UNITED STATES SENTENCING COMMISSION

COMPUTATION OF "RECENCY" CRIMINAL HISTORY POINTS UNDER USSG §4A1.1(e)

AUGUST 2010

THE UNITED STATES SENTENCING COMMISSION

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I.   Introduction

On May 1, 2010, the United States Sentencing Commission (Commission) submitted to Congress an amendment that would eliminate the consideration of "recency" points provided in subsection (e) of USSG §4A1.1 (Criminal History Category).[1] The amendment will become effective November 1, 2010, absent congressional action to the contrary. This document provides certain background information considered by the Commission, including a review of the Commission's original justification for including specific elements within the criminal history score (USSG §§4A1.1(a-f)), a short summary of the recidivism research that supported the use of the elements within the criminal history score, the results of a review of state sentencing guidelines systems regarding their use of a recency component, a summary of public comment and testimony received by the Commission, an examination of Commission data from fiscal year 2009, and reanalyses of Commission recidivism data.

Section 4A1.1(e) constitutes one of four measures of criminal history under USSG §4A1.1, each of which contributes points to determine an offender's criminal history score. Subsections (a) through (c) provide that criminal history points are to be added based on the length and type of prior sentences. Specifically, subsection (a) adds three points for sentences exceeding one year and one month; subsection (b) adds two points for each sentence exceeding 60 days, not counted under subsection (a); and subsection (c) adds points for sentences not counted in (a) or (b). As discussed more fully below, an additional component of criminal history, often referred to as "status," is captured by subsection (d). Subsection (d) adds two points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

The component of the criminal history score that is addressed by Amendment No. 5 and therefore is the focus of this document is commonly referred to as "recency" and is provided for in USSG §4A1.1(e). Under this provision, points are added if the defendant committed the instant offense less than two years following release from confinement on a sentence counted under USSG §4A1.1(a) or (b). Specifically, two points are added unless status points also apply, in which case only one point is added for recency. Subsection (f) requires the addition of points for certain crimes of violence not otherwise included above. In fiscal year 2009, USSG §4A1.1(e) was applied in 14,548 cases, either alone (n=4,627) or in combination with USSG §4A1.1(d) (n=9,921). Because the application of recency occurs more frequently when status applies, this document discusses both subsections in order to provide an appropriate context.

Section 4A1.1(e) also interacts with some Chapter Two guidelines either because criminal history is considered in the determination of the base offense level or in the application of a specific offense characteristic. As discussed in Part II of this document, the application rate of USSG §4A1.1(e) varies substantially across offenses. Recency points are added alone or in

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[1] Sentencing Guidelines for United States Courts, 75 Fed. Reg. 27388-01 (May 14, 2010) (hereinafter Amendment No. 5).

combination with status in approximately one-third of the cases sentenced under USSG §2L1.2 (Unlawfully Entering or Remaining in the United States) and USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), two of the most frequently applied Chapter Two guidelines.[2] Section 4A1.1(e) applies substantially more often in cases sentenced under these two guidelines than other Chapter Two guidelines.

II.   Brief History of USSG §4A1.1

The January 15, 1988, *Guidelines Manual* included the recency provision at USSG §4A1.1(e), and the provision has changed little since then.[3] The current version of this subsection is provided below:

> (e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

A corresponding Application Note (Note 5) explains —

> 5.   §4A1.1(e). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while in imprisonment or escape status on such a sentence. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). However, if two points are added under §4A1.1(d), only one point is added under §4A1.1(e).

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[2] For both of these guidelines, prior criminal conduct is considered in determining the Chapter Two offense level.

[3] USSG §4A1.1(e) has been amended only one time since it first appeared in the guidelines effective November 1, 1987. Amendment 259, effective November 1, 1989, added the phrase "or while in imprisonment or escape status on such a sentence" immediately before the period at the end of the first sentence "to clarify that subsection (e) applies to defendants who are still in confinement status at the time of the instant offense (*e.g.*, a defendant who commits the instant offense while in prison or on escape status)." USSG App. C, Amend. 259, Reason for Amendment. In addition, the definitional section of USSG §4A1.2 (which provides definitions and instructions for computing criminal history) was amended, effective November 1, 1991, to clarify the meaning of the term "under a criminal justice sentence" as used in USSG §4A1.1, and added two definitions specifically applicable to USSG §4A1.1(e). USSG App. C, Amend. 381. Section 4A1.2(l) was added to exclude from the definition of "under a criminal justice sentence" for purposes of USSG §4A1.1(e) a sentence that is under appeal and its execution has been stayed pending appeal, and USSG §4A1.2(n) was added to clarify that "failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence." *Id.*

The background commentary further explains —

> Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under §4A1.1(a) or (b). Because of the potential overlap of (d) and (e), their combined impact is limited to three points. However, a defendant who falls within both (d) and (e) is more likely to commit additional crimes; thus, (d) and (e) are not completely combined.

While the points computed pursuant to USSG §4A1.1(e) are commonly referred to as "recency" points, this criminal history provision is not the only measure of "recency" in this guideline. The commentary in USSG §4A1.1 refers to both subsection (d) and subsection (e) as measures of "recency."[4] Both provisions were included in the January 15, 1988, edition of the *Guidelines Manual*.

Near the time of the initial promulgation of the guidelines, the Commission released a *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (Report)[5] explaining

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[4] Section 4A1.1(d), often referred to as the "status" provision, states —

> Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

The corresponding Application Note states that —

> Two points are added if the defendant committed any part of the instant offense (<u>i.e.</u>, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. <u>See</u> §4A1.2(n). For the purposes of this item, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this item to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (<u>e.g.</u>, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. <u>See</u> §4A1.2(m).

> USSG §4A1.1, comment. (n. 4).

