

UNITED STATES SENTENCING COMMISSION

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PUBLIC MEETING

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THURSDAY
AUGUST 24, 2023

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The U.S. Sentencing Commission met in the Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 3:00 p.m. EDT, Judge Carlton W. Reeves, Chair, presiding.

PRESENT

JUDGE CARLTON W. REEVES, Chair
JUDGE LUIS FELIPE RESTREPO, Vice Chair
LAURA E. MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
JUDGE CLARIA HORN BOOM, Commissioner
JUDGE JOHN GLEESON, Commissioner
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex-Officio Commissioner

ALSO PRESENT

KATHLEEN GRILLI, General Counsel
KENNETH P. COHEN, Staff Director

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P-R-O-C-E-E-D-I-N-G-S

3:02 p.m.

CHAIR REEVES: The meeting is now called to order. Good afternoon, I welcome you all to this public meeting of the public meeting of the United States Sentencing Commission. I'm the Chair of the Commission, Carlton W. Reeves, and I thank each of you for joining us, whether you're in this room with us or attending via live stream.

I have the honor of opening this meeting with my fellow commissioners. To my right we have Vice Chair Claire Murray, Commissioner Candice Wong, and Commissioner John Gleeson. To my left we have Vice Chair Luis Felipe Restrepo, Vice Chair Laura Mate, and Commissioner Claria Horn Boom. We also are joined by Ex-Officio Commissioner Jonathan Wroblewski.

Our first order of business is to wish my fellow commissioner a very happy birthday. And Ms. Wong, I know you are all looking and

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asking how did this young woman get on the Commission? She's only 25 years old, but happy birthday Commissioner Wong. May you have many, many, many more. The second order of business though, is a vote to adopt our April 5th, 2023 public meeting minutes. Is there a motion to do so?

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER BOOM: Second.

CHAIR REEVES: Is there any discussion on the motion? Hearing no further discussion, vote on the motion by saying aye.

(Chorus of aye.)

CHAIR REEVES: Any nays? No nays. All right, the motion is adopted by voice vote. The next item of business is the report of the chair. Since our last meeting in April of this year, we've done a number of things, including starting to speak with and train our judges out there in the land on what we believe will be our new amendments and things with respect to the

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sentencing commission.

We had a judges training improvements in Seattle, Washington, and it was attended by over 70 federal judges. Feedback from those in attendance I believe was very positive. We are planning our next year's program right now. That will be held in my neck of the woods, New Orleans. It'll be a lot of fun. I think it's scheduled for June of 2024.

Next week many of us will be together again because we have a national training program in Los Angeles. This training program, so far we have more than a thousand people registered who will be attending. Those who will be in attendance include judges, probation officers, defense attorneys, and prosecutors. We had a public hearing on retroactivity last month.

It was a one-day hearing, there were 15 witnesses who testified before us. Witness representatives from the Department of Justice, the federal public defenders, each of our standing advisory groups, the Practitioners

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Advisory Group, the Probation Officers Advisory Group, Tribal Issues Advisory Group, and the Victims Advisory Group.

We also heard from law enforcement agencies and advocacy groups, and even the formerly incarcerated individuals. Since our last meeting we've had two public comment periods. Comments came to us on our retroactivity of the Criminal History Amendments. Those comments totaled more than 8,000.

We also had comments on our proposed priorities for the upcoming amendment cycle. Those drew more than 2,000 comments. For each of these comment periods, we received comments from a wide range of individuals and commenters including senators, judges, the Department of Justice, the Federal Public Defenders Offices, our advisory groups, organizations, attorneys, and other professionals, as well as senators.

Including, again, those who are currently incarcerated. So that is my report for what we've done since April. I'd just like to

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take this opportunity to again, first of all, thank the public. Because the public has been giving us information. Secondly, I thank our staff. Our staff has been heroic for the last 300 -- I didn't count them up, but we were confirmed August 4th, 2023.

And they've been the moving full steam ahead since that date. Obviously they've been working far longer than this group of commissioners, and I do want to thank the staff for all that you have done in helping us get to this point, and helping us get to every point in the process that we are doing on a day to day basis.

Again, I thank the public, I thank the staff, and finally, I guess I should I thank my fellow commissioners who have worked heroically as well with one another, and with each other. So, I thank you, and I thank the support that you give one another, and I just appreciate all that we do.

So, that's enough of hearing from me,

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now we need to hear on the next item of business, a vote on the final policy priorities for the 2023-2024 amendment cycle. The General Counsel, Ms. Kathleen Grilli, will now advise the Commission on that matter.

MS. GRILLI: Thank you, Judge Reeves.

The Commission published a notice of possible policy priorities on June 20th, 2023 with a public comment period closing on August 1st. The Commission received and reviewed that comment pursuant to the notice. A motion to adopt and publish in the federal register the final notice of policy priorities for the Commission's 2023-2024 amendment cycle would be in order at this time.

