

United States Sentencing Commission Public Meeting Minutes
August 24, 2023

Chair Carlton W. Reeves called the meeting to order at 3:02 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Carlton W. Reeves, Chair
- Laura E. Mate, Vice Chair
- Claire Murray, Vice Chair
- Luis Felipe Restrepo, Vice Chair
- Claria Horn Boom, Commissioner
- John Gleeson, Commissioner
- Candice C. Wong, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Patricia K. Cushwa, Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth P. Cohen, Staff Director
- Kathleen Grilli, General Counsel

Chair Reeves welcomed the public to the Commission's public meeting, whether they were attending in-person or watching via the Commission's livestream broadcast.

Chair Reeves introduced his fellow commissioners. Sitting to his right were Vice Chair Claire Murray, Commissioner Candice Wong, and Commissioner John Gleeson. Sitting to his left were Vice Chair Luis Felipe Restrepo, Vice Chair Laura Mate, Commissioner Claria Horn Boom, and ex-officio Commissioner Jonathan Wroblewski.

Chair Reeves announced that the first order of business was to wish Commissioner Wong a very happy birthday. The commissioners did so, with the Chair expressing his wish that Commissioner Wong would celebrate many more birthdays in her future.

Chair Reeves announced that the second order of business was a motion to adopt the April 5, 2023, public meeting minutes. Commissioner Gleeson moved to adopt the minutes, with Commissioner Boom seconding. Chair Reeves called for discussion on the motion. Hearing no discussion, Chair Reeves called for a vote, and the motion was adopted by voice vote.

Chair Reeves stated that the next item of business was the Report of the Chair. He reported that since the April meeting, the commissioners have been busy, including talking to and training judges on the recently promulgated amendments and on other matters related to the Commission's work.

In June, the Commission held its annual judges training seminar in Seattle, Washington, which was attended by over 70 federal judges. Feedback from the attendees was very positive. Next year's program will be held in New Orleans, LA, in June 2024.

In the upcoming week of September 25th, some of the commissioners will be attending the Commission's annual national training seminar in Los Angeles, California. More than a thousand people have registered to attend, including judges, probation officers, defense attorneys, and prosecutors.

On July 19, 2023, the Commission held a public hearing on possible retroactive application of the recently promulgated criminal history amendments. During the one-day hearing, 15 witnesses testified, including representatives of the Department of Justice, the Federal Public Defenders, and each of the Commission's standing advisory groups: the Practitioners Advisory Group, the Probation Officers Advisory Group, the Tribal Issues Advisory Group, and the Victims Advisory Group. The Commission also heard from law enforcement agencies, advocacy groups, and formerly incarcerated individuals.

Chair Reeves reported that the Commission has had two public comment periods since the April meeting. More than 8,000 comments on the possible retroactive application of the recently promulgated criminal history amendments were received and more than 2,000 comments on the proposed policy priorities for the upcoming amendment cycle were received. The Commission received comments from a wide range of commenters including senators, judges, the Department of Justice, the Federal Public Defender Offices, the Commission's advisory groups, advocacy organizations, attorneys, and other professionals in addition to currently incarcerated individuals.

Chair Reeves concluded his report by thanking the public for its comments on the Commission's work and Commission staff for their heroic work since the commissioners' confirmations on August 4, 2023. He noted the staff was moving "full steam ahead" daily and thanked it for helping to get the commissioners to this point in the current amendment process. Chair Reeves also thanked his fellow commissioners who have also worked heroically with one another, and he expressed his appreciation for all their work.

Chair Reeves stated that the next item of business was a possible vote to adopt and publish the final notice of policy priorities for the 2023-2024 amendment cycle. He called on the General Counsel, Kathleen Grilli, to advise the Commission on this possible vote.

Ms. Grilli stated that a notice of possible priorities was published by the Commission in the Federal Register on June 20, 2023, with the comment period concluding on August 1, 2023. The Commission received and reviewed public comment pursuant to that notice.

Ms. Grilli advised that at this time a motion to adopt and publish in the Federal Register the final notice of priorities for the Commission’s 2023-2024 amendment cycle, attached hereto as Exhibit A, would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Gleeson moved to adopt the proposed motion to publish, with Commissioner Boom seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves stated that the next item of business was a possible vote on the retroactive application of Parts A and B, Subpart 1 of the recently promulgated Amendment 821 pertaining to criminal history (or the “Criminal History Amendment”).¹ He called on the General Counsel to advise the Commission on this matter.

Ms. Grilli stated that the Commission had before it a proposed amendment, attached hereto as Exhibit B, that would include Parts A and B, Subpart 1, of Amendment 821 in the list at 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 available for retroactive application subject to a special instruction instructing the court that it shall not order a reduced term of imprisonment based on either Part A or Part B, Subpart 1, of the Criminal History amendment unless the effective date of the court’s order was February 1, 2024 or later.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and granting staff technical and conforming amendment authority, would be in order.

¹ See U.S. SENT’G COMM’N, GUIDELINES MANUAL App. C, amend. 821 (effective Nov. 1, 2023) (Nov. 2023) [hereinafter USSG]. Amendment 821 was initially designated as Amendment 8 in the amendments submitted to Congress on April 27, 2023, and this was how it was referenced during the Commission’s August 24, 2023, public meeting. However, the references to Amendment 8 during the meeting have been changed to Amendment 821 in these meeting minutes as an aid the reader.

Part A of Amendment 821 limited the overall criminal history impact of “status points” (i.e., the additional criminal history points given to individuals for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status) under §4A1.1 (Criminal History Category) (hereinafter the “Status Points Amendment”).

Part B, Subpart 1 of Amendment 821 created a new Chapter Four criminal history guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) providing a decrease of two levels from the offense level determined under Chapters Two and Three for individuals who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors (hereinafter the “Zero-Point Amendment”).

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Gleeson moved to promulgate the proposed amendment, with Vice Chair Mate seconding. The Chair called for discussion on the motion.

Chair Reeves stated that in April, the commissioners voted unanimously to change how the sentencing guidelines would calculate criminal history scores. Given that decision, the Commission was required by law to consider whether people incarcerated under the previous calculations should get a chance to have their sentences revised in line with the new calculations. The Guidelines Manual sets forth several factors the Commission must weigh when making a retroactivity decision, such as the purpose for the amendment and the magnitude of the change in the guideline range made by the amendment.

Chair Reeves stated that all acknowledge that a core function of the Commission was to collect and analyze research and data and gather information on sentencing. That function ensures that the Commission's work was rooted, as it must be, in the best available evidence. The Commission originally believed consideration of an individual's status points at sentencing was consistent with the then-existing empirical research assessing components of recidivism and patterns of career criminal behavior.

But, Chair Reeves explained, the most recent data proved that the Commission was wrong. Status points added little to the overall predictive value associated with criminal history scores. Likewise, the latest research on recidivism disproved the Commission's earlier belief that all people with zero criminal history points should be grouped with people having one criminal history point.

By passing the Criminal History Amendment, Chair Reeves continued, the Commission unanimously agreed to correct this error. As one commenter put it, the Chair recounted, the Commission's changes to the criminal history calculations were 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 times of incarceration as the preferred means of punishment in this country.

