UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
THOMAS F. EAGLETON U.S. COURTHOUSE
111 S. TENTH STREET, ROOM 14.148
ST. LOUIS, MISSOURI 63102

CHAMBERS OF
STEPHEN R. CLARK
CHIEF DISTRICT JUDGE

314/244-7540

June 29, 2023

United States Sentencing Commission
c/o Hon. Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chairman Reeves and Members of the Sentencing Commission:

On behalf of all Judges of the United States District Court for the Eastern District of Missouri, I submit this comment in support of applying the 2023 criminal-history amendment *prospectively only*. Prospective application of both parts of the 2023 criminal-history amendments will: (1) promote the essential principle of finality of criminal judgments; (2) respect the rights of crime victims, and promote both deterrence and truth in sentencing; and (3) avoid placing extraordinary strains on the limited judicial and probation resources of this District, and presumably of other districts throughout the country.

First, as the Supreme Court recently reiterated in *Edwards v. Vannoy*, "applying 'constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" 141 S. Ct. 1547, 1554 (2021) (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)). Similarly, in *Barajas v. United States*, the Eighth Circuit recognized "the importance of protecting the finality of criminal convictions," and held that the limit on retroactivity applies to collateral review of federal convictions. 877 F.3d 378, 382 (8th Cir. 2017) (citing *Teague*, 489 U.S. at 310). Applying the amendments retroactively will likewise seriously undermine the essential principle of finality.

Second, applying the amendments only prospectively will promote the rights of crime victims as set forth in the Crime Victims' Rights Act. 18 U.S.C. § 3771. Courts have held that the Crime Victims' Rights Act serves the aims of: (1) "ensur[ing] that the district court doesn't discount the impact of the crime on the victims; (2) . . . forc[ing] the defendant to confront the human cost of his crime; and (3) . . . allow[ing] the victim 'to regain a sense of dignity and respect rather than feeling powerless and ashamed.'" *Kenna v. U.S. District Court*, 435 F.3d 1011, 1016 (9th Cir. 2006) (quoting Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001)).

Relatedly, prospective application of the amendment will promote one of the central purposes of criminal sentences: deterrence. *See* U.S. SENT'G GUIDELINES MANUAL Ch. 1, Part A, § 2 (U.S. SENT'G COMM'N 2021). Conversely, retroactive application will undermine the deterrent effect of sentencing. Similarly, retroactive application will undermine truth in sentencing, the central premise of the Sentencing Reform Act of 1984.

Third, applying the amendment only prospectively will avoid placing significant and unwarranted strains on scarce judicial and probation resources. The Commission's own data demonstrates this. An estimated 50,545 offenders in the custody of the Federal Bureau of Prisons as of January 28, 2023, were assigned status points at sentencing.[1] An estimated 11,495 of those offenders will have a lower guideline range if the Commission were to make Part A of the 2023 criminal-history amendment retroactive.[2] Additionally, an estimated 34,922 offenders in BOP custody as of January 28, 2023, were assigned no criminal history points under Chapter Four, Part A of the *Guidelines Manual* when sentenced for their instant offense.[3] Of those 34,922 zero-point offenders, 12,574 meet the criteria in Part B, Subpart 1 of the 2023 criminal-history amendment.[4] Slightly more than half (57.8%, n = 7,272) of those offenders will have a lower guideline range if the Commission were to make Part B, Subpart 1 of the 2023 criminal-history amendment retroactive.[5] Retroactive application therefore would have a substantial impact on the judicial and probation resources of Districts across the country.

The Eastern District of Missouri has one of the busiest criminal dockets in the country.[6] The Commission projects that 315 offenders in our District will be eligible for sentence reductions if the amendments were applied retroactively.[7] Retroactive application therefore would have a substantial impact on the judicial and probation resources of our District. For more detailed commentary on the burdens that retroactivity would place on our Probation Office, see the attached Addendum submitted by our Chief Probation Officer.

Further, as of December 31, 2022, the Eastern District of Missouri had 2,257 offenders on post-conviction supervision.[8] The abrupt release of additional offenders to supervision, when the Probation Office is already dealing with diminished resources, raises several public-safety concerns.

