

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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June 23, 2023

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

**Re: Defender Comment on the Retroactivity of Parts A and B
of the Criminal History Amendment**

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to support the retroactivity of Parts A (status points) and B (zero criminal history points) of the criminal history amendment. By making Parts A and B retroactive, the Commission can better ensure that people already sentenced benefit from more equitable sentencing policies that reflect empirical data and national experience.

The Commission has identified three factors it considers when determining whether a guideline should be retroactively applied: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range; and (3) the feasibility of applying the amendment retroactively.¹ As explained below, each of these factors strongly supports retroactivity for Parts A and B. Both Parts are empirically based and target guidelines that recommend sentences greater than necessary.² The average change in the guideline range for both

¹ See USSG §1B1.10 cmt. background.

² See USSC, *Official Text Version of 2023 Amendments (Effective November 1, 2023)* 49–53 (Apr. 27, 2023), <https://tinyurl.com/2p978wrt> (“2023 Amendments and Reasons for Amendment”) (citing USSC, *Revisiting Status Points* (2022), <https://tinyurl.com/2pcz7mw3>; USSC, *Recidivism of Federal Offenders Released in 2010* (2021), <https://tinyurl.com/yhs3hwee>).

Parts is anticipated to be well above the sixth-month threshold.³ The vast majority of those eligible for retroactive relief are people of color—the people most harmed by our criminal justice policies.⁴ And districts are well-prepared to implement retroactivity. Through previous retroactivity projects like the 2014 Drug Guidelines Amendment (“Amendment 782”), districts have established processes to streamline screening, filing, and resolving retroactivity motions. Defenders are confident that the processes used to implement Amendment 782—a project significantly larger than this one is expected to be⁵—could effectively be used if the Commission makes Parts A and B retroactive.

I. Part A: Status Points

Since the guidelines’ inception, Chapter 4 has directed that two points be added to a person’s criminal history score if they committed the instant offense while under a criminal justice sentence.⁶ This year, the Commission amended this rule. People with six or fewer criminal history points will no longer receive status points.⁷ People with seven or more criminal history points will receive one status point instead of two.⁸

Purpose. The Commission’s stated purpose for Part A is two-fold: (1) Commission data confirms that status points lack an empirical basis; and (2)

³ See USSC, *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* 9, 17 (2023), <https://tinyurl.com/7ckwwz99> (“Criminal History Impact Analysis”).

⁴ See *id.* at 13, 21.

⁵ Compare USSC, *2014 Drug Guidelines Amendment Retroactivity Data Report* tbl. 1 (2021), <https://tinyurl.com/y45yd5hm> (reporting 50,998 motions filed), and USSC, *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* 7 (2014) <https://tinyurl.com/yntaxjtp> (estimating 51,141 individuals would be eligible), with Criminal History Impact Analysis at 31 (anticipating an eligibility group of 11,495 for Part A, and 7,272 for Part B).

⁶ See USSG §4A1.1(d) (1987).

⁷ See 2023 Amendments and Reasons for Amendment at 50.

⁸ See *id.* at 44.

the current rule produces sentences greater than necessary to serve the purposes of sentencing.⁹ Both reasons support retroactivity.

The Commission’s longtime recognition that status points do not meaningfully contribute to the recidivism predictability of the criminal history score supports retroactivity. In 2005, the Commission recognized that including status points and the since-eliminated “recency points” in the criminal history score did not meaningfully add to the predictive quality of the criminal history score.¹⁰ Last year, in *Revisiting Status Points*, the Commission reported that while status points regularly increase guideline ranges—and correlate with longer sentences—they improve prediction of rearrest “by only 0.2 percent.”¹¹

In addition to lacking an empirical basis, status points also produce sentences that are unnecessarily long. As the Commission acknowledged in its Reason for Amendment, people are sufficiently penalized for committing a new offense while under a criminal justice sentence. For those who violate federal supervision, the guidelines already “separately account[] for consecutive punishment imposed upon revocations of supervised release.”¹² People who violate other criminal justice sentences would also likely be subject to a violation of that original sentence.¹³ Further, it is “possible that [a person’s] criminal history score would be independently increased as the result of additional time imposed as the result of a revocation of probation or

⁹ See *id.* at 50–51.

