

## UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON RETROACTIVITY OF  
PARTS A AND B OF THE  
2023 CRIMINAL HISTORY AMENDMENT

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WEDNESDAY  
JULY 19, 2023

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The United States Sentencing Commission met in the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Washington, D.C. at 9:00 a.m. EDT, the Honorable Carlton W. Reeves, Chair, presiding.

## PRESENT:

CARLTON W. REEVES, Chair  
LUIS FELIPE RESTREPO, Vice Chair  
LAURA E. MATE, Vice Chair  
CLAIRE MURRAY, Vice Chair  
CLARIA HORN BOOM, Commissioner  
JOHN GLEESON, Commissioner  
CANDICE C. WONG, Commissioner  
JONATHAN J. WROBLEWSKI, Ex-Officio Member

## ALSO PRESENT:

KENNETH P. COHEN, Staff Director  
KATHLEEN C. GRILLI, General Counsel



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1 P-R-O-C-E-E-D-I-N-G-S

2 9:23 a.m.

3 CHAIR REEVES: Good morning. All  
4 right. And for you all to -- out there in TV  
5 land good morning too and you can shout back at  
6 your screen if you wish. I'm the chair of the  
7 United States Sentencing Commission, Carlton W.  
8 Reeves, and I welcome you all to this hearing.

9 I thank each of you for joining us  
10 whether you're in this room with us or attending  
11 via live stream. I have the honor of opening  
12 this hearing with my friends and fellow  
13 commissioners.

14 To my left we have Vice Chair Claire  
15 Murray, Vice Chair Laura Mate, and Commissioner  
16 Candice Wong. To my right we have Vice Chair  
17 Luis Felipe Restrepo, Commissioner Claria Boom,  
18 and Commissioner John Gleeson is not present in  
19 the room but he will be attending by phone and  
20 he'll -- hopefully we'll have his presence here  
21 this afternoon.

22 We're also joined by ex-officio

1 commissioner on the end there Commissioner  
2 Jonathan Wroblewski. I want to thank all of my  
3 fellow commissioners for their extensive  
4 contributions, their spirit of collaboration, and  
5 their dedication to our work. I'm honored to be  
6 sitting among such esteemed colleagues and  
7 friends.

8 We're also joined by Commission  
9 employees, some of whom are in this room, many of  
10 whom are not. They've done the research, they've  
11 drafted the policies, they have set up this room,  
12 and they -- and they have done so, so much, so  
13 much more to make this hearing possible, and I  
14 thank each of them.

15 On behalf of the commissioners and the  
16 public I thank all of our agency staff for the  
17 amazing work that they do every day. We value  
18 your public service.

19 When preparing these remarks I thought  
20 about what Congress said is the Commission's most  
21 important mission, to establish citizen policies  
22 and practices for the federal criminal justice

1 system that meets specific criteria.

2 Our policies must provide certainty  
3 and fairness in sentencing, including by avoiding  
4 unwarranted sentencing disparities and our  
5 policies are supposed to reflect advancement and  
6 knowledge of human behavior as it relates to  
7 criminal justice process.

8 The purpose of today's hearing speaks  
9 to our core mission of crafting sentencing policy  
10 that is fair and evidence based. In May, we  
11 unanimously voted to create policies that will  
12 change how criminal history affects the sentences  
13 of defendants.

14 Reflecting the latest research on  
15 effective criminal justice practices these  
16 policies will ensure defendants receive more just  
17 and evidence-based synthesis in the years to  
18 come.

19 Now we must decide whether people  
20 incarcerated under the old policies should get a  
21 chance to have their sentences revised in line  
22 with our new one.

1           In other words, today's testimony will  
2 help us decide whether to apply criminal history  
3 amendments to the sentencing guidelines  
4 retroactively.

5           Congress has told us to make this  
6 decision by examining a wide spectrum of views.  
7 To that end, we asked the public to provide us  
8 with their input. We received hundreds of  
9 comments from senators, judges, lawyers,  
10 religious leaders, doctors, professors,  
11 advocates, victims, families, concerned citizens,  
12 and incarcerated people.

13           Those comments are posted on our  
14 website as are the video -- videos and  
15 transcripts of the hearings we conducted on these  
16 amendments. I encourage the members of the  
17 public to read these comments and watch our prior  
18 hearings.

19           When those persons spoke to the  
20 Commission they were heard. We heard them say  
21 this decision of retroactivity is our chance to  
22 correct past wrongs and address the systemic

1       disparities that have plagued our society for far  
2       too long.

3                       We heard them say our decisions must  
4       weigh the needs of victims and survivors and we  
5       heard them say our decision can inject hope into  
6       the lives of those who will be eligible.

7                       Today these comments will be  
8       buttressed by testimony from a distinguished  
9       group of individuals. To all who are speaking  
10      with us today I promise that your extensive  
11      journeys and preparations will be worth it. When  
12      you speak to the Commission you will be heard and  
13      you will -- you will be read too as your  
14      testimony will be available for the public to  
15      access on our website, [www.USSC.gov](http://www.USSC.gov).

16                      Finally, I want to give our witnesses  
17      and the public some insight into how we  
18      commissioners will make our decisions about  
19      retroactivity. Many of the witnesses speaking  
20      today will talk about the costs of any decision  
21      we make.

22                      Let me reassure you, we take pains to



1 consider all these costs. We consider the time  
2 judges and their staffs will have to expend  
3 dealing with filings for reduced sentences. We  
4 consider the additional resources expended on  
5 reentry and supervision.

6 But we also consider the financial  
7 costs of continuing to incarcerate someone, which  
8 stands at roughly \$44,000 per person per year  
9 with the BOP, which is \$40,000 more than the  
10 annual cost of supervision and which also  
11 increases year after year after year.

12 And we consider costs that has little  
13 to do with docket sizes or dollars and cents --  
14 the moral price of incarcerating someone for  
15 longer than is necessary, for longer than is  
16 just.

17 As my former colleague, Judge George  
18 Hazel, so aptly put it, liberty is the norm.  
19 Every moment of incarceration should be  
20 justified. Whatever decision the Commission  
21 makes on retroactivity I promise it will reflect  
22 every cost, every benefit, and every perspective

1 we hear about today.

2 Panelists, you will have -- you will  
3 each have five minutes to speak. We will have  
4 read your written submissions, and to the member  
5 of the -- to the members of the public, those who  
6 are watching, I encourage you to read that  
7 testimony.

8 Again, it is on the website. Read  
9 their statements. It is that -- those statements  
10 are on the website, again, at [www.USSC.gov](http://www.USSC.gov).

11 I implore you to read these documents,  
12 to read this information in addition to the  
13 statements that are posted. I remind you that  
14 the public comments are also posted. They're  
15 posted there on the website.

16 We have also performed an impact  
17 analysis on the retroactive application of Parts  
18 A and B of the 2023 Criminal History Amendments.  
19 It is on the website. Please read it.

20 Also, this is directed to the public  
21 again. If you would like to receive updates on  
22 future events of this Commission or other

1 Commission or all of our Commission activities  
2 visit us on Twitter.

3 Unless you get that message that says  
4 rate limit exceeded visit us there on Twitter or  
5 contact us directly. You may subscribe to our  
6 email and receive email updates. Any questions  
7 you may present to us by email,  
8 pubaffairs@USSC.gov, or you may call us 202-502-  
9 4597.

10 Now, returning to our panelists, your  
11 time will begin when the light turns green. You  
12 have one minute left when it turns yellow and no  
13 time left when it turns red.

14 If I cut you off please understand I'm  
15 not being rude as we have so much to cover today  
16 and a limited time to hear from everyone. For  
17 our audio system to work you will need to speak  
18 closely into the microphones, and the weather  
19 isn't the only thing that's hot.

20 It's not as hot as it was yesterday,  
21 I don't think, because we have got a little rain.  
22 But it's been hot all of over here but these mics

1 are even hotter.

2           So please make sure -- make sure you  
3 understand that these mics are hot. So be  
4 warned. Again, when you speak to the Commission  
5 you will be heard but you're likely to be heard  
6 by everyone in America. So just be careful.

7           When all the panelists have finished  
8 speaking the commissioners may ask each of you  
9 questions. I'm certain we will do so. Thank you  
10 for joining us, and I look forward to a very  
11 productive hearing.

12           Our first panel is made up of -- and  
13 I would like to introduce our first panelists who  
14 will present the executive branch's perspective  
15 on retroactivity.

16           We have with us the Honorable Kevin G.  
17 Ritz, who serves as a United States Attorney for  
18 the Western District of Tennessee. He's close  
19 enough to be my homeboy. He's in Memphis.

20           Mr. Ritz was previously an assistant  
21 United States Attorney in the Western District of  
22 Tennessee for 17 years. He has held various

1 leadership positions in the office including  
2 serving as appellate chief and special counsel  
3 for over a decade.

4 Mr. Ritz has twice served on the  
5 Department of Justice's Appellate Chiefs Working  
6 Group. Mr. Ritz, when you are ready. We are  
7 ready when you are, sir. Thank you.

8 MR. RITZ: Good morning, honorable  
9 Chair Reeves, vice chairs, and commissioners. My  
10 name is Kevin Ritz and I serve as the United  
11 States Attorney for the Western District of  
12 Tennessee.