[5] UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987).

the Commission's bases for choosing the components of the criminal history score. The Report stated, in part, that —

> The criminal history score used in the guidelines is comprised of five elements that address the frequency, seriousness, and recency of the defendant's prior criminal history. *See* §4Al.l(a)-(e). The particular elements that the Commission selected have been found empirically to be related to the likelihood of further criminal behavior and also are compatible with the purposes of just punishment.[6]

The components themselves were selected to fulfill the dual goals of addressing (1) the increased risk of recidivism and (2) the enhanced culpability associated with prior offending. The Report further explains —

> In selecting elements for the criminal history score, the Commission examined a number of prediction instruments, with particular attention to the four prediction instruments recently reviewed by the National Academy of Sciences Panel on Criminal Careers. Two of these four prediction instruments, the United States Parole Commission's "Salient Factor Score" and the "Proposed Inslaw Scale for Selecting Career Criminals for Special Prosecution," were developed using data on federal offenders. Four of the five elements selected by the Commission for inclusion in the criminal history score are very similar to elements contained in the Salient Factor Score. The remaining element was derived from an element contained in the Proposed Inslaw Scale.[7]

The elements "very similar" to the Salient Factor Score (SFS) are USSG §§4A1.1(a-e). The single element "derived" from the Inslaw Scale appears to be USSG §4A1.1(f), which adds one point "for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this element." While the Report indicates that this was part of the original criminal history score, this element was not added to the criminal history score until November 1, 1991.[8] The Inslaw Scale was developed originally to assist United States Attorneys in determining which cases to assign to career criminal units for prosecution.[9]

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[6] Report at 42.

[7] *Id.* at 43 (citations omitted). The remaining two scales not used by the Commission are the "Rand Scale to Distinguish Inmates by Individual Crime Rates" and the "Iowa Risk Assessment Instrument." Inslaw — the Institute for Law and Social Research — is a small, Washington, D.C.-based information technology company.

[8] USSG App. C, Amend. 381.

[9] *See* CRIMINAL CAREERS AND "CAREER CRIMINALS" VOL.1 (Alfred Blumstein et al. eds., National Academy Press 1986) (hereinafter Career Criminals Vol. 1).

The SFS is an empirically based recidivism prediction instrument that has been in use since 1972. It is considered a *static* prediction instrument, which means it measures information about the offender that is available at the time of sentencing.[10] The version in use at the time the Commission initially developed the criminal history score was the SFS 81.[11] Not all the elements contained in the SFS 81 are included in the guidelines' criminal history calculation. Table 1 below presents a comparison of the elements of the SFS 81 and comparable elements used by the Commission.

Table 1
Comparison of USSC Criminal History Elements and
Salient Factor Score (SFS 81) Elements

Elements	USSC Criminal History Computation	Salient Factor Score SFS 81
Frequency of Prior Offending	**Count of prior convictions** (USSG §§4A1.1(a),(b),(c))	**Count of prior commitments (up to four)** (Element A)
Seriousness of Prior Offense	**Individual imposed sentence lengths of prior convictions** (USSG §§4A1.1(a),(b),(c))	**Count of prior commitments of 30 days or more (up to three)** (Element B)
Under Criminal Justice Sentence at Time of Instant Offense	**Instant offense committed while under sentence or supervision** (USSG §4A1.1(d))	**Instant offense committed while under sentence or supervision** (Element E)
Recency of Prior Offending	**Two years since release from 60 days or more days' prison imposed** (USSG §4A1.1(e))	**Three years since *last* release from 30 days or more commitment** (Element D)
Age at Current Offense		**Age at instant offense and priors** (Element C)
Drug Dependence		**History of Heroin/Opiate** (Element F)
Violent Prior not receiving points (from Inslaw Scale)	**Violent convictions not receiving points** (USSG §4A1.1(f))	

The predictive accuracy of the various iterations of SFS has been assessed in numerous studies performed primarily by United States Parole Commission researchers. For example, research conducted in 1994 by the Parole Commission reassessed the predictive accuracy of the SFS 81 for three data periods spanning 17 years. The predictive accuracy of the tool as a whole was tested on samples of federal offenders released (1) between 1970 and 1972; (2) in 1978; and

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[10] Peter B. Hoffman, *Twenty Years of Operational Use of a Risk Prediction Instrument: The United States Parole Commission's Salient Factor Score*, 22 J. CRIM. JUST. 477, 481 (1994).

[11] The SFS had been revised, to that point, three times. The original, the SFS 72, was revised by the SFS 73, the SFS 76, and the SFS 81. "In general, these revisions have reduced the number of items in the instrument, improved scoring reliability, and reduced the number of non-criminal history, 'status' items (*e.g.*, employment, living arrangements)." *See id.* at 480.

(3) in 1987. That analysis demonstrated that at three time points, the proportion of offenders recidivating was positively associated with their classification level as determined by this tool. For example, using the 1987 sample, among persons identified as a "poor" risk, 67 percent recidivated within three years of release. In comparison, among those classified as a "very good" risk, only 16 percent recidivated during the study period.[12]

The Commission also has performed recidivism research, analyzing the recidivism of a sample of offenders sentenced in fiscal year 1992. This research compared the predictive accuracy of the guidelines' "Criminal History Category" (CHC) with the newest iteration of the salient factor score, the SFS 98.[13]

In January 2005, the Commission published *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Recidivism Report) comparing the Salient Factor Score and the CHC calculation used in the guidelines.[14] In this analysis, the measure of accuracy is a statistic that tests the ability of these two tools to identify beforehand, a recidivist.[15] The authors report that the difference in

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[12] The Commission, in the Report, cites a comment from the National Academy of Sciences Panel on Criminal Careers, stating that "[t]wo measures of predictive power — point biserial correlation, mean cost rating — show that for all versions [of the SFS], the score and the four risk categories are at the high end of the accuracy range reported in other parole recidivism studies." Report at 43 (citing Career Criminals Vol. 1, at 182).

[13] The SFS 81 and the SFS 98 are very similar. Both count the frequency, seriousness, and recency of the defendant's prior criminal history. The SFS 81 included a measure of whether the offender had a history of heroin or opiate dependence that was dropped from the SFS 98. Also, the SFS 98 adds a measure to account for offenders over the age of 41 who have minimal or no prior criminal conduct.