Chair Reeves agreed with that commenter's statement. The demand for evidence-based sentences bears as strongly on the past, the Chair stated, as it does on the future. He noted that the Commission agreed that it was wrong to allow new sentences to be untethered from the latest data and that all should agree it was wrong to allow sentences still being served to have their sentence length be based on outdated research.

Chair Reeves observed that the purpose of the Criminal History Amendment was not the only factor relevant to the commissioners' retroactivity decision. As many commenters wrote, he recounted, the Commission had a duty to consider all the costs associated with retroactivity. The Chair stated that the commissioners also considered the time judges would spend dealing with new filings and the additional resources expended on re-entry and supervision.

But, Chair Reeves stated, the commissioners also considered the financial cost of continuing to

incarcerate an individual, which was currently \$44,000 per year, \$40,000 more than the annual cost of supervision. As the American Conservative Union Foundation testified at the Commission's July hearing, retroactive application represented a substantial opportunity to save taxpayers millions of dollars and allowed the government to better allocate resources towards proven crime prevention efforts.

Chair Reeves recognized that as a matter of practice the Commission did not make minor downward adjustments to the guidelines retroactive, and a number of stakeholders suggested that retroactive application of the Criminal History Amendment would be inappropriate because its changes were minor in nature. Most prominent among those commenters was the Department of Justice. However, he said, for those like himself that lack firsthand knowledge of incarceration, but are familiar issuing decades long sentences, a policy resulting in an average sentencing reduction of a little over a year may seem minor to some.

Nevertheless, Chair Reeves asserted, for those who have spent time in prison, or who have loved someone who has, there was nothing minor about a year's worth of freedom. For these people, as the Chair's former colleague Judge George Hazel put it, every day, month, and year that was added to their ultimate sentence would matter.

Chair Reeves recalled that the Commission heard similar statements from a number of formerly incarcerated people. As one said, every single day he received off his sentence put him one day closer to his family. Another said that any reduction that could get him closer to seeing his father before he passes, seeing his son graduate high school, or watching his son marry, would mean the world to him. And a third person whose father was recently diagnosed with brain cancer told the Commission: What would an additional year with my father mean to me? I lack the words to explain what comfort a single additional hug would mean to him or I.

In making the Criminal History Amendment retroactive, Chair Reeves stated, the Commission would be giving back over 20,000 years of freedom to federally incarcerated people and their families. This was over seven million days parents could have back with their children, children could have back with their parents, and communities could have back with their neighbors.

There was nothing minor about the liberty at stake in the Commission's retroactivity decision, Chair Reeves asserted. This was, he said, liberty that just a few months ago this Commission unanimously voted to give to people who would be sentenced in the moments and the years to come. Again, he reiterated, the Commission did so on the belief that the data and research no longer justified some portion of the penalties related to criminal history. What was unjustified in the future was unjustified in the past, and must be rectified now, the Chair stated. As Judge Jack Weinstein once said, the Chair added, justice favors freedom over unnecessary incarceration.

Chair Reeves stated that if no single person should bear the injustice of an unnecessary day in prison, then surely thousands should not be forced to suffer seven million unnecessary days of incarceration. The Chair closed his remarks by urging his fellow commissioners to vote in favor of retroactivity.

Chair Reeves asked whether there was any additional discussion on the proposed amendment and called on Vice Chair Restrepo.

Vice Chair Restrepo thanked Chair Reeves and expressed his agreement with all of the Chair's points in favor of retroactivity and stated that he would respectfully offer some thoughts of his own. As with previous retroactivity decisions, there had been some concerns raised about the burden retroactivity might place on the judiciary. He noted that the Commission had received comments about the increased workloads for federal district court judges, assistant United States attorneys, federal defenders, and probation officers. The Commission had also heard concerns about releasing incarcerated people without adequate re-entry resources.

As a former U.S. district court judge, Vice Chair Restrepo stated that he was familiar with the workload tethered to that position. Further, having been involved in the Eastern District of Pennsylvania's re-entry program since 2007, he knew the importance of ensuring that incarcerated people had a smooth, well-planned transition out of prison. While sensitive to the administrative burdens at issue, the Vice Chair did not believe that these concerns should stand in the way of retroactivity.

Vice Chair Restrepo expressed his confidence that the courts were well equipped to dispose of the motions for relief that may come their way. In the context of prior retroactivity decisions, ones that led to a far larger number of applications than the Commission predicted under the proposed amendment, federal judges, assistant United States attorneys, federal defenders, the private bar, and probation officers worked together to efficiently address those motions.

Vice Chair Restrepo explained that experience with compassionate release during the COVID pandemic demonstrated that when faced with a wave of motions far more complex than those at issue today, federal courts were ready to handle whatever came their way. He quoted Judge Ralph R. Erickson of the Eighth Circuit Court of Appeals, who testified at the Commission's July retroactivity hearing, who said, "When it comes to our federal courts and retroactivity, I think they'll get it done."

Vice Chair Restrepo recognized that some have argued that the Commission's decision on retroactivity could cause a flood of motions from every person with status points, and every person without criminal history points. Past experience suggests this would not happen, he believed.

Vice Chair Restrepo noted, for example, that for the 2014 amendment reducing guideline drug trafficking penalties by two levels (known as the "Drugs Minus Two Amendment"), at the time of retroactivity, over 90,000 people were serving sentences under guidelines affected by that amendment.² Yet, only about half of that figure filed motions for sentence reductions, which was in line with the Commission's estimates of those actually eligible for relief. Vice Chair

² For the Drugs Minus Two Amendments, see USSG App. C, amend. 782 (effective Nov. 1, 2014) and USSG App. C, amend. 788 (effective Nov. 1, 2014).

Restrepo expressed his confidence that the Commission's staff estimates would again accurately reflect reality.

Vice Chair Restrepo had no doubt that a rush to release people from prison can, without proper planning, lead to unfortunate results. But he was confident that such consequences could be avoided today, and that the Commission's decision will not undermine public safety. First, judicial districts across the country, including those in places that expect to see the most motions, have long established programs to provide the necessary planning and resource provisions.

Second, no person can be released before a judge weighs the factors at subsection (a) of 18 USC § 3553 (Imposition of a Sentence), which includes the need to protect the public and provide the defendant with needed correctional treatment in the most effective manner. Just as they have in the context of prior retroactivity decisions, Vice Chair Restrepo observed, judges will use their discretion to ensure sentences are only reduced when appropriate. He also noted that those released pursuant to the Drugs Minus Two Amendment, for example, did not recidivate at higher rates than normal.

Given the experiences of the past, the steps the Commission is taking in the present, and for all the reasons Chair Reeves gave in support of retroactivity, Vice Chair Restrepo asked his colleagues to vote in support of the proposed amendment.

Chair Reeves called on Vice Chair Mate.

Vice Chair Mate expressed her appreciation for the opportunity to speak and her agreement with Chair Reeves and Vice Chair Restrepo's remarks. She added that, as Chair Reeves explained, to inform the Commission's decision, the commissioners listened to the testimony taken at the Commission's July public hearing and reviewed the comments it received on the issue.

Vice Chair Mate recounted how some commenters urged the commissioners to follow the decision made by the Commission in 2010, over a decade ago, to not make retroactive a previous amendment eliminating consideration of recency points (or the "Recency Points Amendment") in the criminal history guidelines.³ The Vice Chair stated that the circumstances and evidence currently before the Commission were different than they were in 2010 and supported a different result.