13 Thank you for the chance to discuss  
14 the department's views on retroactive application  
15 of Parts A and B of the Criminal History  
16 Amendment.

17 The department understands the  
18 Commission's interest in leniency for first time  
19 offenders and appreciates the concerns animating  
20 the status point amendment but we oppose  
21 retroactivity of both parts.

22 When evaluating retroactivity the

1 guidelines instruct the Commission to consider  
2 the purpose, the magnitude of the change, and the  
3 difficulty of retroactive application.

4 Each of these factors counsels against  
5 retroactivity here. The Commission has  
6 traditionally viewed retroactivity as the  
7 exception and not the rule. This is because  
8 finality in judgments is essential to the  
9 operation of our criminal justice system ensuring  
10 justice for victims and defendants.

11 Historically, the Commission has  
12 reserved retroactivity for amendments that strive  
13 to correct a systemic wrong and we have supported  
14 it in those instances including the 2011  
15 amendment that reduced crack cocaine penalties.

16 But this criminal history amendment  
17 does not correct systemic failures. It instead  
18 facilitates efficient guideline operation,  
19 reflects recent commissioned studies on  
20 recidivism, and accounts for variances and  
21 departure rates.

22 The amendment results in a minor

1 downward adjustment that Congress did not intend  
2 for retroactive application. These factors  
3 weighed against retroactivity of the recency  
4 amendments in 2010 and they do so again here.

5 Congress also recognized that  
6 evaluating retroactivity involves balancing the  
7 burden on the courts and the magnitude of the  
8 change. Here the magnitude of the change is  
9 small.

10 While any sentencing reduction is  
11 significant to the person serving that sentence,  
12 the status point amendment at best would result  
13 in one criminal history category reduction, which  
14 is generally equivalent to a one offense level  
15 reduction. That's the smallest the Commission  
16 can make via the amendment.

17 The zero point offenders amendment  
18 similarly has a minor effect, resulting in a two  
19 offense level reduction. Thus, the magnitude of  
20 the change is small and retroactivity would  
21 contravene congressional intent and Commission  
22 precedent.

1           The burden on the courts and the  
2 criminal justice system, on the other hand, would  
3 be significant, which is why all the judges who  
4 publicly commented on the amendment also oppose  
5 retroactivity.

6           The Commission estimates that there  
7 are potentially more than 85,000 individuals in  
8 the Bureau of Prisons who were assigned status  
9 points or had zero points. Past experience has  
10 shown that most if not all of these individuals  
11 will move for a sentence reduction.

12           While the Commission estimates that  
13 only a fraction may ultimately be eligible 85,000  
14 defendants is more than half of those who are in  
15 custody of the Bureau of Prisons.

16           Processing these motions would more  
17 than double the sentencing work done by the  
18 system including prosecutors, courts, defense  
19 attorneys, probation, and the BOP in a given  
20 year.

21           Additionally, the Commission's numbers  
22 underestimate the number of potentially eligible



1 defendants. That's because the new exclusionary  
2 criteria introduce novel legal concepts that will  
3 require additional fact finding and litigation.  
4 Retroactivity here would be, in the words then  
5 Commissioner Howell, administratively burdensome  
6 to the point of impracticality.

7           There is also a public safety concern.  
8 Defendants with status points have already  
9 recidivated while under a prior criminal justice  
10 sentence and are likely to recidivate again.

11           The majority are in criminal history  
12 categories four, five, and six and many committed  
13 serious or violent crimes. Part B has limiting  
14 criteria but still applies to many serious  
15 offenders. It sweeps in public corruption,  
16 national security offenses, and serious economic  
17 and corporate crimes.

18           The amendment rewards those who  
19 violated a position of public trust and it  
20 benefits many white collar defendants, resulting  
21 in greater inequities.

22           Finally, retroactivity poses both

1 operational and reentry concerns. Retroactivity  
2 would interrupt transition planning for the BOP  
3 and increase burdens on probation.

4 In sum, public safety risks, the  
5 purpose of the amendment, the limited magnitude  
6 of the changes, the significant burden on the  
7 system, and the Commission's own precedent all  
8 counsel against retroactive application of these  
9 amendments.

10 The department appreciates the  
11 opportunity to provide our view and looks forward  
12 to continuing our work with you. I look forward  
13 to your questions.

14 CHAIR REEVES: Thank you, Mr. Ritz.  
15 I turn to my colleagues. I'll open the door to  
16 anyone who wants to jump in first.

17 COMMISSIONER WONG: May I? Mr. Ritz,  
18 one of the other commenters that favored  
19 retroactivity noted that districts already have  
20 systems in place for handling post-conviction  
21 matters, including U.S. Attorneys offices.

22 I was wondering if from the

1 department's perspective having estimated that  
2 close to 85,000 inmates may potentially move for  
3 relief should this be made retroactive, whether  
4 you think as a U.S. attorney that you already  
5 have sufficient staffing or resources devoted to  
6 handling that burden and, if not, whether you  
7 foresee some kind of increase in support staff or  
8 prosecutors.

9 MR. RITZ: We do not have it on hand  
10 and I came to this role after being appellate  
11 chief for 12 years and managed all response to  
12 prior amendment cycles.

13 Safe to say we created ad hoc systems  
14 in each of those circumstances. I think that's  
15 fair to say, at least in our district. The same  
16 happened for the probation office in our public  
17 defender's office as well.

18 I don't anticipate -- at least it  
19 didn't happen before -- that we get additional  
20 resources. The last time these things happened  
21 we diverted other resources to this task -- this  
22 very important task of sorting through these

1 motions and figuring out who was eligible and  
2 whether a reduction was warranted.

3 I happen to think our AUSAs are doing  
4 important work and so that is a significant  
5 burden on us. I guess what I would also say is  
6 it's a significant burden on the system and we do  
7 think the right number to focus on and to be  
8 clear eyed about is the 85,000 number and our  
9 experience -- past experience taught us that any  
10 individual in this circumstance with status  
11 points or zero point offenders is going to move  
12 and I think no one in this room would begrudge  
13 those individuals for filing a motion and seeing  
14 what happened, right, and seeing how the system  
15 worked it through.

16 But the -- it's a big burden. We did  
17 it in the past. Frankly, I'm proud of how we  
18 handled these things in the past and I can speak  
19 for other U.S. attorneys around the country. We  
20 did a good job and that's -- we, not just us but  
21 our public defender colleagues, our probation  
22 office, court staff, BOP.

1                   We did what it took. But the fact  
2 that it happened before does not mean that it was  
3 not a significant burden and would not be again.

4                   VICE CHAIR MURRAY: Thanks, Mr. Ritz.

5                   In your papers the department's  
6 fallback position is that if we do vote in favor  
7 of retroactivity that we delay implementation for  
8 nine months and I'm interested in how you arrived  
9 at that number.

10                  In the past we have sometimes delayed  
11 for six months, sometimes for a year. Was there  
12 a magic to nine months here?

13                  MR. RITZ: I don't think there was a  
14 magic, Commissioner, but it was certainly a  
15 result of the decision making process, which  
16 folded in the views of the various department  
17 components.

18                  The department contains multitudes and  
19 a multitude of viewpoints and BOP was a piece of  
20 that, and it's safe to say BOP had concerns about  
21 how much time it would take to run up and to  
22 implement this.

1           Usually their processes start about  
2 180 days before a release date. There's a  
3 shortage, as I understand, and there's already a  
4 strain on reentry and transitional housing  
5 resources.

6           So short answer there's no magic but  
7 we did consider six months. We did consider a  
8 year. Landed on nine months is what we thought  
9 would be a fairly comfortable time period. But  
10 it is a fallback position.

11           CHAIR REEVES: Let me ask you, you've  
12 been in the U.S. Attorneys Office 17 years. So  
13 you've seen the past retroactive amendments and  
14 you indicated that we are a bit ad hoc sort of  
15 ways in which you've dealt with prior  
16 retroactivity procedures.

17           Could you tell me what you -- what  
18 your district specifically did to accommodate the  
19 drugs minus two and the other -- crack  
20 retroactive?

21           MR. RITZ: Yes, Commissioner, it was  
22 -- essentially we did -- and this is just us.

1 We're a medium sized office, and we had one AUSA  
2 who essentially dedicated to that full time for a  
3 matter of not weeks but months and then many  
4 other AUSAs picked up cases, especially if they  
5 were their cases originally.

6 What we run into, you know, all the  
7 various ways in which we have been revisiting  
8 criminal justice -- federal sentences over the  
9 past several years is a lot of times it's a brand  
10 new group of people that are picking these cases  
11 up.

12 It's a different judge, a different --  
13 certainly a different AUSA, a different defense  
14 attorney. And so that kind of builds in a piece  
15 of the burden.

16 But, essentially, I think the public  
17 defenders also did the same. The probation  
18 office did the same and our district kind of had  
19 a point of contact and those people went through  
20 case by case.

21 I will say one aspect of it that I'm  
22 not sure is reflected in the papers that have

1       been presented to this Commission is, yes, the  
2       public defenders played a role in our district  
3       and did an excellent job as they always do.

4                But the cases that they handled, at  
5       least for our district, were the cases on the  
6       list -- essentially, the list that was provided  
7       of who might be eligible and so they would enter  
8       a notice for those cases.