[14] *See* UNITED STATES SENTENCING COMMISSION, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE (2005), http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf.

[15] The statistical method used in the report is the area under the receiver operating characteristics curve. The Recidivism Report notes that —

> [m]easuring the area under the curve (AUC) is an established technique associated with receiver operating characteristic (ROC) curve analysis. The AUC statistic provides a probability that an offender's criminal history is able to predict recidivism. The AUC statistic ranges from a value of 0.5 (indicating no ability to predict recidivism) to a value of 1.0 (indicating 100 percent accuracy in predicting recidivism). The greater the AUC, the better the predictive power of the measure being tested.

> *Id.* at 11.

The Recidivism Report further notes —

> AUCs between 0.5 and 1.0 indicate a "better than random" predictive accuracy, but a "less than

predictive ability between the scores for the two measures is "highly significant" statistically.[16] It concludes that "[o]verall, the SFS is a better predictor of recidivism than is the CHC."[17]

However, examination of the results indicates that the predictive values for these tools are quite close and, though different in a statistically significant manner, may not be meaningfully different. For the SFS, the statistical value equals .7313 while the corresponding value for the CHC is .6992.[18] As explained in the staff report, this value can be interpreted as the number of times out of 100 — in a comparison of a recidivist and non-recidivist — the recidivist will score higher (under Chapter Four of the guidelines) or lower (under the SFS) than a non-recidivist. For the SFS, that value is 73 times out of 100. For Chapter Four of the guidelines, the value is 69 times out of 100. A later finding in the Recidivism Report indicates that the difference between the two instruments is not statistically significant if an "age" factor similar to the age factor in the SFS was added to the calculation of the criminal history category in USSG §4A1.1. Unlike the SFS, Chapter Four of the guidelines was designed not only to determine the risk of recidivism but also to be compatible with the purposes of just punishment.[19]

III.   Results of Review of State Sentencing Guideline Systems

Staff conducted a review of state sentencing guideline systems that utilize some form of written guidelines to determine whether and the way in which recency and status are addressed in those state systems. The review included the sentencing guidelines of 14 states

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perfect" predictive accuracy. For the hypothetical example appearing in the figure above [not included here], the AUC of 0.67 indicates that 67 out of 100 times, randomly chosen recidivists and non-recidivists are compared, a recidivist would have more prior criminal history than a non-recidivist. This indicates that while the extent of prior criminal history is a strong predictor of recidivism, it is not a perfect predictor.

Id. at 33.

[16] *Id.* at 12.

[17] *Id.*

[18] *Id.*

[19] USSG Ch. 4, Pt.A, intro. comment. (2009).

and the District of Columbia.[20] No state system measures recency of the current offense in relation to a prior offense in the same manner as the federal guidelines.

Only three jurisdictions employ a measure of recency. Two jurisdictions, Wisconsin and Virginia, apply a measure of recency in determining the appropriate sentence, although the measure is not as direct as that contained in the federal guidelines. The third jurisdiction, Missouri, captures recency in its guidelines as part of a "risk assessment" used to determine eligibility for release on parole. Thirteen jurisdictions capture status in some manner in determining the offender's sentence (Arkansas, Delaware, the District of Columbia, Kansas, Maryland, Massachusetts, Minnesota, Missouri, North Carolina, Utah, Virginia, Washington, and Wisconsin).[21] In two jurisdictions, Oregon, and Pennsylvania, neither status nor recency are captured.

As discussed below, the state systems that contain measures of either recency or status differ in the mechanics of capturing these elements and their ultimate impact on the offender's sentence. The three states measuring recency will be discussed first, followed by a discussion of those that capture status.

A.   Recency in the State Guidelines Systems

Virginia's consideration of recency is limited to determining an offender's eligibility for alternatives to incarceration. If the sentencing guidelines applicable to a Virginia offender recommend a term of imprisonment, alternatives to incarceration may be available if certain requirements are met. For example, the offense must be nonviolent, and the offender cannot have a history of violent crimes. Certain drug offenses are excluded. A risk assessment is completed for eligible offenders. One of the elements considered in the risk assessment is a measure of recency which inquires whether any arrests or confinements occurred in the past 18 months. If so, six points are added. If the offender acquires 33 additional points (for elements such as age, employment, and prior record) the offender is ineligible for an alternative to incarceration.

Wisconsin has a system of advisory guidelines that considers a variety of mitigating and aggravating circumstances in relation to each offense. The Wisconsin guidelines list factors that

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[20] The review included an examination of the written guidelines and a telephone contact to the sentencing commissions of each jurisdiction to insure that staff interpreted the written guidelines properly. The jurisdictions surveyed are all members of the National Association of Sentencing Commissions (*i.e.*, Arkansas, Delaware, the District of Columbia, Kansas, Maryland, Massachusetts, Minnesota, Missouri, North Carolina, Oregon, Pennsylvania, Utah, Virginia, and Washington); Wisconsin is the exception.

[21] Although the Wisconsin Sentencing Commission is currently defunct, its advisory guidelines remain in use. Similarly, in Oregon, although prison sentences are mainly determined by statute and its guidelines have not been updated since 1992, the guidelines remain in place. In Massachusetts, not only are the guidelines advisory, but judges are not required to calculate a guideline sentence.

a court should consider in determining whether an offender's criminal history is aggravating or mitigating. One such consideration is recency, which can be either a mitigating or aggravating factor, and is addressed as follows —

> *Time since most recent conviction or period of incarceration* – As prior convictions become more distant from the present offense, they become less reliable indicators of risk. Sexual offenses are significant exceptions. They must be carefully reviewed, no matter how old the conviction/offender. This factor provides the court with an opportunity to indicate whether the passage of time is calculated from the most recent conviction or period of incarceration, whether little time has passed or many years, and whether this factor is mitigating or aggravating.

