines Amendment Retroactivity Data Report* tbl. 5 (2021), https://tinyurl.com/2mvdzdp4 (hereinafter "2014 Drug Amendment Data Report").

[6] Letter from Randolph D. Moss on behalf of the Criminal Law Committee of the Judicial Conf. to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 14–15 (June 23, 2023) (hereinafter "CLC June 2023 Letter").

[7] Letter from Jonathan J. Wroblewski on behalf of DOJ to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 1–2 (June 22, 2023) (hereinafter "DOJ June 2023 Letter").

fairness is certainly important when weighing retroactivity—it is part of the Commission's duty to consider an amendment's "purpose"—it is not an independent criterion. The phrase "fundamental unfairness" does not even appear in the statute governing retroactive amendments,[8] the retroactivity policy statement,[9] nor the enabling statute.[10]

Even if correcting a systemic and fundamental unfairness were a necessary fourth requirement, it is met here. It is fundamentally unfair to leave excessive—and therefore, illegitimate—sentences in place. And the same factors that supported the adoption and prospective application of this amendment—fairness, equity, and proportionality—apply to those who have already been sentenced. In her testimony supporting the retroactivity of Amendment 782, Judge Irene M. Keeley, the Criminal Law Committee representative, stated that it was fundamentally unfair to allow "the date a sentence was imposed [to] dictate the length of imprisonment; rather, it should be the [person's] conduct and characteristics that drive the sentence whenever possible."[11] Put simply: it is wrong to demand the incarceration of a person for 14 or 15 months longer than what the Commission deems "sufficient, but not greater than necessary" under § 3553(a) because of the timing of their sentencing.

Further, the racially disparate effects of the flawed criminal history calculations are no different than those produced by the drug guideline. The changes the Commission made to the crack and drug guidelines through Amendments 706 and 782 were facially neutral but disproportionately alleviated overly punitive sentences for communities of color because of racially uneven "drug war" enforcement. The same is true here. Though facially neutral, both Parts A and B primarily affect people of color. Indeed, the demographics of individuals impacted by Part A (status points) are similar to those impacted by Amendment 782, in that the majority of impacted people are either Black or Hispanic individuals.[12] This is not surprising: it is well recognized that criminal history, as a metric, bakes in racial disparities that occur at every stage of the criminal justice process (and before a person enters the system because of educational and socioeconomic

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[8] *See* 18 U.S.C. § 3582(c)(2).

[9] *See* U.S.S.G. §1B1.10.

[10] *See* 28 U.S.C. § 994(u).

[11] Statement of Hon. Irene M. Keeley on behalf of the Criminal Law Committee of the Judicial Conf. Before the U.S. Sent'g Comm'n, Washington, D.C., at 1 (June 10, 2014).

[12] *Compare* 2023 Criminal History Amendment Impact Analysis, at tbl. 3A *with* 2014 Drug Amendment Data Report, at tbl. 5.

disadvantages) and that make non-whites more likely than whites to have a criminal conviction and be on supervision.[13]

B. Lessons learned during prior retroactive amendment cycles will facilitate retroactive application of this amendment.

For the reasons explained below, the opponents of retroactivity severely overstate the anticipated workload that will be placed on courts, probation officers, prosecutors, and defense counsel if and when the amendment is given retroactive effect.

Districts have systems in place for handling § 3582(c)(2) motions. Following the retroactive application of Amendments 706, 750, and 782, individual districts, by necessity, developed their own systems for reviewing and deciding motions for relief under § 3582(c)(2). In my district, Maryland, for example, a probation officer produced a single-page memo for every person whose name appeared on a Commission-prepared list. My office and the U.S. Attorney's office reviewed the presentence report, judgment, and statement of reasons for each person. In the vast majority of cases, determining eligibility was straightforward and was evident based on our review of these records. In a few cases, where questions were raised about drug types or quantities, we referred to the sentencing transcript. For each person who we determined to be eligible for relief, my office filed a single-page motion that presented the new guideline range and summarized the § 3553(a) factors. In the end, we filed 525 motions for people we deemed eligible under Amendment 782. The court granted relief in 500 cases (95 percent) and denied relief on discretionary grounds in 25 cases (5 percent).

