



June 23, 2023

Hon. Carlton W. Reeves, Chair  
United States Sentencing Commission  
Thurgood Marshall Building  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20008

**Re: Retroactive Application of the Criminal History Amendment, Relating to “Status Points” and People with Zero Criminal History Points**

Dear Judge Reeves:

FWD.us is a bipartisan organization that believes America’s families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, FWD.us is committed to ending mass incarceration, eliminating racial disparities in the criminal justice system, expanding opportunities for people and families impacted by the criminal justice system, and data-driven approaches to advancing public safety. These commitments led FWD.us to support the Sentencing Commission’s adoption of the Criminal History Amendment in April of this year.<sup>1</sup> For the same reasons, we now write to urge the Commission to exercise its authority pursuant to 28 U.S.C. § 994(u) to apply Parts A and B of the Criminal History Amendment (together, the “Criminal History Amendment”) retroactively.<sup>2</sup>

The Commission’s adoption of Parts A and B—eliminating “status points” for people with fewer than seven criminal history points (the “Status Points Amendment”) and providing a two-point offense level reduction for people with zero criminal history points (the “Zero-Point Amendment”<sup>3</sup>), respectively—reflect the Commission’s recognition that the current method of

---

<sup>1</sup> U.S. Sentencing Commission [hereinafter “U.S.S.C.”], *Amendments to the Sentencing Guidelines, April 27, 2023*, p. 77 (2023) [hereinafter “2023 Amendments”], [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).

<sup>2</sup> Because Parts A and B of the Criminal History Amendment reduce the sentencing range for certain categories of offenses, 28 U.S.C. § 994(u) requires the Commission to determine whether the changes should be applied retroactively. Federal judges may not apply changes to the Guidelines retroactively absent the addition of the amendment to the list contained in the formal policy statement located in § 1B1.10 of the Guidelines. 18 U.S.C. § 3582(c)(2). Sentence reductions under § 3582(c)(2) do not constitute a full resentencing.

<sup>3</sup> The Commission uses the term “Zero-Point Offender” to describe the proposed amendment. Formerly incarcerated people and advocates, however, have long called for replacing labels, such as “offender,” that stigmatize and pre-judge individuals. Our research found that such labels elicit biased reactions compared to more neutral terminology such as “individual with a criminal record.” FWD.us, “People First:

calculating a person's Guidelines range does not further the Commission's mission of "implementing data-driven sentencing policies."<sup>4</sup> Specifically, the Commission determined that status points "add little to the overall predictive value associated with the criminal history score" and that people assessed zero criminal history points have far lower rates of recidivism than even people with a single criminal history point.<sup>5</sup>

Because these two current guidelines are not supported by the Commission's own data analysis, the Criminal History Amendment should be applied retroactively to reduce sentences that can no longer be justified on policy grounds. Specifically, retroactive application of the Criminal History Amendment:

- Is similar in size, scope, and process to other changes that have been successfully implemented retroactively, such as the Drugs Minus Two Amendment in 2014;
- Will not compromise public safety; and
- Represents a principled and data-driven application of the Commission's authority.

We commend the Commission's continued commitment to reevaluating the Guidelines in light of new data. Retroactive application of the Criminal History Amendment will both further the Commission's central mission and advance public safety.

### **1. The Courts' Experience with the Drugs Minus Two Amendment in 2014 and Other Recent Amendments Provides Clear Precedent for the Successful Retroactive Application of the Criminal History Amendment**

While the scope and magnitude of the changes represented by the retroactive application of the Status Points Amendment and the Zero-Point Amendment are significant, the federal courts have successfully implemented previous retroactive amendments on an even larger scale. In April 2014, the Commission adopted an amendment that reduced the base offense level derived from the Drug Quantity Table for all drug quantities across all drug types.<sup>6</sup> Three months later,

---

Drop the Harmful Labels From Criminal Justice Reporting," <https://www.fwd.us/criminal-justice/people-first/>.

<sup>4</sup> 2023 Amendments, p. 77.

<sup>5</sup> U.S.S.C., *Memo re: Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment*, p. 3 (2023) [hereinafter "Retroactivity Memo"], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf> (citing U.S.S.C., *Revisiting Status Points* (2022) [hereinafter "Revisiting Status Points"], [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)).