Finally, the Missouri guidelines contain a risk assessment tool used to determine eligibility for release on parole. The scale contains 11 separate elements including age, education, employment, substance abuse, and criminal history. The best possible score on the scale is 7; the worst possible score is -8. One of the 11 elements considers whether the offender has had a five-year period free from incarceration or a finding of guilt. If so, one point is added, weighing in the offender's favor. If not, no points are added.

B.   Status in the State Guideline Systems and in the District of Columbia

Thirteen jurisdictions capture status in their guidelines. Although the definitions and terminology differ among the states, the inquiry is essentially the same as in the federal system, *i.e.*, whether the offender was under some form of criminal justice sentence (such as probation, parole, supervised release, or confinement) at the time of commission of the instant offense. Jurisdictions containing measures of status can be grouped broadly into two categories: those quantifying criminal history in a manner similar to the federal sentencing guidelines (adding up points to arrive at a score) and those using status generally as an aggravating factor. The first category includes seven of the 13 jurisdictions: Arkansas, Maryland, Minnesota, North Carolina, Utah, Virginia, and Washington. In these jurisdictions, status is considered in conjunction with prior convictions to arrive at a specific score.

In contrast, in Delaware, the District of Columbia, Massachusetts, Missouri, and Wisconsin, status is considered as an aggravating factor. These jurisdictions differ as to whether status is to be considered in choosing a sentence within the otherwise applicable range or as a reason for departure to a higher range.

Kansas is unique because it does not consider status in determining the offender's criminal history category or sentencing range. The Kansas guidelines treat status as the possible tipping point from a probationary sentence to one of incarceration. Under the Kansas guidelines, if status is present, a sentencing court "may" sentence an offender to prison "even when the new crime of conviction otherwise presumes a non-prison sentence." In Kansas,

status is not relevant in any determination other than whether a sentence of straight probation or imprisonment should be imposed.

IV.   Public Comment on Recency to Commission

In January 2010, the Commission gave notice of its proposed guideline amendments and solicited public comment, including the calculation of recency. It collected written submissions and received oral and written statements during a public hearing on March 17, 2010, regarding the utility of the recency provision. The United States Department of Justice (DOJ) responded that the recency provision improved the Commission's criminal history computation because, in its view, the Commission's previous research established that each of the guidelines' existing subsections furthered the goal of predicting recidivism:

> [C]urrent subsections 4A1.1(d) and (e) are drafted appropriately to target two distinct recidivism and culpability concerns . . . .
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> [W]ith respect to predicting recidivism, in 2005, the Commission analyzed the power of each element in its Criminal History Category ("CHC") model to predict recidivism and conclude that "*each* of the five elements [of] §§ 4A1.1(a)-(e) [ ] makes an independent and *statistically significant* contribution" to predicting recidivism.[22]

The DOJ concluded that existing Commission research established a correlation between the recency provisions and recidivism/increased offender culpability.

The Commission's Probation Officers Advisory Group (POAG) believed that the recency provision "could be important in predicting recidivism" and that its elimination would have a limited impact affecting only one-third of all cases.[23]

The Federal Public and Community Defenders (FPD) reviewed Commission research and concluded that USSG §4A1.1(e) is not an accurate predictive tool and is not an accurate determinant of increased offender culpability:

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[22] Letter from Jonathan J. Wroblewski, Dir., Office of Policy and Legislation, U.S. Dep't of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm'n (Mar. 22, 2010) (internal citations omitted) (emphasis in original), at 11-12, *available at* http://www.ussc.gov/pubcom_201003/DOJ2010%20Comment%20Letter%20on%20Proposed%20Amendments%20FINAL.pdf.

[23] *See* Letter from POAG, to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm'n (Feb. 3, 2010) at 4, *available at* http://www.ussc.gov/pubcom_201003/POAG%20Paper%20February%202010.pdf.

Recency points add essentially nothing to the criminal history score's predictive quality, and do not operate in theory or in practice to distinguish which defendants are more culpable. . . .

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[This application] fail[s] to reliably distinguish between offenders with more or less relative culpability. The people who move into a higher criminal history category because of recency points are often no different from — or are less culpable than — those who do not.[24, 25]

The National Lawyer's Guild's National Immigration Project agreed with the reasoning presented in the FPD's written statement.[26]

The Commission's Practitioner's Advisory Group (PAG) noted the "experience of practitioners who see firsthand the ways in which recency (as well status) points exaggerate the supposed differences between defendants with prior records."[27] The PAG also raised the concept of offender "fragility" during the early period of post-incarceration release:

The period soon after completion of an earlier sentence, especially the period after one has served time in prison for the first time, is a fragile one for many of our clients. The Guidelines currently put those who recidivate while still under supervision or within two years of release in a higher Criminal History Category

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[24] *See* Margy Meyers, Incoming Chair, Fed. Defender Sentencing Guidelines Comm., on Behalf of the Federal Public and Community Defenders, before the U.S. Sentencing Comm'n on Proposed Amendments for 2010 (Mar. 17, 2010) at 90, 94 (internal citations omitted), *available at* http://www.ussc.gov/pubcom_201003/FPD_Testimony%20of%20Meyers%20and%20Mariano.pdf.

[25] Although he testified on a different subject matter, Dr. Scott Decker's remarks also implicitly inform the "recency" debate. In response to a question concerning whether the proximity of prior crimes should be a significant factor in sentencing, he responded that there is generally a lack of certainty of punishment in state systems and consequently, the "timing [of offenses] is not that important because there are so many underlying offenses by the time they get to the federal system." *Alternatives to Incarceration/Specific Offender Characteristics* at 201, United States Sentencing Comm'n Public Hearing (Mar. 17, 2010) (Testimony of Dr. Scott Decker), *available at* http://www.ussc.gov/AGENDAS/20100317/Hearing_Transcript.pdf.

[26] Letter from Dan Kesselbrenner, Exec. Dir., and Carrie Rosenbaum, Member, National Immigration Project, to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm'n (Mar. 22, 2010) at 5, *available at* http://www.ussc.gov/pubcom_201003/National%20immigrationProject.pdf.

