NAAUSA
National Association of Assistant U.S. Attorneys

July 10, 2023

Chair Judge Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002

Re: Written Comments on the Retroactivity of Criminal History Amendment

Dear Chair Judge Carlton W. Reeves, Vice Chairs, and Commissioners:

The National Association of Assistant United States Attorneys (NAAUSA)–representing the interests of over 6,400 Assistant U.S. Attorneys (AUSAs) working in the 94 U.S. Attorney Offices–provides the following comments regarding the proposal to make retroactive the criminal history amendments submitted to Congress.

NAAUSA opposes the attempt to make the Commission's criminal history amendments applicable to "status points" and "zero-point offenders" retroactive. First, these reforms are fundamentally antithetical to the Sentencing Guidelines progressive sentencing regime and should not be extended retroactively. Second, making the amendments retroactive amounts to an unfunded mandate that will impose significant resource constraints on U.S. Attorney Offices.

First, the Commission's criminal history amendments applicable to "status points" and "zero-point offenders" are fundamentally antithetical to the Sentencing Guidelines progressive sentencing regime and should not be made retroactive. The Sentencing Guidelines are intended to further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.[1] To do this, Congress sought for the Guidelines to provide "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[2] Further, the introductory commentary to Part A of Chapter 4 of the Guidelines makes clear that one of the main purposes of the Guidelines is recognizing that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[3]

[1] 2021 Guidelines Manual (ussc.gov)
[2] Id.
[3] Id.

Offenders who have committed new offenses while under a criminal justice sentence are by definition recidivists—meaning they have already been convicted of past criminal conduct. The underpinnings of the status point amendment and the proposal for retroactive application ignore this reality and run counter to Guideline's intentions.

Part A addressing status points eliminates status points entirely for offenders with six or less criminal history points. Under USSC Section 4A1.1(a), a prior felony conviction in which the offender is sentenced to more than one year of imprisonment results in the assessment of three criminal history points. Thus, under the proposed amendment, an offender could have been convicted of two three-point felony offenses and receive no status points. An offender in Criminal History Category VI, who has at least 13 criminal history points now only receives one status point. This amendment runs counter to a fundamental purpose set forth in Chapter 4, which is to establish a sentencing regime with escalating consequences for repeat offenders.

While the Commission has argued that the status points do not effectively predict likelihood of rearrest,[4] relying on this alone to significantly curtail use of the status points misunderstands their purpose. In addition to predicting future recidivism, status points acknowledge *current* recidivist tendencies and provide proportional punishment. It is absurd to say that a third-time felony offender who commits his offense while under a criminal justice sentence should not be assessed status points simply because considering the number of criminal history points previously assessed for those past crimes is unlikely to predict the commission of a fourth felony. Just punishment has long been recognized to require escalating discipline for repeat offenders.

In fact, the Sentencing Commission's own impact study established that the vast majority of offenders who receive status points are in criminal history category III (before adding the status points) and that the average offender who received status points had at least 7 criminal history points (before receiving status points)—meaning that these offenders fell within criminal history category IV. These are offenders who already had multiple prior criminal convictions counted under Chapter 4, and thus, were not timed out. Accordingly, these offenders had already demonstrated that they are recidivists who do not respect the law and are more likely to reoffend.

The average sentence imposed on offenders eligible for sentence reductions with retroactivity also indicates the severity of criminal conduct committed by those offenders. The average sentence of eligible offenders under the status points amendment was 120 months (10 years), meaning that these were offenders who had engaged in serious criminal conduct, including

[4] Revisiting Status Points (ussc.gov)

4,658 offenders convicted of drug trafficking, 2,371 offenders convicted of firearms offenses, and 1,391 offenders convicted of robbery—or 73 percent of the total number of offenders who would be eligible for relief under the Commission's proposal.[5]

Providing retroactive sentence adjustments to these offenders will result in more crime and fails to sufficiently recognize the sentencing factors of punishment and deterrence under 18 USC 3553(a).

Part B addressing zero-point offenders is similarly problematic. This provision creates a windfall to white-collar defendants and would exacerbate existing sentencing disparities between white-collar defendants and defendants convicted of non-white-collar offenses.

Making this provision retroactive would also exacerbate racial disparities in sentencing. Data from the sentencing commission highlights that black male offenders continue to receive longer sentences than similarly situated white male offenders and violence in an offender's criminal history does not appear to account for any of the demographic differences in sentencing.[6] Providing an additional windfall for white collar offenders–more than half of whom are white[7]–will only deepen this trend and undermine the American people's trust in sentencing.