¹⁰ See *Revisiting Status Points* at 4; see also USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 26 (2005), <https://tinyurl.com/5fw3ezpw>; Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm’n, Washington, D.C., at 91–92 (Mar. 17, 2010), <https://tinyurl.com/mr3bubjd>. Recency points were removed from the criminal history score, in part, because of this data. See USSG App. C, Amend. 742, Reason for Amendment (effective Nov. 1, 2010).

¹¹ *Revisiting Status Points* at 3, 11–12.

¹² 2023 Amendments and Reasons for Amendment at 51.

¹³ See Statement of Jami Johnson before the U.S. Sentencing Comm’n, Washington, D.C., at 27–28 (Mar. 8, 2023), <https://tinyurl.com/4zt3wn7a> (listing penalties that already apply for committing an offense while under a criminal justice sentence).

supervised release for the offense that also results in the addition of status points.”¹⁴ The Commission rightly determined that the “double penalty” of two status points is too severe a punishment in all cases.¹⁵ Because status points were just as excessive when applied to past sentences as they are today, the Commission should make Part A retroactive.

By “balance[ing] [its] mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing,” the Commission necessarily concluded that prospective application of Part A would not threaten public safety.¹⁶ Neither would retroactive application. If past outcomes are any indication, retroactive applicability of guideline amendments does not result in an increased rate of recidivism.¹⁷ And there is even more reason to believe that public safety would not be an issue with this amendment. Unlike Amendments 782, 750, and 706, Part A was promulgated, in part, because Commission data establish that status points do not meaningfully predict increased recidivism. Because these points never identified people more likely to be rearrested in the first place, there is no reason to believe that removing the effect of these points for people who have already been sentenced would be linked to

¹⁴ 2023 Amendments and Reasons for Amendment at 51.

¹⁵ Transcript of Public Meeting of the U.S. Sentencing Comm’n, Washington, D.C., at 18 (Apr. 5, 2023), <https://tinyurl.com/yc3uthan> (“April 5 Public Meeting”) (Chair Reeves).

¹⁶ 2023 Amendments and Reasons for Amendment at 50; *see also* April 5 Public Meeting at 92 (Apr. 5, 2023) (Vice Chair Mate) (“This evidence-based guidance will improve the lives of thousands of people each year, strengthen communities, and serve public safety.”).

¹⁷ *See USSC Retroactivity & Recidivism: The Drugs Minus Two Amendment 6* (2020), <https://tinyurl.com/85r8sudu> (reporting no statistically significant difference in recidivism rates of people released early from retroactive relief and comparable people who served full sentences); USSC, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment 3* (2018), <https://tinyurl.com/f7bmu553> (finding that the recidivism rates “were virtually identical” for people who were released early from retroactive relief and people who had served their full sentence before retroactivity took effect); USSC, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment 3* (2014), <https://tinyurl.com/z3t6kpri> (“Retroactive sentence reductions did not result in higher recidivism rates. . .”).

increased rearrests. Indeed, there is ample reason to believe public safety would be enhanced by permitting people serving unnecessarily long sentences to return home sooner.¹⁸

Section 1B1.10 further ensures public safety. Courts would be required to leave all guideline calculations but those amended by Part A the same.¹⁹ Mandatory minimums would still apply, as would other guideline enhancements (e.g., for possession of a weapon or aggravating role).²⁰ And, before granting any sentence reduction, courts would be required to consider all § 3553(a) factors, including the seriousness of the offense, and the need to protect the public from further crimes.²¹

Impact. The “magnitude of the change in the guideline range” also supports retroactivity of Part A.²² While amendments that “generally reduce the maximum of the guideline range by less than six months” are not typically

¹⁸ See, e.g., Don Stemen, Vera Evidence Brief, *The Prison Paradox: More Incarceration Will Not Make Us Safer* 2–3 (2017), <https://tinyurl.com/5n933pvc> (recounting the criminogenic effects of high rates of imprisonment including weakening of social and family bonds, deprivation of income and future income potential, disrespect for the law, and collateral consequences like loss of employment and stable housing); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049 (2008) (cataloging a host of crime-producing effects of imprisonment and estimating their aggregate impact on crime rates by drawing inferences from existing data and research); see also USSC, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 19 (1996), <https://tinyurl.com/ywhttnec> (acknowledging that alternatives to incarceration “divert [individuals] from the criminogenic effects of imprisonment which include contact with [people convicted of] more serious [crimes], disruption of legal employment, and weakening of family ties”).

