U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

June 22, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the Sentencing Commission's request for comment on whether Parts A and B of the recently promulgated criminal history guideline amendment addressing "status points" and "zero-point offenders" should be applied retroactively to previously sentenced offenders.[1]

As then-Commissioner Howell observed, "[t]he Commission has over its history used its authority under 28 U.S.C. 994(u) infrequently to [make] retroactive guideline amendments that reduce sentencing ranges."[2] Pursuant to the commentary to §1B1.10, the Commission considers, 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," when selecting amendments included for retroactivity.[3] Historically, the Commission has reserved retroactive application for amendments that strive to correct a systemic wrong, such as then amendment that reduced crack

[1] Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2023, and request for comment, 88 Fed. Reg. 28254 (May 3, 2023), available at https://www.federalregister.gov/documents/2023/05/03/2023-09332/sentencing-guidelines-for-united-states-courts. We use the term "offender" as the Commission did in the amendment and the issue for comment.

[2] *Sent'g Comm'n Public Meeting on June 30, 2011,* 22:15-21 (Statement of Comm'r Beryl Howell), available at available at https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.

[3] U.S. SENT'G COMM'N, *Guidelines Manual* §1B1.10, comment. (backg'd.) (hereinafter USSG).

cocaine penalties in 2011.[4] The Department has similarly supported retroactive application of guideline amendments in such circumstances.[5]

Retroactive application of the criminal history amendments, by contrast, would extend far beyond the Commission's past practice. The Department appreciates the Commission's interest in leniency for first-time offenders, as well as the concerns animating its amendment related to status points. These amendments, however, represent the type of "minor downward adjustment[s]" to the Guidelines that Congress did not intend for retroactive application.[6] At the same time, the burden posed by retroactivity would be immense. The Commission estimates that 50,545 individuals in BOP custody were assigned status points at sentencing,[7] and an additional 34,922 individuals are zero-point offenders.[8] The Department expects that nearly all of these 85,000 individuals would move for an adjustment, creating an unprecedented burden on courts and victims. The corresponding strain on reentry services also raises public safety concerns.

For the reasons set forth below, the Department opposes retroactive application of both Parts A and B of the criminal history amendment. If the Commission nevertheless proceeds, the Department requests that the Commission delay implementation of retroactivity by at least nine months to allow the Bureau of Prisons (BOP) and the U.S. Probation Office sufficient time to properly prepare and coordinate reentry services for eligible offenders.

I. Burden on the courts and victims

Applying any guideline amendment retroactively imposes a burden on the courts and victims, and Congress has recognized that such burden is an important factor in evaluating the appropriateness of retroactivity. The Commission has recognized the same. Sentence reductions for eligible offenders are not automatic under §1B1.10. As then-Commissioner Brown Jackson observed during a public meeting on retroactivity in 2011, "in each case a federal judge must determine the appropriateness of a sentence reduction for that particular defendant, adjusting the sentence only if warranted and if the risk to public safety is minimal."[9]

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[4] *See, e.g.*, *Sent'g Comm'n Public Meeting on June 30, 2011,* 13:5-9 (Statement of Comm'r Ketanji Brown Jackson on retroactivity of amendments to implement the 2010 Fair Sentencing Act) ("The crack cocaine guideline penalty reduction is not some minor adjustment designed to facilitate efficient guideline operation, but it reflects a statutory change that is unquestionably rooted in fundamental fairness.").

[5] *U. S. Sent'g Comm'n Public Meeting on June 1, 2011,* 14:6-13 (Statement of Att'y Gen'l Eric Holder) (supporting retroactivity of amendments to implement the 2010 Fair Sentencing Act) available at https://www.ussc.gov/sites/default/files/Hearing_Transcript_1.pdf; *see Public Hearing on Retroactivity of 2014 Drug Amendment on June 10, 2014 before the U.S. Sent'g Comm'n,* 105:15-21 (Statement of U.S. Attorney Sally Yates) (supporting limited retroactivity of the pending drug guideline amendments"), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf.

