



TESTIMONY OF

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

“PUBLIC HEARING ON
RETROACTIVITY”

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Introduction

Judge Reeves and distinguished members of the Commission:

Thank you for the opportunity to participate in today's hearing. In addition to serving as the Chief of the Dallas Police Department, I am also the President of the Major Cities Chiefs Association (MCCA). The MCCA is a professional organization of law enforcement executives representing the largest cities in the United States and Canada. It is an honor to appear before the Commission today on behalf of my MCCA colleagues.

My testimony will provide a local law enforcement perspective on whether Parts A and B of the Commission's 2023 Criminal History Amendment should be applied retroactively. As a leader in policy discussions related to criminal justice reform, the MCCA is well-positioned to weigh in on this issue. Through our advocacy with Congress, the Administration, and other stakeholders, the MCCA has fought for many reforms to increase fairness and make the criminal justice system in the United States more equitable for all. However, the MCCA is concerned that retroactively applying Part A and Part B of this amendment will be detrimental to public safety. More specifically, it will provide relief to violent offenders, does not sufficiently account for the risk of recidivism, will create implementation and logistical challenges, and will exacerbate ongoing issues with a lack of accountability throughout the criminal justice system.

Retroactivity Position

In general, the MCCA does not support retroactivity with respect to criminal justice reforms. The criminal justice system needs some degree of finality to operate properly. This helps establish a deterrent, promote transparency and accountability, and ensure victims receive the justice they deserve. There's a reason why, except in limited circumstances, the law prohibits sentences from being modified once implemented.

The MCCA acknowledges that there are situations where retroactivity may be appropriate. However, this should be narrowly scoped and focus on things such as addressing historical shortcomings within the criminal justice system. One example is the federal sentencing disparity for crack versus powder cocaine, which has disproportionately impacted communities of color, especially black men. The MCCA is one of the leading organizations advocating for Congress to advance legislation eliminating this disparity. It is also critical to ensure that any criminal justice reform applied retroactively includes sufficient guardrails to ensure that only non-violent offenders receive relief. The MCCA strongly believes that Parts A and B of the Commission's amendment do not meet these criteria and, as a result, should not be applied retroactively.

Relief to Violent Offenders

One of the MCCA's primary concerns with the retroactive application of Part A of the Commission's amendment is that doing so will provide relief to violent offenders. When an offender commits another offense while on parole, probation, supervised release, or another court-ordered sentence with a custodial or supervisory component, two criminal history points, often referred to as status points, are added to the calculation of the offender's criminal history score. Part A of the Commission's amendment will reduce the impact of status points by eliminating them for offenders with six or fewer criminal history points (based on the other elements of the

formula), regardless of whether they committed the new offense while under a criminal justice sentence. Offenders under a criminal justice sentence with seven or more criminal history points will now only receive one status point instead of two.

Currently, 50,545 offenders in Bureau of Prisons (BOP) custody received status points. According to the Commission's retroactivity analysis, 11,495 of these offenders would have fallen into a lower sentencing guideline range had status points not been included in their criminal history score calculation.¹

A closer examination of the types of offenses these individuals were convicted of confirms that this group includes violent offenders. Approximately three-quarters of the offenders who would be eligible for a reduced sentence were convicted of drug trafficking (about 41%), firearms offenses (about 21%), or robbery (roughly 12%). Some of the other crimes these offenders committed include child pornography offenses, assault, sexual abuse and other sex offenses, murder, and kidnapping.² These are not non-violent offenders. This point is underscored when considering some of the specific details of the crimes that placed these individuals into the guideline range under which they were ultimately sentenced. For example, a weapon was involved in the crimes that 2,176 of these offenders committed. Another 2,074 offenders received a mandatory minimum related to the use of a firearm.³ Part A of the Commission's amendment will almost certainly provide relief to violent offenders and, as a result, should not be applied retroactively.

Recidivism Concerns

Recidivism remains a significant issue in major cities throughout the United States. A substantial portion of the violent crime in MCCA member jurisdictions is perpetrated by a subset of the population, many of whom are repeat offenders. For example, recent data from New York City indicated that nearly a quarter of the individuals arrested for burglary commit another felony within the next two months.⁴ In Washington, D.C., the average homicide suspect has been previously arrested 11 times.⁵ Here in Dallas, the data underpinning the Dallas Police Department's Violent Crime Reduction Plan, which broke the city into over 100,000 microgrids, found that 50 of these grids were responsible for nearly 10% of all the violent crime in the city. Through a mix of community engagement and enforcement strategies, which includes surveilling, deterring, and arresting repeat violent offenders, the Dallas Police Department has driven down violent crime in these grids by 50%. While this is a positive development, it demonstrates the linkage between recidivism and violent crime.

