



June 23, 2023

Honorable Carlton W. Reeves  
Chair, United States Sentencing Commission  
One Columbus Circle, N.E., Suite 2-500  
Washington, D.C. 20002-8002

**Re: Issue For Comment On Retroactivity Of Criminal History Amendment**

Dear Judge Reeves:

NACDL hereby responds to the Commission's request for comment on the retroactive application of Part A of the 2023 Criminal History Amendment which limits, and, in some cases, eliminates status points under USSG § 4A1.1(d), and Part B, Subpart 1 of this year's Criminal History Amendment, which amends USSG § 4C1.1 to provide for a two-level downward adjustment for "zero-point offenders." NACDL endorses retroactive application for both provisions without limitation. In addition to the forgoing, NACDL agrees with the analysis and positions set forth in comments submitted by the Federal Defenders.

With retroactivity, thousands of people will be eligible for release over the next several years. Without it, these same people will serve what may be unnecessarily lengthy terms of imprisonment at great cost to the prisons that house them and to the integrity of the criminal justice system that unfairly detains them. By limiting the impact of status points, the Commission is enacting into policy what several studies have already shown: that status points do not meaningfully increase the criminal history score's successful prediction of rearrest and, as such, these additional points serve no legitimate sentencing purpose. Similarly, those who will be eligible for reduced sentences for being zero-point offenders are the least likely to reoffend and pose the least danger to the community. As such, their eligibility for release does not trigger meaningful public safety concerns. Although the number of potentially eligible inmates for reduced sentences under both parts of the amendment is not insignificant, it is modest compared to incarcerated individuals who qualified for sentence reductions following previous retroactive amendments. The Bureau of Prisons, the United States Probation Office, the judiciary, and counsel on both sides are competent and equipped to implement retroactive application of the Amendment.

The Commission has set forth its policy statement regarding retroactive application of amendments in § 1B1.10 of the Guidelines and has specifically identified twenty-nine amendments that may be applied retroactively.<sup>1</sup> The Commission has explained that in selecting these particular amendments, the Commission considered, among other 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 to determine an amended guideline range under subsection (b).”<sup>2</sup> Examination of the amendments through the lens of these factors unequivocally establishes the just conclusion that they be applied retroactively.

Part A of the Commission’s amendment to the criminal history rules limits the impact of status points to a defendant’s criminal history score. Under the current §4A1.1(d), two points are added to a person’s criminal history score if they committed the instant offense while under a criminal justice sentence, including parole, probation, supervised release, imprisonment, work release, or escape status.<sup>3</sup> The Commission originally “envisioned status points as consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior and therefore envisioned status points as being reflective of, among other sentencing goals, the increased likelihood of future recidivism.”<sup>4</sup> However, several Commission studies have revealed that the addition of status points to a defendant’s criminal history does not, in fact, meaningfully improve the criminal history score’s prediction of rearrest. The Commission’s 2005 study of status points and recency points – which assigned additional criminal history points under § 4A1.1 if the instant offense was committed less than two years after release from a prior term of imprisonment – concluded that they improved the prediction of rearrest by only .1 percent.<sup>5</sup> The Commission subsequently eliminated recency points—but not status points—from § 4A1.1

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<sup>1</sup> See USSG § 1B1.10(c).

<sup>2</sup> See *id.* cmt. background.

<sup>3</sup> USSG § 4A1.1(d). Under Part A of the 2023 criminal history amendment, status points will no longer apply to defendants with six or fewer criminal history points under subsections (a) through (d)—even if the instant offense was committed while the offender was under a criminal justice sentence. U.S. Sent’g Comm’n, *Adopted Amendments to the Sentencing Guidelines*, 78-85 (Apr. 27, 2023), available [https://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305\\_RF.pdf](https://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf) (“Adopted Amendments”). Defendants under a criminal justice sentence with seven or more criminal history points under subsections (a) through (d) will be assessed one additional criminal point under amended § 4A1.1(e), rather than the two points previously assigned. *Id.*

<sup>4</sup> Adopted Amendments, *supra* n. 6 at 78 (citing USSG Ch.4, Pt.A, intro. comment.) (quotations omitted).