[6] *See* USSG §1B1.10, comment.

[7] SENT'G COMM'N, RETROACTIVITY IMPACT ANALYSIS OF PARTS A AND B OF THE 2023 CRIMINAL HISTORY AMENDMENT (May 15, 2023) at 9, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.

[8] *Id*. at 17.

[9] *Sentencing Commission Public Meeting on June 30, 2011,* 14:11-18 (Statement of Commissioner Ketanji Brown Jackson on retroactivity of the amendments to implement the 2010 Fair Sentencing Act), available at https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf.

More specifically, offenders must move for a sentencing reduction; the government must respond to the motion; probation officers must review the application and determine if the amendment affects the offender's guideline calculation and meets the criteria of §1B1.10; the Bureau of Prisons must gather disciplinary and other prison records for the offender to be reviewed by the sentencing court; and the court must review all this information to evaluate the appropriateness of a reduction for each offender individually. The sentencing court is required to consider the factors listed in 18 U.S.C. § 3553(a) as well as the defendant's post-sentencing conduct to determine whether a reduction is warranted, the extent of any reduction, and "the nature and seriousness of the danger to any person or the community" that would result from a sentencing reduction.[10]

Here, the Commission estimates that 50,545 offenders in BOP custody were assigned status points at sentencing,[11] and 34,922 offenders in BOP custody are zero-point offenders.[12] The combined total of offenders potentially eligible for a sentencing reduction if the amendments are made retroactive – more than 85,000[13] – is more than half of all individuals housed in the Bureau of Prisons.[14] While the Commission estimates that only a fraction of those individuals would ultimately be eligible for a reduction (11,495 offenders for Part A, 7,272 for Part B),[15] those estimates understate the true number of offenders who might be eligible under Part B of the amendment. Part B contains several new and un-litigated exclusionary criteria that use novel legal concepts.[16] Because these criteria are new, the Commission used proxies from the current Guidelines to estimate offender eligibility to the extent possible. But many of the proxies are poor substitutes for these novel criteria and exclude many defendants who would be eligible for a reduction under Part B.

More fundamentally, regardless of how many individuals are ultimately eligible, the Department anticipates that most of the 85,467 individuals will move for a sentence reduction. Most motions will be made in good faith. Application of the Sentencing Guidelines – and of the criminal history algorithm in particular – is complex, and it will not be readily apparent to those in custody whether they qualify for a reduction. Part A of the amendment requires recalculation of a defendant's criminal history score; and both parts require review of the applicable guideline ranges, enhancements, and statutory minimum sentences.[17] The default will be to apply for a sentencing reduction. Experience teaches as much, as more than 13,000 *ineligible* offenders

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[10] USSG §1B1.10, comment. (n. 1 app. (B)).
[11] Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment (May 15, 2023) at 9.
[12] *Id*. at 17.
[13] *Id.* at 31.
[14] Estimate as of May 18, 2023. BOP: Population Statistics.
[15] Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment (May 15, 2023) at 31.
[16] *See supra* note 1 at 28271.
[17] In estimating the applicability of Part A, for example, the Commission excluded offenders for whom: (1) the change to the offender's criminal history score did not change the criminal history category to which they were assigned; (2) the offender's criminal history category was determined by another guideline provision; (3) the offender's current sentence is below the new guideline range and the offender did not receive a departure for substantial assistance when initially sentenced; or the offender was sentenced to a statutory mandatory minimum sentence.

sought sentencing reductions when amendments to the drug guidelines were applied retroactively.[18]

The Commission must carefully weigh this burden when considering retroactivity. As then-Commissioner Howell explained when considering the 2010 "recency amendments," "the potential burden on the courts would be substantial if the approximately 43,000 offenders who received recency points petitioned for review of their sentences when only a comparatively small number may be eligible to benefit."[19] Here, retroactive application would likely involve up to 85,000 sentence reduction motions. To put this number in context, in fiscal year 2022, there were approximately 64,000 defendants sentenced for felonies and Class A misdemeanors in the federal system.[20] Retroactive application of this amendment would more than double sentencing-related proceedings for courts. The burden on the courts – including prosecutors, defense attorneys, probation, and the Bureau of Prisons – would be overwhelming and weighs heavily against retroactivity.