Vice Chair Mate explained that when the Commission voted on retroactivity for recency points, it was on the heels of the President signing the bipartisan Fair Sentencing Act of 2010 that partially ameliorated the crack-powder cocaine sentencing disparity, an issue the Commission

³ For the Recency Points Amendment, see USSG App. C, amend. 742 (effective Nov. 1, 2010). For the discussion on why the Commission did not make the Recency Points Amendment retroactive, see U.S. Sent'g Comm'n, Public Meeting Minutes (Sept. 16, 2010), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf.

had brought to Congress' attention in 1995. In 2010, Congress called on the Commission to act quickly to amend the guidelines in response to the Fair Sentencing Act. Upon doing so, Vice Chair Mate continued, the Commission was required by statute to specify whether any reductions applied retroactively.⁴

Vice Chair Mate stated that while the Commission faced several important decisions on one of the most profound and widely recognized injustices in federal sentencing, crack cocaine sentencing, it did not face the same calls to address disparities stemming from criminal history score calculations. It was not until five years after the commissioners acted on recency points that the Robina Institute of Criminal Law and Criminal Justice urged the Commission to scrutinize the fairness of the criminal history score and narrowly tailor the criminal history components to meet the terms and goals of sentencing while avoiding unnecessary disparities.

Vice Chair Mate explained that it was these kinds of calls that influenced her vote in what was ultimately a unanimous decision in April to change the Commission's approach to criminal history scores for the better. Additionally, she noted, the commissioners now have evidence that the Commission did not have in 2010 regarding the administrability of the Commission's decision in 2014 to make retroactive the Drugs Minus Two Amendment.

As Vice Chair Restrepo mentioned, Vice Chair Mate said, past experience provided compelling evidence that the number of motions arising from the current Criminal History Amendment may not be as large as some fear. That experience also demonstrated the capacity of district courts to implement systems that aided in the effective and efficient management of the workload while ensuring that individuals who were eligible for relief, and for whom relief is appropriate after considering the section 3553(a) factors, were not imprisoned any longer than necessary.

Vice Chair Mate stated that the evidence before the Commission supported a decision to make the Criminal History Amendment retroactive, and she joined her colleagues in urging for a vote in favor of retroactivity.

Chair Reeves called on Vice Chair Murray.

Vice Chair Murray thanked Chair Reeves, and Vice Chairs Restrepo and Mate for their remarks. She stated that she was offering her statement on the retroactivity of just Part A of the proposed amendment, the Status Points Amendment, on behalf of herself and Commissioners Wong and Boom. She added that Commissioner Wong would also speak about status points, and Commissioner Boom would speak on Part B, Subpart 1, of the proposed amendment, the Zero-Point Amendment, for the three commissioners.

Vice Chair Murray stated that the three commissioners had nothing but respect for all of their

⁴ For the amendments related to the Fair Sentencing Act of 2010, see USSG App. C, amend. 748 (effective Nov. 1, 2010), USSG App. C, amend. 750 (effective Nov. 1, 2011), and USSG App. C, amend. 759 (effective Nov. 1, 2011).

colleagues on the Commission, but that today was a day they would differ in views. In particular, Vice Chair Murray and Commissioners Wong and Boom believed that making the Status Points Amendment retroactive was misguided. And further, they were concerned that doing so deviated from the Commission's precedents and deviated in ways that would impose heavy and ultimately unjustified burdens on our court system, on criminal victims, and on the important principle of finality in criminal judgments.

Vice Chair Murray recognized that making the Criminal History Amendment apply retroactively was a weighty responsibility, and it was one that all of the commissioners took seriously. She noted that making an amendment apply retroactively was a power that the Commission had long recognized that Congress wanted the Commission to exercise in exceptional cases, not as a rule. The Vice Chair believed that this was common ground for the commissioners but, respectfully, it was very different to justify retroactivity based on the fact that what was just now was also just in the past. That is a different principle.

Vice Chair Murray recounted that as former commissioner and now Judge Beryl Howell explained, this was because the finality of judgments was an important principle in our judicial system, and we require good reason to disturb final judgments. For that reason, in 2010, Vice Chair Murray observed, the Commission explicitly declined to make retroactive its Recency Points Amendment, which, in her view, was so closely analogous to the proposed Status Points Amendment in all relevant respects as to be indistinguishable.

Vice Chair Murray stated that all of the 2010 Commission's reasoning in refusing to make the Recency Points Amendment retroactive applied with full, and in some cases, greater force today. She explained that the framework under which the Commission determined whether retroactivity was appropriate was by looking at three factors: (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. She stated that she and Commissioner Wong would detail how each of those factors militates against rendering the Status Points Amendment retroactive; Commissioner Boom would address these factors with respect to the Zero-Point Amendment.

Vice Chair Murray stated that the purpose of the Status Points Amendment was not to right some fundamental systemic injustice in the criminal justice system or in the guidelines. Rather, it was to respond to evolving data regarding the marginal predictive value of status points with respect to the risk of recidivism. The Commission's recent studies on recidivism indicated that status points were less helpful in predicting recidivism risk than the original Commission initially believed. Consistent with that new data, the Commission chose this year to refine and recalibrate its treatment of status points under the guidelines, lessening their impact on defendant's criminal history scores, but retaining one status point for recipients in higher criminal history categories.

Vice Chair Murray explained that this does not mean that the previous version of the guidelines that relied on status points were unjust. After all, the current amendments retain a status point for approximately half of defendants. In fact, the Vice Chair continued, the Commission recently told Congress in its reasons for amendment accompanying these amendments that the

Commission was retaining that one status point for defendants with higher criminal histories because it “continued” to recognize that status points “serve multiple purposes of sentencing.” The multiple purposes of status points include not just predicting recidivism, but also accounting for “the offender’s perceived lack of respect for the law.”

For that reason, Vice Chair Murray stated, in the words of the Criminal Law Committee of the Judicial Conference (or the “CLC”)—which for practical purposes speaks for the judicial branch and had submitted public comments strongly opposing making this amendment retroactive—the Status Points Amendment “was not intended to correct a fundamentally unfair approach to sentencing. It’s merely an attempt to update the guidelines to account for ongoing research in the field of criminology.” In that respect, she noted, the Status Points Amendment was closely analogous to the Commission’s 2010 amendment eliminating recency points, which were points that were added to a defendant’s criminal history score when the offense of conviction was committed less than two years after a prior offense.

Vice Chair Murray explained that the 2010 Recency Points Amendment was also prompted by Commission research revealing that recency points added little to the predictive power of a defendant’s criminal history score with respect to recidivism. That was, she noted, precisely the rationale that underpinned this year’s Status Points Amendment. But the 2010 Commission had no trouble in unanimously and decisively determining that the Recency Points Amendment should not be applied retroactively. In doing so, she said, the Commission relied in part on the fact that the Recency Points Amendment was motivated by evolving data, not concerns about fundamental injustice.

Vice Chair Murray quoted then–commissioner, and now Supreme Court Justice Ketanji Brown Jackson: “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.” The Vice Chair believed Justice Jackson’s reasoning applied now with equal force.