<sup>5</sup> U.S. Sent’g Comm’n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, 26 (Jan. 2005) available [https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104\\_Recidivism\\_Salient\\_Factor\\_Computation.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf) (finding that the full criminal history score, with all components included, successfully predicted rearrest 69.9% of the time but, if status points and recency points were removed, the score would still successful predict rearrest 69.8% of the time).

in a 2010 amendment to the sentencing guidelines.<sup>6</sup> In 2022, however, the Commission’s study on status points confirmed, once again, that status points do not increase the prediction of recidivism, improving the prediction of rearrest by only .2 percent.<sup>7</sup> This finding dovetails with the Commission’s acknowledgment that prior convictions are often already accounted for in a defendant’s criminal history score, making status points an unnecessarily harsh measure that do not serve any sentencing goals.<sup>8</sup>

Moreover, far from furthering the purposes of sentencing, the Commission’s data also demonstrates that status points have a disparate impact on people of color.<sup>9</sup> This is no surprise as research shows that people of color—particularly Black people—are far more likely than whites to be targeted by law enforcement, be on supervision, and be subject to longer terms of supervision than whites.<sup>10</sup> By applying Part A retroactively, the Commission would help alleviate this disparity and the disproportionate impact it has had on the sentences of Black and Hispanic defendants.<sup>11</sup>

Accordingly, the Commission’s empirical data supports the conclusion that status points do not meet the sentencing goals of providing just punishment, specific deterrence, or protecting the public, and instead perpetuate racial disparities.<sup>12</sup> By limiting the impact of status points and

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<sup>6</sup> USSG App. C, amend. 742 (effective Nov. 1, 2010).

<sup>7</sup> U.S. Sent’g Comm’n, *Revisiting Status Points*, 3 (June 2022) available [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628\\_Status.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf). (finding that a full criminal history score correctly predicts rearrest 65.1% of the time while the criminal history score with status points removed predicts rearrest 64.9% of the time—a difference of only .2%) (“Revisiting Status Points”).

<sup>8</sup> Adopted Amendments, *supra* n. 6 at 78 (“The Commission further recognized that it is also possible that an offender’s criminal history score would be independently increased as a result of additional time imposed as the result of a revocation of probation or supervised release for the offense that also results in the addition of status points.”)

<sup>9</sup> *Id.* at Table 1 (finding the demographic breakdown of status offenders to be 41.1% Hispanic; 32.7% Black; and 22.7% White, and 3.5 % Other).

<sup>10</sup> See Statement of Jami Johnson on Behalf of the Federal Public and Community Defenders, 30-31 (March 8, 2023) available <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/FPD5.pdf>.

<sup>11</sup> U.S. Sent’g Comm’n, *Memo From The Offices of Research and Data and General Counsel, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* (May 15, 2023), 13 Table 3A (May 15, 2023) available <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf> (finding the demographic characteristics of those defendants eligible for retroactive application of Part A to be: 43% Black, 27.8% Hispanic, 25% White and 4.2% Other) (“Retroactivity Impact of 2023 Criminal History Amendment”).

<sup>12</sup> *Id.* at 2 (“Accounting for a defendant’s criminal history in the guidelines addresses the need for the sentence “(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of

applying the amendment retroactively, the Commission would improve the accuracy and reliability of the guidelines and help reduce unwarranted disparities.

Part B, Subpart 1 amends criminal history calculations to ensure that recommended sentences under the guidelines are no greater than necessary to serve the statutory purposes of sentencing. “Zero-point offenders” have considerably lower recidivism rates as compared to other offenders with more significant criminal histories. In fact, the Commission’s recent recidivism data reports that “zero-point offenders” recidivate at rates nearly half as frequently as “one-point offenders” (26.8% compared to 42.3%).<sup>13</sup> Informed by this data, the Part B, Subpart 1 amendment—which enjoyed overwhelming support during the public comment period—acknowledges that the goals of specific deterrence and incapacitation are achieved with reduced sentences for “zero-point offenders.” Conversely, without the amendment, “zero-point offenders” would face—and *did face*—greater than necessary recommended sentences.

As the Commission has been tasked by Congress to establish sentencing policies that reflect “the advancement in knowledge of human behavior as it relates to the criminal justice process,”<sup>14</sup> the Commission’s recent studies make clear that including status points and over-punishing zero-point offenders do not further the purposes of sentencing. NACDL cannot think of a more compelling reason for retroactivity than the data-supported conclusion that human beings may be serving unnecessarily lengthy prison terms without it.

Additionally, retroactive application serves the Commission’s laudable goal to minimize the likelihood that prison populations exceed capacity. As of February 23, 2023, the Bureau of Prisons was operating at six percent above rated capacity.<sup>15</sup> Although in 2019 and 2020 the Bureau of Prisons’ inmate population declined as a result of the First Step Act and COVID-19 related policies, the BOP currently projects the inmate population to swell again in 2023 and 2024.<sup>16</sup> Retroactivity of the 2023 Criminal History Amendment will help alleviate the costs and strains of an overcrowded prison system.