Likewise, the Commission should strongly consider the immense burden of retroactivity on victims. During the Commission's February hearing, the Chair of the Victims Advisory Group highlighted in her written testimony the "suffering experienced by victims or families contacted about a motion for early release."[21] As she explained, "[s]uch events re-open the wounds of chapters they thought were long closed, cause extreme anxiety if they are fortunate enough to have some notice of a potential release, and instill unimaginable fear when they learn of an offender's unexpected release."[22] Every motion for a sentence reduction risks causing the victim to suffer again. Given the anticipated number of applications that would be filed under retroactive application of the criminal history amendment, retroactivity would, as the Chair of the Commission's Victim Advisory Group testified, "not [be] sensitive to the victim experience."[23]

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[18] SENT'G COMM'N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT (May 2021), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf.

[19] *U.S. Sent'g Comm'n Public Meeting on September 16, 2010,* minutes at 2 (Statement of Comm'r Judge Beryl Howell on retroactive application of the recency points amendment), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf; *see also* U.S. SENT'G COMM'N, ANALYSIS OF THE IMPACT OF AMENDMENT TO SECTION 4A1.1 OF THE SENTENCING GUIDELINES IF THE AMENDMENT WERE APPLIED RETROACTIVELY (September 1, 2010), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/recency/20100901_Recency_Retro.pdf.

[20] U.S. SENT'G COMM'N, TABLE OF FEDERAL OFFENDERS IN EACH CIRCUIT AND DISTRICT FOR FY 2022, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table01.pdf.

[21] *U.S. Sent'g Comm'n Public Meeting on February 2, 2023,* written testimony at 3 (Statement of Professor Mary Graw Leary), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/VAG1.pdf.

[22] *Id.*

[23] *Public Hearing on the Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sent'g Comm'n*, 222:17 March 8, 2023 (testimony of the Commission's Victim Advisory Grp Chair Mary Graw Leary), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/Transcript_Day2.pdf.

II. Magnitude of the change

Precisely because of the burden associated with retroactivity, the commentary to §1B1.10 reflects that Congress did "not expect that the Commission will recommend adjusting existing sentences under the provision . . . when there is only a minor downward adjustment in the guidelines."[24] The legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)) expressly states that Congress did not intend for "minor downward adjustments" to the Guidelines to be applied retroactively. Congress recognized that the decision to apply a guideline amendment retroactively involves a balancing of the burden of retroactivity on the courts and the magnitude of the sentencing change from the amendment, such that a "minor downward adjustment" in the Guidelines should not be applied retroactively.

That is the case here. With regard to Part A (status points), eliminating one or two status points from an offender's previously calculated criminal history score would, at most, move an offender down one criminal history category under the rules set out in Chapter Four of the Guidelines. Using the Sentencing Table in Chapter Five, such a move is generally equivalent to a reduction of one offense level, the smallest reduction the Commission can make through a guideline amendment and, by any definition, a "minor downward adjustment."[25] Part B of the amendment will have a similarly "minor" impact, resulting in a two offense-level reduction. In such circumstances, retroactive application would contravene congressional intent.

