

A D D E N D U M
to
THE GUN VIOLENCE EPIDEMIC:
A PUBLIC HEALTH CRISIS

This Addendum is available at:

<https://www.govinfo.gov/content/pkg/CHRG-118shrg60434/pdf/CHRG-118shrg60434-add1.pdf>

Submitted by Chair Durbin:

American Academy of Pediatrics, statement	2
National Education Association, November 27, 2023, letter	5

Submitted by Senator Booker:

American Conservative Union, statement	6
Center for Justice and Human Dignity, July 10, 2023, letter to U.S. Sentencing Commission	9
Families Against Mandatory Minimums, statement	18

**Testimony for the Record of Sandy L. Chung, MD, FAAP
On Behalf of the American Academy of Pediatrics
Before the U.S. Senate Committee on the Judiciary
“The Gun Violence Epidemic: A Public Health Crisis”
Tuesday, November 28, 2023**

Chairman Durbin, Ranking Member Graham, and Honorable Members of the Senate Committee on the Judiciary, thank you for the opportunity to provide testimony for the record on the urgent need to protect children from firearm violence. My name is Dr. Sandy Chung. I am a pediatrician and the president of the American Academy of Pediatrics (AAP). I am offering written testimony for the record for your November 28th hearing “The Gun Violence Epidemic: A Public Health Crisis” on behalf of the AAP, a non-profit professional organization of 67,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults.

Every day across the United States, pediatricians work with families to protect children as a routine matter of clinical care. Pediatricians encourage safe sleep practices, counsel about car seat safety, and encourage consistent use of safety devices including seatbelts and bicycle helmets. In the same way, pediatricians also counsel families about firearm safety. This is not an ideological decision but a public health one to address the leading cause of death of children.

Across this country, communities are suffering from preventable firearm-related injuries and deaths. Suicide, violent crime, and unintentional shootings cause both acute and long-term trauma to families, communities, and children affected by these preventable tragedies. In 2022, the most recent year for which we have data, firearm-related injuries led to 48,117 fatalities among Americans.¹ Since 2017, firearm-related injuries have become the leading cause of death for children and youth. Exposure to firearm violence also contributes to toxic stress and harms children's health and development. For these reasons and many more, pediatricians have long advocated for comprehensive policies to protect children from the dangers of firearm-related morbidity and mortality and believe that preventing firearm violence is a public health issue.

The AAP is greatly appreciative for last year's enactment of the *Bipartisan Safer Communities Act* (BSCA) and celebrated its passage as a major public health victory for children and their families. On behalf of the AAP, I would especially like to thank Chairman Durbin and Ranking Member Graham for supporting this bill as well as all members on both sides of the aisle who supported passage of this bipartisan bill.

However, there is still much work to be done to further prevent firearm injuries and deaths, which is why for decades, the AAP called for the resumption of federal investment for nonpartisan firearm violence prevention research. The AAP appreciates the sustained federal investment of \$25 million total, split evenly between the Centers for Disease Control and Prevention (CDC) and the National

Institutes of Health (NIH), for firearm injury and mortality prevention research, since bipartisan legislation resumed this work in Fiscal Year (FY) 2020. But with chronic underinvestment in this field, we need significantly more research so we can understand what works and take it to scale. That is precisely what the BSCA did with policies like Extreme Risk Protection Orders, and we need to find further solutions to replicate that success.

CDC and NIH continue to receive many more high-quality proposals than they are able to fund, and additional funding can generate research into important questions, such as the most effective methods to prevent firearm-related suicides among veterans; the relationship between firearm access and opioid-related harm on firearm suicide risk; the best ways to prevent unintended firearm injuries and fatalities among women and children; how to reduce firearm-related violent crime; and numerous other vital public health and crime prevention questions.ⁱⁱ And this research is already yielding valuable results, including insights into how children and teens experience firearm violence in big cities and its impacts on their health, the needs of young people involved with the juvenile justice system who are at particularly high risk of experiencing firearm violence, and crisis hotline data to better understand how mass shootings impact young people.ⁱⁱⁱ

This research is taking place across the country in rural, suburban, and urban areas and being conducted by nonpartisan experts dedicated to finding ways to reduce and prevent firearm violence. Some of the research projects are being conducted at places like the University of South Alabama, University of Missouri – Columbia, Research Triangle Institute in North Carolina, Baylor College of Medicine in Texas, The University of Texas Medical Branch at Galveston, among others.

As part of the AAP's efforts to support this important research, the AAP leads the [Gun Violence Prevention \(GVP\) Research Roundtable](#), a non-partisan coalition of national medical, public health, and research organizations dedicated to advancing the firearm violence prevention research field. Formed in October 2021, this coalition serves as a hub for health-related organizations to highlight the critical impact of investments in research on reducing injuries and deaths from firearms. This year, over 400 national, state, and local medical, public health, and research organizations signed [a letter](#) supporting this important research funding and emphasizing our shared belief in the necessity of this funding to protect the public's health and well-being.

The AAP is grateful for Congress' continued funding for firearm violence research prevention research at the CDC and NIH and encourages Congress to continue to make support for maintaining and expanding firearm violence prevention research, funding, and data a priority. We would also welcome the opportunity to discuss and collaborate around ways to expand the impact of work that current federal investments already support.

Thank you for the opportunity to submit this testimony. The AAP looks forward to working with the Senate Committee on the Judiciary and the rest of Congress to protect the health, well-being, and safety of children and our communities.

ⁱ Johns Hopkins Center for Gun Violence Solutions. “CDC Provisional Data: Gun Suicides Reach All-time High in 2022, Gun Homicides Down Slightly from 2021.” *Johns Hopkins Bloomberg School of Public Health*. June 2023. Available at: <https://publichealth.jhu.edu/2023/cdc-provisional-data-gun-suicides-reach-all-time-high-in-2022-gun-homicides-down-slightly-from-2021>.

ⁱⁱ See <https://www.cdc.gov/violenceprevention/firearms/funded-research.html>.

ⁱⁱⁱ See <https://www.cdc.gov/violenceprevention/firearms/firearm-research-findings.html>.

November 27, 2023

Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Senator:

On behalf of the National Education Association's 3 million members and the 50 million students they teach and support in public schools and colleges, we submit these comments for the record for the Judiciary Committee's November 28 hearing, "The Gun Violence Epidemic: A Public Health Crisis."

The National League of Cities defines a public health crisis as anything that "impedes individuals and communities from being healthy" and limits our "ability to live well and thrive." The nation's epidemic of gun violence clearly fits that definition. Virtually no place in America is safe from gun violence. Mass shootings have occurred in many of the places we gather, from schools and colleges to grocery stores, places of worship, banks, concerts, and parades. Besides massacres that make the headlines, students and educators must cope with the alarmingly frequent shootings that occur in neighborhoods and communities of all descriptions. Whether or not our children are the victims of gun violence, they are left with the pain and trauma from them as America lurches from one shooting to the next. This continual exposure robs them of childhood and denies them a secure foundation for learning and development.

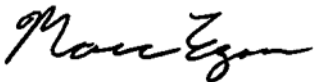
According to the Pew Research Center, the number of children and teenagers killed by gunfire in the U.S. [increased by 50 percent between 2019 and 2021](#). Since 2020, [the leading cause of death for children and teenagers has been guns](#). Our answer to this public health crisis should be doing all we can to prevent gun violence, not simply reacting to its aftermath.

To that end, it is not enough to force students to endure active shooter drills, which can have the effect of further traumatizing them. Arming educators, who entered the profession to teach and nurture and not to act as armed guards and first responders, is also not the answer. We are a nation that stands up to terror around the world; surely, these "solutions" are not the best we can do to stand up to terror in our own communities.

We ask you to support trauma-informed responses to gun violence by focusing on measures to protect and enhance the mental health and well-being of students and educators. We ask you to pass the commonsense gun laws that are favored by most Americans, including more than 70 percent of gun owners, according to a study by the bipartisan gun safety organization called [97Percent](#). These include requiring background checks on all gun sales and banning assault weapons. In addition, as you look to various approaches to making schools and campuses safer, we ask you not only to reject arming educators, but also to oppose school-hardening measures that will heighten anxiety rather than cultivate the nurturing environments students need.

We applaud you for recognizing that America's gun violence epidemic is a public health crisis. Please *treat* it as a crisis by coming together to pass laws that will turn the tide and grant students and educators the security they deserve.