¹⁹ See USSG §1B1.10(b)(1).

²⁰ See *id.*; Criminal History Impact Analysis at 9–10 & n.37.

²¹ See 18 U.S.C. § 3582(c)(2) (citing 18 U.S.C. § 3553(a)); see also USSG §1B1.10 cmt. n.1(B)(ii) (“The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction. . .”).

²² USSG §1B1.10 cmt. background.

eligible for retroactivity,²³ the Commission anticipates that if Part A was made retroactive, the average sentence reduction would be 14 months—far from “only a minor downward adjustment.”²⁴

Further, as part of its duty to establish uniform and fair sentencing policy, the Commission must consider *who* would benefit from this change in the guideline range as well.²⁵ The impact report anticipates that over 70 percent of people eligible for retroactive relief under Part A are classified by the Commission as Black or Hispanic²⁶—the groups harmed most acutely by mass incarceration.

The reasons for this troubling impact are understood. As we stated in support of eliminating status points prospectively, research shows that Blacks and Latinos are more likely than whites to be on supervision, be subject to longer terms of supervision than similarly situated whites, and are more likely to be revoked at higher rates.²⁷ Indeed, at every stage of the criminal justice process, people of color fare worse.²⁸ Communities of color are more heavily policed, and people of color are stopped and searched more frequently than whites.²⁹

²³ *Id.*

²⁴ *Id.* (quoting S. Rep. No. 98-225, at 180 (1983)).

²⁵ See 28 U.S.C. § 991(b)(1)(B) (requiring the Commission to establish sentencing policies that are fair and avoid unwarranted disparities).

²⁶ See Criminal History Impact Analysis at 13.

²⁷ See Defenders’ Annual Letter to the Sentencing Comm’n at 14 & accompanying notes (Sept. 14, 2022).

²⁸ See, e.g., Radley Balko, Opinion, *There’s Overwhelming Evidence that the Criminal Justice System is Racist. Here’s the Proof.*, Wash. Post (June 10, 2020), <https://tinyurl.com/3sd5n7b3> (collecting studies demonstrating racial bias at numerous stages in the criminal justice process); The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (Apr. 2018), <https://tinyurl.com/mvrhnyt9> (collecting disparities between whites and communities of color in traffic stops, searches, arrests, pretrial release, sentencing outcomes, and appeals).

²⁹ See, e.g., *id.*; Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736 (2020), <https://5harad.com/papers/100M-stops.pdf>; see also USSC, *What Do Federal Firearms Offenses Really Look Like?* 33 (2022), <https://tinyurl.com/2tk26bed>.

People of color are denied bail more often than their white counterparts.³⁰ They face bias in plea bargaining.³¹ They are more likely to be wrongfully convicted.³² And they serve more severe sentences.³³

Retroactive application of Part A would not cure this systemic injustice. But denying judges the opportunity to reduce excessive sentences would surely perpetuate it. Granting judges the discretion to determine whether retroactive relief is appropriate in individual cases would go a long way towards promoting respect for the law and reuniting many of the 11,495 presently incarcerated individuals with their families and communities.

Administrability. Identifying a person's eligibility for retroactive relief under Part A would be straightforward.³⁴ Since courts are required to

³⁰ See e.g., *supra* note 28; NACDL, *Race and Pretrial* (Dec. 2022) (last accessed June 22, 2023), <https://tinyurl.com/2tbt2xxh>; Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, Prison Policy Initiative (Oct. 2019), <https://tinyurl.com/ycy7spy6>.

³¹ See, e.g., *supra* note 28; Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. Crim. L. & Criminology 93 (2021); Alexander Testa & Brian D. Johnson, *Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution*, 31 Crim. Just. Pol'y Rev. 500 (2020); Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. Rev. 1187 (2018).