III. Public Safety

Retroactive application of the amendment would also raise public safety concerns. Section 3553(a)(2) requires courts to impose a sentence that, among other factors, promotes respect for the law, provides adequate deterrence, and protects the public.[26] In voting against retroactive application of the recency amendment in 2010, then-Commissioner Howell relied on similar public safety considerations, noting that "the majority of the 8,000 offenders who may be eligible to benefit are in Criminal History Categories IV, V, and VI, which raises public safety concerns."[27]

For Part A, status points reflect past recidivism while under a criminal justice sentence. These defendants, by definition, have already committed multiple crimes on multiple occasions, and according to the Commission's own research, are quite likely to recidivate again.[28] The data

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[24] S. Rep. 98-225, at 180 (1983), available at https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/legislative-history-of-the-comprehensive-crime-control-act-of-1983.pdf.

[25] There are a few cells in the Sentencing Table from which a one criminal history category reduction is between a one- and two-offense level reduction, or equal to a two-offense-level reduction. But in no case is the reduction greater than two offense levels.

[26] 18 U.S.C. § 3553(a).

[27] *U.S. Sent'g Comm'n Public Meeting on September 16, 2010,* minutes at 2 (Statement of Comm'r Judge Beryl Howell on retroactive application of the recency points amendment), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf;

[28] *See, e.g.,* U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW (March 2016) at 18, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

cited by the Commission in its retroactivity analysis underscores this concern – of the 11,495 sentenced defendants with status points that the Commission estimates would be eligible for retroactive relief, almost 60% are in criminal history categories IV, V, and IV.[29] Additionally, the Commission estimates that almost 40% of the individuals potentially eligible for a retroactive reduction were subject to either a weapon specific offense characteristic or a firearms mandatory minimum.[30] Many were sentenced for serious or violent crimes, including firearms (2,371, 20.6%); robbery (1,391, 12.1%); child pornography (325, 2.8%); assault (257, 2.2%); sexual abuse (250, 2.2%); murder (156, 1.4%); kidnapping (43, 0.4%); and manslaughter (35, .3%).[31]

As to Part B of the amendment, the Commission added ten new exclusionary criteria that will limit its application. However, the amendment – and the retroactive application of it – will still apply to many serious offenders, especially white-collar offenders, and will signal an inequitable benefit for such offenders. The amendment also sweeps in defendants who committed public corruption offenses, national security offenses, and serious economic and corporate crimes. As the Commission's Chair of the Victims Advisory Group (VAG) testified before the Commission, the amendment specifically rewards those who abuse a position of public trust and "are in a position in which they can offend for the very fact that they don't have prior criminal histories," including business leaders, prison guards, scout troop leaders, school principals or teachers, who "exploit" their lack of a prior criminal history to gain access to victims to harm them.[32]

These public safety concerns are particularly pronounced because retroactive application of amendments would place large burdens on transition services. As discussed in further detail below, thousands of defendants may become eligible for immediate or near-term release, without providing the Probation Office and the Bureau of Prisons sufficient opportunity to plan for such release or to provide the services critical for successful reentry to the community. It would be particularly unwise to release status-point offenders without essential services and support, because they are individuals who previously recidivated.

IV. Purpose

Historically, the Commission has believed that retroactive application of guideline amendments should be the exception and not the rule "because the finality of judgments is an important principle in our judicial system, and we require good reasons to disturb final judgments."[33] As the Supreme Court has repeatedly stated, the principle of finality is essential to the operation of our criminal justice system. "Without finality, the criminal law is deprived of much of its deterrent effect."[34] And as then-Chair Saris noted in 2011, "Because of the

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[29] *Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* at 14.
[30] *Id.*
[31] *Id.*
[32] *Public Hearing on the Proposed Amendments to the Federal Sentencing Guidelines Before the U.,S. Sent'g Comm'n*, 216:5-9 (March 8, 2023) (testimony of the Commission's Victim Advisory Group Chair Mary Graw Leary), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/Transcript_Day2.pdf.
[33] *Sent'g Comm'n Public Meeting on June 30, 2011,* 22:15-21 (Statement of Comm'r Beryl Howell), available at available at U.S. Sentencing Commission Public Meeting Transcript (June 30, 2011) (ussc.gov).
[34] *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989).