CHAIR REEVES: Is there a motion to adopt and publish in the federal register the final notice of policy priorities for the 2024 amendment cycle as suggested by our General Counsel?

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

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COMMISSIONER BOOM: Second.

CHAIR REEVES: Is there any discussion of the motion? Hearing no further discussion, vote on the motion by saying aye.

(Chorus of ayes.)

CHAIR REEVES: Any nays? I didn't hear any. The motion is adopted, and let the record reflect that at least four commissioners voted in favor of the motion. The next item of business is a possible vote on the retroactivity of Amendment Eight pertaining to Parts A and B of the Criminal History Amendment. The General Counsel, Ms. Grilli, will now advise the Commission on that matter.

MS. GRILLI: Yes. You have before you a proposed amendment, it was Amendment 8 in the document submitted to Congress earlier this year, and will, when it takes effect, become Amendment 821. It would include Parts A and B, Subpart 1 of that amendment in the listing in 1B1.10(d) as an amendment that may be available for retroactive application subject to a special

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instruction that tells the court that it shall not order a reduced term of imprisonment based on either Part A or Part B, Subpart 1 of the amendment unless the effective date of the court's order is February 1st, 2024 or later. A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and with technical and conforming amendment authority to staff is appropriate at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by our General Counsel?

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MATE: Second.

CHAIR REEVES: Before we hold -- there's now been a second. But before we hold our vote regarding retroactivity, I would like to make a few remarks about that decision. I know each of my colleagues will also be making remarks, so I'll keep mine brief.

In April, we commissioners voted

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unanimously to change how the sentencing guidelines calculate criminal history scores moving forward.

Given that decision, we are required by law to consider whether people incarcerated under the old equations should get a chance to have their sentences revised in line with the new ones. The Guidelines Manual sets forth several factors we must weigh when making our retroactivity decision, such as the purpose for the amendment, and the magnitude of the change in the guideline range made by the amendment.

In weighing these factors we reviewed a tremendous amount of input from individuals and communities across the country. We received countless comments from senators, judges, lawyers, religious leaders, doctors, professors, applicants, victims, families, and incarcerated people. We received thoughtful testimony during a public hearing on retroactivity, including the Department of Justice, federal public defenders, and the Commission's advisory groups.

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I encourage members of the public to visit our website to hear this testimony, and read these comments. When those persons spoke to the commissioners they were heard. We heard them remind us that our changes to criminal history calculations were informed by data collected by the Commission over more than a decade.

We all acknowledge that a core function of the Commission is to collect and analyze research and data, and gather information. That function ensures our work is rooted, as it must be, in the best available evidence. The Commission originally believed status points were consistent with the existing empirical research assessing components of recidivism and patterns of career criminal behavior.

But the most recent data proves we were wrong. Status points, we learned add little to the overall predictive value associated with criminal history scores. Likewise, the latest research on recidivism disproved our earlier

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belief that all people with zero criminal history reports should be grouped with people having one criminal history point.

By passing our Criminal History Amendment we unanimously agreed to correct these errors. As one commenter put it, our changes to criminal history calculations are data driven, measured, and sensible reforms that will ensure greater fairness in the treatment of defendants in the federal system and help reduce the historical over-reliance on often lengthy times of incarceration as the preferred means of punishment in this country.

And I agree. The demand for evidence-based sentences bears as strongly on the past, in my view, as it does on the future. We commissioners agreed it was wrong to allow new sentences to be untethered from the latest data. And we should all agree it is wrong to allow sentences still being served to have their length based on outdated research.

Of course the purpose of the amendment

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is not the only factor relevant to our retroactivity decision. As many commenters reminded us, we have a duty to consider all costs regarding retroactivity. We considered the time judges will have to spend dealing with new filings. We also considered the additional resources expended on re-entry and supervision.

But we also considered the financial cost of continuing to incarcerate an individual, which at this moment stands at 44,000 dollars each year. That's 40,000 dollars more than the annual cost of supervision. As the Conservative Political Action Coalition told us at our hearing, retroactive application represents a substantial opportunity to save taxpayers millions of dollars allowing the government to better allocate resources towards proven crime prevention efforts. Finally, it is true as a matter of practice, the Commission does not make minor downward adjustments to the guidelines retroactive.

A number of persons and stakeholders

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have suggested that for our Criminal History Amendments, retroactivity is inappropriate because the changes were minor in nature. Most prominent among those commenters was the Department of Justice. For those who lack firsthand knowledge of incarceration, like me, for those like me, who are familiar issuing decades long sentences, a policy that results in a little over a year in average sentence reduction to some may seem minor.

But for those who have spent time in prison, or who have loved someone who has, there is nothing minor in my view about a year's worth of freedom. For these people, as my former colleague Judge George Hazel put it, every day, month, and year that was added to their ultimate sentence will matter. The Commission heard as much from a number of formerly incarcerated people.