³² See, e.g., *supra* note 28; Samuel R. Gross, *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (Sept. 2022), <https://tinyurl.com/28b4nkjf>; c.f. Barbara O'Brien et al., *Latinx Defendants, False Convictions, and the Difficult Road to Exoneration*, 66 UCLA L. Rev. 1682, 1687–1705 (2019) (discussing ways in which Latino individuals accused of crime are uniquely vulnerable to wrongful conviction).

³³ See, e.g., *supra* note 28; Erik J. Girvan & Heather Marek, *The Eye of the Beholder: Increased Likelihood of Prison Sentences for People Perceived to Have Hispanic Ethnicity*, 47 L. & Hum. Behav. 182, 191 (2023); Elizabeth Tsai Bishop et al., *Racial Disparities in the Massachusetts Criminal System*, Criminal Justice Policy Program, Harvard Law School 30–64 (Sept. 2020), <https://tinyurl.com/22ukjc64>; USSC, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* 32–33 (2018), <https://tinyurl.com/yuffcf46>; M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320, 1336–51 (2014).

³⁴ See USSG §1B1.10 cmt. background.

calculate and consider the guideline range in every case,³⁵ it would be readily apparent from the sentencing record whether someone received status points under §4A1.1(d) and, if so, whether those points increased the person’s guideline range.³⁶

Processing the sentence reduction motions would not be unduly burdensome, either. Districts have done this before. Defenders and probation have testified about the collaborative systems that judges, probation, defenders, and prosecutors already have implemented to successfully manage past guideline retroactivity projects.³⁷ Districts nationwide have fine-tuned these procedures to “efficiently and effectively review cases for eligibility, determine whether an individual should receive a sentence reduction, and plan for release.”³⁸ This project is anticipated to be smaller in scale than past guideline retroactivity projects,³⁹ and thus likely to be even more manageable.

³⁵ See 28 U.S.C. § 3553(a)(4)(A); Fed. R. Crim. P. 32(d)(1); (i)(3).

³⁶ See, e.g., Criminal History Impact Analysis at 8 (“For the amendment made by Part A pertaining to status points, additional fact-finding is not required to determine the amended guideline range. . . .”).

³⁷ See, e.g., Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 80–100 (June 10, 2014) (Deputy Chief Probation Officer Quincy Avinger, Jr. testifying as to the District of South Carolina), <https://tinyurl.com/5efzadrj>; *id.* at 99–100 (Chair Saris); *id.* at 203–205 (Sarah Gannett); Statement of Sarah Gannett Before the U.S. Sentencing Comm’n, Washington, D.C., at 14–15 (June 10, 2014), <https://tinyurl.com/2v5mp58t>; Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington D.C., at 65–66; 68–69, 125–26 (June 1, 2011), <https://tinyurl.com/4a932s8e> (Michael Nachmanoff); Statement of Stephen Sady Before the U.S. Sentencing Comm’n, Washington D.C. (Nov. 13, 2007), <https://tinyurl.com/2p8fezch>.

³⁸ Defenders’ Public Comment on Retroactivity of Amendments to Drug Quantity Table at 13 (July 7, 2014), <https://tinyurl.com/mr387s8p>.

³⁹ The Commission anticipates that 11,495 people would be eligible for retroactive relief under Part A. See Criminal History Impact Analysis at 9. The difference between the Commission’s eligibility prediction and the number of motions actually filed has steadily decreased since Amendment 706—likely because districts have perfected successful systems to administer these projects. The Commission anticipated that 51,141 people were eligible for sentence reductions under Amendment 782 and reported that 50,998 people filed motions. See *supra* note 5. It anticipated that 12,040 people would be eligible for sentence reductions under Amendment 750 and reported that 13,990 people filed motions. See USSC, *Analysis*

Further, the number of people eligible for release within the first year should not be an obstacle. The Commission anticipates that 4,429 people would be eligible for release within the first year if Part A was made retroactive.⁴⁰ But 3,163 of those 4,429 are already scheduled to be released within the first year under their current, unamended sentence even without retroactive relief.⁴¹ The additional 1,266 people—spread across all districts—should not prevent retroactivity. Many of these individuals would not require probation’s resources. Almost a quarter of those eligible for immediate release and almost 13 percent of the total eligible for retroactive relief under Part A are non-U.S. citizens.⁴² Upon release from federal custody, the vast majority of these individuals would likely be detained by Immigration and Customs Enforcement pending removal or removal proceedings and would not require probation’s active supervision or release plans.