¹ "Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment," *United States Sentencing Commission*, May 15, 2023, pg. 9.

² *Ibid.*, pg. 15.

³ *Ibid.*, pg. 14.

⁴ "Career and Violent Criminals Are Exploiting New York's Criminal Justice System," *New York City Police Department*, August 3, 2022. <<https://www.nyc.gov/site/nypd/news/p00055/career-violent-criminals-exploiting-new-york-s-criminal-justice-system>>

⁵ Bryce Robinson, "Verify: Do homicide suspects in DC have an average of 11 prior arrests?," *WUSA 9 News*, March 13, 2023. <<https://www.wusa9.com/article/news/verify/verify-homicide-suspects-prior-arrests/65-a66c3b04-a303-4b33-90b1-f94f698e1492>>

The MCCA is concerned that the retroactive application of Part A of the Commission’s amendment would provide relief to individuals at high risk of recidivating. In fact, the offenders affected by this portion of the amendment already have a history of recidivism. The only reason that they were assigned status points is because they were convicted of another offense while on parole, probation, supervised release, etc.

The most recent Sentencing Commission study focused on the recidivism of federal offenders further cements the recidivism risk associated with the offenders who would be impacted if Part A were made retroactive. This study found a correlation between an offender’s Criminal History Category (CHC), which is determined by the number of criminal history points an offender receives, and recidivism. More specifically, the higher the CHC, the more likely the offender would be rearrested. Here are the rearrest rates for offenders included in the study, aggregated by CHC:

- CHC II—49.4%
- CHC III—61.9%
- CHC IV—70.3%
- CHC V—75.4%
- CHC VI—76.2%⁶

These statistics are incredibly troubling given that 91% of the offenders eligible for relief if Part A of the amendment was applied retroactively, fall into CHCs III-VI. Even if status points were the reason offenders moved up a CHC category, the recidivism risk is still significant. Some other elements of the Sentencing Commission’s recidivism study are also alarming. For example, roughly 31% of the crimes offenders committed while recidivating were violent crimes, including assault, robbery, and murder. Furthermore, offenders convicted of firearms offenses had the highest recidivism rate, around 71%.⁷ This is concerning, considering that 20% of the individuals eligible for relief if Part A was retroactive, were convicted of firearms offenses.⁸ Based on the information above, it is clear that many of these offenders, despite receiving status points, represent a significant recidivism risk. As a result, retroactively applying Part A of the Commission’s amendment would be detrimental to public safety.

Implementation Challenges and Impact on Local Law Enforcement

If the Commission were to make Parts A and B of its 2023 Criminal History Amendment retroactive, it would likely create some implementation challenges. One is with respect to how retroactivity will impact offenders initially sentenced below the recommended guidelines. According to the Commission’s retroactivity analysis, nearly 18% of Part A offenders received a sentence below the guidelines due to their cooperation with the government. Roughly another 12% were sentenced below the recommended range for other reasons. Those numbers are approximately 23% and 19% for Part B offenders, respectively.⁹ Whether these offenders should

⁶ “Recidivism of Federal Offenders Released in 2010,” *United States Sentencing Commission*, September 2021, pp. 26.

⁷ *Ibid.*, pg. 5.

⁸ “Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment,” pg. 15.

⁹ *Ibid.*, pp. 14, 22.

be eligible for additional relief is a valid question, especially since many are violent or repeat offenders.

It is also essential for the Commission to consider the capacity of federal probation and related services in making its decision about retroactivity. If Part A were to be implemented retroactively, an additional 1,266 offenders would be eligible for release within a year, and 2,090 offenders could be released immediately. For Part B, 1,472 additional offenders would be eligible for release within the first year, and 1,198 offenders could be released immediately.¹⁰ This will likely overwhelm existing federal post-release supervision services.

Similarly, there has not been sufficient investment in re-entry services to handle an influx of new individuals who require them. These services help individuals reentering from prison secure basic human necessities, such as food and housing, obtain adequate health care, including mental health and substance abuse treatment, and access economic opportunities, such as education and job training. MCCA members have found that when these needs are met, it helps address the root causes of criminal behavior and prevent recidivism. For example, Dallas has implemented a “focused deterrence” strategy focused on engaging offenders at the highest risk for recidivism. During this engagement, offenders are connected to social and other services, but it is also made clear that further criminal activity will not be tolerated. While this strategy has been successful here in Dallas, not every jurisdiction has the capability to implement these kinds of programs, and it is important to recognize that offenders who would be released if Parts A and B of the Commission’s amendment were made retroactive will be spread nationwide.