As one said, every single day I receive off my sentence puts me one day closer to my family. As another said, any amount of

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reduction that could get me closer to seeing my father before he passes, possibly seeing my son graduate high school, or even getting to watch my son get married would mean the world to me.

And as a third person whose father was recently diagnosed with brain cancer told us, 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. Through our unanimous vote to pass our Criminal History Amendment, we acknowledge that there are individuals in custody of the Bureau of Prisons who are serving sentences longer than necessary to achieve the purposes of sentencing.

In making our Criminal History Amendment retroactive, we could be giving back over 20,000 years of freedom to felony incarcerated people and their families. That's over 7 million days parents could have back with their children, children could have back with their parents, and communities could have back with their neighbors.

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There is nothing minor about the liberty at stake in our retroactivity decision. This is liberty that, just a few months ago this Commission again unanimously voted to give to people who will be sentenced in the moments and the years to come.

Again, we did so on the belief that based on data and research we could no longer justify some portion of the penalties related to criminal history. What is unjustified in the future was unjustified in the past, and must be rectified now. As Judge Jack Weinstein once said, justice favors freedom over unnecessary incarceration.

If no single person should bear the injustice of an unnecessary day in prison, then surely in my view, thousands should not be forced to suffer 7 million unnecessary days of incarceration. So, I urge my fellow commissioners, my colleagues, to vote in favor of retroactivity.

Is there any further discussion on the

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motion? And I know we do have remarks from our other commissioners. I'll turn to Vice Chair Judge Restrepo, Vice Chair Mate, I call her VC Mate, Laura Mate and then Vice Chair Murray, Commissioner Wong, Judge Boom, and Judge Gleeson in that order.

VICE CHAIR RESTREPO: Thank you, Chair Reeves. I agree with all your points in favor of retroactivity, and respectfully offer some thoughts of my own. As with previous retroactivity decisions, there have been some concerns raised about the burden retroactivity might be placed on the judiciary.

We received comments about increased workloads for federal district court judges, AUSAs, federal defenders, and probation officers. We also heard concerns about releasing incarcerated people without adequate re-entry resources. As a former U.S. district court judge, I'm familiar with the work load tethered to that position.

And having been involved in the

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Eastern District of Pennsylvania's re-entry program since 2007, I know the importance of ensuring incarcerated people have a smooth, well planned transition out of prison. And while sensitive to the administrative burdens at issue, these concerns should not stand in the way of retroactivity.

I am confident that our courts are well equipped to dispose of 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 we predict here, federal judges, AUSAs, federal defenders, the private bar, and probation officers worked together efficiently addressing these motions.

In our experience with compassionate release during COVID demonstrated that when faced with a wave of motions far more complex than those at issue here, federal courts were ready to handle whatever came their way. To quote Judge Erickson, who testified at our recent hearings on retroactivity, when it comes to our federal

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courts and retroactivity, I think they'll get it done.

Some have argued that our decision on retroactivity will cause a flood of motions from every person with status points, and every person without criminal history points. Past experience suggests this will not happen. Take for example the Drugs Minus Two Amendment, at the time of retroactivity, over 90,000 people were serving sentences under guidelines affected by that amendment.

Yet, only about half that figure filed motions for sentence reductions in line with the Commission's estimate of those actually eligible for relief. I am confident the Commission's staff estimates will again accurately reflect reality. There's no doubt that a rush to release people from prison can, without proper planning, lead to unfortunate results.

I am confident that such consequences can be avoided here, and that our decision will not undermine public safety. First, judicial

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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 18 USC 3553(a) factors, which include 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, judges will use their discretion to ensure sentences are only reduced when appropriate.

Of note, those released pursuant to the "Drugs Minus Two" for example, did not recidivate at higher rates than normal. Third, we've provided a delay before motions for relief become effective. We're taking this step affording judges, AUSAs, federal defenders, and probation officers the time they need to prepare.

Given the experiences of the past, and the steps we're taking in the present, and all

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the chair has said in support of retroactivity, I ask my colleagues to vote in support of these amendments. Thank you, Chair Reeves.

VICE CHAIR MATE: I appreciate the opportunity to speak, and I am in full agreement with the statements of Chair Reeves, and Vice Chair Restrepo. I have only a little to add. As Chair Reeves noted, to inform our decisions today, we listened to testimony at a public hearing, and reviewed written responses to our request for comment.

And some have urged us to follow the decision made by the Commission in 2010, over a decade ago, to not make retroactive a different amendment to the guidelines' criminal history provision, namely the one eliminating recency points. The circumstances and evidence before us today however are different than they were in 2010, and support a different result for these criminal history amendments.

When the Commission voted on retroactivity for recency points, it was on the

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heels of the president signing the bipartisan Fair Sentencing Act of 2010 that partially ameliorated, the crack powder cocaine disparity, an issue the Commission 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 Act.