[27] *See* Letter from David Debold, Chair, and Todd Bussert, Vice-Chair, to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm'n (Mar. 22, 2010) at 15, *available at* http://www.ussc.gov/pubcom_201003/POAG%20Paper%20February%202010.pdf.

than those whose current offense comes after a somewhat longer period. In our experience, that distinction is not meaningful. Often, circumstances beyond the client's control — and unrelated to blameworthiness or likelihood to offend again — account for the difference in the timing of recidivism. In short, our practical experience matches the results of the Commission's research.[28]

The American Civil Liberties Union (ACLU) stated that other guideline provisions adequately account for past criminal conduct and that the application of recency points "leads to disproportionate multiple counting of a defendant's past criminal conduct."[29] The National Association of Criminal Defense Lawyers generally concurred with the ACLU's comments, stating that application of both the recency and status provisions results in "unnecessary and often unfair double-counting of the same prior criminal conviction, thereby artificially inflating the defendant's criminal history score."[30]

V. Data Analysis: Application of Recency and Status in Fiscal Year 2009

The data analysis performed on the impact of the application of USSG §§4A1.1(d) and (e) can be summarized as follows:

- Twenty percent of all cases receive points for recency;
- Recency alone is applied much less frequently than either status alone or in combination with status points;
- The rate of application of both recency and status differs substantially by the Chapter Two offense involved; and
- If recency points are removed from the criminal history score, 30.4 percent of cases that received these points would see a reduction, by one category, in the criminal history category.

In fiscal year 2009, the Commission received information on 81,372 cases sentenced under the guidelines. Of the 81,372 total cases, 71,054 had complete documentation for this analysis. Of the 71,054 cases with complete documentation, 23,964 cases (33.7%) received points for either USSG §4A1.1(d) (status), USSG §4A1.1(e) (recency), or both. Of the 71,054 cases with
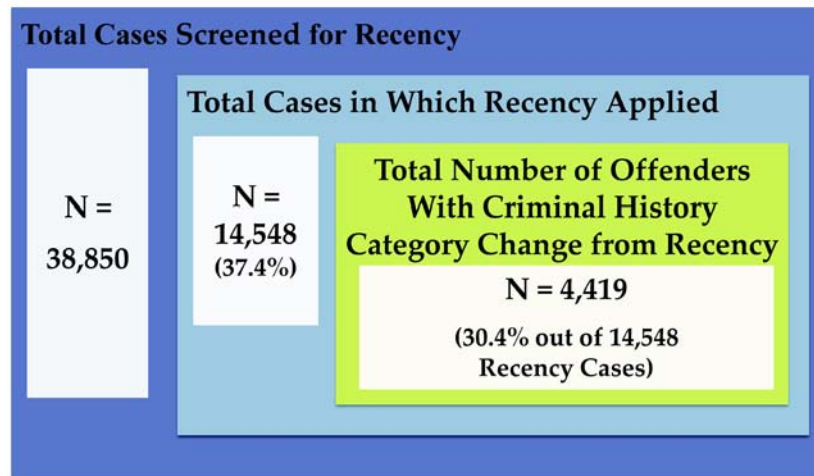
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[28] *See id*.

[29] *See* Letter from Laura W. Murphy, Dir., ACLU Wash. Legislative Office, to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm'n (Mar. 22, 2010) at 8, *available at* http://www.ussc.gov/pubcom_201003/ACLU_Murphy_Comments.pdf.

[30] *See* Statement of Cynthia Hujar Orr, on Behalf of the National Association of Criminal Defense Lawyers, before the U.S. Sentencing Comm'n (Mar. 17, 2010) at 4-5, *available at* http://www.ussc.gov/pubcom_201003/NACDL_comments.pdf.

complete documentation, recency points were applied in 14,548 or 20.5 percent of the cases. Of the 14,548 cases that received recency points, status points also were applied in 9,921 cases (68.2%), while recency alone was applied in 4,627 cases (31.8%). Of the 71,054 cases with complete documentation, status points were applied without recency in 9,416 cases (13.3%).

To be eligible for recency points, the offender must have a relevant criminal history event having a sentence of 60 days or longer; having such an event necessarily places the offender in Criminal History Category II. This means that only those offenders in Criminal History Category II and greater are potentially eligible for application of recency points. In fiscal year 2009, 38,850 (54.7% of 71,054) offenders had a criminal history category of II or greater. The structure of the criminal history guidelines is such that the application of one or two points for recency may not add sufficient points to increase the offender's criminal history category.[31] Of the 14,548 offenders who received recency points, less than one-third experienced an increase in their criminal history category as a result of its application. *See* Figure 1.

Figure 1
Criminal History Change for All Recency Cases
Fiscal Year 2009 Analysis

Total Cases Screened for Recency

Total Cases in Which Recency Applied

N = 38,850

N = 14,548 (37.4%)

Total Number of Offenders With Criminal History Category Change from Recency

N = 4,419

(30.4% out of 14,548 Recency Cases)

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY2009.

Table 2 presents information on the application of recency and status points for selected guidelines during fiscal year 2009. Guidelines were selected for inclusion in this table to satisfy two purposes. The first purpose is to provide a broad perspective on the application of USSG §4A1.1(d) or USSG §4A1.1(e) in the data. To achieve this, the five most frequently applied

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[31] This could be the situation because the additional points did not result in a criminal history point total sufficient to reach the next category or because of the operation of other Chapter Four provisions.

guidelines for all cases sentenced were chosen: USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy); USSG §2L1.2 (Unlawfully Entering or Remaining in the United States); USSG §2B1.1(Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States); USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition); and USSG §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). These five guidelines account for 80.7 percent of all cases sentenced in fiscal year 2009. The second purpose is to identify guidelines that account for criminal history in the Chapter Two computation.[32] For some of these offenders, a single prior offense could be counted up to four times in the determination of the sentencing range. That is, the same prior offense may trigger an increase in the applicable guideline range under the following guideline provisions: (1) a specific offense characteristic or base offense level under Chapter Two; (2) criminal history points under USSG §§4A1.1(a-c); (3) status points under USSG §4A1.1(d); and (4) recency points under USSG §4A1.1(e).