Sincerely,



Marc Egan
Director of Government Relations
National Education Association



**TESTIMONY OF FRANK W. RUSSO, ESQ.
ASSOCIATE GENERAL COUNSEL
THE CONSERVATIVE POLITICAL ACTION COALITION
NOLAN CENTER FOR JUSTICE**

JULY 19, 2023

The purpose of the criminal justice system is, first and foremost, to make communities safer. One way to ensure we do that is by focusing on proportionality, accountability, fiscal responsibility, and human dignity. The United States Sentencing Commission can accomplish these goals, in part, by tailoring its guidance to allow for retroactivity only in the cases where early release would benefit public safety. Accordingly, retroactive application of Part B to the Criminal History Amendment has the potential to accomplish this by freeing up resources that can be effectively reallocated to the most serious offenders and more proven crime prevention efforts.

At its core, the retroactive application of Part B would facilitate proportionality and accountability by addressing a limitation in the Sentencing Guidelines. Previously, the Guidelines failed to differentiate between "zero-point offenders"--individuals without any prior criminal history points--and "one-point offenders," despite a significant difference in their recidivism rates. Zero-point offenders are actually *16 percent less likely to re-offend* compared to one-point offenders.¹ The Commission acknowledged this disparity with Part B, providing for a two-level reduction for those without prior criminal history points. By taking into account an offender's recidivism potential, we can ensure that the severity of their sentence aligns with the actual risk an individual poses to public safety.

It is important to note that these amendments do not establish a blanket reduction for all applicants. Retroactivity is designed to create a pathway for individuals who meet specific criteria and have worked hard to earn a sentence reduction. We saw this proven to be effective with the retroactive application of the 2007 Crack Cocaine Amendment, where only 64.2% of

¹ U.S. SENTENCING COMM'N, *Amendments to the Sentencing Guidelines* 1-3 (April 2023).

reduction requests were actually granted.² Further, those who did receive a sentence reduction through retroactivity did not exhibit higher recidivism rates compared to a similar group of individuals who had not earn early release.³ Therefore, history shows us that retroactivity can be successfully implemented without compromising public safety.

The advantages of retroactive application extend beyond the scope of recidivism. It also has the potential to generate substantial cost savings within the federal prison system. We are well aware that prison is expensive, as each federal inmate costs taxpayers nearly \$40,000 per year.⁴ Now, consider this: the Commission estimates that retroactive application of Part B could result in an average sentence reduction of 15 months for nearly 9,000 zero-point offenders.⁵ If we do the math, it's estimated those reductions can turn into savings of nearly *half a billion dollars* in incarceration costs.

These considerable savings not only alleviate the financial burden on taxpayers but allow for smarter investments in crime prevention. The evidence is clear: to achieve long-term crime reduction, *we must address the drivers of recidivism*.⁶ Instead of locking up zero-point offenders, who have demonstrated significantly lower recidivism rates, we can strategically allocate our system's limited resources toward higher-risk individuals. For example, we can invest our resources into employment and educational programming in prisons, which are proven to reduce recidivism.⁷ Research even estimates that for every dollar invested in correctional education programming, we can save between four and five dollars in reincarceration costs.⁸ This proves the financial incentive is rooted in improving public safety.

Ultimately, when we grant reductions solely based on the fortunate timing of an offender's sentencing hearing, it shakes the public's faith in our criminal justice system. When people perceive the system as unfair, they become less willing to work in it and develop a general skepticism toward law enforcement. This distrust in our justice system would, in turn,

² U.S. SENTENCING COMM'N, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, 2-3 (May 2014).

³ *Id.*

⁴ U.S. BUREAU OF PRISONS, *Annual Determination of Average Cost of Incarceration Fee* (Sept. 2021).

⁵ U.S. SENTENCING COMM'N, *Analysis of the Impact of 2023 Criminal History Amendment (Parts A and B) if Made Retroactive*, 9-10 (May 2023).

⁶ Bronna Kahle & David Guenther, *Give inmates an education and they'll be less likely to re-offend*, Crain's Detroit Business, May 31, 2022 (Mackinac Policy Center and State Representative Bronna Kahle: "Other states with similar programs have seen resounding success. According to a recent report co-authored by two renowned former corrections officials, Ohio prisoners who took part in a college degree program while behind bars were half as likely to commit new crimes. These programs also lead to millions of dollars worth of savings for taxpayers, with Pennsylvania saving more than \$400 million after 10 years").

⁷ Lois M. Davis, et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, 18, 77-78 (2013) (observing a 43% lower recidivism rate among the program's inmate participants).

⁸ *Id.*

undercut public safety. This is especially true when we consider offenders who are eligible for retroactive application of sentencing reductions and have earned the opportunity for a second chance by demonstrating good behavior. The Commission's decision to apply Part B retroactively would preserve judicial discretion, ensuring that each offender's unique background and record are considered before release.

If this amendment is applied retroactively, we are confident that giving certain zero-point offenders the ability to earn a sentence reduction will benefit our communities in more ways than one. By providing narrowly tailored retroactivity that requires a comprehensive review of each individual case, the Commission is ensuring that reducing recidivism is at the core of any decision made in our justice system. When we reduce recidivism, this means there is one less problem for law enforcement to solve, one less case for a prosecutor to handle, and, most importantly, one less victim who faces the consequences of our justice system's failure to rehabilitate those in its care. Thank you for the opportunity to testify today and I look forward to any follow up that can be of assistance to the Commission.



A handwritten signature in black ink, appearing to read 'Frank Russo', is positioned above the printed name and title.

Frank Russo
Associate General Counsel
Director of the Prosecutors & Law
Enforcement Advisory Council
American Conservative Union

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July 10, 2023

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Proposed Amendments

Re: Written Testimony Regarding Retroactive Application of
The 2023 Criminal History Amendments

To the Commission:

I submit this written testimony on behalf of the Center for Justice and Human Dignity (the “Center”) in anticipation of my July 19, 2023 testimony regarding whether the 2023 criminal history amendments to the U.S. Sentencing Guidelines (“Guidelines”) should be applied retroactively.

For the reasons set forth below, the Center enthusiastically supports retroactive application of the so-called zero-point amendment, providing a potential reduction in sentence for the least culpable first-time offenders who present a low risk of recidivism. The Center also supports retroactive application of the so-called status points amendment, based on its understanding that, as with the zero-point amendment, it will be applied with due regard for ensuring that the lowering of sentences for eligible defendants will not compromise public safety. Both of these amendments are data-driven, measured, and sensible reforms that will ensure greater fairness in the treatment of defendants in the federal system and help reduce the historical over-reliance on often-lengthy terms of incarceration as the preferred means of punishment in this country.

Introduction

The Center for Justice and Human Dignity (www.cjhd.org) is a 501(c)(3) nonprofit organization whose mission is to safely reduce incarceration in the United States while improving conditions for incarcerated individuals and correctional staff. The Center promotes values of human dignity, shared safety, and sensitivity to the needs of those most directly impacted by the criminal legal system – including victims, defendants, and society at large. It has a steering committee of 20 current and former federal and state court judges, and a board of directors that includes, among others, Larry Thompson (former U.S. Attorney for the Northern District of Georgia and Deputy Attorney General of the United States), Jeremy Fogel and Nancy Gertner (retired U.S. District Court judges), and me (former U.S. Attorney for the Eastern District of New York).

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Retroactivity Standards

Guideline 1B1.10 sets forth criteria used by the Commission to determine whether to make retroactive a Guideline amendment that reduces an already-sentenced defendant's Guideline range. Among the relevant factors are "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range." Applying such an amendment to already-sentenced defendants reflects a decision by the Commission that the lower Guideline range is "sufficient to achieve the purposes of sentencing" and enables a court, in its discretion, to decide whether a reduction in the defendant's sentence is appropriate. The reduction is not automatic; as with other sentencing-related decisions, the decision whether to grant such a reduction ultimately rests in the hands of district judges, who are called upon to decide not only whether a defendant is eligible for the reduction under the terms of the amendment but also whether, considering all of the 3553(a) factors, including public safety, such a reduction is warranted in each individual case.

We now review each of the two criminal history amendments, taking into consideration all of the aforementioned factors.

The Zero-Point Amendment

Each of the 1B1.10 factors supports retroactive application of the zero-point amendment.

Purpose. The purpose of this amendment is to recognize the need for lesser punishment for defendants with no criminal history points under the Guidelines – the lowest possible score. The Commission's data-driven analysis of this issue reveals that such defendants present a significantly lower risk of recidivism than others placed in Criminal History Category I – defendants with one criminal history point. A 2021 Commission report concluded that zero-point defendants are 37% less likely to be re-arrested than one-point defendants (26.8% compared to 42.3%).¹ This significant difference in recidivism represents the largest difference in recidivism rates among individuals within any Criminal History Category. This report was strikingly consistent with an earlier, 2016 Commission report, which concluded that zero-point defendants are 36% less likely to be re-arrested than one-point defendants (30.2% compared to 46.9%).² The Commission's reliance on this significant and consistent data to reform the federal sentencing regime is a highly commendable effort to imbue that regime with greater, empirically-based fairness.