Upon doing so, the Commission would be required by statute to specify whether any reductions applied retroactively. The Commission faced several important decisions on one of the most profound and widely recognized injustices in federal sentencing. At that time the Commission 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 Sentencing Commissions to scrutinize the fairness of the criminal history score, and narrowly tailor the criminal history

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components to meet the terms and goals while avoiding unnecessary disparities.

I know that these kinds of calls influenced my vote in what was ultimately a unanimous decision in April to change our approach to criminal history scores for the better. Finally, we also have evidence now that the Commission did not have in 2010 regarding the administrability of the Commission's decision in 2014 to make retroactive amendments to the drug guideline.

As Vice Chair Restrepo mentioned, that experience provides compelling evidence that the number of motions arising from the current Criminal History Amendments may not be as large as some fear. That experience also demonstrates the capacity of district courts to implement systems that aid in the effective and efficient management of the work load while ensuring that individuals who are eligible for relief, and for whom relief is appropriate after considering the 3553(a) factors are not imprisoned any longer

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than necessary.

The evidence before us today supports a decision to make the Criminal History Amendment retroactive, and I join my colleagues in urging the vote in favor of retroactivity.

CHAIR REEVES: Thank you, VC Mate.

VICE CHAIR MATE: Thank you, Chair Reeves.

VICE CHAIR MURRAY: Thank you Chair Reeves, and Judge Restrepo, and VC Mate. I'd like to offer this statement on the retroactivity of just the status point amendment on behalf of three commissioners: myself, Commissioner Wong, who will also speak shortly about status points, and Commissioner Boom, who will address the Zero Point Amendment on all of our behalf.

As you know, just as a preamble, the three of us have nothing but respect for you, and all of our colleagues on the Commission, but today is a day that I think we will differ. In particular, we think that making the Status Points Amendment retroactive is misguided. More

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specifically we're concerned that the amendment, and making it retroactive, deviates from the Commission's precedents.

That's not the point where we, the Commission differs. (Laughter.) But we think that this decision deviates from the Commission's precedents in ways that impose heavy and ultimately unjustified burdens on our court system, on criminal victims, and on the important principle of finality in criminal judgements. Deciding whether to apply an amendment retroactively is a weighty responsibility, and it's one that we all take seriously.

It's also a power that the Commission has long recognized that Congress wanted us to exercise in exceptional cases, not as a rule. I think that's common ground on the Commission, but respectfully, it's very different than saying what is just now was also just in the past, that's a different principle.

As former commissioner, and later Judge Beryl Howell explained, this is because the

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finality of judgements is an important principle in our judicial system, and we require good reason to disturb final judgements. For that reason in 2010, the Commission explicitly declined to make retroactive its Recency Amendment, which was so closely analogous to the status point amendment in all relevant respects in my view as to be indistinguishable.

All of the 2010 Commission's reasoning in refusing to make the Recency Amendment retroactive applies with full, and in some cases greater force here.

So, just by way of framework under our policies the Commission determines whether retroactivity is appropriate by looking at three factors: 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.

Commissioner Wong and I will detail how each of those factors militates against rendering the Status Points Amendment

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retroactive, and Judge Boom will address those factors with respect to the Zero Point Amendment.

So, first, purpose. The purpose of the status point amendment is not to right some fundamental systemic injustice in the criminal justice system or in the guidelines. Rather it is 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 indicate that status points are 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 our 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.

That does not mean the previous version of the guidelines that relied on status

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points were unjust. After all, our current amendments retain a status point for approximately half of defendants. In fact, we recently told Congress in our Statement of Reasons accompanying these amendments that we are retaining that one status point for defendants with higher criminal histories because we "continued" to recognize the status points "serve multiple purposes of sentencing."

Not just predicting recidivism, but they serve multiple purposes of sentencing. "including the offender's perceived lack of respect for the law." For that reason, in the words of the Criminal Law Committee of the Judicial Conference, which for practical purposes speaks for the judicial branch, and has submitted public comments strongly opposing making this amendment retroactive, the Status Points Amendment is "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

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criminology." In that respect, the status point amendment is closely analogous to the Commission's 2010 amendment eliminating recency points, which are 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.

The Recency 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's 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 Amendment should not be applied retroactively. In doing so, it relied in part on the fact that the Recency Amendment was motivated by evolving data, not concerns about fundamental injustice.

In the words of then commissioner, and

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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." Justice Jackson's reasoning applies here with equal force.

Second, the magnitude of the change in the guideline range made by the status point amendment also counsels against retroactive application. Of course, Chair, you are absolutely right, no reduction in sentence is minor to someone who is incarcerated, and unable to be home with the people they love, and the Commission can never lose sight of that, it's fundamentally important.

But Congress did require us to make distinctions amongst the sentence reductions permitted by various amendments. Minor is Congress' word, not ours. Congress told us that quote minor downward adjustments in the guidelines should not be made retroactive,

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because they do not believe, quote that courts should be burdened with adjustments in those cases.