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[32] These four additional guidelines, ordered by the number of cases sentenced, are — USSG §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport); USSG §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law); USSG §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product); and USSG §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials).

Table 2
Application of Status[1] and Recency[2] Points for Selected Guidelines in Fiscal Year 2009

	Total Cases[3]			Total Cases	
	N	**%**		**N**	**%**
2D1.1	**23,316**		**2L2.2**	**1,616**	
Status or Recency	6,761	29.0	*Status or Recency*	177	11.0
Status Only	3,200	13.7	*Status Only*	95	5.9
Recency Only	1,203	5.2	*Recency Only*	25	1.5
Both	2,358	10.1	*Both*	57	3.5
2L1.2	**16,921**		**2L2.1**	**371**	
Status or Recency	8,547	50.5	*Status or Recency*	30	8.1
Status Only	2,592	15.3	*Status Only*	23	6.2
Recency Only	1,835	10.8	*Recency Only*	1	0.3
Both	4,120	24.3	*Both*	6	1.6
2B1.1	**7,789**		**2N2.1**	**37**	
Status or Recency	1,498	19.2	*Status or Recency*	1	2.7
Status Only	793	10.2	*Status Only*	1	2.7
Recency Only	189	2.4	*Recency Only*	0	0.0
Both	516	6.6	*Both*	0	0.0
2K2.1	**6,166**		**2K1.3**	**22**	
Status or Recency	3,283	53.2	*Status or Recency*	4	18.2
Status Only	1,185	19.2	*Status Only*	1	4.5
Recency Only	777	12.6	*Recency Only*	1	4.5
Both	1,321	21.4	*Both*	2	9.1
2L1.1	**3,163**				
Status or Recency	678	21.4			
Status Only	323	10.2			
Recency Only	148	4.7			
Both	207	6.5			

[1] USSG §4A1.1(d) adds two points to the offender's criminal history score if the instant offense is committed while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. This provision is commonly referred to as "status" points.

[2] USSG §4A1.1(e) adds two points to the offender's criminal history score if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under USSG §4A1.1(a) or (b) or while in imprisonment or escape status. If two points are added for USSG §4A1.1(d), only one point is added for this section. This provision is commonly referred to as "recency" points.

[3] This analysis includes only cases with complete guideline information.

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY2009.

The nine guidelines presented in Table 2 satisfy these purposes (the total is only nine because four guidelines are both the most frequently applied and contain a criminal history-related enhancement).[33] These nine guidelines account for 83.6 percent of all cases for which complete documentation was available (59,401 of 71,054 total cases). Recency points, status points, or both were applied in 35.3 percent of the cases sentenced under these nine guidelines; in other words, of the 59,401 cases sentenced under these guidelines, 20,979 received points for recency or status or both.

For each of these nine guidelines set forth in Table 2, points for status alone or status in combination with recency are applied more frequently than the application of points for recency alone. The proportion of cases within each guideline that receives either of these enhancements varies substantially by guideline. When either enhancement is applied —

- the lowest rate of application is found at USSG §2N2.1 (2.7% of these cases); and
- the highest rates of application are found at USSG §2K2.1 (53.2% of these cases) and USSG §2L1.2 (50.5% of these cases).

A.   Case Coding Project

The Commission conducted additional analyses of offenders receiving recency points and sentenced under the Chapter Two guidelines that interact with USSG §4A1.1(e) with the greatest frequency — USSG §§2L1.2 and 2K2.1.

For this project, the fiscal year 2006 data from an earlier criminal history project was used. This prior project was completed in April 2007 and produced a datafile documenting the complete criminal history of 11,207 offenders. Making use of this dataset provided access to information on a greater number of cases than if the project was started anew with a small sample of fiscal year 2008 cases. Of the 11,207 cases, 1,912 were sentenced under USSG §2L1.2, of which 694 (36.3%) received recency points. This percentage is very close to the percentage of USSG §2L1.2 offenders sentenced in fiscal year 2009 who received recency points (35.2%). Likewise, in this dataset there are 1,117 offenders who were sentenced under USSG §2K2.1, 346 of whom have recency points. The percentage in the fiscal year 2006 sample (31.0%) also is very close to the percentage of USSG §2K2.1 cases receiving recency in fiscal year 2009 (34.0%).

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[33] Among the guidelines most used in federal cases (USSG §§2D1.1, 2L1.2, 2B1.1, 2K2.1, and 2L1.1), only USSG §2B1.1 does not include a potential increase to the Chapter Two offense level based on a criminal history factor. While USSG §2D1.1 does provide an alternative base offense level that is dependent on the presence of a prior drug crime, this application is limited to (1) only those offenders convicted of specific drug statutes; and more significantly, (2) those cases in which death or serious bodily injury from the *use* of the drug is present. This latter provision applies extremely rarely. Because these criteria are rarely met, very few cases sentenced under USSG §2D1.1 receive a base offense level enhancement for a prior drug offense and the enhancement for recency.

1.   Analysis of case coding project of USSG §§2L1.2 and 2K2.1 offenders

A large proportion of offenders sentenced in fiscal year 2006 under USSG §§2L1.2 or 2K2.1 received points for recency alone or in combination with status. For those offenders who were sentenced under USSG §§2L1.2 or 2K2.1, and who received both status and recency points, a single event triggered both enhancements in a large percentage of the cases. Specifically, 88.5 percent of USSG §2L1.2 offenders and 78.7 percent of USSG §2K2.1 offenders who received both status and recency points had a single triggering event.