Vice Chair Murray believed that the second factor the Commission considers in its retroactivity determinations, the magnitude of the change in the guideline range made by the Status Points Amendment, also counseled against retroactive application. She acknowledged that Chair Reeves was absolutely right that no reduction in a sentence was minor to someone who was incarcerated and unable to be home with the people they love. She agreed that the Commission should never lose sight of that; it was fundamentally important.

But Vice Chair Murray stated, Congress did require the Commission to make distinctions amongst the sentence reductions permitted by various amendments. “Minor” is Congress’ word, she noted, not the Commission’s. Congress told the Commission that, “minor downward adjustments in the guidelines should not be made retroactive,” because Congress did not believe, “that courts should be burdened with adjustments in those cases.”

For that reason, Vice Chair Murray continued, the Commission’s criteria require it to take into account and to gauge the magnitude of a sentence reduction permitted under an amendment. More specifically, they provide that amendments that generally reduce the maximum of the

guideline range by less than six months categorically fall outside the Commission's policy statements on retroactivity.

Outside of that categorical exclusion, Vice Chair Murray stated, magnitude has to be weighed. The Status Points Amendment does not fall into the categorical exclusion, but it comes very close. Thirty percent of relevant defendants are eligible for a reduction of six months or less—not 50 percent. Sixty percent of relevant defendants would be eligible for a 12-month reduction or less, and the median defendant would be eligible for a reduction of ten months or less. Just to look at things slightly differently, the Vice Chair suggested, eliminating one or two status points from a defendant's criminal history score would, at most, move that defendant down one criminal history category.

Because of the structure of the sentencing table, Vice Chair Murray explained, moving down one criminal history category is equivalent in almost all cases to a reduction of one offense level, the smallest reduction the Commission can make through an amendment to the guidelines. Here again, she noted, status and recency points were closely analogous. The Recency Points Amendment, too, had the effect of lowering eligible defendant's criminal history scores by one to two points, and the 2010 Commission had no trouble unanimously determining that it should not apply retroactively.

Vice Chair Murray offered two additional points. First, it was true that the 2010 Commission was acting on the heels of another amendment, but she believed that was true for the Commission today because of the recent Compassionate Release Amendment.

Second, Vice Chair Murray recounted, the Commission heard from several probation offices spontaneously, and from all of the judges from the Eastern District of Missouri stating that because they would need to act on the heels of the Commission's compassionate release amendment, which becomes effective November 1, 2023, they were already going to be swamped with motions. So, this was a time when it would be particularly hard for them to entertain retroactivity motions. The Vice Chair also noted her understanding that the demographic disparities which give many people pause in the status point regime were present in equal measure in the Recency Points Amendment.

Vice Chair Murray concluded by stating that for these reasons, she and Commissioners Wong and Boom had not heard today any compelling reason to deviate from the Commission's 2010 precedent.

Chair Reeves called on Commissioner Wong.

Commissioner Wong thanked Chair Reeves and Vice Chair Murray. She stated her intention to add a few observations about the third factor in the Commission's retroactivity analysis and the difficulties of practical implementation that the retroactive application of the Status Points Amendment would entail. Here, she, Vice Chair Murray, and Commissioner Boom feared the strain on the court system would be stark and immense.

Commissioner Wong explained that the Commission estimated that there were 50,545 status point recipients currently in the Bureau of Prison's (BOP) custody, which was close to 80 percent of the federal defendants sentenced for felonies or class A misdemeanors last year. Combine that 50,545 with the nearly 35,000 zero-point offenders implicated by the Zero-Point Amendment, she continued, and we are talking about over 85,000 potential candidates for sentence reductions, which is more than half the population held in BOP custody.

To be sure, Commissioner Wong acknowledged, many of the 50,545 status point recipients may not be actually eligible for sentence reduction. The Commission estimates the actually eligible population at around 11,500. But what was clear, she continued, was that the wave of motions for retroactive sentence reduction befalling the courts would not be limited to only those 11,500 inmates; far more would file.

Commissioner Wong stated that this was clear as a matter of lived experience from prior guideline amendments, clear as a matter of common sense, and by virtue of the complexities of computing criminal history. Evaluating whether a status point reduction would in actuality lower one's sentencing range is no simple lay exercise, particularly when overlaid with the multiple novel application issues that the Commission's Probation Officers Advisory Group has already flagged, she added.

Commissioner Wong observed that these numbers also echo the remarkably similar data noted by then-commissioner Justice Ketanji Brown Jackson in declining to make the Recency Points Amendment retroactive in 2010. As Justice Jackson indicated at the time, more than 43,000 then-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, Justice Jackson observed, if the Recency Points Amendment was made retroactive, the courts could be overwhelmed with unsuccessful sentence reduction motions. Here again, Commissioner Wong asserted, the Commission was presented with a similarly overwhelming pool of likely movants, and a similarly small fraction of likely beneficiaries.

Yet today, Commissioner Wong observed, the Commission was poised to take the opposite path. Strikingly, the public comments submitted by the judicial branch came out overwhelmingly against retroactivity. The CLC, which has supported making certain amendments retroactive in the past, sounded the alarm in no uncertain terms.

Commissioner Wong stated that the Commission had received written comments from 24 judges, chief judges, senior judges, new judges, border judges, and every one of which urged against retroactivity. As the CLC explained, retroactivity of the Status Points Amendment would strain the already strained resources of pre-trial and probation services, and it will do so at a time "when halfway housing is in short supply, and probation offices have limited supervision, staff, and budgets."

Commissioner Wong explained that probation officers would be required to review criminal histories, compute new guidelines sentencing ranges, and prepare new reports for thousands of defendants. Supervision officers would have to keep pace with supervising thousands of

additional people eligible for release perhaps sooner than expected and strive to do so with adequate planning and without jeopardizing community safety. The Administrative Office of the United States Courts has estimated that the burdens of retroactivity would require a significant increase in budget and staffing, pegged at up to 250 new officer positions, in probation and pre-trial services.

As should be obvious, Commissioner Wong noted, this was an increase that we, as the United States Sentencing Commission, with no powers of the purse, were wholly unable to promise, much less provide. The reality was that this herculean effort would require what the CLC calls, “the reallocation or diversion of resources from other important duties,” be it of probation, pre-trial prosecutors, or the courts.

Commissioner Wong, along with Vice Chair Murray and Commissioner Boom, feared that such tradeoffs could come at the expense of public safety. Status point offenders, after all, spanned all criminal history and offense categories, noting that a staggering 91 percent of those eligible for retroactive application of the status point amendment were in criminal history categories III through VI with 58 percent in categories IV through VI. Over 20 percent were firearms offenders, a category that recidivates at a higher rate than non-firearms offenders in every age group, 12.1 percent of those eligible stand convicted of robbery, 507 stand convicted of assault or sexual abuse, and 156 stand convicted of murder, she reported. And of course, every status point offender had previously recidivated, having earned status points in the first place by recidivating while under a prior sentence.

Commissioner Wong stated that the Commission’s own estimates projected that with retroactive application of the status points amendment, even with a three-month delay, 2,963 status offenders would be eligible for release within the first year of the amendment’s effective date. In this context, she asserted, it would be all the more prudent to apply the Commission’s refined guideline amendment prospectively and incrementally without risking the early release of duly convicted, duly sentenced violent offenders.