Finally, the Commission must consider how retroactivity impacts entities outside the federal system. If an offender released due to retroactivity recidivates, local law enforcement will be responsible for the immediate response to address that crime, even if the case eventually ends up in the federal system. Despite the many challenges facing the profession, MCCA members and their local law enforcement colleagues will continue to do everything necessary to keep their communities safe, even if that means taking action against offenders who should still be in prison.

Rise in Violent Crime and Lack of Accountability

Over the past few years, communities across the country have struggled with increasing violent crime rates. Every quarter, the MCCA publishes a violent crime survey that includes homicide, aggravated assault, robbery, and rape data from all member agencies. According to the MCCA’s latest violent crime survey, homicides during the first quarter of 2023 decreased by approximately 7.5% compared to the same period in 2022. Aggravated assaults during this time also decreased slightly, by roughly 2.7%. However, violent crime remains a significant challenge in major cities, as violent crime rates are still well above pre-pandemic levels. For example, compared to the first quarter of 2019, homicides are up 50.9%, and aggravated assaults are up 34% in 2023.

Police are just one component of the criminal justice system. MCCA members have experienced challenges with other parts of the system not doing their part to hold offenders accountable. This includes a reluctance on the part of district attorneys to prosecute certain crimes, judges releasing violent offenders on personnel recognizance or very low bonds, and prosecutors and judges not

¹⁰ *Ibid.*, pp.17,25.

following sentencing guidelines, among other issues. This lack of accountability within the criminal justice system undoubtedly is contributing to the current violent crime situation in America, as offenders do not believe they will face the consequences for their actions.

The MCCA is concerned that making Parts A and B of the Commission's amendment retroactive will exacerbate these challenges with accountability. As described earlier in this testimony, the criminal justice system requires finality to operate as effectively as possible. Making tens of thousands of convicted offenders eligible for resentencing will, without question, contribute to the notion that the criminal justice system is not holding people accountable. This is especially true considering that most of these offenders are repeat offenders, many of whom committed violent crimes. Finally, even though they wouldn't be resentenced, the single largest group of offenders (29,943) who would benefit if Part A of the Commission's amendment were applied retroactively are those assigned a criminal history score of 7 or higher, which would place them in CHC IV, V, or VI.¹¹ These offenders would have their criminal history score reduced by one point, which the MCCA believes sends a troubling message, considering these are some of the most serious offenders currently in federal custody.

Part B of the Commission's Amendment

Much of this testimony has focused on Part A of the Commission's amendment. Some concerns about this portion of the amendment are less applicable to Part B. For example, it is less likely that retroactively applying Part B of the amendment would provide relief to violent offenders. This portion of the amendment relates to "zero-point offenders," who are those with no criminal history points. These are typically first-time offenders, and while it is certainly not always the case, MCCA members have reported that violent crime tends to be driven by repeat offenders. Furthermore, the amendment includes additional eligibility criteria that will help exclude violent and other serious offenders. For example, Part B does not apply to offenses involving violence, a firearm, or other dangerous weapon. Offenses that resulted in death or serious bodily injury, sex offenses, and hate crimes are also ineligible. Commission studies on recidivism have also demonstrated that "zero-point" offenders are significantly less likely to recidivate, even when compared to offenders with a single criminal history point.¹² That being said, the MCCA still does not believe Part B should be retroactive for many other reasons described earlier.

Conclusion

Ongoing evaluation and assessment of federal sentencing policy play an essential role in ensuring that these policies have the intended effect on crime and that America's criminal justice system remains fair and equitable. A different analytical lens, however, is required when determining whether a policy should be applied retroactively.

The criminal justice system requires some degree of finality, and as a result, the MCCA generally does not support retroactivity except in limited circumstances. Part A of the amendment does not contain sufficient guardrails to ensure that, if applied retroactively, it will not provide relief to violent offenders. Making Part A and Part B retroactive will also create logistical challenges and

¹¹ *Ibid.*, pg. 9.

¹² "Recidivism of Federal Offenders Released in 2010," pg. 27.

exacerbate ongoing issues with accountability in the criminal justice system. Finally, responding to the associated public safety impacts of retroactively applying these portions of the amendment will disproportionately fall to local law enforcement. For these reasons, the MCCA encourages the Commission not to make Parts A and B of the 2023 Criminal History Amendment retroactive.

Thank you again for the opportunity to appear before you today. The MCCA looks forward to continuing to work closely with the Sentencing Commission. I look forward to any questions you may have.