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[1] U.S. Sentencing Commission, *Office of Research and Data Memorandum* (May 15, 2023), at p. 9, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.
[2] *Id.*
[3] *Id.* at p. 17.
[4] *Id.*
[5] *Id.*
[6] *See* Judicial Caseload Profile: Missouri Eastern—Combined Civil and Criminal Federal Court Management Statistics (Mar. 31, 2023), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2023.pdf.
[7] U.S. Sentencing Commission, *Office of Research and Data Memorandum* (May 15, 2023), at pp. 12, 20, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf.
[8] *See* Table E-1—Federal Probation System Statistical Tables For The Federal Judiciary (Dec. 31, 2022), https://www.uscourts.gov/statistics/table/e-1/statistical-tables-federal-judiciary/2022/12/31.

Our District also expects an influx of filings as a result of the Supreme Court's recent decision in *Dubin.* In *Dubin*, the Supreme Court held that the two-year mandatory sentence imposed by 18 U.S.C § 1028A(1)(a) applies only "when [a] defendant's misuse of another person's means of identification is . . . the crux of what makes the underlying offense criminal . . . ." *Dubin v. United States*, 143 S. Ct. 1557, 1563 (2023). According to a Sentencing Commission report, nearly 4,400 offenders were imprisoned under § 1028A between 2017 and 2021.[9] According to the same report, most of those sentenced received a four- or five-year sentence, many of whom could request sentence reductions in the future, requiring review by the Probation Office and rulings by the courts.

Additionally, the Commission recently expanded the means by which an offender can seek compassionate release. *See* Amendment to § 1B1.13, 88 Fed. Reg. 28,254 (May 3, 2023). This amendment will undoubtedly lead to significant numbers of both meritorious and non-meritorious motions for sentence reductions, which again will require review by the Probation Office and rulings by the Court.

Finally, any retroactive application raises the very real prospect of meritless motions, which probation offices and courts must nonetheless address. The Commission's data demonstrates this concern: nearly 67 percent of all requests in connection with the 2007 crack-cocaine amendment were denied because the offenders were found to be ineligible for a sentence reduction under §1B1.10.[10] Experience and common sense would suggest that retroactive application likewise would produce substantial numbers of meritless motions, further straining scarce probation and judicial resources.

We urge the Commission to bear in mind that the plainly foreseeable costs outlined in this letter will be incurred. Yet, the potential benefits of retroactive application are comparatively uncertain. Because the Sentencing Guidelines are advisory, and criminal-history scores are just one of a host of factors Courts must consider in imposing sentence under 18 U.S.C. § 3553(a), it is impossible to foresee how many offenders whose guidelines ranges might be retroactively reduced would realize actual sentence reductions. It is even more difficult to anticipate the actual magnitude of any such reductions. While we would never minimize the significance of any reduction to an individual offender, weighing the speculative prospective benefits of retroactivity against its certain costs in the context of the entire federal criminal-justice system counsels strongly in favor of prospective application only.

We note that our concerns largely parallel those of the Committee on Criminal Law of the Judicial Conference of the United States (CLC). See the CLC's letter to the Hon. Carlton W. Reeves dated June 23, 2023. We concur in the CLC's judgment that "[r]etroactivity of either part would bring significant impacts on the courts, concrete workload implications for our

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[9] *See* Quick Facts—Section 1028A Aggravated Identity Theft Offenses (July 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Aggravated_Identity_Theft_FY21.pdf.

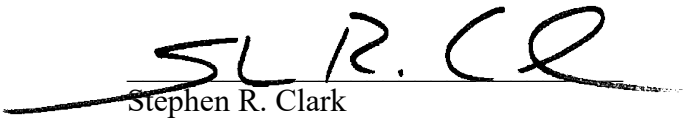
[10] U.S. Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report* (June 2011), at p. 14, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf.

probation and pretrial services offices, and a host of effects for other judiciary stakeholders." *Id.* at p. 4.

For all these reasons, the Judges of the United States District Court for the Eastern District of Missouri respectfully submit that the Commission should apply the amendments prospectively only.

If you have any questions of would like further information, please feel free to contact me.