Commissioner Wong suggested caution lest the Commission forget the burdens of retroactivity would be borne by victims of crime as well. As the Commission’s Victims Advisory Group warned, behind each motion for retroactive sentence reduction was a crime victim whose life will be upended by the filing, a victim who will experience the repeated yet unexpected trauma of destabilizing their expectations of finality regarding their offender’s sentence.

Commissioner Wong concluded by observing that retroactivity was the exception, not the norm. Here, it was the view of Vice Chair Murray, Commissioner Boom, and herself that the targeted purpose of the Status Points Amendment, the limited magnitude of the projected relief, and the substantial burdens of application all weigh heavily against such exceptional treatment.

Chair Reeves called on Commissioner Boom.

Commissioner Boom thanked Chair Reeves. She stated that her statement was on behalf of herself and Vice Chair Murray and Commissioner Wong, who opposed the proposed retroactive

application of the new zero-point offender guideline at §4C1.1 created by Part B, Subpart 1, of Amendment 821. Commissioner Boom expressed her gratitude for the opportunity to do the important work of the Commission, and she was grateful to work with the staff and her fellow commissioners, all of whom approached the Commission's work with the gravity that it deserves.

Given her fellow commissioner's understanding of the gravity of the proposed amendment, Commissioner Boom continued, she said she would be especially disappointed if the Commission voted in favor of retroactivity. She recounted how the Commission often reflected that when you speak to the Commission, you will be heard. But in this instance, she asserted, with both parts of the proposed retroactivity amendment, the Commission would fail to heed its own mantra if the Commission voted for retroactivity.

Commissioner Boom noted that with the exception of the perspective from incarcerated individuals and their counsel, every significant stakeholder in the criminal justice system came out against making either part of the Criminal History Amendment retroactive. Or, in the case of the Probation Officer's Advisory Group, strongly advocating the pitfalls of doing so. Why, Commissioner Boom asked. Because there was no principled application of the guiding policy statement at §1B1.10 that supported retroactivity, she answered.

Commissioner Boom explained that the commissioners' task as a bipartisan Commission was to dispassionately apply the policy statement on retroactivity, heeding Congress' direction that retroactivity was the exception, not the rule. But today, she observed, the commissioners would ignore the guard rails that were supposed to guide them, and instead opt for unbounded retroactivity if we made these amendments retroactive.

Both the CLC, and every one of the 24 judges who drafted public comment on retroactivity told the Commission in no uncertain terms that making either of today's amendments retroactive would be a mistake. Commissioner Boom added that getting that many judges to agree on anything was extraordinary.

Commissioner Boom observed that the CLC's reasoned position did not reflect a refusal to do the work, or a fundamental intractable opposition to retroactivity, but a principled one tethered to the Commission's §1B1.10 policy statement. As the CLC's letter outlined, the CLC has supported retroactive application for past amendments that actually aligned with the policy statement, such as the 2011 Fair Sentencing Act Amendment and the 2014 Drugs Minus Two Amendment. In 2010, Commissioner Boom noted, the CLC opposed a similar criminal history "tweak" related to recency points and the 2010 Commission had no problem unanimously heeding the CLC's position and rejected retroactivity.

Commissioner Boom explained that first, and most importantly, the purpose of the proposed Zero-Point Amendment was not to redress some miscarriage of justice. The Commission's recent reports on recidivism showed that defendants with zero criminal history points were markedly less likely to recidivate than even defendants with one criminal history point. But, she continued, in the current discretionary sentencing scheme judges already considered the

defendant's zero-point status, which is why sentencing courts have long varied and departed downwards when sentencing zero-point offenders.

That is, Commissioner Boom emphasized, judges already consider the offender's zero-point status, and the Commission's recently promulgated amendment was a step forward in aligning the current guidelines with what courts are already doing with zero-point offenders. The promulgated amendment fine-tuned the Guidelines Manual to account for the Commission's latest research on recidivism, but those were tweaks, the continuing churn of updating the Manual to implement new criminological data and research. It was a far cry, she asserted, from righting a systemic wrong that justice demanded be applied retroactively.

The CLC explained its opposition to retroactivity because the amendments did not address issues of fundamental fairness, but simply refine the sentencing process based on evolving data. The CLC cautioned that making the amendments retroactive would, Commissioner Boom recounted in the CLC's words, "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."

The burden was obvious, Commissioner Boom stated, with respect to the proposed Zero-Point Amendment and the numbers were striking. The Commission's retroactivity impact statement estimated that courts could receive as many as 34,922 sentence reduction motions if the Zero-Point Amendment was made retroactive, and as many as 7,272 offenders could be eligible for sentence adjustments.

Commissioner Boom observed that this would amount to a huge number of potential motions, only a small fraction of which were likely to be meritorious. Retroactivity of the Zero-Point Amendment defied the sort of easy mechanical application some witnesses reported experiencing with the Drugs Minus Two Amendment, or the 2007 Crack Minus Two Amendment, she recounted.⁵ On its face, a defendant's pre-sentence report makes it clear whether he or she was convicted of a drug offense or one involving crack cocaine, but this was not so for zero-point eligibility, the Commissioner noted.

Commissioner Boom explained that even where a defendant has zero countable criminal history points, the Zero-Point Amendment applies to him or her only if that person does not fall within one of the ten enumerated exclusions. Going forward, she continued, probation officers will include an analysis of whether a defendant falls into any of those exclusions in the pre-sentence report.

⁵ In 2007, the Commission reduced by two levels the base offense levels assigned by the Drug Quantity Table at subsection (c) of §2D1.1 (Drug Trafficking) for each quantity of crack cocaine. See USSG App. C, amend. 706 (effective Nov. 1, 2007); USSG App. C, amend. 711 (effective Nov. 1, 2007); USSG App. C, amend. 713 (effective Mar. 3, 2008). Collectively, these amendments are sometimes referred to as the "Crack Minus Two Amendment."

But, Commissioner Boom stated, pre-sentence reports that were created prior to the Zero-Point Amendment simply cannot be expected to contain that same information. For example, one of the exclusions excluded defendants who personally caused substantial financial hardship. That analysis is nowhere found in the existing guidelines, she noted, which applies an enhancement in the broader category of cases where the offense resulted in substantial financial hardship. Before 2015, the guidelines did not include a substantial financial hardship enhancement at all.

For that reason, Commissioner Boom explained, a substantial number of pre-sentence reports for defendants convicted of fraud simply cannot be expected to answer the question of whether the defendant personally caused substantial financial harm, and thus was eligible for a reduction of sentence, and the courts will be unable to rule on those motions without substantial fact finding.

The Commission's Probation Officers Advisory Group identified at least four exclusions where additional facts would likely be necessary. For that reason, Commissioner Boom observed, every probation office that submitted comment as to retroactivity asked the Commission not to make the Zero-Point Amendment retroactive, citing for example, the extreme difficulty of implementing the amendment retroactively due to the nature of post-sentencing fact finding and litigation.

Commissioner Boom stated that the Zero-Point Amendment failed to address an issue of systemic unfairness, yet has a substantial and costly burden on victims, courts, probation officers, communities, and other stakeholders. And, she added, it sacrificed other purposes of punishment, especially finality in sentencing.