II. Part B: Zero Criminal History Points

In Part B of the criminal history amendment the Commission created a new guideline, §4C1.1, which provides a two-level offense level decrease for certain people with zero criminal history points.⁴³ As with Part A, each of the three factors outlined in §1B1.10 weigh in favor of retroactivity.

Purpose. The Commission promulgated §4C1.1 because longstanding data and judicial practice indicated that the guideline-recommended sentences for people with zero criminal history points were greater than necessary to serve

of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively 10 (2011), <https://tinyurl.com/yppk4pj8>; USSC, *Final Crack Retroactivity Data Report Fair Sentencing Act* tbl. 1 (2014), <https://tinyurl.com/cpcfyed3>. And it anticipated that 19,500 people were eligible for sentence reductions under Amendment 706 and reported that 25,736 people filed motions. See USSC, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* 4 (2007), <https://tinyurl.com/3tdxfxap>; USSC, *Preliminary Crack Cocaine Retroactivity Data Report* tbl. 1 (2011), <https://tinyurl.com/bdhfbvj5>.

⁴⁰ See Criminal History Impact Analysis at 16–17.

⁴¹ See *id.*

⁴² See *id.* at 13 & 16, n.38 (reporting 12.8 percent of all persons eligible for Part A are non-U.S. citizens and that 23.7 percent of those eligible for immediate release are non-U.S. citizens).

⁴³ See 2023 Amendments and Reasons for Amendment at 45–46.

the purposes of sentencing.⁴⁴ The reasons the Commission promulgated this amendment are not new—and they apply equally to prospective sentences and sentences already imposed.

First, data. Commission data repeatedly indicates that people with zero criminal history points have a considerably lower rate of rearrest than other groups.⁴⁵ In promulgating this amendment, the Commission cited its recent data showing that people with zero criminal history points were substantially less likely to be rearrested than people with one criminal history point even though they are placed in the same criminal history category.⁴⁶ This trend is not new. Since 2004, Commission data has identified that “[the] zero point [] recidivism rate is substantially lower than the recidivism rates for [people] with only one criminal history point.”⁴⁷

Second, judicial practice. Section 4C1.1 reflects the Commission’s “continuous evolution” of the guidelines to ensure they “embody the § 3553(a) considerations, both in principal and in practice.”⁴⁸ Commission data show judges sentence below the guideline range more often for people with no criminal history points than for people with one point.⁴⁹ But while the higher rate of below-guideline sentences in zero-point cases prompted the

⁴⁴ See *id.* at 52–53.

⁴⁵ See, e.g., USSC, *Recidivism of Federal Offenders Released in 2010* 27, fig. 14 (2021), <https://tinyurl.com/2p922sns> (“2021 Recidivism Report”); USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 7, fig. 1 (2017), <https://tinyurl.com/5n8hn77f>; USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18, fig. 6 (2016) <https://tinyurl.com/bdfr62f5>.

⁴⁶ 2023 Amendments and Reasons for Amendment at 52 (citing 2021 Recidivism Report at 26, fig. 14) (“Among other findings, the report concluded that [people with zero criminal history points] were less likely to be rearrested than [people with one criminal history point] (26.8% compared to 42.3%), the largest variation of any comparison of offenders within the same Criminal History Category.”).

⁴⁷ USSC, *Recidivism and the “First Offender”* 13 (2004), <https://tinyurl.com/2sc6pbbn> (“2004 First Offense Report”).

⁴⁸ *Rita v. United States*, 551 U.S. 338, 350 (2007).

⁴⁹ See 2023 Amendments and Reasons for Amendment at 52.