This amendment is thus not designed merely to "simplify guideline application"³ – a feature of non-retroactive amendments. To the contrary, it is a conscious effort to better tailor the amount of punishment to the history and characteristics of the defendant – in other words, a

¹ U.S. Sentencing Commission, *Recidivism of Federal Offenders Released in 2010* (Sept. 2021), at 26.

² U.S. Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview* (March 2016), at 18 Figure 6.

³ U.S. Sentencing Commission, Public Meeting Minutes (Sept. 16, 2010), at 2.

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substantive judgment that zero-point defendants should not be, because they do not need to be, punished as harshly as their one-point counterparts. It is consistent with the statutory command in 28 U.S.C. § 994(j) that the Guidelines reflect the “general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” It is similarly in line with the fundamental tenet of federal sentencing, embodied in 18 U.S.C. § 3553(a), that a sentence must be “sufficient, but not greater than necessary” to achieve the purposes of sentencing. It is, in short, an important improvement in sentencing policy that deserves the widest application – both prospectively and retroactively.

The consequent impact on our correctional system also supports retroactive application. This will help free up much-needed space and programmatic resources in a still-overcrowded federal prison system so that they can be devoted to serving those defendants who need them most. This, in turn, will enhance both public safety as well as rehabilitation, which will, in turn, help reduce recidivism.

This amendment is, in short, a quintessentially substantive and well-justified measure designed to bring about a smarter, better-tailored sentencing regime. Given that, it is entirely appropriate for the Commission to make the amendment applicable regardless of whether a defendant happens to have been sentenced before or after its adoption.

Magnitude of the Change. The degree of potential benefit to zero-point defendants also squarely supports making it retroactive. Here again, the Commission’s own guidance is instructive. Under the Commentary to Guideline 1B1.10, the Commission recognizes that amendments that reduce the maximum of the guideline range by “less than six months” are generally not retroactive. This is consistent with the history underlying the Commission’s enabling legislation, in which Congress stated that it did not expect the Commission to make a Guideline change retroactive if the Guideline was “simply refined in a way that might cause isolated instances of existing sentences falling above the [amended] guidelines or when there is only a minor downward adjustment in the guidelines.”⁴

This amendment, in contrast, would confer a far more substantial benefit on many eligible defendants. According to the Commission’s highly informative and thorough analysis of the potential retroactive application of this amendment, 7,272 defendants would, on average, be eligible for a 15-month reduction in their sentences, representing a 17.6% reduction in their overall sentence lengths.⁵ The 15-month reduction is more than double the “less than six months” standard. From this perspective, the potential impact of the zero-point amendment on sentenced defendants is of more than sufficient magnitude to justify making it retroactive.

And this is not merely a mathematical point. The potential benefit of less prison, and greater freedom, is profound. Every day, every week, every month, and every year of incarceration, matters profoundly: not just to the defendants, who are deprived of the many features of normal

⁴ S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

⁵ U.S. Sentencing Commission, *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment* (May 15, 2023) (“2023 Retroactivity Analysis”), at 17.

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lives, but their immediate families, other loved ones, and others who depend on them – all of whom suffer and often suffer greatly from their absence. For all of them, the “magnitude of the change” embodied in the zero-point amendment is huge indeed.

Difficulty in Applying the Amendment. Applying the zero-point amendment retroactively will not present an undue burden on the system.

The recalculation of an eligible defendant’s Guideline range should be mathematically easy. All that is entailed is a two-level reduction in an eligible defendant’s offense level and the consequent use of a reduced Guideline range. And determining a defendant’s initial eligibility for the reduction should be similarly straightforward: a defendant’s original sentencing judgment and pre-sentence report should reflect whether or not they had zero criminal history points.

The amendment’s exclusions will of course add a step to the eligibility determination, but should not make implementation of the amendment particularly difficult. While a district judge will be required to determine whether any exclusion applies, the judge will have plenty of guidance to assist in that process. Some exclusions mirror already-existing Guideline provisions, for which there is a healthy body of precedent and guidance – including from the Commission’s own analysis of retroactivity.⁶ Many will already have been addressed at the original sentencing. Many will be able to be resolved on the existing factual record. And if not, judges can (as they have in the past, with a plethora of sentencing factors) still resolve them without the need for a full-blown evidentiary hearing. Indeed, to the extent that a defendant will have the burden of demonstrating their entitlement to this mitigating adjustment, any evidentiary gap precluding a district court from making a finding whether an exclusion applies will presumably result in the amendment not being applied.

Moreover, if history is any guide, the concerns expressed by some of an avalanche of meritless motions appear overstated. The Commission’s experience with three significant retroactive amendments strongly suggests that retroactive application of the zero-point amendment will be manageable. For the 2007 “crack minus two” amendment, 19,500 motions were predicted and 25,736 were filed⁷; for the 2011 Fair Sentencing Act crack cocaine amendment, 12,040 motions were predicted and 13,990 were filed⁸; and for the 2014 “drugs minus two” amendment, 51,141 motion were predicted and 50,998 (a *lower* number) were filed.⁹ Given that experience,

⁶ *Id.* (Appendices A-E).

⁷ U.S. Sentencing Commission, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* (Oct. 3, 2007), at 4 (estimating 19,500 defendants eligible for reduction); U.S. Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report* (June 2011), Table 1 (25,736 motions filed).

⁸ U.S. Sentencing Commission, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively* (May 20, 2011), at 10 (estimating 12,040 defendants eligible for reduction); U.S. Sentencing Commission, *Final Crack Retroactivity Data Report Fair Sentencing Act* (Dec. 2014), Table 1 (13,990 motions filed)

⁹ U.S. Sentencing Commission, *Analysis of the Impact of the 2014 Drug Guidelines Amendment if Made Retroactive* (May 27, 2014), at 7 (estimating 51,141 defendants eligible for reduction); U.S.

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retroactive implementation of the zero-point amendment – for which the Commission estimates there are 7,272 eligible defendants – should be well within the capacity of the criminal justice system to handle.

Any incremental burden on the judiciary, moreover, must be viewed in context. Defendants who end up serving shorter sentences will, by definition, free up prison resources – with more space and programmatic resources for defendants who remain. This, in turn, will improve the experiences and well-being of both incarcerated defendants and correctional staff, in both measurable and immeasurable ways. The legitimate concern about having time to prepare for the earlier release of many defendants can easily be accommodated by the Commission delaying retroactive implementation of the amendment for a modest period. And, to ensure that victims have a voice in this process, a district court can provide them with reasonable notice and an opportunity to be heard before a motion is decided, just as courts are required to do under the recent amendment to the compassionate release guideline.¹⁰

In the end, if the system ends up temporarily working somewhat harder to implement a commendable sentencing reform that will improve the fairness of the criminal justice system and the lives of tens of thousands directly and indirectly affected by it, it is well worth it.

Retroactive application of the zero-point amendment can, as with other retroactive amendments, be achieved consistent with the goals of sentencing. To be sure, even a first-time offender can present a risk to public safety and require incarceration. But this amendment, applied retroactively, does not undermine the legitimate interest in public safety. In order for a zero-point defendant's sentence to be reduced, a district judge will be required to conclude that (1) the defendant is eligible for the reduction, (2) none of the amendment's exclusions applies, (3) the defendant did not already receive credit (by way of a departure or variance) for the fact that they had no criminal record, and (4) reduction of their sentence is consistent with the 3553(a) factors, including providing just punishment and protecting the public from further crimes. This provides multiple layers of protection against the improvident reduction of a zero-point defendant's sentence.

These are not empty platitudes. Data support the fact that district judges frequently deny motions by already-sentenced defendants for reductions in their prison terms. For example, courts denied 36% of motions made by defendants seeking the benefit of the 2007 “crack minus two” amendment.¹¹ Similarly, courts denied 45% of motions made by defendants seeking the benefit of

Sentencing Commission, *2014 Drug Guidelines Amendment Retroactivity Data Report* (May 2021), Table 1 (50,998 motions filed).

¹⁰ Guideline 1B1.13, Application Note 2.

¹¹ U.S. Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 2014), at 2.

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the 2011 Fair Sentencing Act crack cocaine amendment.¹² And in an analogous circumstance – application of the so-called compassionate release guideline (1B1.13) in the wake of the First Step Act of 2018 – the results are similar: in the last three years, of the more than 23,000 compassionate release motions that were denied, 3553(a) was a reason for the denial in over 12,000 of them and protection of the public was a reason for the denial in over 3,000 of them.¹³ This is empirical proof of what is already understood to be true: that district courts can be trusted to implement the zero-point amendment responsibly, with due regard for the various competing considerations.