2.   Analysis of case coding project of USSG §2L1.2 cases

Using the Commission's fiscal year 2006 criminal history coding project, 694 offenders were identified who were sentenced under USSG §2L1.2 and who received one or two points for recency. Of these, more than two-thirds (n=496 of 694, 71.5%) involved cases in which only a single event triggered the recency points.

Of these 694 offenders who were sentenced under USSG §2L1.2, 505 (72.8%) received points for both recency and status. For nearly all these cases (n=447 of 505, 88.5%) the same criminal history event triggered the recency and status points. Of these 505 offenders who received status and recency points, 182 (36.0%) had only one prior eligible criminal history event. For these offenders, that single event was counted four times in determining the final guideline range. This single event triggered the application of (1) the specific offense characteristic at USSG §2L1.2(b)(1); (2) the criminal history points at USSG §§4A1.1(a) or (b); (3) the status points at USSG §4A1.1(d); and (4) the recency points at USSG §4A1.1(e).[34]

3.   Analysis of coding project of USSG §2K2.1 cases

From the Commission's fiscal year 2006 criminal history coding project, 346 offenders were identified who were sentenced under USSG §2K2.1 and who received one or two points for recency. In half of these (n=173 of 346, 50.0%), only a single event triggered the recency points.

Of these 346 offenders who were sentenced under USSG §2K2.1, 239 (69.1%) received points for both recency and status. For more than three-quarters of these cases (n=188 of 239,

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[34] In addition to the number of eligible criminal history events, information was collected on the temporal relationship between the moment the offense of "being found" illegally in the United States was committed and the application of status and recency points. As part of the coding project, data was collected on whether the offense triggering the recency points occurred before or after the most recent deportation. Of the 694 cases examined, sufficient information was available to conduct this analysis in 688 cases. In 33 of the 688 cases (4.8%), the triggering offense for recency occurred after the most recent deportation.

78.7%) the same criminal history event triggered both enhancements and 62 (25.9%) had only one prior eligible criminal history event. For these 62 offenders, that single event was counted four times in determining the final guideline range. This event triggered the particular base offense level at USSG §2K2.1; the criminal history points at USSG §§4A1.1(a) or (b); the status points at USSG §4A1.1(d); and, the recency points at USSG §4A1.1(e).

B.   Association with Below-Range Sentences

Analysis of fiscal year 2009 data suggests an association between the application of recency and the likelihood of the court imposing a below-range sentence and citing a criminal history reason. An examination of all below-range sentences (including those that were both government and non-government sponsored)[35] finds that criminal history was cited as a reason in 10.5 percent of all below-range sentences. In cases in which recency was applied, either alone or in combination with status, criminal history was cited as a reason for a below-range sentence in 12.0 percent of the cases. In cases in which recency points alone applied, a criminal history reason was cited in 15.5 percent of below-range sentences. Finally, below-range cases in which only status points were applied, criminal history was cited as a reason in 11.2 percent of cases.

C.   Recidivism

One of the four purposes of the criminal history chapter of the *Guidelines Manual* is the consideration of the offender's likelihood of recidivism.[36] The Recidivism Report examined the subsequent criminal offending of a sample of offenders sentenced under the guidelines in fiscal year 1992.

The Recidivism Report used a statistical method that compares the total criminal history points of a randomly chosen recidivist with the total criminal history points of a randomly chosen non-recidivist. The ideal result is that for each comparison, the recidivist will have a greater number of points than the non-recidivist. The Commission used the same statistical method to further analyze the data from the Recidivism Report to determine the specific marginal contribution of recency to the prediction of recidivism.

Two reanalyses were performed. In the first, the reanalysis computed the predictive ability of criminal history score excluding the recency subsection. That is, the reanalysis used those subsections of the criminal history score related to frequency and seriousness (USSG

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[35] Both government and non-government sponsored below-range sentences are included because the court may cite multiple reasons for a below-range sentence. The purpose of this analysis was to capture every instance in which a criminal history reason was cited, regardless of the sponsorship.

[36] *See* USSG Ch.4, Pt.A intro. comment.

§§4A1.1(a-c)), status (USSG §4A1.1(d)), and violence (USSG §4A1.1(f)). The results of the reanalysis showed that the recidivists will have a greater number of criminal history points in 6,982 out of 10,000 such comparisons.

In the second reanalysis, recency points were included in the criminal history score, such that all components of the criminal history score were included. This comparison improves slightly to 6,992 out of 10,000 comparisons.

D.   Prison Impact

The potential impact on sentences and to the federal prison population of eliminating the recency points at USSG §4A1.1(e) was estimated using the Commission's Prison Impact Model, which has been in use in some form since the guidelines were first developed. This model is used to estimate the impact of proposed statutory or guideline amendments (or both) on newly sentenced offenders and to project into the future the impact of those amendments on bed space in the federal Bureau of Prisons.[37] This model assumes that all factors other than the proposed change in the specific sentencing policy under review (*e.g.*, arrest rates, charging practices, conviction rates, and other sentencing policies) remain constant over time. As a result, changes in the specific policy under review are isolated from other systemic change.[38]

For this specific analysis, the fiscal year 2009 dataset was used. Initially, the model identifies offenders receiving points (either one or two) from the application of USSG §4A1.1(e). For each identified offender, those points are removed from the calculation of the criminal history score. Using the new criminal history score, a new criminal history category is determined. While every offender receiving recency points will receive a new criminal history
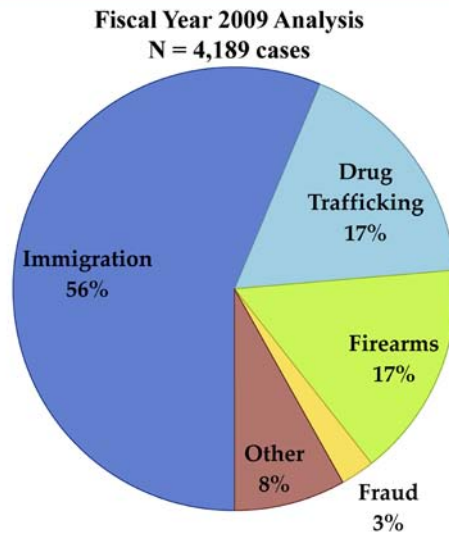
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[37] The model estimates the change to a "steady-state" prison population resulting from changes to the guidelines. Change is measured in person-years of imprisonment. In general, person-years of imprisonment can be thought of as the long-term prison population. The concept of a "steady-state" population envisions a prison system in homeostasis. In this system, the number of new, incoming inmates is equal to the number of out-going (released) inmates, and all beds are assumed to be occupied.