9                What we saw and what the court saw  
10       were a whole pie and that included pro se  
11       motions, motions by offenders that were not on  
12       that list but thought maybe they would move for  
13       relief and maybe they had a good faith basis for  
14       thinking that.

15               Trying to think if there was another  
16       aspect of that, Commissioner. I would say the  
17       BOP was involved. We usually always get the BOP  
18       records. That takes some time to kind of see how  
19       this individual has spent their time in custody.

20               And I guess the last -- the last point  
21       I'll say about that process, which I'm also not  
22       sure is reflected in the submissions, is it



1 actually can be difficult to recreate or create  
2 for the first time a sentencing record.

3 If there was no appeal, for example,  
4 there's typically not going to be a sentencing  
5 transcript. So there's a little bit of time and  
6 effort that goes into that and trying to figure  
7 those things out. And so those are -- that's an  
8 aspect that I hope that's responsive in  
9 describing how our district handled it.

10 CHAIR REEVES: You would agree,  
11 though, that the presentence report actually  
12 would be a good reference point and a starting  
13 point on analyzing anything about the conduct of  
14 the defendant during the course of the crime?

15 MR. RITZ: A hundred percent,  
16 Commissioner, and the presentence report along  
17 with the statement of reasons is the starting  
18 point. It was often not the ending point and I  
19 think that's fair to say.

20 CHAIR REEVES: Okay. Thank you.

21 COMMISSIONER BOOM: Good morning, and  
22 thank you for your submission. I'm your neighbor

1 as well, just your neighbor to the north.

2 My question goes to the burden  
3 argument and I was curious about the department's  
4 position. The department believes just about  
5 every one of the folks who -- of the 85,000 who  
6 meet some parts of the criteria but all of them  
7 will file motions.

8 Other panelists who we have heard from  
9 or will hear from later today argue that in the  
10 past only about 20 to 30 percent of all the  
11 motions that are filed are by folks who are  
12 ineligible and so I would like for you to sort of  
13 speak to that and then explain why you think in  
14 this situation it would be closer to 85,000.

15 MR. RITZ: I would say first that was  
16 not our experience and I think the numbers bear  
17 it out that it would be more than 20 to 30  
18 percent, maybe not on drugs minus two but on some  
19 of the other cycles.

20 I don't have those precise numbers in  
21 front of me. I can just tell you in our  
22 experience we dealt with a large portion of

1 people who were -- ended up not being eligible  
2 but moved.

3           And I think, again, I want to be  
4 clear, I don't think we or anyone here would  
5 begrudge an individual with status points or who  
6 had zero points filing a motion and I think  
7 that's another piece of this that might be a  
8 little different is actually a little -- it's a  
9 little less mechanical than the drugs minus two.  
10 It's a little more involved to understand, okay,  
11 if you're eligible would that actually affect --  
12 would the decrease in criminal history points  
13 affect the criminal history category.

14           It would not always affect that  
15 because sometimes it would just mean you're just  
16 still in the same category. There is also -- and  
17 we ran into this the last couple of cycles as  
18 well -- situations like the career offender  
19 enhancement that comes into play and so you have  
20 to sort out whether that is what set the offense  
21 level or the criminal history category as opposed  
22 to -- as opposed to the circumstances of the

1 offense. So I hope that's responsive.

2 CHAIR REEVES: Vice Chair Murray?

3 VICE CHAIR MURRAY: So I know in 2011  
4 the department advocated for some carve outs for  
5 people -- offenders with gun enhancements, for  
6 example. You haven't advocated, you know, a  
7 fallback position here for carve outs.

8 Are there carve outs that would  
9 mitigate some of the department's concerns about  
10 public safety? I know, for example,  
11 retroactivity of status points would put over  
12 1,100 firearms offenders back on the streets in  
13 the first year.

14 Are there carve outs that are  
15 particularly concerning to you that we should  
16 consider?

17 MR. RITZ: We have not. Our official  
18 position is you should not be made retroactive.  
19 We have not adopted a fallback position on that  
20 front and on the dimension of whether  
21 retroactivity should be limited to only certain  
22 offenders.

1 I will say -- we do highlight it on  
2 materials and I'll highlight here -- that there  
3 are a lot of violent offenders that are swept in  
4 here -- the firearms offenders, robbery, there's  
5 also child exploitation.

6 Child pornography offenses are swept  
7 in. And then on the Part B side, as we said,  
8 national security offenses, offenses committed by  
9 people who abused a position of trust.

10 So those are particularly concerning.  
11 We flagged them as reasons for nonretroactivity  
12 as a general sense. I guess in a very, very high  
13 level -- and I don't want to speak out of school  
14 out of what I'm authorized to say -- we're  
15 against retroactivity.

16 So any -- if there was a spectrum  
17 between nonretroactivity and full retroactivity  
18 and there was somewhere in between that we'd  
19 prefer that then to the full retroactivity.

20 COMMISSIONER WONG: I wonder if we  
21 might take advantage of your experience as a  
22 former appellate litigator, but are there -- you

1 described some of the application here as less  
2 mechanical than some changes in the past.

3 I'm wondering if there are follow-on  
4 legal issues that you could foresee where the  
5 change involves a change to criminal history  
6 category as opposed to sort of a reduction in  
7 offense level, for instance, with the safety  
8 valve, you know, or, you know, implicating.

9 As you know, there's currently a  
10 circuit split on the application of the safety  
11 valve. Just if you have sort of a crystal ball  
12 here on some of the legal issues that could be  
13 litigated.

14 MR. RITZ: I appreciate the question.  
15 I would say the safety valve is a great example.  
16 The probation officer's submission here flagged  
17 that and I thought that was appropriate to flag  
18 that the reduction in criminal history points  
19 might lead to the safety valve coming into play  
20 in a way that it was not considered at the  
21 initial sentencing, and as we all know there are  
22 lots of other aspects to the safety valve that

1 would then need to be considered.

2 I think that's a complicating factor  
3 that is easy to foresee if Part A was -- would be  
4 made retroactive. Another is that career  
5 offender issue that I flagged.

6 As we all know, the career offender  
7 provision itself has been a moving target for the  
8 last 10 or 15 years on a violence or controlled  
9 substance offense.

10 We definitely ran in the last time  
11 through situations where we were arguing and  
12 litigating over, well, do we consider whether the  
13 career offender provision is still applicable or  
14 not, right, for a drug offender, for example.

15 And I guess the last thing I'd say --  
16 or two more things. One is, you know, the  
17 appellate piece of this I would like to flag  
18 before my time expires because it is not just a  
19 burden -- retroactivity imposes not just a burden  
20 on the district courts, a burden on the appellate  
21 courts and I'm in a circuit where every appeal  
22 from one of these motions or one of the

1 adjudication of these motions requires full  
2 briefing.

3 And as we all know, the courts of  
4 appeals saw lots of litigation even on the past  
5 fairly mechanical drugs minus two in the prior  
6 amendments.

7 Lots of litigation. There were  
8 actually Supreme Court cases, as we know, about  
9 these issues. So sometimes they're foreseeable  
10 and sometimes they're not.

11 The last thing I'll say is on Part B,  
12 and we have made this, I think, clear in our  
13 materials, we do -- we're very concerned about  
14 some of the exclusionary criteria that are set  
15 out in Part B, that there's going to be extensive  
16 litigation over those criteria, some of which are  
17 kind of new phrases to understand and litigate  
18 and interpret.

19 CHAIR REEVES: Anyone else has -- I'll  
20 ask one other question then since we have this  
21 time.

22 Irrespective of, I guess, one of the



1 things that I've sort of expressed to others in  
2 other comments courts have to deal with filings  
3 that are made every day in every situation. The  
4 keys of the courthouse are open and there's  
5 nothing to stop people from filing cases that  
6 have merit, nothing to stop them from filing  
7 meritless cases, and certainly nothing stops an  
8 appeal from going forward.

9 So how do we account -- how can we  
10 account for that? Should we be concerned about  
11 this increase of cases that might be filed when  
12 they can be filed anyway whether --

13 MR. RITZ: Yes is the short -- you can  
14 be and you should be and it's not just because  
15 the department is saying so but it's because  
16 that's one of the three key factors that the  
17 Commission's commentary says to consider is the  
18 burden and the difficulty on the system.

19 And so it is -- it is a significant  
20 burden and we do believe that 85,000 is the right  
21 number to focus on as opposed to the smaller --  
22 much smaller numbers of people who might be

1 eligible, at the end of the day. I think that's  
2 how I would respond to that.

3 CHAIR REEVES: Okay. Thank you, sir.  
4 I appreciate it. Any other questions for Mr.  
5 Ritz?

6 Well, thank you, sir, for your  
7 testimony. We certainly appreciate you. Hope  
8 you have a safe trip back to Memphis.

9 MR. RITZ: Thank you for the -- thank  
10 you so much. Thank you.

11 CHAIR REEVES: All right.

12 Our second panel, ladies and  
13 gentlemen, provides us with the perspective of  
14 criminal law practitioners on this issue. First  
15 -- and I hope I do not butcher your name -- I  
16 hope so -- we have Sapna Mirchandani -- thank you  
17 -- who serves as an assistant public defender in  
18 the District of Maryland.