importance of finality of judgments and the burdens placed on the judicial system when a change to the guidelines is applied retroactively, the Commission takes this duty very seriously and does not come to a decision on retroactivity lightly."[35]

Hence, absent the need to correct systemic failures, finality in sentencing is "essential to the operation of our criminal justice system," helping ensure justice for victims, defendants, and participants in the criminal justice system.[36] In voting against retroactive application of the recency amendment, then-Commissioner Brown Jackson noted that, "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."[37] The same factors that weighed against retroactive application of the recency amendment in 2010, weigh against retroactive application here.[38] The amendment was the result of several Commission studies regarding the nature of the Guidelines' criminal history score and its ability to predict an offender's likelihood of rearrest.[39]

Moreover, Part B of the amendment reflects consideration of high departure and variance rates for zero-point offenders and seeks to bring the Guidelines more in line with existing practice.[40] This amendment's purpose thus falls into the category of amendments "designed to facilitate efficient guideline operation" for which the Commission has previously rejected retroactive application.[41]

V. Difficulty of applying the amendment retroactively

The Commission has previously disfavored retroactive application of amendments – like this one – that would require comprehensive fact-finding after a lengthy passage of time. As then-Commissioner Howell noted when voting against retroactive application of one part of a guideline amendment in 2010, such "time-consuming and administratively difficult-to-apply factors" not previously considered during the original sentencing would be challenging for courts to evaluate and fact-find retroactively and would likely lead to hearings and litigation.[42]

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[35] *Sent'g Comm'n Public Meeting on June 30, 2011,* 3:12-17 (Statement of Chair Patti Saris).
[36] *Teague,* 489 U.S. at 309 ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect"); *see also United States v. Frady*, 456 U.S. 152, 166 (1982) (concluding that the federal government has an interest in the finality of criminal judgments).
[37] *Sent'g Comm'n Public Meeting on June 30, 2011,* 13:5-9. (Statement of Comm'r Ketanji Brown Jackson).
[38] *See supra* note 20, ("The purpose of the recency amendment was to simplify guideline application, not to correct a perceived fundamental unfairness with the application of recency points.").
[39] U.S. SENT'G COMM'N, ADOPTED AMENDMENTS TO THE SENTENCING GUIDELINES EFFECTIVE NOVEMBER 1, 2023 AT 49-50, May 1, 2023, ("AMENDMENTS"), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf.
[40] *Id.* at 52.
[41] *See supra* note 20 ("The purpose of the recency amendment was to simplify guideline application, not to correct a perceived fundamental unfairness with the application of recency points.").
[42] *Sent'g Comm'n Public Meeting on June 30, 2011* 19:1-12 (statement of Comm'r Beryl Howell) ("These are new factors . . . that were not formerly considered by judges as part of the original guideline calculations, and consideration now, if we were to consider making that [part] of the amendment retroactive, would likely require courts to engage in new fact-finding with the concomitant need for hearings . . . And this process to my mind would just be administratively burdensome to the point of impracticality.").

Retroactive application of guideline amendments and statutory sentencing provisions is rarely simple and straightforward, but applying the status-points and zero-point-offender amendments retroactively will be particularly difficult. Courts will need to consider multiple novel legal principles to determine which defendants are eligible for a sentence reduction.