Additional data further support that retroactive application of the zero-point Guideline range reduction will not compromise public safety. Again, there is precedent to support this, as retroactive application of several notable Guideline range reductions has resulted in lower (or unaffected) recidivism rates among defendants who benefitted from the reductions versus those that did not. Defendants receiving the benefit of the “crack minus two” amendment’s Guideline range reduction had a 43.3% recidivism rate, as compared to a 47.8% rate for similarly-situated defendants who did not receive the reduction.¹⁴ Similarly, defendants who received the benefit of the “drug minus two” amendment’s guideline range reduction had a 27.9% recidivism rate, as compared to a 30.5% rate for similarly-situated defendants who did not receive the reduction.¹⁵ Likewise, defendants who received the benefit of the Fair Sentencing Act crack cocaine amendment’s Guideline range reduction, and similarly-situated defendants who did not, had the same recidivism rate: 37.9%.¹⁶ And with a somewhat analogous group – lower-risk defendants released early from 2020 to 2022 under the CARES Act – the recidivism rate has, so far, been stunningly low: as of August 2022, of the more than 11,000 defendants released early under the CARES Act, only 17 committed new crimes (and of those, only one committed a violent crime).¹⁷ In short, retroactive application of the zero-point amendment can provide desirable benefits to thousands of justice-impacted individuals without compromising public safety.

¹² U.S. Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (March 2018), at 2-3.

¹³ U.S. Sentencing Commission, *Compassionate Release Data Report* (Dec. 2022), at Tables 11, 13, 15.

¹⁴ U.S. Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 27, 2014), at 3.

¹⁵ U.S. Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* (July 2020), at 6.

¹⁶ U.S. Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: the 2011 Fair Sentencing Act Guideline Amendment* (Mar. 2018), at 3.

¹⁷ C. Johnson, *Released during COVID, some people are sent back to prison with little or no warning* (NPR, Aug. 22, 2022), available at <https://www.npr.org/2022/08/22/1118132380/released-during-covid-some-people-are-sent-back-to-prison-with-little-or-no-warn>.

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The Status Points Amendment

Each of the 1B1.10 factors also supports retroactive application of the status points amendment. The purposes and effects of the amendment – to eliminate an instance of excessive punishment and to reduce racial disparity in sentencing – justifies it; the magnitude of the change is substantial; and implementation of it will be even easier than the zero-point amendment, since it requires only a potential re-calculation of a defendant’s Criminal History Category with no exclusions. For efficiency’s sake, we do not repeat here the various justifications for retroactive application that apply to both amendments; instead, we focus on criteria particularly applicable to the status points amendment.

Purpose. As with the zero-point amendment, the status points amendment is a data-driven adjustment to the federal sentencing regime. A 2005 study showed that there is only a 0.1% difference in the extent to which status points improve a criminal history score’s successful prediction of re-arrest.¹⁸ Similarly, a 2022 study revealed only a 0.2% difference.¹⁹ And yet status points were included in 37.5% of all federal sentencings in the last five years, with defendants placed in a higher Criminal History Category in 61.5% of those cases.²⁰ This translates into a lot of additional prison time, which – from a recidivism perspective – is unjustified.

Two additional objectives of the status points amendment make it even more deserving of retroactive application. First, it eliminates the multiple penalties imposed when a defendant commits a crime while under a particular status (for example, while on probation or supervised release): in such a circumstance, the defendant faces (1) punishment for that crime, (2) more criminal history points (and, oftentimes, a higher Criminal History Category) for committing the crime while under a particular status, and (3) separate punishment for violating the terms of their status (e.g., a violation of probation or supervised release). Avoiding multiple punishments for the same conduct is a worthy objective, and one that ought to be pursued equally for defendants regardless of when they were sentenced.

Second, the amendment addresses the fact that the impact of status points falls heavily on minorities, who reportedly experience a disproportionate amount of over-policing by law enforcement. For example, Black defendants are 1.4 times as likely to have status points assigned to them as other defendants – consistent with the fact that they are far more likely to be targeted for criminal law enforcement, to be under criminal justice system supervision, and to serve much longer supervision terms. Retroactive application of the status points amendment will help rectify that: of the expected beneficiaries, 43% are Black and 28% are Hispanic.²¹ Retroactive application of this amendment – as with the Commission’s 2007 and 2011 amendments to the crack cocaine guideline (both of which were retroactive) – will therefore help further the compelling objective

¹⁸ U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 2005), at 26.

¹⁹ U.S. Sentencing Commission, *Revisiting Status Points* (June 2022), at 3.

²⁰ U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index* (May 1, 2023), at 50.

²¹ 2023 Retroactivity Analysis, at 13.

COVINGTON

of reducing unwarranted racial disparities in sentencing. This is (or should be) a high priority for all criminal justice stakeholders – including the Executive Branch. It is evidenced boldly by the President’s May 25, 2022 Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, in which President Biden recognized that “[i]t is time that we acknowledge the legacy of systemic racism in our criminal justice system and work together to eliminate the racial disparities that endure to this day.” Sentenced defendants should have the opportunity to benefit from this well-supported reform, just as much as individuals who have yet to be sentenced.

Magnitude of the Change. As with the zero-point amendment, the magnitude of the status points amendment is substantial. The average reduction in sentence is estimated to be 14 months – again, more than double the Guidelines’ “less than six months” standard – and will result on average in a 11.7% reduction in a defendant’s sentence.²² And the Commission estimates that 11,495 defendants stand to benefit from the reduction – thus improving the lives of the tens of thousands of individuals directly and indirectly affected by these defendants’ imprisonment.

Difficulty in Applying the Amendment. Retroactive implementation of this amendment should not present particular difficulty. Determining whether status points were added to a defendant’s criminal history score, and whether elimination or reduction of them would place the defendant in a different Criminal History Category (with a different Guideline range), should both be relatively straightforward tasks. Unlike the zero-point amendment, nothing further would be required to render a defendant eligible (or ineligible) for the reduction. And, as discussed above, the potential burdens arising from retroactive application are either overstated or can be readily addressed.

As with the zero-point amendment, retroactive application of the status points amendment can be achieved without sacrificing the goals of sentencing. To be clear, there is an obvious distinction between the two categories of defendants potentially covered by these amendments – status point defendants, by definition, have lengthier criminal records generally involving at least two criminal convictions, if not more. Because of this, district courts will need to exercise particular care in determining whether reduction of such a defendant’s sentence is justified and can be accomplished with due regard for the need for a sentence to promote respect for the law and to constitute just punishment. But as noted above, district courts have a well-established track record of determining whether to grant a sentence reduction to an already-sentenced defendant and to deny them the reduction if the 3553(a) factors do not support it. There is no reason to believe they will not continue to do so with respect to the status points amendment.

²² *Id.* at 9.

COVINGTONConclusion

I appreciate the opportunity to submit this written testimony to the Commission as it considers this timely and important topic. By making the 2023 criminal history amendments retroactive, the Commission can take meaningful and positive steps to implement improvements to our federal criminal sentencing system.

Respectfully,

/s/ Alan Vinegrad

Alan Vinegrad

cc: Kathleen Cooper Grilli, Esq.
General Counsel



Witness Statement of
Mary Price, General Counsel, FAMM
Before
The United States Sentencing Commission
July 19, 2023 Public Hearing on Retroactivity
July 10, 2023

The best way to predict the future is to create it.

– T. Bell, FMC Carswell

Thank you Chair Reeves, co-chairs, and commissioners for the invitation to speak with you today for FAMM as you consider whether to make Parts A and B of the criminal history amendments retroactive. My testimony today is intended to supplement FAMM’s written comment, which is attached for your convenience. This witness statement aims to address some of the concerns about retroactivity raised by the Criminal Law Committee and the Department of Justice.

Fundamental Fairness

The Criminal Law Committee of the U.S. Judicial Conference (CLC or Committee) has commendably supported retroactivity where it finds that, among other things, fundamental fairness requires it. In this instance, the Committee does not support retroactivity. The CLC’s “principal concerns . . . relate to the retroactive application of Part A given (1) the absence of any sort of countervailing, fundamental equity interests” such as were addressed by prior retroactivity decisions and (2) the burden retroactivity would place on probation services.¹ We believe the CLC is mistaken when it assumes fundamental fairness is absent in the amendments’ impact. And, even if the Commission finds addressing fundamental fairness is not one of the anticipated outcomes of retroactivity, the Commission historically has made prior amendments retroactive without a finding of fundamental fairness.

¹ Letter from Hon. Randolph D. Moss to Hon. Carlton W. Reeves 4 (June 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf.



(1) The amendments are tailored to advance the purposes of sentencing.