19 There she handles appeals to the  
20 Fourth Circuit Court of Appeals. Over the past  
21 15 years she has managed the office's retroactive  
22 sentencing projects including for amendments that

1 reduced the basic offense level for crack cocaine  
2 offenses, gave retroactive effect to the Fair  
3 Sentencing Act guidelines, and reduced the base  
4 offense level for all drug offenses.

5 Second, we have Patrick Nash, who  
6 serves as vice chair of the Commission's  
7 Practitioners Advisory Group. With 30-plus years  
8 of legal experience his practice focuses on  
9 complex criminal defense with a particular  
10 emphasis on federal matters.

11 Mr. Nash is the current coordinator of  
12 all attorneys in the Eastern District of Kentucky  
13 who contract with the court to provide defense  
14 services for indigent defendants.

15 Over the years he has served on a wide  
16 variety of criminal law related committees such  
17 as the United States Courts Defender Services  
18 Advisory Group, the United States Court of  
19 Appeals for the Sixth Circuit Advisory Committee  
20 on Local Rules, and the Sixth Circuit's committee  
21 on adding criminal jury instructions.

22 Finally, we have Steve Wasserman, who

1 serves as president of the National Association  
2 of Assistant United States Attorneys.

3 The association represents more than  
4 6,000 federal prosecutors and civil attorneys  
5 across the country. Mr. Wasserman serves as an  
6 assistant United States Attorney in the District  
7 of Columbia where he has spent the last 13 years  
8 prosecuting violent and drug-related offenses.

9 Ms. Mirchandani -- thank you. I'm  
10 sorry. We are ready to hear from you.

11 MS. MIRCHANDANI: Thank you, Chair  
12 Reeves, co-chairs, and commissioners. On behalf  
13 of federal, public, and community defenders we  
14 support applying the 2023 Criminal History  
15 Amendment retroactively and we ask that you do so  
16 without delay.

17 CHAIR REEVES: I'm sorry. Could you  
18 bring your mic a little closer and speak up? We  
19 want to make sure everyone hears your thought  
20 provoking words.

21 MS. MIRCHANDANI: Okay. I've worked  
22 as an assistant federal public defender in the

1 District of Maryland for nearly two decades where  
2 I've managed my office's retroactivity work on  
3 amendments 706, 750, and 782.

4 Thanks to the Commission's bold action  
5 in making those amendments retroactive we helped  
6 secure reduced terms for hundreds of people  
7 serving unduly harsh sentences.

8 My former clients have been extremely  
9 grateful for the second chance and they have  
10 flourished. This afternoon you'll get to hear  
11 from one of them. Bernard Gibson, Jr., had no  
12 criminal history. Yet, in 1997 he received a 27-  
13 year sentence for a nonviolent drug offense.

14 Fortunately, through drugs minus two  
15 his term was reduced to 22 years. Like the drug  
16 amendment drug minus two this year's Criminal  
17 History Amendment is the result of the  
18 Commission's diligent and data-driven work.

19 The data showed that two metrics used to  
20 compute criminal history scores over the last 35  
21 years was flawed due to the original Commission's  
22 assumptions about recidivism that have been

1 proven not true.

2 With the empirical evidence in hand  
3 the Commission fixed the guidelines. Now it has  
4 the power and the opportunity to allow courts to  
5 take a second look at cases where the flawed  
6 guideline form the basis for sentencing.

7 Turning to those cases, I have to  
8 admit that when I saw the demographics of who  
9 will qualify for retroactive relief it really  
10 surprised me, although it shouldn't have.

11 The vast majority of recipients are  
12 Black and Hispanic. The racial disparities are  
13 striking and look very similar to those that  
14 existed when the Commission retroactively applied  
15 drugs minus two.

16 Even though the criminal history  
17 guideline, like the drug guideline, was neutral  
18 on its face it's a reflection of the profound  
19 unfairness of our criminal justice system which  
20 communities -- where communities of color have  
21 borne the brunt of over policing and unduly harsh  
22 punishments.

1                   Retroactive application of the  
2 Criminal History Amendment would be one small  
3 step toward restoring a sense of fairness to the  
4 system.

5                   In my opinion, we owe that not only to  
6 the more than 18,000 people already serving  
7 unduly long terms but to their children, their  
8 partners, their parents, and their communities,  
9 all of whom suffer in their absence.

10                  Retroactivity will temporarily result  
11 in additional work but it is manageable and it is  
12 worth the effort. We have learned valuable  
13 lessons through each of the three prior  
14 retroactivity cycles.

15                  We know how to prioritize motions, we  
16 know how to efficiently resolve cases, and we  
17 often do so collaboratively with prosecutors.  
18 And we have already completed much, much larger  
19 projects including drugs minus two.

20                  Compared to that we now -- we know  
21 that two-thirds of all districts dealing with  
22 retroactivity will have fewer than 200 cases

1 each, which is very small in the big scheme of  
2 things.

3 We ask that the Commission not impose  
4 any delay in making the amendment retroactive.  
5 Considering the magnitude for relief, which will  
6 be around 14 or 15 months, even a short delay  
7 would eat away at valuable time our clients could  
8 be spending in their communities.

9 The formerly incarcerated witnesses  
10 who testify this afternoon will attest that that  
11 is not minor time. It is real time, and as Chair  
12 Reeves said earlier in his opening remarks,  
13 liberty is the norm.

14 So even a single day of incarceration  
15 beyond what is necessary violates this letter and  
16 spirit of 3553(a). Plus, based on my personal  
17 experience managing three projects over the last  
18 15 years the delay is not needed. We are in a  
19 very different place today than we were during  
20 those cycles.

21 We have noticed a shift in the BOP's  
22 release planning, possibly as a result of the



1 First Step Act. But now my clients are generally  
2 asked to submit release plans roughly 18 months  
3 before release.

4 Previously with the drug amendment  
5 they started release planning six months before  
6 release. But now it's 18 months and the  
7 additional lead time with the previous amendments  
8 was needed so that probation officers could  
9 approve release plans, provide transitional  
10 services.

11 But today with the longer pipeline of  
12 release those steps have already been completed -  
13 - are likely to have already been completed more  
14 than a year before release and we can begin  
15 preparations now during the three and a half  
16 month period before -- that's already built in  
17 before the amendment goes into effect November  
18 1st.

19 In closing, the Commission's data  
20 shows us that some guideline ranges were tainted  
21 by false assumptions about recidivism and the  
22 impact of those harsher terms landed

1 predominantly on Black and Hispanic individuals.

2           These -- we -- federal defenders urge  
3 the Commission to use its authority to fix the  
4 errors retroactively and without delay. I'm  
5 grateful for the opportunity to share defenders'  
6 views with the Commission and I welcome any  
7 questions.

8           CHAIR REEVES: Thank you.

9           Mr. Nash?

10           MR. NASH: Good morning. May it  
11 please the Commission and my fellow panelists, my  
12 name is Patrick Nash. I'm from Lexington,  
13 Kentucky, and I'm the vice chair of the  
14 Practitioners Advisory Group.

15           Our group consists of one practitioner  
16 from each of the 12 circuits. We also have three  
17 at-large Commission members and have a chair and  
18 a vice chair. So there's 17 of us on our group,  
19 and it is our position and our recommendation  
20 that both Parts A and B be applied retroactively  
21 by this Commission.

22           Above all, we believe that this is a

1 matter of fairness. We have numerous individuals  
2 who have received potentially greater than  
3 necessary sentences because of status points,  
4 overly lengthy sentences because they were in  
5 fact zero point offenders, and in each of these  
6 situations we believe that allowing district  
7 courts to have the opportunity to correct these  
8 sentences is fair and it fully -- allows them to  
9 fully comply with the very first directive of  
10 Section 3553, which is to impose a sentence that  
11 is sufficient, of course, but not greater than  
12 necessary.

13           It's also a matter of fairness because  
14 retroactive application of these guidelines would  
15 promote respect for the law and respect for our  
16 criminal justice system.

17           As practitioners all too often we  
18 realize that our clients and their families have  
19 a very low opinion of the system and have a very  
20 low opinion of how the criminal justice system  
21 works.

22           But this is an opportunity. It's an

1 opportunity for this Commission to demonstrate  
2 that when we find a problem we fix it and we fix  
3 it for everyone.

4 We don't just fix it for those who  
5 have the good fortune to have their cases come at  
6 the right time, and we also fix it even if it  
7 means some additional work. Leaving behind  
8 between 18,000 and 19,000 people who may have  
9 overly lengthy sentences will not engender  
10 respect for our system.

11 But applying this retroactively and  
12 working hard to do so that will serve to increase  
13 confidence in the system and increase confidence  
14 and respect for the law.

15 But perhaps most fundamentally this is  
16 an opportunity for the Commission to have a real  
17 positive impact on thousands of lives and not  
18 just the thousands of lives of the individuals  
19 who are incarcerated who can potentially adjust  
20 their sentences but the thousands upon thousands  
21 of lives of their family members and their loved  
22 ones.

1 All of these people because of  
2 fairness will have the chance to restart their  
3 lives, rebuild their lives, and rebuild their  
4 families.

5 As to the magnitude of the change, our  
6 group feels like it's right in the sweet spot.  
7 It's not too large of a group to be unmanageable.