<sup>6</sup> See U.S.S.C., *Retroactivity & Recidivism: The Drugs Minus Two Amendment, passim* (2020) [hereinafter "DMTA Recidivism Report"],

the Commission voted unanimously to make the amendment retroactive, allowing incarcerated people to file, and courts to consider, sentence reduction motions beginning in November of that year.<sup>7</sup> According to the Commission's own statistics, as of July 2020, federal courts had granted 30,852 retroactivity motions out of the 50,676 that had been filed—significantly more than the number expected for the Criminal History Amendment—resulting in an average reduction in incarceration of 25 months (17.2% average reduction).<sup>8</sup>

The Drugs Minus Two Amendment followed on the heels of two other successfully implemented retroactive Guidelines amendments: the Crack Minus Two Amendment<sup>9</sup> and the FSA Guideline Amendment.<sup>10</sup> In the three years after the Crack Minus Two Amendment became effective, the courts granted 16,511 of 25,736 motions for retroactive sentence reductions, resulting in an approximately 20% average sentence reduction in successful motions.<sup>11</sup> Similarly, in the years following the adoption of the FSA Guideline Amendment, courts granted 7,748 of the 13,990 retroactivity motions, resulting in an average sentence reduction of 30 months (19.9% average reduction).<sup>12</sup>

The Criminal History Amendment, submitted to Congress in late April 2023, makes two critical changes to the way the Guidelines calculate criminal history points: The Status Points Amendment would eliminate so-called “status points” for people with six or fewer criminal history points and impose only one point for people in higher criminal history categories.<sup>13</sup> The Zero-Point Amendment, meanwhile, would give people who are assessed zero criminal history points under the Guidelines a two-level reduction in their offense level calculation, with certain

---

[https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708\\_Recidivism-Drugs-Minus-Two.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf).

<sup>7</sup> The effective date of any resulting reduction in sentence was delayed until November of the following year. *Id.*, p. 1.

<sup>8</sup> *Id.*, p. 5. This average sentence was reduced from 146 months to 121 months. *Id.*

<sup>9</sup> The Crack Minus Two Amendment resulted in a two-level reduction in the base offense levels derived from the Drug Quantity Table for each quantity of crack cocaine. U.S.S.C., *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, p. 1 (2014) [hereinafter “CMTA Recidivism Report”],

[https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf).

<sup>10</sup> See U.S.S.C., *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment*, p. 1 (2018) [hereinafter “FSAA Recidivism Report”], [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328\\_Recidivism\\_FSA-Retroactivity.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf). The FSA Guideline Amendment incorporated the reduced statutory sentences for crack cocaine offenses in the Fair Sentencing Act of 2010. *Id.* at p. 1. While Congress did not make the statutory sentence reductions retroactive, the Commission nevertheless gave the corresponding Guidelines amendment retroactive effect. *Id.*

<sup>11</sup> *CMTA Recidivism Report*, p. 2.

<sup>12</sup> *FSAA Recidivism Report*, pp. 2-3.

<sup>13</sup> See *2023 Amendments*, p. 77. Under the current Guidelines, people are assessed two additional criminal history points where the person was under a criminal justice sentence (i.e., parole, probation, supervised release, etc.) when they committed the instant offense, known as “status points.”

exceptions.<sup>14</sup> In reaching its decision whether to apply the amendment retroactively, the Commission must consider, among other things, “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.”<sup>15</sup>

The federal courts are well equipped to apply both components of the Criminal History Amendment retroactively under § 1B1.10 of the Guidelines. Retroactive application of the Status Points Amendment is mechanical—that is, a person’s eligibility for resentencing may be determined by reference to the original guideline calculation. While determining the impact of the Zero-Point Amendment requires courts to take an additional step to determine whether any of the guideline’s exclusions apply, many of the exclusions will be readily apparent from the sentencing record.

According to the Commission, almost 19,000 people currently serving federal sentences would be eligible to file motions for a sentence reduction were the Criminal History Amendment to be applied retroactively:<sup>16</sup>

- **Status Points Amendment** – Retroactive application would likely impact 11,495 people currently serving federal sentences, 43% of whom are Black and 28% of whom are Hispanic, with an average sentence reduction of 14 months.<sup>17</sup>
- **Zero-Point Amendment** – Retroactive application would likely impact 7,272 people currently serving federal sentences, 10% of whom are Black and 70% of whom are Hispanic, with an average sentence reduction of 15 months.

As the Commission’s analysis shows, retroactive application of the Criminal History Amendment would prevent thousands of currently-incarcerated people from serving sentences that can no longer be supported by data and allow them to be released without compromising public safety (see more below). The federal courts’ experience with the retroactive application of the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments shows that changes to the Guidelines of this scope and magnitude can be applied retroactively without massive disruptions to the operations of the federal courts or significant litigation.

---

<sup>14</sup> See *Id.* at pp. 78-80. The proposed amendment carves out cases with specific “aggravating factors,” including cases involving: terrorism, the use or credible threat of violence, death or serious bodily injury, sex offenses, substantial financial hardship, firearms, offenses involving “individual rights,” hate crimes and serious human rights offenses, or a continuing criminal enterprise. The amendment also gives judges sentencing people under the new § 4C1.1 regarding when a non-incarceratory sentence may be appropriate.

<sup>15</sup> *Retroactivity Memo*, p. 8.