The Committee explains that retroactivity should reflect all the purposes of sentencing, but retroactivity of Parts A and B fail to do so and thus retroactivity is not warranted.² Assessing status points, according to the Commission, serves more than one purpose of sentencing, as the CLC observes.³ Besides properly predicting recidivism, status points account for the defendant's perceived lack of respect for the law. The concern is that retroactivity would advance the predictive aim of status points – achieving one goal of sentencing – but not support respect for the law – another goal of sentencing. The comment then appears to conclude that because the amendments do not advance all the purposes of sentencing, they do not correct for a fundamentally unfair approach at sentencing.⁴

We think this conclusion misapprehends the amendment. The Commission's nuanced approach to Part A and Part B retroactivity was fashioned with the purposes of punishment in mind. For example, the Commission's retroactivity plan would retain status points for individuals with seven or more criminal history points. Far from demonstrating that the status point amendment fails to correct for fundamental unfairness, the Commission's calibrated approach focuses relief squarely on the impact of those points on defendants with limited criminal history and for whom status points do not serve any purpose of punishment. And, the amendment is faithful to other § 3553 (a)(2) factors, such as respect for the law, by retaining status points for individuals with more than six criminal history points.⁵

Similarly, the Commission tailored Part B to provide relief to defendants with no criminal history whose instant offense is not of a crime of violence or an otherwise serious offense. It explained in the reasons for amendment that it had “identified circumstances in which zero-point offenders are appropriately excluded from eligibility in light of the seriousness of the instant offense of conviction or the existence of aggravating factors”⁶ As explained, this carefully tailored guideline addresses all the purposes of punishment. It provides potential relief for individuals whose criminal history score does not accurately reflect their risk of recidivism, while denying the relief to others for whom the Commission concludes it does and whose

² *Id.*

³ *Id.*

⁴ *See id.* at 4, 7.

⁵ USSG, Amendments to the Sentencing Guidelines, Reader-Friendly Version, Criminal History, Reason for Amendment 78 (Apr. 27, 2023) (pointing out that “by retaining ‘status points’ for those offenders in higher criminal history categories, the Commission continues to recognize that ‘status points,’ like other criminal history provisions . . . reflect and serve multiple purposes of sentencing, including the offender’s perceived lack of respect for the law . . .”).

⁶ *Id.* at 79-80.

conduct or impact demonstrate to the agency the need to provide for a longer sentence to deter, punish, and provide rehabilitation.

(2) To the extent that fundamental fairness is a prerequisite to retroactivity, the amendments advance that purpose.

When formulating its positions on retroactivity, the Criminal Law Committee takes into account the purposes, magnitude, and impact of retroactivity of Parts A and B. Historically it has also used its commitment to a sentencing regime that advances fundamental fairness to determine whether to support retroactivity in a given case.⁷ The Committee's steadfast adherence to fundamental fairness leads it in this instance to oppose retroactivity for Parts A and B because it concludes they do not implicate this principle.

As the Commission points out, retroactivity "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing."⁸ It also examines the magnitude of the change and the impact of implementing retroactivity on the criminal justice system. These three considerations are not exclusive, as evidenced by the Commission's concern for fundamental fairness in its crack based-retroactivity decisions. In 2010, Congress passed the Fair Sentencing Act and directed the Sentencing Commission to make conforming changes to the guidelines. While the Commission did not cite fundamental fairness in its decision to make those changes retroactive, it noted that "[t]he Fair Sentencing Act of 2010 specified in its statutory text that its purpose was to 'restore fairness to Federal cocaine sentencing' and provide 'cocaine sentencing disparity reduction.'"⁹ Two commissioners, Ketanji Brown Jackson and William B. Carr, Jr., addressed fundamental fairness in their remarks at the meeting during which the Commission voted to make Amendment 750 retroactive.¹⁰ Fairness was also a big feature of the Commission's promulgation of the so-called "crack minus two" amendment and its decision to make that amendment retroactive.¹¹

But fundamental fairness is not a limiting principle. This is evident from the fact that it was not cited by the Commission as a reason for the largest retroactivity decision in the Commission's history: the so-called drugs-minus-two amendment. The reasons for amendment 782, which

⁷ See *supra* n.1 at 4-5.

⁸ USSG §1B1.10, comment. (backg'd.)

⁹ U.S. Sentencing Comm'n, Reader-Friendly Version of Amendment on Retroactivity of Amendment 750 at 2, *citing* 124 Stat. at 2372 (June 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20110630_RF_Amendment_Retro_0.pdf.

¹⁰ U.S. Sentencing Comm'n, Public Meeting Minutes 3, 4 and 8 (June 30, 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting_Minutes.pdf.

¹¹ U.S. Sentencing Comm'n, Transcript of Meeting on Retroactivity *passim* (Dec. 11, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting_Minutes.pdf.

reduced drug guidelines by two levels, were “to reflect the Commission's determination that setting the base offense levels above mandatory minimum penalties is no longer necessary and that a reduction would be an appropriate step toward alleviating the overcapacity of the federal prisons.”¹² The reasons for amendment did not cite fundamental fairness. Indeed, at the hearing proceeding the Commission’s decision, then-Commissioner Ketanji Brown Jackson expressed skepticism that retroactivity was in part intended to correct a fundamental unfairness.¹³

(3) It would be fundamentally unfair to allow the date an unjust sentence was imposed to dictate whether it should be continued.

FAMM believes that even though fundamental fairness is not a necessary consideration, it is nonetheless met here. Leaving behind more than 18,000 people to serve months or years more in prison than the Commission has deemed sufficient to comply with § 3553 (a)(2) is fundamentally unfair. In the sentencing realm, the measure of justice is whether the punishment fulfills the purposes of punishment. Courts are commanded to impose a sentence that is sufficient but no longer than necessary to meet those purposes. Once the Commission has realized that the punishment is longer than necessary to meet those purposes, it is obliged to address the delta. The Commission has done so here. To deny retroactive application to people serving such sentences, leaving them to endure incarceration the Commission has determined is greater than necessary would be fundamentally unfair.

We are reminded of the analysis Judge Irene M. Keeley, then Chair of the Criminal Law Committee, applied when announcing the Committee’s support for retroactivity of Amendment 782 reducing all drug sentences by two levels. “Here, the driving factor for the Committee's decision was fundamental fairness. We do not believe that the date a sentence was imposed should dictate the length of imprisonment. Rather, it should be the defendant's conduct and characteristics that drive the sentence whenever possible.”¹⁴

Her insight applies with equal force here. It would be fundamentally unfair to deny access to retroactive relief to the many people whose incarceration was enhanced by status points or whose sentence were too long despite their lack of criminal history, while providing their similarly

¹² U.S. Sentencing Comm’n, Amendment to the Sentencing Guidelines, Reader-Friendly Version 1 (July 18, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782_0.pdf.

¹³ U.S. Sentencing Comm’n, Transcript of Public Hearing on Retroactivity of the 2014 Drug Amendment, 252-253 (June 10, 2014), https://www.ussc.gov/sites/default/files/transcript_1.pdf (asking “We’ve heard a lot about fairness, the moral imperative, et cetera, et cetera. And, I have to say that I saw that very clearly in the crack cocaine retroactivity. Here it’s not as clear. And I’m wondering is crack retroactivity a different animal or not?”).

¹⁴ *Id.* at 20 (Remarks of Judge Irene M. Keeley, Chair, Criminal Law Committee), https://www.ussc.gov/sites/default/files/transcript_1.pdf.

situated but not yet sentenced cohorts the benefits at sentencing. Courts can use conduct and characteristics to determine whether an incarcerated individual deserves relief, rather than letting the calendar dictate the sentence.

(4) Fundamental fairness requires retroactivity to correct for glaring racial and ethnic disparities in the use of status points and treatment of defendants with zero points.

The fact that amendments to the guidelines reducing crack cocaine sentences addressed disparities that were widely known and that had long undermined public confidence in the fairness of the criminal justice system is not an argument against addressing disparities in criminal history scoring.¹⁵ The Commission’s retroactivity analysis exposes demographic disparities in the provision of status points and the treatment of zero point defendants. That disparate treatment is no less egregious because it has only recently been brought to light by this Commission. A hidden disparity is still a disparity. Now known, it should be addressed.

In this case, status points are disproportionately assessed on people of color. Demographic data on incarcerated people who would be eligible for status point retroactivity reveal that 4,941 or 43 percent are Black and 3,194 or almost 28 percent are Hispanic.¹⁶ Of defendants assessed status points between fiscal years 2017 and 2021, 32.7 percent were Black,¹⁷ but only 20.5 percent of all defendants sentenced in that period were Black.¹⁸ Similarly, demographic data demonstrate that 6,035 eligible people of color make up 83.1 percent of individuals eligible for the zero-point adjustment; nearly 70 percent are Hispanic.¹⁹

FAMM appreciates that the Commission declined to make the recency amendments retroactive in 2010.²⁰ Several commissioners explained their view that the burden of applying the amendment retroactively was not outweighed by the need to advance fundamental fairness. They also addressed public safety concerns, given the seriousness of offenses and criminal history

¹⁵ *Supra* n. 1 at 9.