8 The numbers we're talking about here,  
9 between 18,000 and 19,000 individuals who will be  
10 eligible for retroactive application, those  
11 numbers are in line with previous amendments that  
12 were retroactive.

13 But it's also not so small of a group  
14 as to be minor and the extent of the potential  
15 reduction, the average reduction being between 14  
16 and 15 months potentially, is also not minor but  
17 is significant and it's a significant change for  
18 those people that are impacted.

19 As for the difficulty of application,  
20 this will take some work but it's not an  
21 overwhelming amount of work and us practitioners,  
22 whether we be private attorneys or whether we be

1 appointed under the Criminal Justice Act, we  
2 stand ready to shoulder the burden of much of  
3 that work.

4 We work and interact closely with our  
5 clients. We explain to those clients who are  
6 ineligible why they are ineligible. We manage  
7 the expectations of the clients who are eligible.

8 We work hand in hand with the United  
9 States Attorney's Office and the probation office  
10 to try to reach consensus where possible and we  
11 streamline our presentations to the court when  
12 agreement is not possible.

13 There are almost 19,000 people that  
14 will be eligible for reductions. That's smaller  
15 numbers than some of the previous retroactive  
16 amendments. The administrative burden here will  
17 be manageable.

18 So for all of these reasons the 17  
19 members of our group recommend full retroactivity  
20 for both Parts A and B.

21 CHAIR REEVES: Thank you, Mr. Nash.

22 Mr. Wasserman?

1 MR. WASSERMAN: Good morning,  
2 commissioners. My name is Steven Wasserman. I'm  
3 a current AUSA in Washington, D.C., and I'm here  
4 today speaking in my capacity as president of the  
5 National Association of Assistant United States  
6 Attorneys that represents the interests of over  
7 6,400 AUSAs working in our 94 U.S. Attorneys  
8 Offices.

9 My statements made today do not  
10 represent the Department of Justice or my U.S.  
11 Attorney and also opposes the proposal to make  
12 the Commission's Criminal History Amendments  
13 applicable to status points and zero point  
14 offenders retroactive.

15 These reforms are fundamentally  
16 antithetical to the sentencing guideline's  
17 progressive sentencing regime and should not be  
18 extended retroactively. The sentencing  
19 guidelines are intended to further the basic  
20 purposes of criminal punishment, deterrence,  
21 incapacitation, just punishment, and  
22 rehabilitation.

1           To do this the introductory commentary  
2 to Part A of Chapter 4 makes clear that one of  
3 the main purposes of the guidelines is  
4 recognizing that, quote, "a defendant with a  
5 record of prior criminal behavior is more  
6 culpable than a first offender and thus deserving  
7 of greater punishment."

8           Offenders who have committed new  
9 offenses while under a criminal justice sentence  
10 are by definition recidivists. The underpinnings  
11 of the status point amendment and the proposal  
12 for retroactive application ignore this reality.

13           Part A eliminates status points  
14 entirely for offenders with six or less criminal  
15 history points. Under Section 4(a) 1.1A a prior  
16 felony conviction in which the offender is  
17 sentenced to more than one year of imprisonment  
18 results in three criminal history points.

19           Thus, under the proposed amendment an  
20 offender could be convicted of two three-point  
21 felony offenses and receive no status points.

22           This runs counter to the fundamental



1 purpose set forth in Chapter 4 to establish a  
2 sentencing regime with escalating consequences  
3 for repeat offenders.

4 While the Commission has argued that  
5 the status points do not effectively predict  
6 likelihood of rearrest, relying on this to  
7 significantly curtail the use of the status  
8 points misunderstands their purpose.

9 In addition to predicting future  
10 recidivism status points acknowledge current  
11 recidivist tendencies and provide proportional  
12 punishment.

13 In fact, the Sentencing Commission's  
14 own impact study established that most offenders  
15 who receive status points are in criminal history  
16 category three before adding status points and  
17 with the average offender who receives status  
18 points had at least seven criminal history points  
19 before receiving status points, meaning that  
20 these offenders fell within criminal history  
21 category four.

22 These are offenders who already had

1 multiple prior criminal convictions counted under  
2 Chapter 4 and thus were not timed out.

3 Accordingly, these offenders have already  
4 demonstrated that they are recidivists who do not  
5 respect the law and are more likely to reoffend.

6 The average sentence imposed on  
7 offenders eligible for sentencing reductions with  
8 retroactivity also indicates the severity of  
9 their criminal conduct.

10 The average sentence of eligible  
11 offenders under the status points amendment was  
12 120 months or 10 years. These are offenders who  
13 engaged in serious criminal conduct including  
14 over 4,600 offenders convicted of drug  
15 trafficking offenses, over 2,300 convicted of  
16 firearms offenses, and over 1,300 convicted of  
17 robbery.

18 Providing retroactive sentencing  
19 adjustments to these offenders will result in  
20 more crime and fails to sufficiently recognize  
21 the sentencing factors of punishment and  
22 deterrence under 18 U.S. Code Section 3553(a).

1                   Part B that addresses zero point  
2 offenders is similarly problematic. This  
3 provision creates a windfall to white collar  
4 defendants.

5                   Here, too, the average sentence of  
6 eligible offenders indicates the severity of the  
7 criminal conduct committed by those eligible for  
8 the adjustment under the proposal.

9                   The average eligible offender received  
10 a sentence of 85 months, or seven years. A  
11 significant portion of eligible zero point  
12 offenders have also been convicted of violent and  
13 dangerous offenses including manslaughter, drug  
14 trafficking, and sex offenses.

15                   Retroactive application of sentencing  
16 adjustments to sentences that are not  
17 unconstitutional or otherwise patently unjust  
18 should be done sparingly.

19                   The rule of law relies on finality and  
20 predictability. Making sentence adjustments  
21 under the Criminal History Amendments applied  
22 retroactively undermines these values.

1                   Accordingly, the Sentencing Commission  
2 should proceed with caution when making such  
3 decisions, particularly where public safety is  
4 likely to be negatively impacted.

5                   We also have significant concerns that  
6 making the amendments retroactive amounts to an  
7 unfunded mandate that will impose significant  
8 resource constraints on the U.S. Attorneys Office  
9 and our written testimony has more information on  
10 those concerns.

11                   Thank you for considering NAAUSA's  
12 perspective and I welcome your questions.

13                   CHAIR REEVES: Thank you, panelists.  
14 I turn to my colleagues and you can fire your  
15 questions at whoever you wish to at any given  
16 time.

17                   Commissioner Wong?

18                   COMMISSIONER WONG: Ms. Mirchandani,  
19 I noted that you've worked on retroactivity of  
20 sentencing issues for about 15 years. I wanted  
21 to ask you about -- I'm sure you're familiar with  
22 the Commission's 2010 recency point elimination.

1           As you know, then the Commission did  
2 not publish or comment retroactivity or hold a  
3 hearing. The Commission voted in 2011 to not  
4 make it retroactive, and Justice Ketanji Brown  
5 Jackson at the time had stated that the recency  
6 amendment was, quote, "not intended to address  
7 the same types of fairness issues involved in the  
8 circumstances where retroactivity typically had  
9 been adopted in the past."

10           I'm curious if you -- you know, the  
11 study that led to that amendment was very  
12 analogous to the study that the Commission relied  
13 on in this situation and that it related to  
14 Commission data about the likely predictive value  
15 of future recidivism.

16           And I'm curious if you agree that  
17 recency points were not intended to address the  
18 same types of fairness as you're now talking  
19 about now or if you do, in fact, think the two  
20 are distinguishable.

21           MS. MIRCHANDANI: We do not think that  
22 you are terribly distinguishable and we argued in

1 favor of retroactivity for amendment 742.

2 The underlying data about the lack of  
3 recidivism between people who receive recency  
4 status points was very similar. At the time also  
5 the data showed that there was racial disparities  
6 in who was affected.

7 The problem is is that there wasn't a  
8 hearing at the time on that amendment and so  
9 those issues weren't really brought to the  
10 forefront.

11 We know better now and we have also  
12 been through more retroactivity cycles, not to  
13 mention in 2011 we were just coming off of the  
14 2010 Fair Sentencing Act and amendment 750 was  
15 made retroactive, which was a huge project.

16 And in the context of making that  
17 project retroactive I think the recency points  
18 maybe didn't get as much attention as they could  
19 have.

20 But we do think that that was the  
21 right call to make that amendment apply  
22 prospectively and we wish it had applied

1 retrospectively. But we can do better now and we  
2 have got a lot more experience in doing that.

3 CHAIR REEVES: Vice Chair Murray and  
4 then Vice Chair Restrepo.

5 VICE CHAIR MURRAY: I wonder if Mr.  
6 Nash would answer the same question that  
7 Commissioner Wong had because my recollection is  
8 that your written submission does try to draw a  
9 distinction between recency and status points in  
10 terms of effect on fairness.

11 MR. NASH: Well, I agree to a large  
12 extent that some of the underlying fairness  
13 concerns are the same. One distinction, and I  
14 thought she did a nice job of distinguishing why  
15 now we're giving more attention to those fairness  
16 concerns than was able to be given before when  
17 there was no hearing and there were so many other  
18 things on the Commission's plate, I would also  
19 point out that in the comments of the Commission  
20 where the recency amendments were deemed to be  
21 not retroactive there was some concern about the  
22 small number of people that would be affected by

1 it.