<sup>16</sup> *Id.*, pp. 1-31.

<sup>17</sup> It should be noted that the effective date of previous retroactive applications of amendments to the Guidelines have been delayed in order to facilitate the orderly administration of the changes in court and to allow Bureau of Prisons officials to make appropriate preparations. See, e.g., *DMTA Recidivism Report*, p. 1.

## 2. Retroactive Application of the Criminal History Amendment Will Not Compromise Public Safety

In adopting the Criminal History Amendment, the Commission relied, in large part, on its findings that the imposition of status points and the current treatment of people with zero criminal history points can not be justified on public safety grounds. Specifically, the Commission’s 2022 report on status points found that people “who received status points were rearrested at similar rates to those without status points who had the same criminal history score.”<sup>18</sup> Similarly, the Commission found that people assessed zero criminal history points have far lower rates of recidivism (26.8% rearrest rate) than even people with a single criminal history point (42.3% rearrest rate), representing the largest difference in rearrest rates when comparing people with the same criminal history category.<sup>19</sup>

Again, the courts’ experience with the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments provides the clearest support for the retroactive application of the Criminal History Amendment. In each case, the Commission evaluated whether the retroactive application of the changes to the Guidelines impacted recidivism, and in each case the Commission reached the same conclusion: there was no statistically significant difference between the recidivism rates of people who received a sentence reduction and those who had served their full sentence before the changes became effective:<sup>20</sup>

- **Drug Minus Two Amendment** – The Commission found no statistically significant difference in the recidivism rates of people who were released an estimated average of 37 months early through the retroactive application of the Drugs Minus Two Amendment (27.9%) and people who served their full sentences and were released prior to the amendment (30.5%).<sup>21</sup>
- **Crack Minus Two Amendment** – The Commission found that the recidivism rate for people who received an average retroactive sentence reduction of approximately 20% was similar to the rate for people who had been released prior to adoption of the Crack Minus Two Amendment. Indeed, as with the Drug Minus Two Amendment, the recidivism rate was actually lower (43.3%) for the retroactivity cohort than for the control group (47.8%).<sup>22</sup>

---

<sup>18</sup> *Revisiting Status Points*, p. 3.

<sup>19</sup> *Retroactivity Memo*, p. 4.

<sup>20</sup> *DMTA Recidivism Report*, p. 1. The average expected sentence reductions under the Status Points Amendment and the Zero-Point Amendment—14 months and 15 months, respectively—are shorter than the reductions under the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments.

<sup>21</sup> *Id.* at p. 6. It is also worth noting that the study found that one-third of the recidivism, for both the study group and the control group, was attributable to court or supervision violations. *Id.*

<sup>22</sup> *CMTA Recidivism Report*, p. 3.

- **FSA Guideline Amendment** – The Commission reached a similar conclusion in its study of the retroactive application of the FSA Guideline Amendment, finding that recidivism rates were “virtually identical” for people who received retroactive sentence reductions averaging 30 months compared to people who had served their full sentences before the amendment took effect.<sup>23</sup>

These studies are in line with a growing body of research that shows that the marginal benefit of lengthier sentences is minimal at best—and counterproductive at worst. Traditionally, proponents of longer sentences have relied on three theoretical public safety justifications: general deterrence (preventing crime by instilling fear of punishment in the general population), specific deterrence (detering an individual from committing further future crime through the imposition of punishment), and incapacitation (keeping people in custody to prevent them from committing offenses in the community).<sup>24</sup> Here, general deterrence is not a consideration, as the Commission has already adopted the Criminal History Amendment for prospective application. The studies cited above also show that prior retroactive sentence reductions have not resulted in any decrease in specific deterrence, as recidivism rates for people released early were the same or lower than for those released after serving their full original sentences.<sup>25</sup>

Moreover, recent literature strongly calls into question the viability of incapacitation as a public safety strategy. Drug trafficking and sale offenses, for instance, are subject to the replacement effect—that is, while specific individuals may not commit further crime while in prison, the volume of drug trafficking is unlikely to decline overall.<sup>26</sup> Similarly, extensive study of the age-crime curve suggests that individuals age out of criminal behavior over time, meaning the marginal value of incarceration also declines over time.<sup>27</sup> Indeed, a recent study by the Council on Criminal Justice of the public safety impact of shortening lengthy prison terms in Illinois found that 1) “modest reductions in the length of long prison stays would likely result in relatively few additional arrests,” and 2) “the additional arrests likely to result from reductions in time served would constitute a virtually undetectable increase in the annual volume of arrests in the state.”<sup>28</sup>

---

<sup>23</sup> *FSA Recidivism Report*, p. 3.

<sup>24</sup> See Laura Bennett and Felicity Rose, Center for Just Journalism and FWD.us, “Deterrence and Incapacitation: A Quick Review of the Research,” <https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research>.