Part B is particularly difficult to apply retroactively, as it involves a long list of new, previously un-litigated, categories of exclusions. While some of the new exclusionary criteria may implicate information already available in the presentence report or elsewhere in the record, many of the criteria involve new, undefined, and un-litigated terms that will require new interpretation and fact-finding. The Commission itself recognized that "additional fact-finding relating to some of the exclusionary criteria under the new §4C1.1 is required to determine whether a 'zero-point offender' receives the two-level reduction."[43] For example, one new exclusionary criteria is that "the defendant did not use violence or credible threats of violence in connection with the offense."[44] These terms are similar, but not identical, to the definition of a crime of violence under §4B1.2, which includes offenses that involve the "use, threatened use, or attempted use of physical force against the person of another."[45] As the Commission is well aware, that definition has caused extensive litigation over its scope, including the meaning of the terms "use," "physical force," and "against the person of another." The new "did not use violence or credible threats of violence" exclusion is likely to generate similar litigation. Although many current sentencing enhancements address violent conduct, these enhancements do not cover the same scope of conduct as the new "did not use violence or credible threats of violence" exclusion. Thus, even in cases involving such enhancements, courts may need to engage in both legal analysis and fact-finding to determine whether the defendant qualifies for the two-level reduction.

Likewise, another new exclusionary criteria is that "the defendant did not personally cause substantial financial hardship."[46] That precise set of facts – that the defendant *personally* caused *substantial* financial hardship – does not form the basis of any current Guidelines provision. *Cf.* USSG §2B1.1(b)(2)(A)-(C) (providing for varying enhancements for economic offenses where "the offense . . . *resulted* in substantial financial hardship"). To determine whether a defendant personally caused "substantial financial hardship," the sentencing court will often need to elicit victim testimony or engage in additional fact-finding, often years after the original offense, when victims may be deceased or otherwise unavailable. As then-Commissioner Howell observed, amendments that "would likely require courts to engage in new fact-finding with the concomitant need for hearings" can "be administratively burdensome to the point of impracticality."[47]

VI. Operational and Reentry Concerns

Finally, we believe it is critical to consider the effects of retroactive application of the amendments on the ability of the Bureau of Prisons and the U.S. Probation Office to properly

[43] Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment at 8.
[44] *See supra* note 1 at 28271.
[45] USSG §4B1.2.
[46] AMENDMENTS at 45.
[47] *Sent'g Comm'n Public Meeting on June 30, 2011* 19:1-12.

prepare offenders for reentry back into the community. For the approximately 11,495 sentenced defendants[48] with status points that would have a lower guideline range if Part A of the amendment were applied retroactively, approximately 2,090 would be eligible for immediate release if retroactivity was effective November 1, 2023, and an additional 1,266 would be eligible for release within the first year.[49] For the approximately 7,272 defendants[50] who would have a lower guideline range under retroactive application under Part B, approximately 3,274 defendants would be eligible for immediate release if retroactivity was effective on November 1, 2023, and an additional 1,472 would be eligible for release within the first year.[51]

Generally, the Bureau of Prisons starts planning for release 180 days in advance.[52] Transition planning includes securing beds in residential reentry centers and providing other programs that require space, resources, re-computation of release dates, and coordination with probation. It also involves working with Probation to develop release and supervision plans. If retroactivity were to take place in November, the already overburdened probation system would be flooded with new cases and many offenders would be denied the benefit of proper reentry services and step-down transitioning to the community, unnecessarily increasing public safety risks.

If the Commission disagrees with our assessment of retroactivity and decides to apply either or both parts of the criminal history amendment retroactively, we recommend that it delay implementation for nine months to allow both the Bureau of Prisons and the Probation Office to make the necessary adjustments and preparations to ensure that all offenders receive the reentry and supervision services that they need and so that the reentry proceeds in an orderly and effective way.

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[48] Sent'g Comm'n, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment at 9.
[49] *Id.* at 17.
[50] *Id.* at 24.
[51] *Id.* at 25.
[52] *Sent'g Comm'n Public Hearing on Retroactivity of 2014 Drug Amendment (June 10, 2014),* 121:15-19 (Statement of Bureau of Prison Dir. Samuels).

For all the reasons discussed here – reasons based on Congress' and the Commission's own articulated criteria – we believe retroactive application of both Parts A and B of the criminal history amendment would be inappropriate, and we oppose it.

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions.

Sincerely,

Jonathan J. Wroblewski

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