Sincerely,



Stephen R. Clark
Chief United States District Judge
Eastern District of Missouri

On behalf of the Court:

Henry E. Autrey
United States District Judge

Ronnie L. White
United States District Judge

Sarah E. Pitlyk
United States District Judge

Matthew T. Schelp
United States District Judge

Catherine D. Perry
Senior United States District Judge

Stephen N. Limbaugh, Jr.
Senior United States District Judge

Rodney W. Sippel
Senior United States District Judge

Audrey G. Fleissig
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John A. Ross
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Shirley Padmore Mensah
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Noelle C. Collins
United States Magistrate Judge

Abbie Crites-Leoni
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John M. Bodenhausen
United States Magistrate Judge

Patricia L. Cohen
United States Magistrate Judge

Stephen R. Welby
United States Magistrate Judge

Rodney H. Holmes
United States Magistrate Judge

Joseph S. Dueker
United States Magistrate Judge

Addendum
Position of the United States Probation Office for the Eastern District of Missouri

Kimberly Bramlett, Chief U.S. Probation Officer, Eastern District of Missouri, and the Probation Office for the Eastern District of Missouri, respectfully submit the following:

Applying Part A, the "status-point" amendment, retroactively

Retroactive application of Part A alone would significantly strain the Probation Office's resources—in this District and, no doubt, in probation offices across the country. In the Eastern District of Missouri alone, retroactive application of the "status point" amendment would result in an estimated 263 eligible offenders who could require a retroactive-amended-guideline report. The Administrative Office gives 4 hours of workload credit for each retroactive-amended-guideline report. That equals 1,052 hours of additional work for the Probation Office, approximately 62 hours of additional work per officer. The Probation Office *already* prepares approximately 85 presentence investigation reports each month, each of which takes about 45 hours.

In total, the Probation Office spends approximately 3,825 hours each month—45,900 hours per year—preparing presentence investigation reports, approximately 225 hours per month for each probation officer. In summary, retroactive application of Part A would cause the Probation Office to face 1,052 hours of additional work on top of the 3,825 hours needed monthly to prepare presentence investigation reports. This summary does not include the amount of hours needed to supervise released offenders, nor does it include the non-meritorious motions that numerous offenders would almost certainly file. Each of those motions, too, would require time and attention from the probation officers.

The Commission has previously declined to apply similar amendments retroactively. In 2010, the Commission decided not to apply retroactively the elimination of recency points. One of the reasons for that decision was the burden that retroactive application would place on the courts. The Commission also noted safety concerns, because the majority of those who might have been eligible for retroactive application fell in criminal history categories IV, V, and VI. Finally, the recency amendment functioned to simplify guidelines application—not to correct a perceived fundamental unfairness. Similar considerations should guide the Commission here.

Applying Part B, the "zero-point" amendment, retroactively

Retroactive application of Part B, too, would burden the Probation Office. In our District, retroactive application of the zero-point amendment would result in an estimated 52 eligible offenders who could require a retroactive-amended-guideline report. Using the 4 hours of workload credit for each retroactive-amended-guideline report noted above, this equals 208 hours of additional work for the Probation Office, approximately 12 hours of additional work per officer. Again, this summary does not include hours spent supervising released offenders, or time spent reviewing and responding to non-meritorious motions.

Retroactive application of the zero-point amendment also raises practical concerns. For example, an offender would not be eligible for the reduction if he or she personally caused substantial financial hardship. Finding the answers to those questions well after—sometimes years after—the commission of the offense would raise substantial difficulties.

Applying both Part A, the "status-point" amendment, and Part B, the "zero-point" amendment retroactively

Retroactive application of both Part A and Part B would result in an estimated 315 eligible offenders in our District who could require a retroactive-amended-guideline report. Using the figures above, this equals 1,260 hours of additional work for the Probation Office, approximately 74 hours of additional work per officer. Again, this summary does not include hours spent supervising released offenders, or time spent reviewing and responding to non-meritorious motions.

Further, based on national immediate-release percentages and Eastern District of Missouri percentages of overall offenders, there could be 59 offenders ready for immediate release, between both amendments, that would require home-plan investigations and immediate supervision. That number is equivalent to one supervision officer's entire caseload. Indeed, the status-point offenders likely would require a relatively high degree of supervision intensity because of the nature of the conduct that would have earned status points.