2           There was a number of about 8,000  
3 thrown out but there was discussion that there  
4 might even be far less than 8,000 that could even  
5 be affected. So it fell into that range of maybe  
6 this only has a minimal impact.

7           Our amendments here clearly are not  
8 that. They're much more substantive and affect  
9 so many more people. So that would be an  
10 additional distinction that I would -- I would  
11 draw.

12           VICE CHAIR RESTREPO: My question is  
13 directed to Ms. Mirchandani and Mr. Nash. Much  
14 has been said and written and more will be said  
15 with respect to the burden these retroactive  
16 application of these amendments would have on the  
17 system.

18           I'm curious that -- and it's probably  
19 just anecdotal experience or testimony you could  
20 provide with respect to how districts that don't  
21 have public defenders and how districts with  
22 public defenders coordinated their CJA attorneys



1 and what kind of burden they should expect and  
2 how those districts and the CJA folks deal with  
3 this.

4 MS. MIRCHANDANI: I can speak first to  
5 how the federal defenders dealt with it and it  
6 was, you know, a little bit scrambled with  
7 amendment 706 because it was the first time we  
8 had done it.

9 It got better and more efficient with  
10 amendment 750 and by the time 782 came around we  
11 were extremely efficient. We would work with  
12 probation, the courts, and the U.S. Attorneys.

13 It would usually be a one-page memo  
14 that was produced. Everybody would give their  
15 opinion. It was all done on paper.

16 There was not a single hearing -- in  
17 almost 600 cases there was not a single hearing.  
18 Factual findings were occasionally made about  
19 drug amount or weight because there would  
20 sometimes be, you know, questions. That was the  
21 very small minority of cases.

22 But it went very smoothly and we

1 didn't use a lot of -- we didn't refer a lot of  
2 cases to CJA counsel because there weren't a lot  
3 of conflicts that came up. But I cannot speak to  
4 where there isn't a defender office. I can only  
5 speak to where there was one.

6 VICE CHAIR RESTREPO: How did the CJA  
7 folks in your district handle it? In a similar  
8 fashion?

9 MS. MIRCHANDANI: The federal defender  
10 took on basically all of the cases unless there  
11 was a serious conflict. Then we would get CJA  
12 counsel appointed. But this actually reminds me  
13 of something that the previous witness said, Mr.  
14 Ritz.

15 He said that the federal defenders  
16 didn't review all the cases for ineligible filers  
17 and that's not true at all. There's a -- in  
18 Maryland at least there's a notice so every  
19 single time a motion is filed pro se it would  
20 come to our office and we reviewed every single  
21 one of those cases.

22 So although -- and if we did not

1 supplement the motion to the court that our  
2 silence was in a -- you know, basically the  
3 message that we didn't think the person qualified  
4 for relief so we didn't supplement it. The  
5 government I think takes our silence as the fact  
6 that we didn't review it. But we did. We  
7 reviewed every single case.

8 VICE CHAIR RESTREPO: And I take it if  
9 there were factual disputes people leaned on the  
10 presentence reports?

11 MS. MIRCHANDANI: Yes, presentence  
12 reports. Basically, you couldn't make any  
13 additional factual findings but the presentence  
14 report basically told us enough.

15 VICE CHAIR RESTREPO: Mr. Nash?

16 MR. NASH: Right. So in our district  
17 we don't have a full time defender. We just have  
18 a CJA panel and in past amend cycles all of our  
19 panel attorneys stood ready to assist in any way.

20 If we were to be reappointed we were  
21 we were ready to do that. A lot of us fielded  
22 calls from our former clients. Even though we

1 weren't officially appointed we would field calls  
2 and consult with them and go through the same  
3 sort of process about advising them whether they  
4 might be eligible or not.

5 I'm not aware that at any point in  
6 time in our district were there ever additional  
7 staff required in the U.S. Attorneys Office with  
8 the probation office or the judge's clerk's  
9 office. I think all of our retroactive  
10 amendments were handled without the necessity of  
11 that. And, again, the CJA panel stood ready to  
12 assist just whenever we were needed.

13 VICE CHAIR RESTREPO: Thank you.

14 CHAIR REEVES: Commissioner Boom and  
15 then Wroblewski.

16 COMMISSIONER BOOM: All right. Good  
17 morning, and thanks to each of you for your very  
18 helpful and thorough submissions.

19 I have written down a couple of  
20 questions and forgot my glasses but I think that  
21 I can make it here so bear with me. This is for  
22 Ms. Mirchandani and then perhaps if Mr. Nash also

1 wants to weigh in.

2 Your letter advances that retroactive  
3 application will not be a significant burden on  
4 the system. But as far as I can tell every other  
5 relevant stakeholder who has weighed in on this  
6 issue opposes retroactivity.

7 The CLC committee opposes  
8 retroactivity. Every individual judge who  
9 provided public comment opposes retroactivity.  
10 The United States Probation Office did not take a  
11 position but then went on to outline the, you  
12 know, dozens of instances of significant burdens  
13 that will burden the system.

14 Of course, we have the DOJ position,  
15 the AUSA position and then, you know, the Bureau  
16 of Prisons, I guess, through the Department of  
17 Justice. So, you know, I don't think it's a  
18 matter of judges simply being too busy to right a  
19 past wrong I think as your letter of phrases it  
20 but, rather, every other relevant stakeholder  
21 opposes retroactivity, at least as far as I can  
22 tell.

1                   Now, again, there's the caveat with  
2 U.S. Probation Office. So what do you say in  
3 light of that, I guess, that the burden is not  
4 significant?

5                   MS. MIRCHANDANI: Well, first of all,  
6 I think a lot of those letters from what I  
7 noticed were sort of assuming data that is not  
8 correct.

9                   One of the assumptions that we heard  
10 Mr. Ritz talk about is that this is going to be a  
11 public safety problem and that people are going  
12 to recidivate. What the data shows is that they  
13 actually are not more likely to recidivate and we  
14 know that from prior cycles.

15                   Another assumption that sort of, you  
16 know, fueled a lot of the opposition is that  
17 85,000 people will file. That's also not borne  
18 out by the data.

19                   The number of people who -- in the  
20 past who filed motions who were ineligible have  
21 actually went down with each cycle. I think  
22 communicating with people who are incarcerated

1 and letting them know what the criteria are will  
2 help reduce that more and I don't -- it will be a  
3 burden. It will be work.

4 I don't want to call it a burden  
5 because even Mr. Ritz said he was proud of the  
6 work he did on amendment 782. He was proud  
7 because it was good work and it was the right  
8 thing to do. And I think we're looking at the  
9 people who will have to work a little harder over  
10 the next couple of years.

11 But the flip side is that if we don't  
12 make the amendment retroactive the BOP has to  
13 bear the burden of incarcerating people 14 or 15  
14 months longer than they need to be incarcerated.

15 The burden is going to be paid one way  
16 or the other, either by the BOP or by the justice  
17 system. The difference is that either my clients  
18 are going to sit in a jail cell for that  
19 additional time or have a second chance at  
20 getting their freedom back.

21 So, in my opinion, it's worth the  
22 effort on our side and it makes it easier for the

1 BOP. They're also suffering from overcrowding.  
2 We know that from the most recent 2023 BOP  
3 report.

4 MR. NASH: May I, your Honor?

5 COMMISSIONER BOOM: Please.

6 MR. NASH: Okay. The -- I echo all  
7 that. You know, the easy -- there's work. The  
8 easy work is dealing with the motions that are  
9 clearly -- you know, where the clients are  
10 clearly ineligible for their pro se motions.  
11 That's the easy work. It's work but it's easier.

12 The harder work is dealing with the  
13 cases where the people are eligible and sorting  
14 through the records and coming up with the  
15 correct sentence, at the end of the day. That's  
16 the 18,000 to 19,000 number.

17 For Part A there's only 12 districts  
18 that have over 200 of those cases. For Part B  
19 there's only six districts that have over 200  
20 cases. All the rest of the districts have 200 or  
21 less, and some of them -- a lot of them far less  
22 than 200 cases.



1           So those are the ones that are going  
2 to take work but it's not an unmanageable amount  
3 and we already have the mechanisms in place. We  
4 have been down this road before.

5           We have had retroactive amendments,  
6 several of them, and we know how to do it. We  
7 know how to triage these cases. The U.S.  
8 Attorneys office knows how to do it. Defense  
9 attorneys know how to do it. We can handle it.

10           COMMISSIONER BOOM: Just a quick  
11 follow up. You mentioned that perhaps the  
12 Commission's retroactivity in 2010 and 2011 was  
13 informed by a recent retroactive amendment that  
14 perhaps informed the recency decision.

15           You know, in the landscape that we  
16 have today we -- assuming that the amendments on  
17 compassionate release actually pass and take  
18 effect in November then that would also expand  
19 grounds for compassionate release and I would  
20 suggest that we'll probably see more of those  
21 motions as well.