[38] If the amendment lengthens sentences, the "steady-state" prison population increases because inmate sentences under the current guidelines would have release dates occurring earlier than would be the situation if the new, longer sentence was applied. These offenders then accumulate in the system because their release is now delayed. Because new inmates arrive at a constant rate, additional beds are required. If the proposed amendment shortens sentences, the "steady-state" prison population decreases because inmates are now released earlier than anticipated, freeing-up prison beds. Other assumptions incorporated into the prison impact model include (1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; (2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and (3) defendants serve the minimum of (A) the sentence imposed less the maximum allowable good conduct time, or (B) their estimated remaining life expectancy, based upon an actuarial table incorporating age, race, and sex.

score, not all will experience a change in the criminal history category. As described earlier, a CHC increase results for approximately one-third of offenders receiving recency points.

The prison impact analysis revealed that if USSG §4A1.1(e) was not applied in fiscal year 2009, 4,189 of the 14,048 offenders receiving recency points would have moved to the next lower criminal history category.[39] This decrease in criminal history category would result in a 16.3 percent reduction in the average sentence of those affected, from 49 months to 41 months. Figure 2 presents information on the distribution of offense types among the offenders receiving a lower sentence.
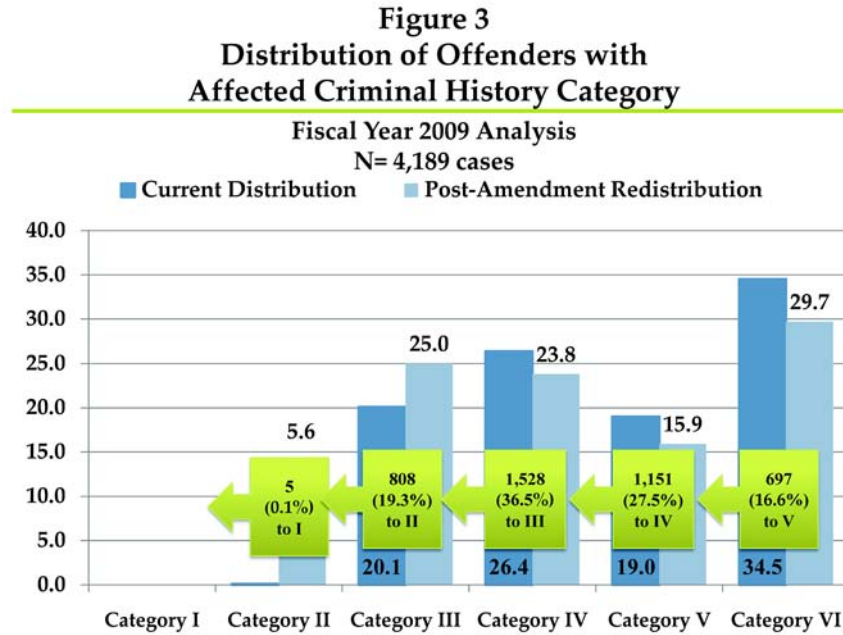
Figure 2
Distribution of Offense Types for Offenders with
Affected Criminal History Category

Fiscal Year 2009 Analysis
N = 4,189 cases

Drug Trafficking 17%

Immigration 56%

Firearms 17%

Other 8%

Fraud 3%

Note that percentages do not total exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY2009.

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[39] The number of offenders in the prison impact analysis differs from the other numbers in this report due to limitations in the data available for use in the model.

Figure 3 presents information on the criminal history categories of the affected offenders. Figure 3 shows the number and percent of offenders from each criminal history category who shift to a lower category.

Figure 3
Distribution of Offenders with
Affected Criminal History Category

Fiscal Year 2009 Analysis
N= 4,189 cases

SOURCE: U.S. Sentencing Commission, 2009 Datafile, USSCFY2009.

The prison impact model also can provide an estimate of the longer term impact of this amendment on the overall federal prison population. Based on this analysis, it is estimated that five years after implementation, this amendment could eliminate the need for up to 1,391 prison beds that otherwise would be filled because of the longer sentences resulting from application of the recency provision.

VI.   Summary

In fiscal year 2009, the applicability of the recency provision was considered in 38,850 cases, all of which necessarily involve defendants in Criminal History Category II or higher. The provision ultimately was applied in 14,548 of these cases (37.4% of 38,850). In two-thirds of the cases receiving recency points, the offender received two additional points for USSG §4A1.1(d) (status) (9,921 of 14,548, 68.2%). Of the 14,548 offenders receiving any recency points, these points had an impact on the offender's calculated criminal history category in only 4,419 cases (30.4% of 14,548 recency applications).

This review also examined the utility of this subsection in predicting recidivism. While the Commission does not have recidivism data on non-citizens, with respect to United States

citizens, Commission research demonstrates that including recency in the criminal history calculation has minimal predictive power. Based on the analysis of Commission recidivism data on United States citizens, the inclusion of recency points improves the prediction that a recidivist has a higher criminal history score (compared with a non-recidivist) in just ten of 3,018 comparisons for which the remaining subsections of USSG §4A1.1 alone did not correctly predict the higher.

The prison impact analysis revealed that if recency points were not available in fiscal year 2009, 4,189 of the 14,048 offenders receiving recency points would have moved to the next lower criminal history category, resulting in a reduction in their average sentence from 49 months to 41 months (a 16.3% average decrease). After five years, eliminating recency points is estimated to save 1,391 prison beds.