

# 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)].<sup>1</sup> 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. . . .”<sup>2</sup> 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.

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<sup>1</sup> §1B1.10. cmt. background.

<sup>2</sup> *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.<sup>3</sup>

### 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.<sup>4</sup> 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.<sup>5</sup>

### 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,”<sup>6</sup> 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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<sup>3</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf).

<sup>4</sup> 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”).

<sup>5</sup> See *id.* at 16.

<sup>6</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220627_Status.pdf) ).

defendant’s criminal history score.<sup>7</sup> 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.”<sup>8</sup>

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.<sup>9</sup> 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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<sup>7</sup> *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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf).

<sup>8</sup> *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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=844).

<sup>9</sup> *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.”<sup>10</sup> Amendment 782 was made retroactive, in part, because the Commission determined that a higher base offense level was “no longer necessary.”<sup>11</sup> 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.”<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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<sup>10</sup> *See* U.S.S.G. App. C, Amendment 759, Reason for Amendment, at 419.

<sup>11</sup> *See* U.S.S.G. Suppl. to App. C, Amendment 788, Reason for Amendment, at 81.

<sup>12</sup> *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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf).

<sup>13</sup> *See* U.S.S.C. Suppl. to App. C, Amendment 788, Reason for Amendment, at 81.

<sup>14</sup> §1B1.10 cmt. background.

<sup>15</sup> *See* Retroactivity Analysis at 9 and 16, Figure 1A.

<sup>16</sup> *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.<sup>17</sup> 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."<sup>18</sup> 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.<sup>19</sup> 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,<sup>20</sup> and there is no reason that fewer than half that number of cases will cause

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<sup>17</sup> See Retroactivity Analysis at 9.

<sup>18</sup> See Retroactivity Analysis at 8.

<sup>19</sup> See *id.* at 9.

<sup>20</sup> 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](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.<sup>21</sup>

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<sup>22</sup>

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

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<sup>21</sup> See Retroactivity Analysis at 12, Table 2A.

<sup>22</sup> 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](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.<sup>23</sup> 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.<sup>24</sup> Notably, non-citizens comprise 73.5% (or 878) of the defendants eligible for immediate release.<sup>25</sup>

## 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.<sup>26</sup> 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%).<sup>27</sup> 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%).<sup>28</sup> The consistently lower recidivism rate for defendants with zero criminal history

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<sup>23</sup> See Retroactivity Analysis at 17.

<sup>24</sup> *Id.* at 24.

<sup>25</sup> *Id.* at 24 n.41.

<sup>26</sup> 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](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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf) (hereinafter “2016 Recidivism Report”).

<sup>27</sup> See 2021 Recidivism Report at 27, Figure 14.

<sup>28</sup> 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.<sup>29</sup> 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.”<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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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<sup>29</sup> *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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf).

<sup>30</sup> §1B1.10. cmt. background.

<sup>31</sup> *See* Retroactivity Analysis at 17 & 24, Figure 1B.

<sup>32</sup> *See id.* at 17.



Non-citizens make up 73.5% of the defendants eligible for immediate release if §4C1.1 is made retroactive.<sup>33</sup> 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.<sup>34</sup> The other four disqualifying criteria can be easily determined by a review of the “Offense Conduct” section of the PSR.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

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<sup>33</sup> *Id.* at 24 n.41.

<sup>34</sup> 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.

<sup>35</sup> §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.

<sup>36</sup> *See* Retroactivity Analysis at 17.

<sup>37</sup> *See* Retroactivity Analysis at 20, Table 2B.

<sup>38</sup> *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,

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