According to the Commission's data, fewer people will be eligible for retroactive relief under the 2023 amendment than were eligible for retroactive relief under either Amendment 706 or 782. Retroactive application of the 2023 amendment is likely to generate far fewer motions from eligible (and even non-eligible) individuals than recent amendments. The Commission anticipates that more than 18,500 people will be eligible to seek relief under the 2023 amendment. By contrast, the Commission estimated that 19,500 would be eligible for relief

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[13] *See, e.g.*, Letter from U.S. Senators Richard J. Durbin, Mazie K. Hirono, & Cory A. Booker to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 1 (June 23, 2023) ("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."); Johnson March 2023 Statement at 30–31 ("Research shows that Black people are far more likely than whites to be targeted by law enforcement for stops, searches, arrests, and criminal prosecutions . . . . Black people are more likely to be on supervision and to be subject to longer terms of supervision than whites, which underscores the uneven impact of the status point rule on minority groups." (citations omitted)).

under Amendment 706 and 51,141 individuals would be eligible for relief under Amendment 782.[14]

Considering past experience, it is likely that fewer than 25 percent of motions will be filed by non-eligible individuals. If the 2023 amendment is applied retroactively, it is expected that many non-eligible individuals will file motions seeking relief. But the Department of Justice (DOJ) vastly overstates the issue, warning that "more than half of all individuals housed in the Bureau of Prisons" will likely seek relief.[15] That is simply not borne out by experience. The floodgates failed to open when Amendment 782 was applied retroactively. During that cycle, roughly 26 percent of those who filed motions (13,091 out of 50,998) were not eligible for relief.[16] In my experience, individuals were more likely to contact the local defender to ask about eligibility rather than submit a *pro se* motion or a letter to the court (which are routinely treated the same as *pro se* motions). And, although roughly 96,000 people were serving time in federal prison for drug offenses on September 30, 2014,[17] only roughly 51,000 people filed motions for retroactive relief under Amendment 782. Thus, DOJ's estimate that "most of the 85,467 individuals" in BOP custody with either status points or no criminal history will file motions lacks a factual basis.[18]

Retroactivity will not lead to a single re-sentencing. Opponents of retroactivity claim that courts will be paralyzed by thousands of re-sentencings.[19] This is simply

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[14] *See* USSC, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* 4 (2007), https://tinyurl.com/2fpvmcse; USSC, *Analysis of the Impact of the 2014 Drug Guideline Amendment if Made Retroactive* 7 (2014), https://tinyurl.com/yjf8unus.

[15] DOJ June 2023 Letter, at 3; *see also* CLC June 2023 Letter, at 11 (suggesting that more than 85,000 people would file motions for sentence reductions if Parts A and B are made retroactive).

[16] Out of 19,015 denials, 12,053 individuals whose motions were denied were categorized by the Commission as "not eligible under §1B1.10" and 1,038 individuals whose motions were denied were categorized as having an offense that " does not involve drugs." 2014 Drug Amendment Data Report, at tbl. 8. Another 4,690 motions were denied on the merits, and 3,046 were categorized as "No reason provided/Other reason." *Id.*

[17] *See* Ann Carson, U.S. Dept. of Just., Bureau of Just. Stats., *Prisoners in 2014*, at 17 & tbl. 12 (2014), https://tinyurl.com/yj6k7byr. This "[i]ncludes trafficking, possession, and other drug offenses," but the report does not provide further detail. To my knowledge, the Commission has not published data on the number of individuals in BOP custody in 2014 who were sentenced under §2D1.1.

[18] *See* DOJ June 2023 Letter at 3.

[19] *See* CLC June 2023 Letter, at 12–13; Letter from Mary Graw Leary, Chair, Victims Advisory Group, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 6 (June 22, 2023).

not true. The law is clear that proceedings under § 3582(c)(2) are *not* re-sentencings. They merely allow courts to "modify" an existing sentence.[20] And there are strict limitations on a court's ability to fashion relief. A court "shall substitute only the amendments listed in subsection (d) . . . and shall leave all other guideline applications unaffected."[21] Additionally, except in cases of substantial assistance, relief is strictly limited to the low end of the amended guideline range.[22]

