



The U.S. Sentencing Commission's Changes to Criminal History and Retroactivity

Explainer

Amendments to Criminal History

The Sentencing Commission sent Congress amendments to the federal Sentencing Guidelines (“the guidelines”) on April 29, including several changes to the way criminal history is calculated in Chapter 4 of the guidelines. Accumulating criminal history points can increase one’s guideline range and affect the ultimate sentence. Two changes will lower criminal history scores starting on November 1. The Commission will [vote](#) on August 24 whether to make those changes retroactive. If made retroactive, the changes would permit 18,500 to seek sentence reductions averaging 14 months or more. This explainer lays out the changes and the potential impact of retroactivity.

Status Points

One change will reduce the use of so-called “status points” in calculating criminal history points. The guidelines add two criminal history points when the “defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.” Status points were intended to deter individuals from recidivating by increasing their calculated guideline should they do so while still involved in the system.

Status points do not serve their intended purpose. According to the Commission, status points do little to predict someone’s likelihood of being rearrested. And yet, they have a significant impact on one’s criminal history. Status points were added in 37.5% of cases over the last five years. More than 61 percent of all defendants with status points saw their Criminal History Category increase, thus increasing the recommended sentencing range.

The Commission voted to amend the Criminal History guideline to eliminate the two-point addition for those serving any form of a criminal justice sentence. The amendment would instead add one point if a defendant: (1) receives seven or more criminal history points **and** (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. This would halve the number of status points, and limit their use to those who have significant criminal history.

Zero-Point Offenders

“Zero-point offenders” is the term given to defendants who have no criminal history points. According to the Commission’s data, people with no criminal history points are at much lower risk of recidivating when compared with people who have only one criminal history point. Yet defendants with no criminal history are treated in the same way as those with one criminal history point for purposes of calculating their guideline range.



With this difference in mind, the amended Criminal History guideline would provide a two-level decrease for some defendants with zero points. Judges will be able to reduce the sentencing range by two levels if the defendant meets a long list of criteria. They are: the defendant did not (1) receive any criminal history points; (2) receive a terrorism adjustment; (3) use violence or credible threats of violence in connection with the offense; (4) possess, receive, or otherwise handle a firearm or other dangerous weapon; (5) personally cause substantial financial hardship; (6) receive a hate crime, vulnerable victim, or serious human rights offense adjustment; (7) receive an aggravating role adjustment; or (8) engage in a continuing criminal enterprise. In addition the instant offense cannot have resulted in death or serious bodily injury; was not a sex offense; and not an offense involving individual rights.

For people who receive a two-level reduction and whose offense level is not higher than 11, the amendment counsels courts to consider a sentence other than imprisonment. If an individual receives the two-level reduction but has an offense level higher than 11 and that offense level, in the court's judgment, overstates the gravity of the offense, the court might also consider a departure to a sentence other than imprisonment.

Retroactivity of the Criminal History Amendments

By law, the Commission must consider whether amendments that could lower guideline sentences should be made retroactive so that people serving sentences that would be lower today are eligible to ask the Sentencing Court to reduce their sentence accordingly.

The Commission voted to consider retroactivity of the changes to the way status points are counted and how first offenders are treated. The agency solicited [public comment](#) and held a [hearing](#) to consider whether to make the change retroactive, and if so, whether any conditions should apply or whether retroactivity should be delayed.

Impact of Retroactivity

According to the [Commission's research](#), almost 11,500 people would be eligible to seek a sentence reduction averaging 14 months due to the change to status points. Another 7,275 people would be eligible to seek reductions as first offenders averaging 15 months. In total, more than 18,500 currently incarcerated people could seek a sentence reduction of anywhere from 14 to 15 months, on average.

The Commission has found that status points and first offender status are disproportionately assessed on people of color. Demographic data on incarcerated people who would be eligible for status point retroactivity reveal that 43 percent are Black and almost 28 percent are Hispanic. Similarly, demographic data demonstrate that people of color make up 83.1 percent of individuals eligible for the zero-point adjustment; nearly 70 percent are Hispanic.

The Commission will [vote](#) on the issue on August 24.

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