Commission to act this year,⁵⁰ the Commission has acknowledged for decades that people with zero criminal history points may warrant different treatment.⁵¹ Section § 994(j) requires the Commission to ensure the appropriateness of lesser sentences for certain people committing a first offense.⁵² And, a version of §4C1.1—proposing a two-level reduction for certain people with zero criminal history points—was prepared by a staff working group and circulated to the Commission in 1991.⁵³

Like Part A, retroactive application of Part B would not undermine public safety. In addition to only applying to people with zero criminal history points—a group the Commission has already established has a very low likelihood of rearrest—the Commission’s added criteria are intended to further exclude people “in light of the seriousness of the instant offense of conviction or the existence of aggravating factors.”⁵⁴ And, even if a person would be eligible for a sentence reduction, a reduced sentence is not guaranteed. Like with all guideline retroactivity, the court may grant a reduced term of imprisonment only after considering the factors in § 3553(a).⁵⁵

Impact. The magnitude of the change in the guideline range if Part B was made retroactive is also significant. The Commission estimates an average sentence reduction of 15 months.⁵⁶

Further, this is not a case where the guidelines were “simply refined in a way that might cause isolated instances of existing sentences [to fall] above the

⁵⁰ See 2023 Amendments and Reasons for Amendments at 52.

⁵¹ See 2004 First Offense Report at 2 (“The first offender adjustment was first studied at the Commission in late 1989. . .”).

⁵² See 28 U.S.C. § 994(j).

⁵³ See 2004 First Offense Report at 3.

⁵⁴ 2023 Amendments and Reasons for Amendments at 53.

⁵⁵ See 18 U.S.C. § 3582(c)(2).

⁵⁶ See Criminal History Impact Analysis at 17.

[amended] guidelines.”⁵⁷ While Part B was promulgated, in part, to better align the guidelines to the downward variance and departure rates in cases involving people with zero criminal history points,⁵⁸ within-guideline sentences were far from rare: last year almost 40 percent of the sentences for people with zero criminal history points fell within the calculated guideline range⁵⁹ and over 55 percent of those anticipated to be eligible for a reduction under Part A were sentenced within the guidelines.⁶⁰ Indeed, *not* making this amendment retroactive, would perpetuate unwarranted disparities—not only between those sentenced prior to November 1, 2023, and those sentenced after—but also between the sentences imposed prior to November 1, 2023 where judges rejected the guideline range and those of the estimated 7,272 individuals currently serving terms of imprisonment who were sentenced consistent with a guideline range that was higher than necessary.⁶¹

Like Part A, retroactive relief under Part B would primarily benefit people of color—almost 70 percent of those anticipated to be eligible are classified by the Commission as Hispanic and approximately 80 percent are classified by the Commission as Hispanic or Black.⁶² Retroactive application would provide a modest step towards reducing the staggering racial and ethnic disparities in the BOP population.⁶³

⁵⁷ USSG §1B1.10 cmt. background (quoting S. Rep. No. 98-225, at 180 (1983)); *see also id.* at * (acknowledging likely typographical error).

⁵⁸ *See* 2023 Amendments and Reasons for Amendment, at 52.

⁵⁹ *See id.* (reporting that “[in] fiscal year 2021, 39.2 percent of [individuals] with zero criminal history points received a sentence within the guidelines range”).

⁶⁰ *See* Criminal History Impact Analysis at 22 (estimating 55.4 percent of people eligible for retroactive relief under Part B were sentenced within the guideline range).

⁶¹ *See id.* at 17 (estimating 7,272 people would be eligible for a sentence reduction under Part B).

⁶² *See id.* (reporting that 69.9 percent of those eligible under Part B are classified by the Commission as Hispanic and 9.9 percent are classified as Black).

⁶³ According to BOP data, 38.5 percent of its incarcerated population is classified as Black, and 30.1 percent is classified as Hispanic. *See* Fed. Bureau of Prisons, *BOP Statistics: Inmate Race* (last accessed June 22, 2023), <https://tinyurl.com/5az7exbw>; Fed. Bureau of Prisons, *BOP Statistics: Inmate Ethnicity* (last accessed June 22,

Administrability. Federal court stakeholders are well-equipped to handle the retroactive application of §4C1.1.