¹⁶ U.S. Sentencing Comm’n, Memorandum to Chair Reeves and Commissioners from Office of Research and Data, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment, Tbl. 3A (May 15, 2023), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf>.

¹⁷ U.S. Sentencing Comm’n, *Revisiting Status Points* 7, Tbl. 1 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.

¹⁸ U.S. Sentencing Comm’n, *Interactive Data Analyzer* (select “Sentencing Outcomes” from the top bar; select “2017” through “2021” in the “Fiscal Year” dropdown), <https://ida.ussc.gov/analytics/saw.dll?Dashboard>.

¹⁹ *Supra* n. 16 at 21, Tbl. 3A.

²⁰ U.S. Sentencing Comm’n, Public Meeting Minutes 2-3 (Sept. 16, 2010), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf.

scores of some of the potential beneficiaries. We continue to believe that recency retroactivity was wrongly decided but also recognize that the commissioners had been laser focused for years on the well-publicized and criticized crack-powder disparity. Lost in the discussion about recency at the Commission and in commentary it received, including from FAMM, was the recognition that the majority of people, 80 percent, who would have been eligible were people of color.²¹ In the 13 years since that decision, we have learned more about structural disparities in sentencing and more attention is paid to significant demographic disparities in sentencing outcomes. Fundamental fairness is grounded in eliminating instances where systemic disparities in policing and prosecution practices are reflected in sentencing outcomes without a countervailing purpose. We know more now and knowing that, are obliged to act.

The Commission's longstanding commitment to identifying disparate outcomes and amending guidelines that result in disparity grounded in race or ethnicity when such treatment does not advance the purposes of punishment should compel this decision. The Commission should act today, as it did not act in 2010, to recognize and correct for disparate outcomes.

Administrability

As we said in our comment letter, FAMM defers to system actors who have served on the front lines of retroactivity on the administrability consideration. That said, a few observations seem in order here.

In its comment, the Criminal Division of the Department of Justice explained it believes that “more than half of all individuals housed in the Bureau of Prisons,” in excess of 85,000 people, will file motions seeking retroactivity of Part A or B when only 18,767 would benefit.²² The sheer number of applicants would dwarf the relatively small number of eligible applicants. The Criminal Division explained that “[e]xperience teaches as much”

But in fact nothing in the history of retroactivity supports the assertion that tens of thousands of ineligible people will apply for retroactivity. For example, the 2014 reduction by two levels in the drug table prompted nearly 51,000 people to apply for retroactive consideration and of those 12,000 were found ineligible.²³ The Department at that time had predicted 60,000 people would apply for relief and urged the Commission to limit drug retroactivity to low level, non-violent

²¹ U.S. Sentencing Comm'n, Memorandum from Office of Research and Data to Chair Sessions et al. 12, Tbl. 4 (September 1, 2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/recency/20100901_Recency_Retro.pdf.

²² Letter from Jonathan J. Wroblewski to The Hon. Carlton W. Reeves 3 (June 22, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=33.

²³ U.S. Sentencing Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report Tbls. 1 & 8 (May 2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf>.

drug defendants with limited criminal history.²⁴ While not insignificant, the number of people who failed to qualify made up 23 percent of all applicants. But the author relies on this outcome to support the assertion that only 22 percent of applicants would even be eligible to apply for the relief, while courts would have to deal with 66,233 ineligible individuals.

Similarly, of the 13,990 people who applied for relief under Amendment 759, making the changes directed by the Fair Sentencing Act retroactive, just over 5,000 or 35 percent were deemed ineligible.²⁵ And, 7,795 people were deemed ineligible to benefit from Amendment 706 of the 25,736 who applied, or 30 percent.²⁶

Recent experience during the COVID pandemic should also provide some comfort to those concerned with an onslaught of meritless motions. Between FY 2020 and 2022 a total of 27,789 people sought a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A).²⁷ In 2020, the federal prison population was 155,562.²⁸ The fear of contracting and being sickened by or even dying from COVID outbreaks in federal prison was of the utmost concern to the people incarcerated in facilities and compassionate release was a well-known option among the population. Even when facing the emergency of a pandemic, the filing rates for compassionate release were nowhere near 50 percent and did not reach even 20 percent.

Fielding motions from 50 percent of the federal prison population would indeed be a big chore, but there is no evidence in past practice to support such an alarming prospect.

While several commenters expressed concerns related to timing and resources about the difficulty of handling a large number of requests for retroactivity,²⁹ suggestions were offered that would mitigate the impact. The Probation Officers Advisory Group made several suggestions to ease the process, including by providing lists of potentially eligible people and

²⁴ Statement of Sally Quillian Yates for Hearing on Retroactive Application of the Pending Drug Guideline Amendment 7 (June 10, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_DOJ.pdf.

²⁵ U.S. Sentencing Comm’n, Final Crack Retroactivity Data Report, Fair Sentencing Act Tbls.1 & 9 (Dec. 2014) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.

²⁶ *Supra* n. 9 at Tbls. 1 & 9.

²⁷ U.S. Sentencing Comm’n, Compassionate Release Data Report Fiscal Years 2020 to 2022 Tbl. 1 (Dec. 2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

²⁸ Federal Bureau of Prisons, Past Inmate Population Totals, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited July 10, 2023).

²⁹ *Supra* n. 1; *see also*, *Supra* n. 22; *see also* Letter from Probation Officer’s Advisory Group to the Hon. Carlton W. Reeves (June 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf.

their discharge dates to help district establish priorities.³⁰ The Federal Public and Community Defenders reminded commissioners about the collaborative processes the parties adopted for earlier retroactivity efforts.³¹ Those working groups could be called together again to ensure the orderly investigation into, filing, and consideration of motions.

Public Safety

The Criminal Division of the Department of Justice urges this Commission to reject retroactivity due to public safety concerns. Pointing out that Part A would include “serious or violent” offenders, the Department would deny retroactivity to all individuals who meet the status points criteria. And, with respect to Part B, the Department urges the Commission to deny all eligible first offenders because “many serious offenders” would be eligible, and because, due to the public safety exclusions many are white collar offenders and their release would lead to inequitable results.³² (Presumably this latter point is a critique aimed at the Commission’s careful work to calibrate this adjustment precisely to alleviate public safety concerns).

First, such arguments were made by the Department but rejected by the Commission in the amendment cycle. Failing to consider those individuals whose sentences were inflated using status points that the Commission has found fail to advance the purposes of punishment while eliminating or reducing those enhancements for everyone going forward is not only unjust, it is contrary to reason. It ignores the fact that thousands of people will serve longer sentences not because they pose a greater threat of recidivism, but due simply to the accident of timing. They pose no greater threat to public safety than their post-November 1 cohorts that the Commission has determined should receive shorter sentences.

Second, the Commission has repeatedly rejected such arguments from the Criminal Division in prior retroactivity cycles. For example, in 2007, the Department opposed retroactivity of the amendment lowering cocaine base offenses by two levels, arguing that it would result in the release of “serious and often violent offenders, who are more likely to recidivate than other offenders”³³ The Commission nonetheless made the change retroactive. In 2011, the

³⁰ Letter from Probation Officer’s Advisory Group to the Hon. Carlton W. Reeves 1-2 (June 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=68.

³¹ Letter from Michael Caruso to Hon. Carlton W. Reeves 8 (June 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=43.

³² *Supra* n. 22 at 6.

³³ Letter from Alice Fisher to The Hon. Ricardo H. Hinojosa 6 (Nov. 1, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_001.pdf; *See also*, Statement of Gretchen C.F. Schappert (Nov. 13, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20071113/Shappert_Testimony.pdf.

Department supported retroactivity of the amendments adopted pursuant to the Fair Sentencing Act, but urged that retroactivity be limited to those without a weapons' enhancement and argued that no one in Criminal History Category IV or higher should be eligible based in part on public safety concerns.³⁴ The Commission did not follow this recommendation. And in 2014, the Department urged the Commission to strictly limit retroactivity of the drug amendment, predicting that 60,000 people would apply for relief. It pressed the Commission to grant eligibility only to people in Criminal History Categories I and II who had neither a gun bump nor a conviction under 18 U.S.C. § 924 (c) and who did not have a variety of enhancements, including for aggravated role or obstruction of justice.³⁵ It recognized that the exclusions it proposed were not a "perfect proxy for dangerousness," but argued they were nonetheless reasonable.³⁶ The Commission rejected this surgical approach in favor of complete retroactivity. It should reject the less than surgical approach urged on it here by the Criminal Division.