For that reason, our goals require us 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 of our policy statements on retroactivity.

Outside of that categorical exclusion, magnitude has to be weighed. The Status Points Amendment doesn't fall into the categorical exclusion. Only 30 percent of relevant defendants are eligible for a reduction of six months or less, not 50 percent, but it comes very close.

60 percent of relevant defendants are eligible for a 12-month reduction or less, and the median defendant is eligible for a reduction of 10 months or less. Just to look at things

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slightly differently, 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, 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, status and recency are closely analogous.

The Recency 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 it should not apply retroactively.

And just two additional points, it is true that the 2010 Commission was acting on the heels of another amendment, but I think that's true for us as well.

So, we heard from several probation offices spontaneously, and in the entire Eastern

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District of Missouri, all of the judges, saying that the fact that they were acting on the heels of our compassionate release amendment, which goes into effect November 1st, meant that they were already going to be swamped with motions.

And so, this was a time when it would be particularly hard for them to entertain retroactivity motions. My understanding is that the demographic differences which give many people pause about demographic disparities in the status point regime were present in equal measure in recency.

So, for that reason, our view is that we have not heard any compelling reason to deviate from the 2010 Commission's precedent here. And with that, I will turn things over to Commissioner Wong with your permission.

CHAIR REEVES: Thank you, Vice Chair Murray, Commissioner Wong.

COMMISSIONER WONG: Thank you, Chair, and thank you, Vice Chair Murray. I'd like to add a few observations about the third factor in

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our analysis. The difficulties of practical implementation that retroactivity of the Status Points Amendment would entail. Here, we fear the strain on our court system would be stark and immense.

The Commission estimates that there are 50,545 status point recipients currently in BOP custody. That is 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, and we are talking about over 85,000 potential candidates for sentence reductions.

85,000 inmates is more than half the population of the entire Bureau of Prisons. To be sure, many of the 50,545 status point recipients may not be actually eligible for sentence reduction. Commission estimates peg the actually eligible population at around 11,500. But what is clear is that the wave of motions for retroactive sentence reduction befalling the

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courts would not be limited to only those 11,500 inmates, far more would file.

That is clear as a matter of lived experience from prior guideline amendments, and it is 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 our Probation Officers Advisory Group has already flagged.

Those numbers also echo the remarkably similar data noted by then commissioner Justice Ketanji Brown Jackson in declining to make the Recency Amendment retroactive in 2010. As Justice Jackson indicated at the time, more than 43,000 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 she observed, if the Recency

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Amendment were made retroactive, the courts could be overwhelmed with unsuccessful sentence reduction motions. Here again we are presented with a similarly overwhelming pool of likely movants, and a similarly small fraction of likely beneficiaries.

Yet today the Commission is poised to take the opposite path. Strikingly, the public comments submitted by the judicial branch came out overwhelmingly against retroactivity. The Criminal Law Committee of the Judicial Conference, which has supported making certain amendments retroactive in the past sounded the alarm in no uncertain terms.

We received written comments from 24 judges, chief judges, senior judges, new judges, board judges, every one of which urged us against retroactivity. As the CLC explained, retroactivity of the Status Points Amendment will strain the already strained resources of pre-trial and probation services.

It will do so at a time "when halfway

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housing is in short supply, and probation offices have limited supervision, staff, and budgets." Probation officers will be required to review criminal histories, compute new guidelines, and prepare new reports for thousands of defendants.

Supervision officers will 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 Courts has estimated that the burdens of retroactivity will require quote 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, that is an increase that we, as the United States Sentencing Commission, with no powers of purse, are wholly unable to promise, much less provide. The reality is that this herculean effort will require what the CLC calls the reallocation, or diversion of resources from other important

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duties, be it of probation, pre-trial prosecutors, or the courts. We fear such trade offs could come at the expense of public safety. Status point offenders after all, span all criminal history and offense categories. A staggering 91 percent of those eligible for retroactive application of the status point amendment are in criminal history categories III through VI.

58 percent are in categories IV through VI. Over 20 percent are 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. 156 stand convicted of murder.

And of course, every status point offender has previously recidivated, having earned status points in the first place by recidivating while under a prior sentence.

The Commission's own estimates project that with retroactive application of the Status

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Points Amendment, even with a three-month delay, 2,963 status offenders will be eligible for release within the first year of the amendment's effective date.

In this context, it would be all the more prudent to apply our refined guideline amendment prospectively and incrementally without risking the early release of duly convicted, duly sentenced violent offenders. Let us not forget the burdens of retroactivity will be borne by victims of crime as well.

As the Commission's own Victims Advisory Group warned, behind each motion for retroactive sentence reduction is 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.

Again, retroactivity is the exception, not the norm. Here it is the view of Vice Chair Murray, Commissioner Boom, and myself that the

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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.

Thank you.

CHAIR REEVES: Thank you, Commissioner Wong. Commissioner Boom?