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the defendant.”). NACDL believes the Commission’s data supports elimination of status points in all cases. However, to the extent the Commission believes status points serve any statutory purposes of sentencing, it should be noted that defendants in Criminal History Categories IV and above may still be eligible for one additional criminal history point if under a criminal justice sentence.

<sup>13</sup> U.S. Sent’g Comm’n, *Recidivism of Federal Offenders Released in 2010*, 26 (Sept. 2021), available [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930\\_Recidivism.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf).

<sup>14</sup> See 28 U.S.C. § 991(b)(1)(C).

<sup>15</sup> U.S. Dep’t of Justice, Federal Prison System, *FY 2024 Performance Budget Congressional Submission*, 12, available [https://www.justice.gov/d9/2023-03/bop\\_se\\_fy\\_2024\\_pb\\_narrative\\_omb\\_cleared\\_3.23.2023.pdf](https://www.justice.gov/d9/2023-03/bop_se_fy_2024_pb_narrative_omb_cleared_3.23.2023.pdf).

<sup>16</sup> *Id.*

And retroactivity's significant positive impact comes with no meaningful cost to public safety. The Commission's extensive studies on the recidivism rates of all federal prisoners who have been released as a result of retroactive application of amended guidelines confirm that there is no statistically significant difference between the rearrest rates for offenders who received a sentence reduction under prior amendments and offenders who had served their full sentences before the guideline reductions took effect.<sup>17</sup> Here, especially, retroactive application raises no meaningful public safety concern. Two decades of Commission data has made clear that status points do not impact the predictive ability of a defendant's criminal history score. With regard to "zero-point offenders," all individuals eligible for a sentence reduction belong to the group of offenders who are least likely to recidivate when released as compared to offenders with more significant criminal histories.

As to both amendments, the costs of implementing these changes retroactively do not outweigh the significant benefits of retroactive application. While implementation of a retroactive amendment necessarily involves time and resources, here the costs are relatively modest and manageable. On May 15, 2023, the Commission's Office of Research and Data submitted its Retroactivity Impact Analysis of the 2023 Criminal History Amendment.<sup>18</sup> In it, the Commission estimated that 11,495 individuals will be eligible to seek a sentence reduction if Part A is applied retroactively, and 7,272 individuals will be eligible to seek a sentence reduction if Part B, Subpart 1 is applied retroactively.<sup>19</sup> In comparison, retroactive application of the last three significant amendments to the drug guidelines qualified several tens of thousands of inmates for potential sentence reductions in the first few years. For example, in the first three and a half years following retroactive application of the 2007 crack cocaine amendment, federal district courts processed 25,515 motions (almost one and a half the projected number of all potential applications under retroactive application of Part A and Part B, Subpart 1).<sup>20</sup> In 2014, the Commission's unanimous vote to apply retroactive treatment to the Drugs Minus Two Amendment qualified an estimated 46,290 inmates for judicial review of their sentences (nearly two and a half times more than Part A and Part B, Subpart 1 eligibility).<sup>21</sup> Notably, despite the

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<sup>17</sup> See, e.g., U.S. Sent'g Comm'n, *Retroactivity and Recidivism, The Drugs Minus Two Amendment* 1, 6 (July 2020), available [https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708\\_Recidivism-Drugs-Minus-Two.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf).

<sup>18</sup> See *Retroactivity Impact of 2023 Criminal History Amendment*, *supra* n. 14.

<sup>19</sup> *Id.* at 31.

<sup>20</sup> Press Release, U.S. Sent'g Comm'n, *U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively* (June 30, 2011), available <https://www.usc.gov/about/news/press-releases/june-30-2011>.

<sup>21</sup> Press Release, U.S. Sent'g Comm'n, *U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences* (July 18, 2014), available

volume of eligible inmates, retroactive application of the amended drug guidelines has been smooth and well coordinated among the courts, probation officers, U.S. Attorney offices, and the defense community. The system can seamlessly process retroactivity of the 2023 Criminal History Amendments.

In short, the factors the Commission considers when selecting amendments for retroactivity—the purpose of the amendment, the magnitude of the change made by the amendment, and the difficulty, or lack thereof, of applying retroactivity—all weigh in favor of retroactive application of both Part A and Part B, Subpart 1 of 2023’s Criminal History Amendment. Retroactivity is fundamentally fair and a well-supported, sound sentencing policy.

Respectfully submitted,

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