Sentencing was the toughest thing federal judges do, Commissioner Boom observed. It was an awesome and humbling responsibility. Judges, she said, understand the gravity of our decisions on victims, on the community, and especially on the incarcerated. And no one, she emphasized, especially judges, want a defendant to spend a single day incarcerated that did not serve the purposes of punishment.

But, Commissioner Boom stated, Congress directed that retroactivity be the exception, not the rule, and the Commission's role as a bipartisan commission was to faithfully apply the factors under §1B1.10 in making retroactivity decisions. As part of this process, she said, the Commission asked for comment, and it got it, loud and clear.

Commissioner Boom stated that it would be a mistake to ignore the reasoned, thoughtful, measured voices of judges, probation officers, and others to instead pursue unbounded retroactivity.

Chair Reeves called on Commissioner Gleeson.

Commissioner Gleeson thanked Chair Reeves and thanked his colleagues for their remarks. The Commissioner expressed his agreement with Chair Reeves, and Vice Chairs Restrepo and Mate's statements. He stated that he agreed with all of their reasons favoring retroactivity, and that it appeared from all the comments heard that the Commission would make the Criminal History

Amendments retroactive, albeit by a divided vote. He stated his intention to add a couple of points of his own in support of that result.

Commissioner Gleeson acknowledged that a number of commentators opposed the retroactive application of these Criminal History Amendment, as have his colleagues, by saying that unlike previous retroactive amendments, the Criminal History Amendment did not remedy a systemic wrong, and thus did not rectify a fundamental unfairness in the Guidelines Manual. In the absence of such a systemic wrong, the argument goes, concerns about administrative burdens and the need for finality of sentencing should compel this body to reject retroactivity.

In Commissioner Gleeson's view, it was hard to overstate how wrong that argument was. The comments the Commission received, he emphasized, could not establish more clearly that Black and Brown people in our country have been arrested and convicted and then found themselves in the status of being under supervision at disproportionately higher rates for decades.

This was not for justifiable reasons, Commissioner Gleeson asserted. His city of New York had its shameful experience with the infamous "stop and frisk" practice of the New York City Police Department. Tens of thousands of young men of color were stopped illegally, told to turn their pockets inside out, arrested for simple possession charges, then sent to Riker's Island—only to be told a few months later that they could either plead guilty and go home right away or wait a long time for trial. They made the obvious choice, Commissioner Gleeson suggested, and racked up a criminal history point, putting themselves in the status of being under supervision. Many of them, because of the resource deprivations of the supervising officers in the New York State system were completely unaware of the fact that they were in the status of being under supervision.

Commissioner Gleeson observed that other areas of our country have had their own versions of stop and frisk, and they all contributed to the reality that over-reliance on criminal history can drive pernicious racial disparities in sentencing. For that reason, the Robina Institute of Criminal Law and Criminal Justice, mentioned earlier, called on the Commission and all other sentencing commissions to examine the racial impact of criminal history scores and all score components, to carefully evaluate any such component with a strong disparate impact on non-White offenders, to ensure that the degree of added enhancement is narrowly tailored to meet the chosen goals without unnecessary severity and disparate impact. In amending the guidelines as the Commission did, he continued, it took this research-based advice seriously, and worked to reduce the impact of racism in our criminal justice system moving forward.

Commissioner Gleeson recognized that there was no such thing as fully remedying a racial disparity that has been "baked" into the criminal justice system for so long. But making these amendments retroactive, he stated, would have a tangible effect on thousands of people of color. With respect to the proposed retroactivity amendment on status points, 43 percent of those potentially eligible for relief were Black and 28 percent are Hispanic. As for the provision regarding zero criminal history points, Commissioner Gleeson noted, 69 percent of those potentially eligible for relief were Hispanic.

Commissioner Gleeson thought that it was a very important day for the Commission. It was established almost 40 years ago by an act of Congress and in one of the very first sections of the law, Congress set forth the purposes of the Commission. One purpose was to establish sentencing policies that were fair and another, which he believed particularly relevant to the day's business, was to develop means of measuring the degree to which sentencing practices were effective in meeting the purposes of sentencing.

Commissioner Gleeson stated that it should be crystal clear to everyone: The Criminal History Amendments were the result of the Commission with its very able staff measuring whether status points and whether lumping zero-point offenders together with those who have one criminal history point have been effective in meeting the purposes of sentencing. Just four months ago, he noted, based on data, and data analyses no one disputes, the Commission unanimously concluded they did not.

Commissioner Gleeson emphasized that the perceived increase in the risk of recidivism on which those upward adjustments in criminal history scores were based were wrong. Further, he said, the increases in punishment they resulted in were unfair, and they were visited disproportionately on defendants of color.

Commissioner Gleeson reiterated that no one disputed this point, but still some have told the Commission to remedy the unfairness in a different way. He recounted that one commentator suggested increasing the sentences of those who had only one criminal history point.

Commissioner Gleeson noted that in April 2023, the same month in which the Commission amended the guidelines to adjust the criminal history computations in the manner being discussed today, a Department of Justice report stated correctly that the First Step Act in 2018 was the culmination of a bipartisan effort to reduce the size of the federal prison population.

The very purposes of opening up compassionate release, to pick one example, and of affording earned time credits to inmates to pick another, Commissioner Gleeson stated, was to take the first steps to remedy a sentencing regime that produced too many federal inmates doing too much time in prison. It was never a good idea to remediate unfairness, he observed, visited on one category of persons who appeared for sentencing by increasing the sentences of those in another category.

But certainly, Commissioner Gleeson said, any such suggestion had never been more out of step with today's bipartisan consensus that it's time to decarcerate. The Commission is an expert body created to formulate fair sentencing policy and it is against that backdrop, not the backdrop that this body acted against in 2010, that the Commission is doing what it is doing today.

Commissioner Gleeson recognized that other commentators, without the slightest disagreement with the data or data analyses, said it was too much of a burden on our criminal justice system to remediate this unfairness in any way except prospectively. But, he explained, the Commission visited fundamental unfairness on thousands of people through guidelines that judges follow.

The Commission lengthened their prison terms based on assumptions it now knows from the data is wrong and was wrong.

The Commission did that, Commissioner Gleeson stressed, and it owed it to them to fix it. There were tens of thousands for whom it was too late to fix because they have served their sentences. We can, he said, at least do something for those still in prison. In the periods of time—Chair Reeves mentioned this, he noted, but some things were so important they bear repetition—in the periods of time they would otherwise be required to serve if the Commission did not make these amendments retroactive, grandparents and parents will die. Kids will have graduations and birthdays. Job opportunities will fade. Commissioner Gleeson thought it was so important for the Commission never to lose sight of the fact that at the receiving end of these sentences there are three-dimensional human beings, some of whom testified before the commissioners last month, with liberty taken away, with families who love them, and communities that need them.

Commissioner Gleeson recounted how he had the benefit of being part of the implementation of retroactive reductions in sentences in 2007, and 2010, and 2014 as a sitting judge. Like the case with respect to the issue before the Commission today, there were tens of thousands of eligible inmates, and there were tens of thousands of motions that were non-meritorious.

Just as the Commission heard today, Commissioner Gleeson observed, there were predictions of chaos, and insufficient resources. But, he noted, prosecutors, and defendants, and probation officers, and at the end, judges, rolled up their sleeves and did the work, and implemented those retroactive sentence reductions. Was it burdensome, he asked. Yes, but to the degree it's burdensome, the liberty interests at stake are more important, the Commissioner answered.