COMMISSIONER BOOM: Thank you, Chair Reeves. I offer this statement on behalf of Vice Chair Murray, Commissioner Wong, and myself opposing retroactivity of the Zero Point Amendment. First, I'm grateful to do the important work of the Commission, and I'm grateful to work with the staff and my fellow commissioners, all of them who approach the Commission's work with the gravity that it deserves.

That is why I will be especially disappointed if the Commission votes in favor of retroactivity. This Commission often reflects that when you speak to the Commission, you will be heard. But in this instance, with both

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amendments, we will fail to heed our own mantra if we vote for retroactivity.

Except for the perspective of incarcerated individuals and their counsel, every significant stakeholder in the criminal justice system came out against making either amendment retroactive. Or in the case of the Probation Officer's Advisory Group, strongly advocated the pitfalls of doing so. Why? Because there's no principled application of our guiding policy statement at 1B1.10 that supports retroactivity.

Our task as a bipartisan Commission is to dispassionately apply the policy statement on retroactivity, heeding Congress' direction that retroactivity is the exception, not the rule. But today we will ignore those guard rails that are supposed to guide us, and instead opt for unbounded retroactivity if we make these amendments retroactive.

Both the Criminal Law Committee of the Federal Judicial Conference, and every one of the 24 judges who drafted public comment on

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retroactivity told us in no uncertain terms that making either of today's amendments retroactive would be a mistake. Getting that many judges to agree on anything is extraordinary.

The CLC's reasoned position does not reflect a refusal to do the work, or a fundamental intractable opposition to retroactivity, but a principled one tethered to the Commission's 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 the CLC opposed a similar criminal history tweak related to recency points. The 2010 Commission had no problem unanimously heeding the CLC's position, and rejecting retroactivity. First, and most importantly, the purpose of the Zero Point Amendment is not to redress some miscarriage of justice.

Our recent reports on recidivism show

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that defendants with zero criminal history points are markedly less likely to recidivate than even defendants with one criminal history point. But in our discretionary sentencing scheme judges already consider the defendant's zero-point status, which is why sentencing courts have long varied and departed downwards when sentencing zero-point offenders.

That is judges have already considered the offender's zero-point status, and our amendment is a step forward in aligning the current guidelines with what courts are already doing with zero-point offenders. It fine tunes the manual to account for our latest research on recidivism, but those are tweaks, the continuing churn of updating the manual to implement new criminological data and research. It is a far cry from righting a systemic wrong that justice demands be applied retroactively.

The CLC explained its opposition to retroactivity because the amendments do not address issues of fundamental fairness, but

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simply refine the sentencing process based on evolving data. They caution that making the amendments retroactive will, in the words of the CLC, bring significant impacts on the courts, concrete work load implications for our probation and pretrial services offices, and a host of effects for other judiciary stakeholders.

The burden is obvious with respect to the zero-point amendment. The numbers are striking. The Commission's retroactivity impact statement estimates that the court may receive as many as 34,922 sentence reduction motions if the zero-point amendment is made retroactive, and as many as 7,272 offenders may be eligible for sentence adjustments.

That amounts to a huge number of potential motions, only a small fraction of which are likely to be meritorious. Retroactivity of the zero-point amendment defies the sort of easy mechanical application some witnesses reported experiencing with the Drugs Minus Two Amendment, or the Crack Minus Two. On its face, a

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defendant's pre-sentence report makes it clear whether he or she is convicted of a drug offense or one involving crack cocaine. Not so for zero-point eligibility.

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, probation officers will include an analysis of whether a defendant falls into any of those exclusions in the pre-sentence report.

But pre-sentence reports that were created prior to our Zero Point Amendment simply cannot be expected to contain that same information. For example, one amendment excludes defendants who personally caused substantial financial hardship. That analysis is nowhere found in the existing guidelines, which apply an enhancement in the broader category of cases where the offense results in substantial financial hardship. And before 2015 the

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guidelines did not include a substantial financial hardship enhancement at all.

For that reason, 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 is eligible for a reduction of sentence. And courts will be unable to rule on those motions without substantial fact finding.

Our Probation Officers Advisory Group identified at least four exclusions where additional facts will likely be necessary, in their words. For that reason, every probation office that submitted comment as to retroactivity asked us not to make the Zero Point Amendment retroactive, citing for example, the extreme difficulty due to the nature of post-sentencing fact finding and litigation.

The Zero Point Amendment fails to address an issue of systemic unfairness, yet has a substantial and costly burden on victims,

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courts, probation officers, communities, and other stakeholders. And it sacrifices other purposes of punishment, especially finality in sentencing.

Sentencing is the toughest thing we do as federal judges. It is an awesome and humbling responsibility. We understand the gravity of our decisions on victims, on the community, and especially on the incarcerated. And no one, especially judges, wants a defendant to spend a single day incarcerated that does not serve the purposes of punishment.

