



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.<sup>1</sup> 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.

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<sup>1</sup> 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](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.<sup>2</sup> Assessing status points, according to the Commission, serves more than one purpose of sentencing, as the CLC observes.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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 . . . .”<sup>6</sup> 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

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.* at 4, 7.

<sup>5</sup> 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 . . .”).

<sup>6</sup> *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.<sup>7</sup> 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."<sup>8</sup> 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.'"<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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

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<sup>7</sup> See *supra* n.1 at 4-5.

<sup>8</sup> USSG §1B1.10, comment. (backg'd.)

<sup>9</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20110630_RF_Amendment_Retro_0.pdf).

<sup>10</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting_Minutes.pdf).

<sup>11</sup> 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](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.”<sup>12</sup> 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.<sup>13</sup>

**(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.”<sup>14</sup>

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

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<sup>12</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782_0.pdf).

<sup>13</sup> 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](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?”).

<sup>14</sup> *Id.* at 20 (Remarks of Judge Irene M. Keeley, Chair, Criminal Law Committee), [https://www.ussc.gov/sites/default/files/transcript\\_1.pdf](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.<sup>15</sup> 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.<sup>16</sup> Of defendants assessed status points between fiscal years 2017 and 2021, 32.7 percent were Black,<sup>17</sup> but only 20.5 percent of all defendants sentenced in that period were Black.<sup>18</sup> 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.<sup>19</sup>

FAMM appreciates that the Commission declined to make the recency amendments retroactive in 2010.<sup>20</sup> 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

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<sup>15</sup> *Supra* n. 1 at 9.

<sup>16</sup> 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>.

<sup>17</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf).

<sup>18</sup> 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>.

<sup>19</sup> *Supra* n. 16 at 21, Tbl. 3A.

<sup>20</sup> 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](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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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

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<sup>21</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/recency/20100901_Recency_Retro.pdf).

<sup>22</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=33).

<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> And, 7,795 people were deemed ineligible to benefit from Amendment 706 of the 25,736 who applied, or 30 percent.<sup>26</sup>

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).<sup>27</sup> In 2020, the federal prison population was 155,562.<sup>28</sup> 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,<sup>29</sup> 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

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<sup>24</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_DOJ.pdf).

<sup>25</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf).

<sup>26</sup> *Supra* n. 9 at Tbls. 1 & 9.

<sup>27</sup> 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>.

<sup>28</sup> Federal Bureau of Prisons, Past Inmate Population Totals, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) (last visited July 10, 2023).

<sup>29</sup> *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](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.<sup>30</sup> The Federal Public and Community Defenders reminded commissioners about the collaborative processes the parties adopted for earlier retroactivity efforts.<sup>31</sup> 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.<sup>32</sup> (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 . . . .”<sup>33</sup> The Commission nonetheless made the change retroactive. In 2011, the

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<sup>30</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=68).

<sup>31</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=43).

<sup>32</sup> *Supra* n. 22 at 6.

<sup>33</sup> 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](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](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.<sup>34</sup> 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.<sup>35</sup> It recognized that the exclusions it proposed were not a "perfect proxy for dangerousness," but argued they were nonetheless reasonable.<sup>36</sup> 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.<sup>37</sup> 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.

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<sup>34</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Stephanie_Rose.pdf).

<sup>35</sup> *Supra* n. 24 at 7.

<sup>36</sup> *Id.* at 9.

<sup>37</sup> 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 . . . .”<sup>1</sup> These considerations support retroactivity.

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<sup>1</sup> 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.”<sup>2</sup> Status points improve the predictive accuracy in only 15 of 10,000 defendants.<sup>3</sup> 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.<sup>4</sup>

### **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.<sup>5</sup> Those defendants were 15.5 percent less likely to reoffend than their one-point counterparts.<sup>6</sup> 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,<sup>7</sup> 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

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<sup>2</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220627_Status.pdf).

<sup>3</sup> *Id.* at 18.

<sup>4</sup> 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](https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf).

<sup>5</sup> *Supra* n. 4 at 52.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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

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.<sup>9</sup>

### **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.<sup>10</sup> 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.<sup>11</sup>

#### **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.<sup>12</sup> 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.<sup>13</sup> 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

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<sup>8</sup> 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>.

<sup>9</sup> *Supra* n. 4 at 53.

<sup>10</sup> *Id.* at 50.

<sup>11</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf).

<sup>12</sup> *Id.* at 18.

<sup>13</sup> *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.<sup>14</sup>

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.”<sup>15</sup> 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.<sup>16</sup>

**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.<sup>17</sup> Of defendants assessed status points between fiscal years 2017 and 2021, 32.7 percent were Black,<sup>18</sup> but only 20.5

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<sup>14</sup> *Supra* n. 8 at 4.

<sup>15</sup> 28 U.S.C. § 994(j)

<sup>16</sup> 18 U.S.C. 3553(a)

<sup>17</sup> *Id.*

<sup>18</sup> *Supra* n. 2 at 7.

percent of all defendants sentenced in that period were Black.<sup>19</sup> 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 criticism<sup>20</sup> and undermined confidence in the fair administration of justice and respect for the law.<sup>21</sup>

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."<sup>22</sup> 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."<sup>23</sup> 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."<sup>24</sup>

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<sup>19</sup> 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>.

<sup>20</sup> See, U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* at 2 & Appendix B (May 2007), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

<sup>21</sup> 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.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

<sup>22</sup> 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>.

<sup>23</sup> *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).

<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

**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.

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*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](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).

<sup>25</sup> *Supra* n. 8 at 9, 17.

<sup>26</sup> *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.<sup>27</sup>

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

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<sup>27</sup> *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