Commissioner Gleeson believed that the speculation that the amendments being made retroactive will somehow endanger public safety was an especially unpersuasive thing to say. First, he continued, it overstated the role of the Commission and the effect of its decision. No one would have his or her sentence reduced automatically as a result of what the Commission does. Under the applicable policy statement, he explained, judges may grant reductions, but they are never required to.

And second, Commissioner Gleeson continued, fear mongering denigrates the judges who implement the work the Commission does. Its policy tells them explicitly to consider whether a reduction based on the retroactive amendments would pose a danger to any person or to the community and authorizes them to deny the reduction if that was the case. There was no reason not to trust the Department of Justice to raise such concerns in the minority of cases in which they will arise. And there was no reason not to trust judges to adjudicate them properly based on the specific facts of each case. Judges know how to protect their communities, he stated.

Commissioner Gleeson applauded the Chair, Judge Reeves, who he believed was a great leader. The Commission does very difficult work, work that obviously gives rise to deep differences of opinions among dedicated commissioners who are all acting in the best of faith. He stated that Chair Reeves' intellect, personality, and leadership style keeps the commissioners close despite their differences.

Commissioner Gleeson also commended his other colleagues, and like Commissioner Boom, he commended all of his colleagues for their dedication to getting sentencing policy right. In his view, he thought that common goal binds the commissioners together even when they strenuously disagree.

Finally, Commissioner Gleeson thanked staff, noting that it does great work under difficult time pressures. He observed that the Commission's votes in April and again today proved that there was no such thing as making the commissioner's work easy. But the men and women on the staff certainly make it much less difficult than it otherwise would be, and he knew he spoke for all of the commissioners in commending staff for their great work, he concluded.

Hearing no further discussion, Chair Reeves called on the Staff Director, Mr. Kenneth Cohen, to make a roll call vote.

Mr. Cohen: Commissioner Wong?

Commissioner Wong: Nay.

Mr. Cohen: Judge Boom?

Commissioner Boom: Nay.

Mr. Cohen: Judge Gleeson?

Commissioner Gleeson: Aye.

Mr. Cohen: Vice Chair Mate?

Vice Chair Mate: Aye.

Mr. Cohen: Vice Chair Murray?

Vice Chair Murray: Nay.

Mr. Cohen: Judge Restrepo?

Vice Chair Restrepo: Yes.

Mr. Cohen: Chair Reeves?

Chair Reeves: Aye.

Mr. Cohen stated that the motion was adopted, and that the record would reflect that at least four commissioners voted in favor of the motion.

Chair Reeves asked if there was any further business before the Commission. The Chair called on Commissioner Wroblewski.

Commissioner Wroblewski thanked Chair Reeves for recognizing him and for his leadership. He wished to make three brief points.

First, Commissioner Wroblewski expressed the Department of Justice's sincere gratitude to the Commission for running an open and transparent process on the question of retroactivity that was considered today. It appreciated not only the process, but the diverse voices that the commissioners heard from over the last two months. Many of the voices, he noted, came from those with a direct stake in the decision, and many, like those from judges and probation officers, came from the court family. The Department of Justice appreciated the time and effort given by all those who shared their views.

Second, Commissioner Wroblewski stated that it was very, very important for the commissioners to recognize that after today's vote will come years of implementation and litigation with effects on stakeholders across the criminal justice system including defendants and victims. The Department of Justice believed that it would be imperative that the Commission help facilitate the implementation of retroactivity through training and the Department of Justice appreciated the discussions that it has had on that.

Commissioner Wroblewski also expressed the Department of Justice's view that it was critical that the Commission do all it can to fully and accurately count the number of motions made in addition to the number that are granted. He acknowledged that this would be quite challenging, and that the Department of Justice would be happy to work with the Commission on it.

Commissioner Wroblewski stated that it was no secret that the Department of Justice disagreed with the Commission's decision today. Nonetheless, it pledged its full support to seeing that retroactivity was done effectively and in a way that ensured that courts get the information they need to make informed decisions on the tens of thousands of sentence modification requests that will certainly be filed in the coming months. The Department of Justice was committed, he emphasized, fully committed to implementing today's decision in a way that best achieved the twin goals of public safety and justice.

Commissioner Wroblewski stated that his colleagues in the Department of Justice, including in the U.S. Attorneys' offices from coast to coast, go to work every day with those two things front and center in their minds, to keep their community safe, and to do justice. He believed everyone owed great thanks to them, to the men and women of the probation service who will bear much of the work on this, and to the entire court family. Commissioner Wroblewski observed that everyone had the great good fortune of working with remarkable professionals across the country.

Finally, Commissioner Wroblewski explained that he would be remiss not to mention his concern about another four-to-three vote on an impactful Commission issue. He remembered well just a few months ago when on the underlying amendments at issue today, there were initial

disagreements about the merits and how to proceed. And yet, he recalled, somehow the Commission came together into a unanimous decision.

Commissioner Wroblewski observed that the Commission did not find a way to find consensus here today, which may undermine its future goals. As you know, he continued, the Department of Justice has for many years sought significant reform to the federal sentencing guideline system. It has pressed those reform efforts at the Commission because it recognized the U.S. Sentencing Commission was a remarkable institution that has shown how to develop evidence-based consensus in a healthy way in order to improve public policy.

Commissioner Wroblewski stated that the Commission's work has led in the past decade, for example, to the reduction of our prison population by almost a third, a remarkable amount, he believed. The healthy collaborations between commissioners, Commission staff, stakeholders, and the public were delicate, and no one should take them for granted, or presume they will last without tending and without compromise, he cautioned.

Commissioner Wroblewski thanked Chair Reeves for giving him the opportunity to speak. He also thanked the Chair for his leadership. Commissioner Wroblewski stated that it was a genuine privilege to work alongside the Chair, all of his colleagues, and the wonderful, and very talented Commission staff.

Chair Reeves asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Gleeson moved to adjourn, with Vice Chair Restrepo seconding. The Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 4:14 p.m.

EXHIBIT A

BAC2210-40

UNITED STATES SENTENCING COMMISSION

Final Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In June 2023, the Commission published a notice of proposed policy priorities for the amendment cycle ending May 1, 2024. After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises

previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2024. While continuing to address legislation or other matters requiring more immediate action, the Commission has decided to limit its consideration of specific guideline amendments for this amendment cycle. Instead, in light of the 40th anniversary of the Sentencing Reform Act, the Commission anticipates focusing on a number of projects examining the degree to which current sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in the Sentencing Reform Act. *See* 28 U.S.C. 991(b)(2). The Commission expects to continue work on many of these priorities beyond the upcoming amendment cycle. The Commission previously published a notice of proposed policy priorities for the amendment cycle ending May 1, 2024. *See* 88 FR 39907 (June 20, 2023).

Pursuant to 28 U.S.C. 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

The Commission has identified the following priorities for the amendment cycle ending May 1, 2024:

(1) Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.

(2) Compilation and dissemination of information on court-sponsored programs relating to diversion, alternatives-to-incarceration, and reentry (*e.g.*, Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program, Supervision to Aid Re-entry (STAR) Program) through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

(3) Examination of the *Guidelines Manual*, including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.