But Congress directed that retroactivity be the exception, not the rule. And our role as a bipartisan Commission is to faithfully apply the factors under 18U.S.C. 3582 in making retroactivity decisions. As part of this process, we ask for comment, and we got it, loud and clear.

It would be a mistake to ignore the reasoned, thoughtful, measured voices of judges, probation officers, and others to instead pursue

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unbounded retroactivity. Thank you.

CHAIR REEVES: Thank you, Commissioner Boom. Commissioner Gleeson?

COMMISSIONER GLEESON: Thank you, Chair Reeves. Thanks to all my colleagues for their remarks. I agree with Chair Reeves, and Vice Chairs Restrepo, and Mate. I agree with all of their reasons favoring retroactivity, and so it appears from all the comments we've heard that we will make the Criminal History Amendments retroactive, albeit by a divided vote. I'd like to add a couple of points of my own in support of that result.

A number of commentators have opposed the retroactive application of these Criminal History Amendments, as have our colleagues now, by saying that unlike previous retroactive amendments, these Criminal History Amendments do not remedy a systemic wrong, and thus do not rectify a fundamental unfairness in the Guidelines Manual.

In the absence of such a systemic

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wrong, the argument goes concerns about administrative burdens and the need for finality of sentencing should compel this body to reject retroactivity. In my view it's hard to overstate how wrong that argument is. The comments we received 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.

And not for justifiable reasons. My own 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, racking up a criminal history point, and putting themselves in

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the status of being under supervision, and 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.

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, as mentioned earlier, called on us 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 we did, the Commission took this research-based

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advice seriously, and worked to reduce the impact of racism in our criminal justice system moving forward.

There's no such thing as fully remedying a racial disparity that's been baked into our criminal justice system for so long. But making these amendments retroactive will have a tangible effect on thousands of people of color. With respect to the amendment on status points, 43 percent of those eligible for relief are Black, 28 percent are Hispanic.

As for the provision regarding zero criminal history points, 69 percent of those eligible for relief are Hispanic. I think this is a very important day for this body. This Commission 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 was to establish sentencing policies that are fair. Another, and this one is particularly relevant to today's business, is to

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develop means of measuring the degree to which sentencing practices are effective in meeting the purposes of sentencing.

And this should be crystal clear to everyone. These Criminal History Amendments are the result of this body 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. And just four months ago, based on data, and data analyses no one disputes, we unanimously concluded they did not.

The perceived increase in the risk of recidivism on which those upward adjustments in criminal history scores were based were wrong. The increases in punishment they resulted in were unfair, and they were visited disproportionately on defendants of color.

As I've said no one disputes that, but still some have told us let's remedy the unfairness in a different way. One commentator

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said let's increase the sentences of those who have one criminal history point.

But this is 2023, in April of this year, the same month in which we amended the guidelines to adjust these criminal history computations in the manner we're discussing 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, was to take 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 visited on one category of persons who appeared for sentencing by increasing the sentences of those in another category.

But certainly any such suggestion has never been more out of step with today's

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bipartisan consensus that it's time to decarcerate. This is an expert body created to formulate fair sentencing policy. And it's against that backdrop, not the backdrop that this body acted against in 2010 that we've done what we're doing here today.

Others, again, without the slightest disagreement with the data or data analyses, say it's too much of a burden on our criminal justice system to remediate this unfairness in any way except prospectively. But we visited fundamental unfairness on thousands of people through guidelines that judges follow. We lengthened their prison terms based on assumptions we now know from the data are wrong, and were wrong.

We did that, and we owe it to them to fix it. There are tens of thousands for who it's too late to fix because they've served their sentences. We can at least do something for those still in prison. In the periods of time --

Chair Reeves mentioned this, but some things are so important they bear repetition.

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In the periods of time they will be otherwise be required to serve if we don't make these amendments retroactive, grandparents and parents will die. Kids will have graduations and birthdays. Job opportunities will fade. I think it's so important for us 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 us last month, with liberty taken away, with families who love them, and communities that need them.

I 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 us today, there were tens of thousands of eligible inmates, and there were tens of thousands of motions that were non-meritorious.

And like we hear today, there were predictions of chaos, and insufficient resources, but prosecutors, and defendants, and probation

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officers, and at the end, judges rolled up their sleeves and did the work, and implemented those retroactive sentence reductions. Was it burdensome, yes, but to the degree it's burdensome, the liberty interests at stake are more important.

The specter that these amendments being made retroactive will somehow endanger public safety is just an especially unpersuasive thing to say. First, it overstates the role of this body and the effect of our decision today. No one will have his or her sentence reduced automatically as a result of what we do today. Under the applicable policy statement, judgements may grant reductions. They're never required to.

And second, this fear mongering denigrates the judges who implement the work this Commission does. Our policy tells them explicitly to consider whether a reduction based on these retroactive amendments will pose a danger to any person or to the community, and

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authorizes them to deny the reduction if that's the case.

There is 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's 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.