Retroactivity will not often lead to extensive investigations or further fact-finding. Some commentators warn that if Parts A and B are made retroactive, courts and probation officers will need to engage in "a fact-intensive effort," possibly even "researching thousands of criminal histories."[23] That is likewise false. As with every prior retroactive amendment, the availability of relief will depend on the record as it existed at the time of sentencing. In my experience managing the retroactivity projects for Amendments 706, 750, and 782 for the Federal Defender's Office in Maryland, a handful of basic records (the presentence report, judgment, and statement of reasons) were sufficient to determine one's eligibility in a majority of cases. In some, we looked beyond those documents, either to sentencing memoranda or the sentencing transcript. If the records do not establish a person is disqualified from relief, the question of eligibility tips in the individual's favor. But that does not mean that relief will necessarily follow. In every case, the court must weigh all relevant sentencing factors under § 3553(a) before granting relief. This process worked well in my district for Amendments 706, 750, and 782. In a minority of cases, factual disputes arose for the court to resolve about drug type and quantity. Once those were resolved, if the court determined a movant was eligible for relief, the court still had to decide whether, and to what extent, to grant relief under § 3553(a). Ultimately, the decision to grant relief was entirely within the court's discretion, subject only to review for an abuse of discretion.

Litigation over the amended guidelines will begin on November 1, 2023, regardless of retroactivity. Critics of retroactivity also warn that applying the 2023 amendment to those already sentenced will produce a wave of resource-draining litigation over criminal history calculations.[24] In particular, they have pointed to the exclusionary criteria in §4C1.1, claiming the novel categories will be a source of

[20] *See* USSG §1B1.10(a)(3).

[21] USSG §1B1.10(b)(1).

[22] *See* USSG §1B1.10(b)(2)(A).

[23] CLC June 2023 Letter, at 5; *see also* DOJ June 2023 Letter, at 7–8; Letter from Probation Officers Advisory Group to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 4–5 (June 23, 2023) (hereinafter "POAG June 2023 Letter").

[24] *See* CLC June 2023 Letter, at 12–13; DOJ June 2023 Letter, at 2, 8; POAG June 2023 Letter, at 2–6.

protracted litigation. As with previous amendment cycles, though, disagreements over the meaning of new guidelines are to be expected. Regardless of the Commission's decision on retroactivity, litigation will begin on November 1, 2023, if not sooner. Judges, in exercising their discretion, face these decisions every time the law or guidelines change, and are fully capable of adjudicating such disputes. But if we look to previous retroactivity cycles as a guide, there is no reason to believe the relatively small number of people seeking retroactive relief under § 3582(c)(2) will appreciably add to that litigation.

C. Retroactive application of this amendment will promote respect for the federal judicial system.

An important goal of sentencing under § 3553(a) is promoting respect for the law. As someone who speaks daily to incarcerated individuals and their families, respect for the judiciary depends more on fairness than it does on finality. Those serving sentences in federal prison understand many of the legal complexities that caused them to be where they are. They accept when their punishment differs from someone else's due to their varying criminal histories, and they accept that women may be treated less punitively for engaging in the same conduct as their male counterparts. But little drains respect for the judiciary as quickly as telling a client they have to spend another year in prison—missing a child's birthday or a parent's bedside visit—because a court is too busy to right a previous wrong. In our view, giving the 2023 amendment retroactive effect is the surest way for the Commission to promote the public's respect for the law and the judicial system.

Some commentators claim the magnitude of relief available under the 2023 amendment (which will average 14 or 15 months) weighs against retroactivity because it is purportedly "minor."[25] This sentiment disregards the central tenet of federal sentencing, which demands that every sentence be "not greater than necessary."[26] It also dismisses the perspective of those serving unnecessarily long prison terms—those who are separated from loved ones, confined to a bleak facility, confronting ceaseless violence around every corner, aching to visit a friend or family member, or eat a home-cooked meal.[27] It also ignores that for every one of the

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[25] *See* DOJ June 2023 Letter, at 2, 5; POAG June 2023 Letter, at 7; Letter from the Honorable Stephanie Rose, S.D. Iowa, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 1 (May 31, 2023).

[26] 18 U.S.C. § 3553(a).

[27] *See, e.g.*, *United States v. Faison*, No. GJH-19-27, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020) ("For [the person sentenced] every day, month and year that was added to the ultimate sentence will matter. . . . [T]he difference between ten and fifteen months may determine whether a son sees his sick parent before that parent passes away. . . . Thus, it is

18,500 people who stand to benefit from retroactive relief, there are satellites of people—parents, children, siblings, grandparents, friends—who also suffer when their loved one is under a sentence of confinement. We urge the Commission to use its authority to reunite these families.

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crucial that judges give careful consideration to every minute that is added to a defendant's sentence. Liberty is the norm; every moment of incarceration should be justified.").