Third, the Commission built public safety guardrails around the criminal history amendments by retaining a status point for people with seven or more criminal history points and excluding a rather large set of defendants from the zero point adjustment. And, courts are obliged to assess every eligible individual using the public safety screen contained in 18 U.S.C. § 3553(a) and apply a special public safety screen in determining whether to reduce a sentence and if so by how much.³⁷ The Division urges the Commission to nonetheless, ban all remaining otherwise eligible individuals, despite these targeted measures. FAMM believes this position is wrong because it would deny every worthy movant, including those the court would find no threat to reoffend, any opportunity to make the case that their sentence was unfairly enhanced by factors the Commission has abandoned or adjusted for in Parts A and B. We call on the Commission to reject it.

Conclusion

I opened this statement with a quote from a FAMM member. She said: "the best way to predict the future is to create it." Her words helped me think about everyone's role in constructing the criminal justice system we want to see. The Commission's role is unique. It can not only correct for unjust sentences going forward, it can also predict a better and more just future for people trapped in unjust sentences today. I urge you to do so by making Parts A and B retroactive.

³⁴ Statement of Stephanie M. Rose for Hearing on Retroactive Application of the Proposed Amendment Implementing the Fair Sentencing Act of 2010 at 8-9 (June 1, 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Stephanie_Rose.pdf.

³⁵ *Supra* n. 24 at 7.

³⁶ *Id.* at 9.

³⁷ U.S.S.G. §1B1.10, comment. (n. 1.B.ii).



June 23, 2023

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.W., Suite 2-500
Washington, D.C. 2002-8002

Re: Comments on Retroactivity of Criminal History Amendment

Dear Judge Reeves,

We are pleased to respond to the request for comment on whether the Commission should make parts A and B of the Criminal History guideline amendments retroactive. FAMM wholeheartedly endorses the proposal. Retroactivity is clearly warranted in light of the factors the Commission considers when determining whether to make an amendment retroactive, and in the interest of justice.

FAMM unites currently and formerly incarcerated people, their loved ones, and many others to promote reforms in sentencing and corrections policies and practices. We elevate the voices of people whose lives have been altered by the criminal justice system so that they are heard by policy makers and other key actors in the system. Advocacy to ensure that ameliorative guideline changes reach people incarcerated under now-abandoned schemes is unquestionably a FAMM cause. Among our 70,000 members are many individuals and families who benefitted from prior retroactivity decisions. Our interest in this topic flows from our work over more than three decades to lessen the impact of unjustifiably long sentences. FAMM wholeheartedly endorses the proposal.

I. Retroactivity is Warranted in Light of the Relevant Considerations

Section 1B1.10 directs the Commission considering retroactivity to assess “the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively”¹ These considerations support retroactivity.

¹ USSG §1B1.10, comment. (backg’d).



A. The Purposes of the Amendments Support Retroactive Application

a. Status Points

The Commission made significant changes in Part A to the coverage and extent of so-called “status points,” by limiting their use to those with serious criminal histories as indicated by their criminal history score. The amended guideline curtails the application of two additional points for defendants whose instant offense was committed while under any criminal justice sentence. Individuals with six or fewer calculated points will no longer receive status points. Those with seven or more points will be assessed one rather than two additional criminal history points. The change reflects the agency’s recognition, based on empirical research, that status points do little to enhance the predictive accuracy of the criminal history score. According to the Commission, the use of status points “only minimally improved the criminal history score’s successful prediction of rearrest—by 0.2 percent.”² Status points improve the predictive accuracy in only 15 of 10,000 defendants.³ Nonetheless, they were assessed in 37.5 percent of cases in the last five years and in 61.5 percent of those cases, status points led to a higher Criminal History Category.⁴

b. Zero Points

Part B creates a new guideline, §4C1.1 (Adjustment for Zero-Point Offenders), providing for a two-level decrease for defendants who received no criminal history points and whose offense did not include specific aggravating factors. As with the status points amendment, the Commission relied on its empirical research on recidivism. In this instance, it shows that defendants with zero calculated criminal history points “have considerably lower recidivism rates” than other defendants, including those with one criminal history point with whom they share Criminal History Category I.⁵ Those defendants were 15.5 percent less likely to reoffend than their one-point counterparts.⁶ In recognition of the difference between zero and one-point defendants, courts grant the former higher rates of variances and departures.

While eschewing the use of uncountable priors to limit the adjustment,⁷ the Commission nonetheless placed guardrails around the adjustment depending on the nature of the instant conviction and aggravating factors associated with it. Those exclusions are informed by statutes such as 18 U.S.C. § 3553(f) and recent firearms changes based on the Bipartisan Safer Communities Act. In appendices to the impact analysis, Commission staff identified some

² U.S. Sentencing Comm’n, *Revisiting Status Points* at 3 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220627_Status.pdf.

³ *Id.* at 18.

⁴ U.S. Sentencing Comm’n, *Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index* at 50 (May 1, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf.

⁵ *Supra* n. 4 at 52.

⁶ *Id.*

⁷ *Id.*

specific guidelines that, if present in the instant sentencing calculation, could exclude application of the adjustment.⁸

Amendments to §5C1.1 also provide that a sentence other than incarceration is generally appropriate for defendants receiving a §4C1.1 adjustment and whose new guideline range is in Zones A or B. It also counsels that defendants receiving zero-point adjustments may be eligible for a departure if the calculated guideline range overstates the gravity of the offense.⁹

B. Retroactivity of the amendments advances the purposes of punishment.

The Commission explained that the changes to criminal history scoring were made to ensure that calculated guidelines result in penalties that reflect the statutory purposes of sentencing.¹⁰ Those purposes include (1) ensuring the sentence reflects the seriousness of the offense, promotes respect for the law, and provides just punishment; (2) adequately deterring criminal conduct; and (3) protecting the public from further crimes by the defendant. Criminal history scores should account for culpability, deterrence, and recidivism risk.¹¹

a. The amendment aims to end the use of status points as a proxy for risk of recidivism.

The Commission has determined that, while status points *may* address blameworthiness and other purposes of punishment, they do not fulfill their primary function – that of advancing the sentencing purpose of predicting recidivism.¹² Moreover, the Commission pointed out in its reason for amendment that other sentencing enhancements, including consecutive punishment upon revocation of supervised release and/or the imposition of additional time based on revocation of probation or supervised release would remain available to the court.¹³ Should omitting status points fail to address the seriousness of the offense or adequately deter conduct, those enhancements can help judges impose a sentence that meets those aims of criminal history scoring.

b. The amendment aims to mitigate the over-sentencing of defendants with zero criminal history points.

As with status points, zero criminal history points result in sentences that are longer than warranted. Defendants with zero criminal history points are scored the same way as those with

⁸ U.S. Sentencing Comm’n, Memorandum to Chair Reeves and Commissioners from Office of Research and Data, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment, Appendices (May 15, 2023), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf>.

⁹ *Supra* n. 4 at 53.

¹⁰ *Id.* at 50.

¹¹ U.S. Sentencing Comm’n, *Revisiting Status Points* at 9 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.

¹² *Id.* at 18.

¹³ *Supra* n. 4 at 51.

one criminal history point, although they pose a significantly lower risk of recidivism. Defendants with zero points were much less likely to be rearrested than those with one criminal history point. The delta, 26.8 percent compared to 42.3 percent, is the widest difference in recidivism rates of any comparison of defendants with different criminal history points in all other Criminal History Categories.¹⁴

The amendment addresses this failure to appropriately reflect lower recidivism in the calculated sentence by providing for a two-level adjustment for certain zero-point defendants. This adjustment provides that defendants with zero points receive sentences that advance the purpose of just punishment. To further ensure, however, that the recommended final range appropriately accounts for the seriousness of the instant offense, the amendment carves out several exceptions from eligibility for the adjustment based on the nature of the convicted offense and/or aggravating factors.

The amendment balances the need for the sentence to reflect the anticipated risk of recidivism, which is demonstrably lower for zero-point defendants, with the goals of ensuring the sentence reflects the seriousness of the offense and protects the public. The adjustment, combined with the guidance in §5C1.1 directing the court to a sentence of non-incarceration in certain cases, helps avoid unwarranted severity. It also complies with Congress’s mandate that the Commission ensure “that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”¹⁵ Meanwhile, targeted exclusions will provide for appropriately longer sentences for that account for the seriousness of the offense, deterrence, and the need to protect the public.