(4) Continuation of its multiyear study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary, and possible consideration of amendments that might be appropriate.

(5) Continued examination of the career offender guidelines, including (A) updating the data analyses and statutory recommendations set forth in the Commission’s 2016 report to Congress, titled *Career Offender Sentencing Enhancements*; (B) devising and conducting workshops to discuss the scope and impact of the career offender guidelines, including discussion of possible alternative approaches to the “categorical approach” in determining whether an offense is a “crime of violence” or a “controlled substance offense”; and (C) possible consideration of amendments that might be appropriate.

(6) Examination of the treatment of youthful offenders and offenses involving youths under the *Guidelines Manual*, including possible consideration of amendments that might be appropriate.

(7) Consideration of possible amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the guidelines.

(8) Further examination of federal sentencing practices on a variety of issues, possibly including: (A) the prevalence and nature of drug trafficking offenses involving methamphetamine; (B) drug trafficking offenses resulting in death or serious bodily injury; (C) comparison of sentences imposed in cases disposed of through trial versus plea; (D) continuation of the Commission’s studies regarding recidivism; and (E) other areas of federal sentencing in need of additional research.

(9) Implementation of any legislation warranting Commission action.

(10) Resolution of circuit conflicts as warranted, 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).

(11) Consideration of other miscellaneous issues coming to the Commission's attention.

AUTHORITY: 28 U.S.C. 994(a), (o); USSC Rules of Practice and Procedure 2.2, 5.2.

Carlton W. Reeves,

Chair.

EXHIBIT B

PROPOSED AMENDMENT: RETROACTIVE APPLICATION OF PARTS A AND B, SUBPART 1 OF AMENDMENT 821

Synopsis of Proposed Amendment: This proposed amendment would provide for the retroactive application of Parts A and B, Subpart 1 of Amendment 821, subject to a special instruction.

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 Commission lists in subsection (d) of §1B1.10 the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2).

On April 27, 2023, the Commission submitted to the Congress amendments to the sentencing guidelines, policy statements, official commentary, and Statutory Index, which become effective on November 1, 2023, unless Congress acts to the contrary. *See* U.S. Sent’g Comm’n, “Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2023, and request for comment,” 88 FR 28254 (May 3, 2023). Parts A and B, Subpart 1 of Amendment 821 (Amendment 8 of the amendments submitted to Congress on April 27, 2023), pertaining to criminal history, have the effect of lowering guideline ranges for certain defendants. Part A of Amendment 821 limits the overall criminal history impact of “status points” (*i.e.*, the additional criminal history points given to defendants for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status) under §4A1.1 (Criminal History Category). Part B, Subpart 1 of Amendment 821 creates a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) providing a decrease of two levels from the offense level determined under Chapters Two and Three for defendants who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors.

The proposed amendment would include Parts A and B, Subpart 1 of Amendment 821 in the listing in §1B1.10(d) as an amendment that may be available for retroactive application, subject to a special instruction stating as follows:

The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court’s order is February 1, 2024, or later.

The proposed amendment also provides a new application note clarifying that this special instruction does not preclude the court from conducting sentence reduction proceedings and entering orders before February 1, 2024, provided that any order reducing the defendant's term of imprisonment has an effective date of no earlier than February 1, 2024.

The Commission is considering the delay in the effective date of any orders granting sentence reductions based on Parts A and B, Subpart 1 of Amendment 821 (1) to give courts adequate time to obtain and review the information necessary to make an individualized determination in each case of whether a sentence reduction is appropriate, (2) to ensure that all defendants who are to be released have the opportunity to participate in reentry programs while still in the custody of the Bureau of Prisons, to the extent practicable, and (3) to permit those agencies that will be responsible for defendants after their release to prepare for the increased responsibility. As a result, defendants cannot be released from custody pursuant to retroactive application of Parts A and B, Subpart 1 of Amendment 821 before February 1, 2024.

Proposed Amendment:

§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) AUTHORITY.—

- (1) IN GENERAL.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) EXCLUSIONS.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—
 - (A) none of the amendments listed in subsection (d) is applicable to the defendant; or
 - (B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.
- (3) LIMITATION.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.—

(1) IN GENERAL.—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. 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.

(2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

(A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) EXCEPTION FOR SUBSTANTIAL ASSISTANCE.—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 sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) 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).

- (d) COVERED AMENDMENTS.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)), and 821 (parts A and B, subpart 1 only and subject to subsection (e)(2)).
- (e) SPECIAL INSTRUCTION INSTRUCTIONS.—
 - (1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court’s order is November 1, 2015, or later.
 - (2) The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court’s order is February 1, 2024, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

- (A) **Eligibility.**—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant’s term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum term of imprisonment).
- (B) **Factors for Consideration.**—
 - (i) **In General.**—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
 - (ii) **Public Safety Consideration.**—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, but only within the limits described in subsection (b).
 - (iii) **Post-Sentencing Conduct.**—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. **Application of Subsection (b)(1).**—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.
3. **Application of Subsection (b)(2).**—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant’s term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant’s term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant’s term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies 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 sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities. In such a case, the court may reduce the defendant’s term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant’s substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant’s substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant’s substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant’s substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. *See* subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. **Application of Subsection (c).**—As stated in subsection (c), 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). For example:

- (A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant’s substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A’s original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

- (B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. *See* §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant’s substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B’s original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. **Application to Amendment 750 (Parts A and C Only).**—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables (currently called Drug Conversion Tables) in the Commentary to §2D1.1 (*see* §2D1.1, comment. (n.8)). Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

6. **Application to Amendment 782.**—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant’s term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant’s term of imprisonment has an effective date of November 1, 2015, or later.

7. **Application to Amendment 821 (Parts A and B, Subpart 1 Only).**—As specified in subsection (d), the parts of Amendment 821 that are covered by this policy statement are Parts A and B, Subpart 1 only, subject to the special instruction at subsection (e)(2). Part A amended §4A1.1 (Criminal History Category) to limit the overall criminal history impact of “status points” (*i.e.*, the additional criminal history points given to defendants for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status). Part B, Subpart 1 created a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) to provide a decrease of two levels from the offense level determined under Chapters Two and Three for defendants who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors.

The special instruction at subsection (e)(2) delays the effective date of orders reducing a defendant’s term of imprisonment to a date no earlier than February 1, 2024. A reduction based on the retroactive application of Part A or Part B, Subpart 1 of Amendment 821 that does not comply with the requirement that the order take effect no earlier than February 1, 2024, is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2). Subsection (e)(2), however, does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before February 1, 2024, provided that any order reducing the defendant’s term of imprisonment has an effective date of February 1, 2024, or later.

78. **Supervised Release.**—

- (A) **Exclusion Relating to Revocation.**—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.
- (B) **Modification Relating to Early Termination.**—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to

a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

- 89. Use of Policy Statement in Effect on Date of Reduction.**—Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of title 18, United States Code, provides: “[I]n 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.”

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: “If 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 Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. *See Dillon v. United States*, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were 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)(1).

The listing of an amendment in subsection (d) 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. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: “It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.” S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

*So in original. Probably should be “to fall above the amended guidelines”.

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