Here too, the average sentence of eligible offenders also indicates the severity of criminal conduct committed by those eligible for adjustment under the proposal. The average eligible offender received a sentence of 85 months (7 years).[8] A significant portion of eligible zero-point offenders have also been convicted of violent and dangerous offenses, including manslaughter, drug trafficking and sex offenses.[9]

Retroactive application of sentencing adjustments to sentences that are not unconstitutional or otherwise patently unjust should be done sparingly. The rule of law relies on finality and predictability. Making sentencing adjustments under the criminal history amendments apply retroactively undermines these values. For these reasons, the Supreme Court has required the utmost clarity from Congress when making a change in the law retroactive. Accordingly, the Sentencing Commission should proceed with caution when making such decisions, particularly when public safety is likely to be negatively impacted.

Second, the Sentencing Commission must understand that each time a retroactive sentencing adjustment is approved–either by the Commission or

[5] Analysis of the Impact of 2023 Criminal History Amendment (Parts A and B) if Made Retroactive (ussc.gov)
[6] Demographic Differences in Sentencing: An Update to the 2012 Booker Report (ussc.gov)
[7] FBI Releases 2020 Incident-Based (NIBRS) Data — FBI
[8] Analysis of the Impact of 2023 Criminal History Amendment (Parts A and B) if Made Retroactive (ussc.gov)
[9] Id.

by Congress–it imposes significant burdens on U.S. Attorney Offices. The difference between retroactive sentencing adjustments approved by Congress and those approved by the Commission is that Congress can provide funding to implement its intended policy. The Commission cannot. As a result, U.S. Attorney Offices are forced to pick up the extra work generated by motions for sentence reductions without the personnel and resources necessary to meet public safety needs.

The COVID-19 pandemic compassionate release expansion exemplifies the problems that occur when an unfunded provision allowing for retroactive sentence reductions is passed. During the pandemic, AUSAs received a significant and burdensome volume of medical compassionate release requests. AUSAs surveyed at the time noted that the vast majority of requests were frivolous and ultimately denied. Nonetheless, substantial attorney time was diverted away from current and new criminal investigations and as well as pending cases to handle these requests. While some larger USAOs are fortunate to have a specialized unit dedicated to post-sentencing litigation; even in these offices AUSAs from the entire office were forced to handle multiple motions for compassionate release on top of their normally heavy caseloads. The same issues arose in smaller offices, which often have insufficient personnel to handle their normal caseload with these additional post-sentencing requests.

The Commission's own impact analysis predicts that approximately one-quarter (22.7 percent or 11,495 offenders) of the of 50,545 status point offenders would have a lower guidelines range if the Commission made Part A of the 2023 criminal history amendment retroactive, and therefore, would be eligible to seek a sentence adjustment.[10] Similarly, of the 34,922 zero-point offenders currently in federal custody, more than a third (36 percent or 12,574 offenders) meet the criteria for a reduction under Part B, and of those, more than half (57.8 percent or 7,272) of those offenders would have a lower guideline range if the Commission were to make Part B, Subpart 1 of the 2023 criminal history amendment retroactive.

That far surpasses the number of COVID-19 related sentence adjustments. The Commission found that in fiscal year 2020, courts decided compassionate release motions for 7,014 offenders and granted a reduction to 1,805 offenders.[11]

As was the case with the large influx of compassionate release motions, during the COVID-19 pandemic, which overburdened USAOs and undermined AUSAs' ability to conduct thorough investigations and reviews of these motions, it is likely that similar problems will arise with the inevitable onslaught of motions that will occur with the retroactive

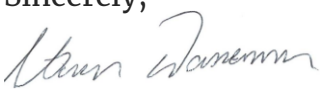
[10] Analysis of the Impact of 2023 Criminal History Amendment (Parts A and B) if Made Retroactive (ussc.gov)
[11] Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic (ussc.gov)

application of the criminal history guideline amendments. The likely result will be that offenders who do not warrant relief under the amendments may nevertheless be granted reductions in their sentences, thereby placing public safety at risk.

The provisions considered today would impose significant burdens on U.S. Attorney Offices without necessary funding and support to ensure their orderly implementation while at the same time, undermining the critical aims of the Sentencing Guidelines themselves. For these reasons, NAAUSA urges the Sentencing Commission to **reject** the proposal to make the Commission's criminal history amendments applicable to "status points" and "zero-point offenders" retroactive.

Thank you for considering NAAUSA's perspective. Please reach out to our Washington Representative Natalia Castro (ncastro@shawbransford.com) with any additional questions.

Sincerely,



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