22           Is that a consideration that the

1 Commission should take into consideration in  
2 deciding this retroactivity issue as far as  
3 additional burden?

4 Because it won't just be retroactivity  
5 on this issue but, rather, one would expect with  
6 the expansion of compassionate release that there  
7 will be additional motions for compassionate  
8 release. So should that play a factor or not?

9 MS. MIRCHANDANI: I mean, everything  
10 is a factor. But I do not see compassionate  
11 release motions being -- standing in the way of  
12 retroactivity here. I mean, frankly, in  
13 Maryland, at least, the big influx of  
14 compassionate release motions were filed during  
15 the pandemic.

16 That was when we saw the -- you know,  
17 a wave of motions come in and those have really  
18 stopped. We now have hardly seen any  
19 compassionate release motions filed.

20 So if there's more of a -- you know,  
21 some more motions filed in November, in my  
22 district the criteria actually has narrowed

1 compassionate release. It hasn't expanded it.

2 I know that's different in other  
3 places, but it's also a very different situation  
4 and it's not the kind of situation that can be  
5 done easily on the paper. This is a really more  
6 mechanical and compassionate release.

7 COMMISSIONER BOOM: Thank you.

8 CHAIR REEVES: Commissioner  
9 Wroblewski?

10 COMMISSIONER WROBLEWSKI: Thank you  
11 very much and thank you to all of you for being  
12 here and for your testimony.

13 Ms. Mirchandani and Mr. Nash, you know  
14 that the Justice Department has taken the  
15 position opposite from yours and I just want to  
16 ask a couple of questions to try to tease out  
17 whether these are -- these differences are  
18 differences in the principles -- the underlying  
19 principles of retroactivity and when they should  
20 apply or whether it's about actually applying  
21 this particular circumstance to those principles.

22 So in the commentary -- Ms.

1 Mirchandani, in the commentary to Section 1B1.10  
2 the Commission quotes the legislative history of  
3 Section 994(u) and it says it should be an --  
4 that says it should be noted that the Commission  
5 does not -- the committee -- this is the Senate  
6 committee that wrote the sentencing reform act --  
7 that the committee does not expect the Commission  
8 will recommend adjusting existing sentences under  
9 this provision when there was only a minor  
10 downward adjustment in the guidelines. Your  
11 testimony suggests to me and your written  
12 submission suggests to me that you think this is  
13 wrong.

14 Is that right? Or do you think this  
15 is correct policy -- as a matter of policy --

16 MS. MIRCHANDANI: As a matter of  
17 policy?

18 COMMISSIONER WROBLEWSKI: -- that if  
19 there's a minor adjustment the Commission should  
20 not make that retroactive?

21 MS. MIRCHANDANI: I think the policy  
22 is fine. But I think that what we're talking

1 about is not in any way a minor adjustment. The  
2 Commission itself has called a minor adjustment  
3 six months.

4 We're talking about well over twice as  
5 long. So I think we fit into the policy. I  
6 think the Commission's policy very much is in  
7 favor of retroactivity here.

8 COMMISSIONER WROBLEWSKI: If I can try  
9 to tease that out just a little bit because this  
10 on the status point reduction it's, roughly, the  
11 equivalent of a one offense level reduction.

12 The most you can move is one criminal  
13 history category with -- for most of the table  
14 equals a one level adjustment. Has the  
15 Commission ever, as far as you know, done  
16 anything less? Can it do anything less than a  
17 one level adjustment?

18 MS. MIRCHANDANI: I mean, I don't know  
19 every single amendment has been passed  
20 retroactively but I have skimmed them. I don't  
21 think that the magnitude here is too small.  
22 Fourteen months reduction, even if it's --because

1 we're talking about people where they are on the  
2 table the one level reduction means 14 months.

3 What's interesting is that that also  
4 is the same as two levels in a different part of  
5 the table. So it depends where you are on the  
6 table. One level can be a huge difference. One  
7 level could be a small difference.

8 What we know is that the average is 14  
9 months for Part A, Part B a little bit longer and  
10 actually for Part B the 18 percent difference is  
11 exactly what was at stake with amendment 782 with  
12 drugs minus two and the government didn't call  
13 that minor but they're calling this minor. I'm  
14 not sure exactly why.

15 COMMISSIONER WROBLEWSKI: Got it. Can  
16 I ask another question about the process? So you  
17 describe in your testimony a very efficient  
18 process for considering 3582(c) motions and you  
19 specifically say that -- or you suggest that the  
20 3582(c) proceedings are limited to the record as  
21 it existed at sentencing.

22 This is the -- from your written

1 submission. As with every prior retroactive  
2 amendment the availability of relief will depend  
3 on the record as it existed at the time of  
4 sentencing.

5 That suggests to me that the record is  
6 frozen, that there won't be any new fact finding.  
7 Am I reading that incorrectly? Is that what you  
8 mean?

9 MS. MIRCHANDANI: The record is frozen  
10 about the offense. The record is not frozen  
11 about post sentencing conduct. But if there  
12 weren't hearings -- in the past at least there  
13 were never hearings to say, well, did this person  
14 have a gun or did this other person have a gun?

15 Whatever was -- existed in the record  
16 was the basis for making decisions. And I should  
17 add that's just about eligibility. So all of the  
18 concerns that were raised about, well, what about  
19 this person being eligible, that's just getting  
20 your foot in the door.

21 After eligibility there's still the  
22 3553(a) analysis in every single case. So if

1       there -- you know, even if a person didn't  
2       personally have a gun and there were guns  
3       involved the government could argue against  
4       relief and in, you know, 40 percent of the drug  
5       cases relief was denied.

6                       So this is just about -- that's just  
7       an eligibility question. And, yes, it is based  
8       on the record as it existed.

9                       COMMISSIONER WROBLEWSKI: So, again,  
10       can I sort of probe a little bit -- just a little  
11       bit more on that?

12                      MS. MIRCHANDANI: Yes.

13                      COMMISSIONER WROBLEWSKI: So I think  
14       what you're suggesting is that the 3553(a) part  
15       of the analysis there may be additional fact  
16       finding. Am I correct on that?

17                      MS. MIRCHANDANI: I wouldn't call it  
18       -- if you want to call it fact finding looking at  
19       what -- looking at the evidence, yes, looking at  
20       what has happened.

21                      COMMISSIONER WROBLEWSKI: But at the  
22       first part of it and if we were to apply -- if



1 the Commission were to apply Part B retroactively  
2 there are these new exclusionary criteria which  
3 may not have been -- there may not have been  
4 factual findings about them.

5 So, for example, there may have been  
6 a finding that the offense involved a victim who  
7 was financially ruined but there may not have  
8 been a finding that the defendant personally was  
9 involved in that.

10 That would require a fact finding and  
11 I assume, am I correct, that there would be fact  
12 finding about that part of the offense? Or do  
13 you think that's wrong and if I'm wrong tell me  
14 why I'm wrong.

15 MS. MIRCHANDANI: I think there might  
16 be searching and fact finding in a very, very  
17 small number of cases. I don't -- I don't  
18 dispute that we're going to have to figure out  
19 what those exclusions mean.

20 But we're going to have to figure out  
21 what those exclusions mean even for prospective  
22 clients and that is not a reason to deny

1 retroactivity to everyone because it will be a  
2 very small number of people.

3 COMMISSIONER WROBLEWSKI: How do you  
4 know it's going to be a very small number of  
5 people?

6 MS. MIRCHANDANI: Because I've looked  
7 at the criteria and I've read a million  
8 presentence reports and, generally, a lot of the  
9 data that is talked about in the exclusionary,  
10 you know, criteria show up.

11 If somebody has a gun it is going to  
12 show up in the presentence report. That is not  
13 something that's left out. The description of  
14 the offense and what the person's personal  
15 culpability was is going to tell us whether those  
16 exclusionary criteria apply.

17 COMMISSIONER WROBLEWSKI: Mr. Nash,  
18 can I ask you one question, and that is your  
19 testimony suggests that every sentence imposed  
20 under our current system -- the post Booker  
21 system -- is sort of empirically very precise and  
22 you talk about and Ms. Mirchandani talks about

1 that if we don't correct it we're not correcting  
2 a systemic and fundamental unfairness and you say  
3 when we have something that's wrong, and you  
4 described it as wrong, that, you know, we need to  
5 fix it.

6 But as you know, the criminal history  
7 score is a point system and not every point adds  
8 to somebody's sentence. So someone with four  
9 criminal history points and someone with six  
10 criminal history points will be in the same  
11 category and will have the same guideline range  
12 despite the fact that the Commission's research  
13 shows that they carry different risks of  
14 recidivism.

15 So I'm just curious, do you -- am I  
16 capturing the system correctly and do you think  
17 that people who have -- the two people, one with  
18 four and one criminal -- one with six criminal  
19 history points who were sentenced the same do you  
20 think that is a fundamental unfairness?

21 MR. NASH: Well, the data that the  
22 Commission has put forth has shown that the

1 difference between zero point offenders and  
2 everybody else is way more significant than the  
3 difference between a four point offender and a  
4 six point offender.

5           There are differences between a four  
6 point and a six point offender but it's not  
7 nearly as great as the difference between a zero  
8 point and everyone else, which is what the  
9 Commission decided to fix.

10           The Commission did not decide to fix  
11 and it wasn't before the Commission, I assume,  
12 the differences in the other categories. So do -  
13 - you know, is there some argument to be made  
14 there in some other hypothetical case? Yes,  
15 there is.