To be sure, determining eligibility for retroactive relief under Part B would be more involved than determining relief under Part A, but courts and stakeholders are prepared to navigate this analysis. In most cases, the §4C1.1 exclusions should be apparent from the record. Several exclusions would be gleaned from the statute of conviction.⁶⁴ Others would be clear from the original guideline calculation.⁶⁵ Any remaining exclusions should be discernable from the factual basis and offense conduct described in the sentencing record. Just as the Commission was able to quickly assess prospective eligibility through guideline-based proxies,⁶⁶ Defenders are confident that courts (with the help of probation officers, defenders, and prosecutors), would be able to manage eligibility determinations as well.

The processes implemented for past retroactivity projects, discussed above, also ease manageability concerns here. For example, the Middle District of Florida—the district expecting the greatest number of eligible cases under Part B⁶⁷—already has a collaborative review process in place. Starting in 2008 with Amendment 706, the district adopted a standing order authorizing the federal defender’s office to represent all people filing motions for a sentence reduction under that amendment. The federal defender’s office, with the assistance of probation, identified the people eligible for relief. Probation prepared a memorandum identifying its position on eligibility and the amended guidelines. Through meetings with the court, defenders, and the

2023), <https://tinyurl.com/mccyw2v7>. These groups are significantly overrepresented in the BOP as compared to the national population. *See* U.S. Census Bureau, *QuickFacts: United States* (last accessed June 22, 2023), <https://tinyurl.com/7pt88z72> (reporting the nationwide population is 13.6 percent Black and 19.1 percent Latino or Hispanic).

⁶⁴ *See, e.g.*, 2023 Amendments and Reasons for Amendment at 45–46 (adopted USSG §4C1.1(a)(5) & (b)(2)).

⁶⁵ *See, e.g., id.* at §4C1.1(a)(2), (8), (9), (10).

⁶⁶ *See* Criminal History Impact Analysis at 28–29; App’x A–E.

⁶⁷ *See id.* at 20, tbl. 2B (anticipating Middle District of Florida to receive 15.4 percent of the total eligible cases under Part B).

government, the parties were able to come to an agreement on most of the motions and almost all motions—even if opposed—were resolved on the papers. The district used this same process for resolving sentence reduction motions pursuant to Amendments 750 and 782. Defenders expect that the same process would apply again.

Other anticipated factors further confirm this project would be manageable. Like with Part A, the number of people expected to be released within the first year if Part B was made retroactive is not substantially greater than if Part B was *not* made retroactive.⁶⁸ And the number of people subject to active supervision would be far less than those receiving sentence reductions. Almost 75 percent of those anticipated to be eligible for immediate release are non-U.S. citizens and over half of all people eligible for Part B retroactivity are non-U.S. citizens.⁶⁹

III. Conclusion

The Commission unanimously passed Parts A and B of the criminal history amendment not because facts changed, or new legal developments emerged. Rather, both parts of this amendment were passed because of what has always been true: status points are unnecessary and guideline-recommended sentences for people with zero criminal history points are too long. When the Commission amends the guidelines to better reflect advancement in knowledge of the criminal justice process,⁷⁰ the benefit of that knowledge should be shared among all to whom it applies.

Defenders recognize that retroactive application of these new provisions may require all federal court actors to temporarily shoulder an increased workload. But as Judge Walton testified before the Commission in 2007, we should not refuse to rectify unfairness in the sentencing process simply

⁶⁸ See *id.* at 24–24 (anticipating 3,274 eligible people would be released within the first year if Part B is made retroactive. But 1,802 of those people will be released under their current, unamended sentence even without retroactivity).

⁶⁹ See *id.* at 21 & 24, n. 41 (reporting 73.5 percent of people eligible for immediate release are non-U.S. citizens and 53.2 percent of all people eligible for relief under Part B are non-U.S. citizens).

⁷⁰ See 28 U.S.C. § 991(b)(1)(C).

because “we’re going to be . . . worked to a greater extent.”⁷¹ “[I]f we’re going to do justice, that means not just justice in the future, but rectifying injustices that occurred in the past.”⁷²

We hope the Commission will do what is just and make both parts A and B of the criminal history amendment retroactive.

Very truly yours,

/s/ Michael Caruso

Michael Caruso
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Jayme L. Feldman
Sentencing Resource Counsel
Federal Public and Community
Defenders

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

⁷¹ Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 17 (Nov. 13, 2007), <https://tinyurl.com/yazzyuz5> (Hon. Walton).

⁷² *Id.*