Because of major budget cuts, the Probation Office likely cannot fill all its vacancies, forcing an already-overworked staff to take on additional offenders requiring more intense supervision. Retroactive application of the criminal-history amendment will place an enormous burden on the Probation Office's investigations unit—which is already struggling to stabilize. The Probation Office struggles with turnover and cannot train officers fast enough, that is, when it can even afford to hire new officers. The Probation Office will not be able to fill all its vacancies because of the anticipated 17.5% financial reduction plan, which will result in a loss of 2.5 million budget dollars.

Additionally, retroactive application of either or both Parts of the amendment raises public-safety concerns. When guidelines are proposed retroactively, a large number of individuals are released directly into the community without the benefit of a half-way house placement (RRC), placing them at greater risk for relapse and recidivism because the Probation Office has not had adequate time to help them plan for their release. The availability of RRCs has significantly reduced in recent months, with two recent closures, thus making placements harder to come by.

Direct-release offenders are proportionally more likely to be revoked. This is supported by 2022 revocation data collected in our District. Anecdotal evidence indicates that revocation stems from a lack of resources, increased likelihood of an unstable home plan, and an inability to make good decisions due to increased stress, anxiety, and frustration that come from immediate release. We believe this lack of stability influences those on supervision to default to similar decision-making patterns that led to the offense of conviction.

Lora Decision

The Supreme Court recently ruled that § 924(j) is a separate offense that does not require consecutive sentencing, but it confirmed that under 18 U.S.C. § 3584(a), the district court had discretion to sentence Count 2 consecutively or concurrently. *Lora v. United States*, 143 S. Ct. 1713 (2023). The *Lora* decision will have implications for both presentence and supervision. For example, a resentencing could require reinvestigation of the case to include consideration of the offender's behavioral adjustment in the BOP. Further, the statute-based sentencing enhancement could result in overserved time and in offenders' immediate release. As noted, immediate release impacts both an officer's workload and the success of the offender post-release.

Adding chaos to confusion, the possibility of overserved time compounds the problems discussed above. Overserved time results in BOP credit. Offenders with BOP credit can be particularly challenging to supervise because, if they know that the BOP will award overserved time credit to a revocation sentence, the diminished prospect of returning to prison loses its deterrent effect and threatens public safety.

First Step Act

The Court already expects significant increase in motion volume due to the recent amendments to USSG § 1B1.13. Congress passed the First Step Act, 18 USC § 3582, in 2018, expanding compassionate release to include motions by defendants. The First Step Act, however, was inconsistent with § 1B1.13, which only covers "motion[s] of the Director of the Bureau of Prisons." Courts across the country then began applying § 1B1.13 inconsistently when defendants moved for compassionate release.

The forthcoming amendments to USSG § 1B1.13 go beyond aligning § 1B1.13 with the provisions in the First Step Act—and they will result in a deluge of motions. These amendments significantly expand what is considered under "extraordinary and compelling reasons" (e.g., medical conditions, family circumstances, victim of assault, changes in law, and other circumstances). Of specific concern, the "changes in law" section appears to provide an avenue for the retroactive application of any changes in law. The "other circumstances" section, further, contains very broad language. Finally, the "family circumstances of the defendant" section uses broad language that would be difficult for any agency, party, or court to substantiate and verify. Specifically, the section states that "extraordinary and compelling reasons" may exist where "[t]he defendant establishes that circumstances similar to those listed in paragraphs (3)(A) through (3)(C) exist involving *any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member . . . .*" (emphasis added).

While these expanded provisions impose a much larger impact on the operations of the Court through increased motions, both potentially meritorious and frivolous, the expanded provisions could lead to an increased number of offenders on supervision and, if necessary, require the Probation Office to develop home plans for each of them. Again, this consumes more limited time and scarce resources of the Probation Office.

Summary

Retroactive application of either or both parts of the amendment would further stretch an already strained system. Our staffing concerns are not unique to us: retirements and a diminished workforce impact our system nationally, as do ongoing budget cuts. Our mission statement is to assist the Court in the fair administration of justice, facilitate long term positive change for those under supervision, and contribute to a safer community. When the Probation Office's resources are strained, the Probation Office cannot fulfill that mission, or even function, effectively. We therefore respectfully urge the Commission to apply both parts of the amendment prospectively only.

Kimberly Bramlett
Chief U.S. Probation Officer
Eastern District of Missouri