Let me finish by applauding our chair, Judge Reeves, who is a great leader. This 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. Carlton Reeves' intellect, his personality, his leadership style keeps us close despite our differences.

I also commend my other colleagues, and like Judge Boom, I commend all my colleagues for their dedication to getting sentencing policy right. And I'd like to think, I do think that that common goal binds us together even when we

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strenuously disagree. And finally a thank you to the staff, again, some things are so important they bear repetition.

The staff does such great work under such difficult time pressures. I think our votes in April, and again today have proven that there's no such thing as making our work easy. But the men and women on the staff certainly make it much less difficult than it otherwise would be, and I know I speak for all of us in commending the staff for their great work.

Thank you, Chair Reeves.

CHAIR REEVES: Thank you, Commissioner Gleeson. Is there any more discussion on the motion? Hearing no further discussion, will the Staff Director Mr. Kenneth Cohen please call the role?

MR. COHEN: Thank you, Judge.

CHAIR REEVES: Commissioners, when your name is called, please vote in favor of the motion by saying aye, or object by saying nay.

MR. COHEN: Thank you, Judge. Judge

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Restrepo?

VICE CHAIR RESTREPO: Aye.

MR. COHEN: Vice Chair Murray?

VICE CHAIR MURRAY: Nay.

MR. COHEN: Vice Chair Mate?

VICE CHAIR MATE: Aye.

MR. COHEN: Commissioner Wong?

COMMISSIONER WONG: Nay.

MR. COHEN: Judge Boom?

COMMISSIONER BOOM: I vote no.

MR. COHEN: Judge Gleeson?

COMMISSIONER GLEESON: Aye.

MR. COHEN: Chair Reeves?

CHAIR REEVES: Aye.

MR. COHEN: The motion is adopted, and let the record reflect that at least four commissioners voted in favor of the motion.

CHAIR REEVES: Thank you, Mr. Cohen. Is there any further business before this Commission?

COMMISSIONER WROBLEWSKI: Mr. Chairman?

CHAIR REEVES: My good friend, Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you, Mr. Chairman, for recognizing me, and thank you so much for your leadership. I will be brief, I just want to make three quick points.

First, I want to express our sincere gratitude to the Commission for running an open and transparent process on the question of retroactivity that we've considered today.

We appreciate not only the process, but the diverse voices that we heard from over the last two months or so. Many of the voices came from those with a direct stake in the decision, and many, like those from judges and probation officers, came from the court family. We appreciate the time and effort given by all those who share their views.

Second, it is very, very important for us to recognize that after today's vote will come years of implementation and litigation with effects on stakeholders across the criminal

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justice system including defendants and victims. We think it is imperative that the Commission help facilitate the implementation of retroactivity through training and otherwise and we appreciate already the discussions that we have had on that.

We also think it is critical that the Commission do all it can to fully and accurately count the number of motions made in addition to the number that's granted. This is quite challenging, and we'd be happy to work with the Commission on it.

It is no secret that we disagree with the commission's decision today.

None the less, we pledge our full support to seeing that retroactivity is done effectively and in a way that ensures 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. We are committed, fully committed to implementing this decision in

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a way that best achieves the twin goals of public safety and justice.

My 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. We owe 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. We all have the great good fortune of working with remarkable professionals across the country.

Finally, I would be remiss not to mention my concern about another four three vote on an impactful Commission issue. I remember well just a few months ago when on the underlying amendments at issue here, there were initial disagreements about the merits and how to proceed.

And yet somehow the Commission came together into a unanimous decision. We have not found a way to find consensus here today, which

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I'm afraid may undermine our future goals. As you know, we have for many years sought significant reform to the federal guideline system. We have pressed those reform efforts at the Commission because we recognize the U.S. Sentencing Commission as a remarkable institution that has shown how to develop evidence-based consensus in a healthy way in order to improve public policy.

It has led in the past decade, for example, to the reduction of our prison population by almost a third, a remarkable amount. The healthy collaborations between commissioners, Commission staff, stakeholders, and the public are delicate, and no one should take them for granted, or presume they will last without tending and without compromise.

Thank you, Mr. Chairman, for giving me this opportunity to say a few words. Thank you for your leadership. It's a genuine privilege to work alongside you, all of our colleagues, and the wonderful, and very talented Commission

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staff. Thank you.

CHAIR REEVES: Thank you, Commissioner Wroblewski. Is there any further business before the Commission? There is no further business before the Commission, now I'll entertain a motion to adjourn.

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR RESTREPO: Second.

CHAIR REEVES: The motion is adopted -
- well, let's hear a vote. All in favor to
adjourn, please say aye.

(Chorus of aye.)

CHAIR REEVES: That sounds like that's
everyone, I did not hear any nays. The motion is
adopted by voice vote, and now the meeting is
adjourned. Thank you all, ladies and gentlemen,
thank you so much.

(Whereupon, the above-entitled matter
went off the record at 4:14 p.m.)

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