

# **United States Sentencing Commission**

Written Testimony

Victims Advisory Group

March 2023



## **I. Introduction**

The Victims Advisory Group (“VAG”) appreciates the opportunity to provide information to the Sentencing Commission (“Commission”) regarding its proposed amendments to the Sentencing Guidelines (“Guidelines”). Our views reflect detailed consideration of the proposals by our members who represent the diverse community of victim-survivor professionals from throughout the nation. These members work with a variety of victim-survivors of crime in all levels of litigation and include victim advocates, prosecutors, private attorneys, and legal scholars. We offer testimony concerning the two proposed amendments below and will provide written commentary addressing other proposed amendments.

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### **III. PROPOSED AMENDMENT: CRIMINAL HISTORY**

#### **A. Status Points under §4A1.1**

The Commission recognizes that a defendant's criminal history is a significant factor for the court to consider when imposing a sentence. The Commission's Introductory Commentary to Sentencing

Guidelines Chapter 4 addresses the significance of a defendant’s criminal history on culpability, deterrence of criminal conduct, societal messaging, punishment, recidivism, and rehabilitation.

If the Commission is to amend §4A1.1, of the three amendment options proposed the VAG finds least objectionable Option 1, which only amends Application Note 4 of the Commentary. That proposed amendment allows for a discretionary departure from adding status points under §4A1.1(d) if such addition “substantially over represents the seriousness of the defendant’s criminal history.”

The Commission’s recent report on recidivism notes that the recidivism rates of offenders released in 2005 and 2010 are unchanged: 49.3% (nearly half of offenders released in these years were rearrested within eight years of release).<sup>12</sup> The Commission’s 2022 report on the use of status points concluded that status points may address the defendant’s culpability and other statutory purposes of sentencing but had minimal effect on the predictive value for recidivism.<sup>13</sup> The Commission did not reference any additional research in its proposed amendments addressing the effect of status points on culpability, criminal deterrence, societal messaging, or other indicators for successful rehabilitation. Without such research, removing status points altogether based on one sentencing factor seems unwarranted. A defendant under a court order status stands in different position than one who is without that status and that has implications for punishment, social messaging, and deterrence. Similarly, without this information the changes suggested in Options 2 and 3 are unwarranted.

The VAG believes that, if the Commission finds an amendment to §4A1.1 necessary at this time, Option 1 provides the most useful application commentary to the courts in determining on a case-by-case basis whether the addition of a particular defendant’s status points “substantially over represents the seriousness of the defendant’s criminal history.” Providing courts with a Commentary on the use of that defined discretion may assist in determining a fair and just sentence, which is what crime victims desire.

On the other hand, the VAG asks the Commission to reject proposed Options 2 and 3 as not supported by the Commission’s available research. Option 2 reduces applicable status points, without a fully researched basis for doing so, and then provides commentary to the courts allowing upward or downward departures. Option 2’s status point reduction combined with the Commentary allowing broader court discretion may lead to a lack of uniformity amongst the courts in status point application, which will

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<sup>12</sup> U.S. SENT’G COMM’N, RECIDIVISM OF OFFENDERS RELEASED IN 2010 (2021), p. 4.

<sup>13</sup> “While the inclusion of status points in the criminal history score may address culpability and other statutory purposes of sentencing, status points do not significantly improve the score’s prediction of rearrest.” U.S. SENT’G COMM’N, REVISITING STATUS POINTS (2022), p. 18.

adversely affect crime victims and their sense of fairness. Option 3 eliminates status points altogether, which option is currently unjustified and contrary to crime victims' interests.

For the foregoing reasons, the VAG asks the Commission to adopt Option 1, if the Commission deems any amendment to §4A1.1 necessary.

#### **B. §4C1.1 Adjustment for Certain Zero-Point Offenders**

From the VAG's review of the Commission's proposed amendment to the Sentencing Guidelines Chapter 4, by adding a new Part C—Adjustment for Certain Zero-Point Offenders, the VAG concludes that the amendment's effect is to reward a convicted criminal defendant for doing (prior to their offense) what is expected of every citizen—obey the law. If a convicted defendant has no criminal history, that is already calculated into the convicted defendant's applicable sentencing range. This proposed amendment is not only rewarding baseline behavior but doing so multiple times in the sentencing calculation. Granting extra credit to a convicted defendant for having no criminal history seems opposite to the purposes of sentencing for a committed offense and contrary to crime victims' interests. From this perspective, the VAG is opposed to both Option 1 and Option 2.<sup>14</sup>

While the VAG is opposed to Options 1 and 2, the VAG reads the Commission's proposal as expressing concern that its research leads it to believe that the Sentencing Guidelines unfairly categorize convicted defendants that *have no prior convictions* with other convicted defendants *who have prior convictions* but whose convictions are not counted because of current Guideline language.<sup>15</sup> If the Commission is committed to making an amendment for the sole purpose of addressing the fairness of how convicted defendants with no prior convictions are treated, the VAG urges the Commission to adopt Option 1, with further detail explained below.

Option 1 focuses solely on convicted defendants with no prior convictions. Option 2 includes convicted defendants with prior convictions which are uncountable under the Guidelines. If fairness to those without prior convictions is the issue, then only Option 1 addresses that issue and only Option 1 should be considered by the Commission.

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<sup>14</sup> The proposal also raises significant questions about the demographics of who will receive this benefit. For example, 76.5% of CSAM offenders have little or no prior criminal history. 99.3% of these offenders are also male, 83.3% are white. Quick Facts – Child Pornography Offenders, U.S. Sentencing. Comm'n, at 1 (2018). Using this as an example, such a change to §4C1.1 could benefit some groups disproportionately as compared to other groups.

<sup>15</sup> The Commission's Proposed Amendment summary also states that in FY 2021, of the approximately 17,500 offenders with zero criminal history points, approximately 13,200 had no prior convictions. Proposed Amendment, Criminal History, (B) Zero Point Offenders, at 2.

If the Commission were to adopt Option 1, then new proposed language of §4C1.1(a) should include each of the criteria proposed in subsections (1)-(6), including these proposed sub-options: subsection (4) should adopt the language “one or more victims;” and subsection (6) should adopt the language “the instant offense of conviction is not a covered sex crime.”

If Option 1 is adopted, the following proposed sub-options should be adopted. Option 1’s proposed amendment to §5C1.1 Commentary Application Note 4, striking the current language and substituting subsection (A) regarding Zero-Point Offenders in Zones A and B are appropriate. Proposed subsection (B), however, should remove “Zone D” references as Zone D is not included in the current language of §5C1.1 and should not be added through Commentary. Proposed subsection (B) should adopt the language “may be appropriate,” as properly noting the court's discretionary application. The proposed paragraph headings to §5C1.1 Commentary Application Note 4 are useful and should be included.

Option 1’s proposed amendment edits to §4A1.3 (b)(2) and its Commentary Application Note 3 are appropriate, if the Commission adopts Option 1.

Likewise, if the Commission were to adopt Option 1, the proposed note to 1. Original Introduction to the Guidelines Manual, 4. The Guidelines’ Resolution of Major Issues (Policy Statement) is an appropriate reference to the adoption of Option 1, with the limitation of “1 level”.

For the foregoing reasons, the VAG asks the Commission to reject Options 1 and 2. If the Commission deems the proposed amendment for Adjustment for Certain Zero-Point Offenders necessary, the VAG asks the Commission to adopt Option 1, with the included sub-options noted above.