Going forward, the amendments will help ensure that criminal history scoring will be consistent with the purposes of sentencing. Unless made retroactive, however, thousands of people whose sentences were increased by the addition of status points or whose zero-point status was not adequately accounted for, will be forced to serve sentences that do not advance those purposes. Failure to make the amendments retroactive will undermine the core congressional directive that sentences be sufficient but no longer than necessary to meet the purposes of punishment.¹⁶

c. Retroactivity of parts A and B will advance just punishment and confidence in the fair administration of justice by ensuring that criminal history enhancements do not fall disproportionately on defendants of color.

The Commission has found that status points 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.¹⁷ Of defendants assessed status points between fiscal years 2017 and 2021, 32.7 percent were Black,¹⁸ but only 20.5

¹⁴ *Supra* n. 8 at 4.

¹⁵ 28 U.S.C. § 994(j)

¹⁶ 18 U.S.C. 3553(a)

¹⁷ *Id.*

¹⁸ *Supra* n. 2 at 7.

percent of all defendants sentenced in that period were Black.¹⁹ 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.

Commendably, the Commission has repeatedly adopted, and then made retroactive, guideline amendments to combat structural demographic disparity, beginning with the so-called crack minus two amendment in 2007. In its 2007 report to Congress on the sentencing of crack and powder cocaine defendants, the Commission pointed out that the glaring disparity in sentences imposed on crack cocaine defendants drew widespread criticism²⁰ and undermined confidence in the fair administration of justice and respect for the law.²¹

The Commission's work in this area undoubtedly led to passage of the Fair Sentencing Act of 2010, narrowing the delta between powder and crack mandatory minimum triggering quantities to 18:1. The agency's commitment to making ameliorative changes to the crack guideline retroactive led Congress to follow suit with the First Step Act of 2018 when it made the new ratio retroactively applicable.

Among the reasons for disparate status points outcomes based on race is the over-policing of communities of color. Those practices set the frame for disparity in prosecutions and sentencing as cases progress through the system. As one analyst explained: "Police were more likely to stop [B]lack and Hispanic drivers for investigative reasons," and "[o]nce pulled over, people of color are more likely than whites to be searched, and [B]lacks are more likely than whites to be arrested."²² Nationwide surveys analyzed by the Bureau of Justice Statistics revealed that "[t]he cumulative effect of these policies is that 49 percent of African American men reported having been arrested by age 23, in contrast to 38 percent of their non-Hispanic white counterparts."²³ Once arrested, people of color were more likely than their white counterparts to "be detained, to receive custodial sentence plea offers, and to be incarcerated."²⁴

¹⁹ U.S. Sentencing Comm'n, *Interactive Data Analyzer* (select "Sentencing Outcomes" from the top bar; select "2017" through "2021" in the "Fiscal Year" dropdown), <https://ida.usc.gov/analytics/saw.dll?Dashboard>.

²⁰ See, U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* at 2 & Appendix B (May 2007), https://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

²¹ See *id.* at 121 n.195, citing Brief of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Respondents ("It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, and as a result has undermined public confidence in the criminal justice system.") https://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

²² See, e.g., Nazgol Ghandnoosh, *The Sentencing Project, Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 4 (2015), <https://www.sentencingproject.org/app/uploads/2022/08/Black-Lives-Matter.pdf>.

²³ *Id.* at 11 (citing Brame, R., Bushway, S. D., Paternoster, R., & Turner, M. G. (2014). Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23. *Crime & Delinquency*, 60(3), 471–486).

²⁴ Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and*

The demographic disparity in status and zero-points is not nearly as well-known as was the disparity in powder and crack cocaine sentencing. But, that it exists and is an unwarranted disparity (as its predictive value is unsupported by data), should compel the Commission to provide that those sentenced using now repudiated guidelines who are eligible for a reduction be given the opportunity to secure one. Doing so will support the fair treatment of people, no matter when they are sentenced, and will also advance respect for the law, which is a core purpose of punishment.

II. Retroactivity is Warranted Given the Magnitude of the Guideline Change Made by the Amendment.

There is no question that retroactivity is warranted given the extent of the average reduction and the number of people who would be eligible. Nearly 11,500 people could benefit if the status points amendment was made retroactively available. Beneficiaries of Part A retroactivity would enjoy an average reduction of 14 months, and 7,272 individuals eligible for Part B would average 15 months off their sentences were their motions granted.²⁵ Taken together, the changes would have a significant impact on nearly 18,000 individuals incarcerated in the federal Bureau of Prisons, significantly shortening sentences for up to 12 percent of the current population of 144,448.

The Commission has explained that it made the change to Part A because assessing status points did not comport with the purposes of sentencing. They did not correlate with increased recidivism. Thus, people are serving sentences increased for no discernible reason and certainly not one that can be justified by the purposes of punishment. Similarly, the change made by Part B for zero-point defendants corrects for the over-incarceration of individuals who have distinctly lower rates of recidivism than others, including those with one criminal history point with whom they share Criminal History Category I.²⁶

Putting the question of magnitude in context, 18,000 people are currently serving sentences averaging 14 and a half months longer than the Commission can justify. These excessive sentences do not punish justly, deter conduct, or protect the public.

The magnitude of the change can also be measured at the most intimate and human level. In the year plus that retroactivity can restore to eligible people, families will be reunited to restore continuity and healing; babies will be born to formerly incarcerated parents; children will promote from kindergartens, graduate law schools, or begin their own families. First steps, first bike rides, first beaus, all will be celebrated with a loved one home. Aging parents will have an extra set of hands for support. Individuals will contribute to their families and communities.

Sentencing, 52 CRIMINOLOGY 514, 534 (2014), https://heinonline-org.proxygt-law.wrlc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/crim52&men_hide=false&men_tab=toc&kind=&page=514.

²⁵ *Supra* n. 8 at 9, 17.

²⁶ *Supra* n. 4 at 50, 52.

Giving a year plus back to an individual whose sentence was unnecessarily enhanced is of a magnitude that defies cost savings or bed space analysis. Our system's interest in keeping people incarcerated is fulfilled only up to the moment when incarceration has served the ends of punishment. Anything more is counterproductive and damaging.

III. Retroactivity is Appropriate in Light of the Ease of Retroactive Application.

FAMM cannot speak with greater credibility than those on the front lines of retroactivity – Probation Officers, Assistant U.S. Attorneys, judges, and defense counsel – about what they may encounter handling §1B1.10 motions under this proposal. We do know that those actors worked together to apply three rounds of retroactive guideline applications, including the massive drugs minus two undertaking. Making this amendment retroactive will involve parties deeply familiar with motions practice under 18 U.S.C. § 3582(c)(2).

Assessing status points, as the staff memo points out, is a relatively straightforward exercise. The zero-point adjustment is not as straightforward, because the court must engage in some fact finding to determine whether the defendant is included or excluded from eligibility. Many of the exclusions will be readily apparent from the sentencing record by examining the counts of conviction, guideline calculations, and adjustments. The Commission has also provided a list of guideline provisions that could aid courts in determining which first offenders are not eligible for reduction.²⁷

Retroactivity may present implementation challenges. We believe the Commission and the parties can take steps to mitigate those challenges. But, at the end of the day, those challenges are outweighed by the opportunity the Commission could provide to people who are serving sentences that, according to the Commission, are unjustifiably long. Individualized justice can never turn on convenience

IV. Retroactivity is the Right Thing to Do

It is in the Commission's power to provide 18,000 people whose sentences it has found are longer than necessary an avenue to sentences that more closely align with just punishment, deterrence, protection of the public, and rehabilitation. FAMM is confident the Commission will not lose sight of the very real human component to the decision before it. Thousands of individuals are serving sentences inflated by excessive adjustments or the failure to credit their lack of criminal history. The retroactivity analysis relies on deep examination and interpretation of cumulative data. But that data is drawn from the individual experience of thousands of people, who, were they sentenced today, unquestionably would receive shorter terms. It would be unjust to change policy in recognition of that injustice they suffered and then deny them an avenue to relief. One of the most difficult questions we face from FAMM members is why policy makers decide to make ameliorative changes prospective only. They do not understand a justice system that requires them to serve a longer sentence than they would today simply due to the fact they

²⁷ *Supra* n. 8 at *Appendices*. Note that the staff analysis contains this caveat: “the methodology should not be considered as the Commission’s interpretation of how this criterion should be applied in all cases. The courts may apply this eligibility criterion differently.” *Id.* at 28, n. 55.

were sentenced before policy makers realized their mistake. Neither do we. There is no defensible answer.

V. Conclusion

We urge the Commission to make Parts A and B of the Criminal History amendment retroactive. Thank you for your work in this area and for your attention to our comments.

Sincerely,



Mary Price
General Counsel



Shanna Rifkin
Deputy General Counsel