<sup>25</sup> The Commission has also released studies on sentence length and recidivism that purport to show that longer sentences have a specific deterrent effect and are associated with lower recidivism. Those studies, however, were based on artificially constructed matched cohorts rather than the stronger quasi-experimental design of the retroactivity studies cited above.

<sup>26</sup> Mark A.R. Kleiman, *Toward (More Nearly) Optimal Sentencing for Drug Offenders*, 3 *Crim & Public Policy* 3 (2006).

<sup>27</sup> Michael Rocque, Chad Posick, and Justin Hoyle, *Age and Crime*. (2015) In *The Encyclopedia of Crime and Punishment*, W.G. Jennings (Ed.). <https://doi.org/10.1002/9781118519639.wbecpx275>

<sup>28</sup> Avinash Bhati, *The Public Safety Impact of Shortening Lengthy Prison Terms* (2023), <https://counciloncj.foleon.com/tfils/long-sentences-by-the-numbers/the-public-safety-impact-of-shortening-lengthy-prison-terms>.

Research across the field shows that any contested and minimal benefits of increased sentence lengths, and incarceration generally, are far outweighed by the harms to individuals, communities, and public safety as a whole. All of the available data suggests that retroactive application of the Criminal History Amendment will not have a negative effect on recidivism rates or public safety.

### **3. Applying the Criminal History Amendment Retroactively Furthers the Commission’s Commitment to Principled, Data-Driven Policymaking**

The Criminal History Amendment reflects the Commission’s recognition that certain current sentencing practices neither serve the underlying purposes of punishment nor advance public safety.<sup>29</sup> Its retroactive application will continue the Commission’s “tradition of data-driven evolution of the Guidelines.”<sup>30</sup>

In 2018, the Justice Lab at Columbia University launched the Square One Project, an effort to reexamine the fundamental underpinnings of the criminal justice system that brought together “abolitionists and reformers; optimists and skeptics; Republicans and Democrats; community organizers, academics, and government officials; formerly incarcerated leaders and law enforcement professionals.”<sup>31</sup> In a recent collection of essays edited by Jeremy Travis and Bruce Western, Square One resurrected the concept of “parsimony” as the central organizing principle for criminal justice policy decisions:

*The cornerstone proposition of the parsimony principle is that the state is entitled to deprive its citizens of liberty only when that deprivation is reasonably necessary to serve a legitimate social purpose. Any liberty deprivation beyond that minimum is gratuitous and constitutes state cruelty. A parsimonious approach to justice therefore insists on the least restrictive intervention to achieve societal goals. This core value then has implications for every aspect of the criminal justice system.*<sup>32</sup>

The parsimony principle provides both a metric for evaluating the Commission’s policy decisions and an important framework for organizing future efforts. Through this lens, the Commission’s acknowledgement that the imposition of status points and treatment of people with zero criminal

---

<sup>29</sup> With regard to the Status Points Amendment, the Commission also recognized the risk that people would be punished twice for the same behavior: “In taking these steps, the Commission observed that the operation of the Guidelines Manual separately accounts for consecutive punishment imposed upon revocations of supervised release, a likely occurrence if [a person] was under a criminal justice sentence during the commission of another offense.” *2023 Amendments*, p. 78

<sup>30</sup> *Id.*, p. 80.

<sup>31</sup> Jeremy Travis and Bruce Western, ed., *Parsimony and Other Radical Ideas About Justice*, p. 321 (2023).

<sup>32</sup> *Id.*, pp. 3-4.



history points cannot be justified by the Commission’s own recidivism data makes retroactive application of the Criminal History Amendment not only good policy, but a moral imperative.<sup>33</sup>

We urge the Commission to retroactively apply the Criminal History Amendment and continue to reevaluate the basic assumptions underlying the Guidelines given the growing research that longer sentences do not advance public safety.

Sincerely,

A handwritten signature in black ink, appearing to read 'Scott D. Levy', written over a horizontal line.

Scott D. Levy  
Chief Policy Counsel  
FWD.us

---

<sup>33</sup> While FWD.us wholeheartedly supports the adoption and retroactive application of the Criminal History Amendment, we note that the carve-outs and exemptions contained in the proposed amendment—namely, the preservation of status points for people with seven or more criminal history points and the exclusion of people with “aggravating factors” (particularly any case involve the use or threat of violence) from the Zero-Point Amendment—are not supported by data and fall afoul of the parsimony principle. Rather, the exceptions seem to be rooted in a desire for retribution or punishment for the sake of punishment. *See, e.g., 2023 Amendments*, p. 78 (the preservation of status points certain people “serve[s] multiple purposes of sentencing, including the [person’s] perceived lack of respect for the law...”). Looking forward, the Commission should hold to the parsimony principle and reject practices and guidelines that are not supported by data and do not advance the public good.