16           But what we're talking about here is  
17 the difference between the zero point and  
18 everybody else and that difference is so  
19 significant that I think we can fairly say that  
20 the sentences that zero point offenders received  
21 were too lengthy in many cases and because they  
22 were too lengthy they deserve to be corrected.

1                   COMMISSIONER WROBLEWSKI: But you're  
2 talking about, of course, Part B. What about  
3 Part A, where the status points is two points and  
4 it could be the difference between a four and a  
5 six or between a five and seven and that kind of  
6 thing? Do you think that that's a different  
7 analysis that the Commission needs to make?

8                   MR. NASH: Well, it is because in the  
9 situation where it doesn't affect the person's  
10 criminal history category they stay in the same  
11 category even though they're either at the bottom  
12 of the pile --

13                   COMMISSIONER WROBLEWSKI: Is that a  
14 fundamental unfairness?

15                   MR. NASH: Well, again, that's an  
16 issue that could be debated but that's not what  
17 this Commission decided to remedy. The  
18 Commission only remedied the situation where it  
19 was so different that it knocked them down to a  
20 criminal history category.

21                   And so that we believe, again, is  
22 enough difference in the initial sentencing to

1 merit correction. Can we go back at some future  
2 date and talk about what you're talking about?  
3 Sure. But for now we're only talking about where  
4 the criminal history categories have changed.

5 COMMISSIONER WROBLEWSKI: Thank you.

6 CHAIR REEVES: Vice Chair Mate and  
7 then Commissioner Wong, please.

8 VICE CHAIR MATE: Mine's really  
9 quick. I just had one clarification question on  
10 the process for you, Ms. Mirchandani, with -- you  
11 know, you've talked about how it's worked in the  
12 past this collaborative process.

13 Would you expect if the Commission  
14 made these amendments retroactive a similar  
15 process going forward?

16 MS. MIRCHANDANI: Yes. I mean, we  
17 already have the relationships. The same people  
18 who worked on the 782 are still there and I  
19 imagine that it would go even smoother, really,  
20 than the past because we have gotten a little  
21 better each time.

22 VICE CHAIR MURRAY: Do you have a

1 sense of sort of geographic diversity or  
2 diversity between offices? I notice the -- it  
3 sounded like in your office you were able to  
4 triage to the point where something like 95  
5 percent of motions were granted.

6 But I know that the national average  
7 is something more like 62 percent for that same  
8 amendment and so it sounds to me like not every  
9 office is operating the way your office is. Do  
10 you -- do you have a sense of the geographic  
11 diversity?

12 MS. MIRCHANDANI: I don't know how it  
13 works under districts but we're happy to share  
14 our formula if it would help the other districts  
15 be more efficient.

16 COMMISSIONER WONG: I had two  
17 questions for Mr. Wasserman. Mr. Wasserman,  
18 could you respond? Mr. Nash mentioned that U.S.  
19 Attorneys offices have the ability to triage and  
20 we heard from the prior panelist that that  
21 usually requires some kind of diversion of AUSA  
22 resources from other work.

1                   Can you just talk about on the ground  
2                   in a tangible way what that triage looks like or  
3                   what the tradeoffs are? That's my first.

4                   CHAIR REEVES: Make sure your mic is  
5                   on, Mr. Wasserman.

6                   MR. WASSERMAN: My personal experience  
7                   with this occurred with the pandemic and my  
8                   office, D.C., is structured a little bit  
9                   differently.

10                  It's the largest office in the country  
11                  and has a section that's dedicated purely to  
12                  local D.C. crimes and then the smaller part of  
13                  the office is the criminal division on the  
14                  federal side.

15                  We have the good fortune of having a  
16                  special proceedings division that typically  
17                  handles all post sentencing matters. With the  
18                  pandemic and I believe with some of the other  
19                  amendments that have occurred over the years  
20                  those motions have overwhelmed that unit, which  
21                  is still relatively small, their ability to  
22                  handle the volume of motions.



1           So and I'm not in that unit. So I  
2 myself handled seven of -- seven compassionate  
3 release motions in 2020 between, I want to say,  
4 about May to December and that was, I think,  
5 consistent with what a lot of other people were  
6 doing, and the one saving grace in that situation  
7 is during that period the court was mostly  
8 closed.

9           So I didn't have, you know, a court  
10 calendar and some of the investigations that we  
11 were working on were delayed. But it was still a  
12 significant burden and the reality of it is is  
13 that the time that AUSAs and I would say that  
14 most offices in my experience don't have a  
15 special unit dedicated to dealing with post  
16 sentencing issues.

17           So that's going to fall on the AUSA to  
18 handle the matter or an AUSA that just happens to  
19 be there if the person has left. That's going to  
20 divert their attention away from existing  
21 investigations, current cases, and I think it's  
22 also important to note that with the expansion of

1 the criteria for compassionate release it would  
2 seem that we are likely to face a significant  
3 increase in compassionate release motions, which  
4 will also have to be handled by the U.S.  
5 Attorneys offices.

6 So it's going to be the retroactive  
7 application that we're talking about here in the  
8 hundreds or thousands, quite frankly, that are  
9 going to come in and I think the thousands of  
10 compassionate release motions that we're going to  
11 get, you know, after those provisions take  
12 effect.

13 So that's going to, I believe, quickly  
14 overwhelm U.S. -- many U.S. Attorney's Offices'  
15 ability to handle this and to conduct, you know,  
16 their sort of ordinary casework.

17 I would note also that, as I  
18 understand it, the current budgets proposed by in  
19 the House and the Senate include significant cuts  
20 to U.S. Attorneys offices.

21 So I don't anticipate that there's  
22 going to be help on the way for U.S. Attorneys

1 offices in personnel to handle this increase in  
2 the workload. So I do have significant concerns  
3 about the volume of work.

4 COMMISSIONER WONG: Do we have time?

5 CHAIR REEVES: Yes. Yes.

6 COMMISSIONER WONG: So my second  
7 question is one thing that I didn't see really in  
8 the commentary was the fact that the vast  
9 majority of criminal cases are resolved by pleas  
10 and I was wondering if you could speak to what  
11 extent the plea offers extended are kind of  
12 extended in the shadow of mutually agreed  
13 understandings of what the guidelines at the time  
14 are.

15 So is there an argument, you know,  
16 that the government would not have agreed to  
17 dismiss certain charges or CAP allocution had the  
18 guidelines been different? Should that be a  
19 concern of ours at this point?

20 MR. WASSERMAN: Yeah. I mean, in plea  
21 agreements -- many plea agreements, you know,  
22 which most cases are ultimately resolved through

1       pleas, you know, we do engage in negotiation with  
2       defense counsel about the guidelines,  
3       enhancements, or bumps that can either be  
4       negotiated in or negotiated out and those are  
5       things that are part and parcel of a lot of  
6       pleas.

7                        So if you now retroactively change the  
8       guideline range in a way that it was not  
9       contemplated by the plea, which had, you know,  
10      what we know been known then might have resulted  
11      in a different disposition you're impacting, you  
12      know, essentially the heart of the plea deal and  
13      I think that kind of goes to the finality of  
14      sentencing, the predictability of sentencing,  
15      that I think is important to the system and  
16      people's confidences in the system.

17                   CHAIR REEVES:  Yeah.  Yes?  No.  No.  
18      Go ahead.

19                   VICE CHAIR MURRAY:  This is a question  
20      for any of the three of you who are interested in  
21      answering.

22                   One argument I saw in the materials

1 from several of our commenters so our Tribal  
2 Issues Advisory Group, several of the probation  
3 officers -- offices that commented is that this  
4 is the first sort of cohort of potential  
5 offenders who are really by and large sentenced  
6 post Booker who we'd be looking at, adjusting  
7 sentences retroactively and in particular that  
8 the first Commission study on retroactivity, or  
9 sorry, on recidivism rates and how status points  
10 affect them came out in 2005.

11 So the data has been there for a  
12 little while and the -- the freedom for a little  
13 while to consider it and I'm wondering just  
14 empirically on the ground how much did you see  
15 those arguments being made by advocates?

16 Like, did you -- did you as defense  
17 attorneys or you as someone who was opposing  
18 defense attorneys hear people making arguments  
19 about, look, status points don't really impact  
20 recidivism -- you shouldn't be taking -- you  
21 should be -- this criminal history overstates the  
22 seriousness of this person's background? Did you

1 see judges taking it seriously? Did you see the  
2 government -- how was government reacting? I'd  
3 be interested in hearing what you -- the three of  
4 you saw on the ground.

5 MR. WASSERMAN: I mean, from my  
6 experience I've not seen defense counsel argue  
7 that and that may -- I mean, there may be a  
8 number of reasons. One is just wasn't something  
9 that was on that particular person's radar  
10 screen.

11 But I think it also demonstrates that  
12 status points exist for reasons beyond recidivism  
13 risk and I think the Criminal Law Committee from  
14 the Judicial Conference pointed that out, that  
15 there are other factors and I think the  
16 commentary to Chapter 4 makes that clear that  
17 this is also about, you know, culpability and,  
18 you know, essentially a escalating set of  
19 consequences that is imposed on repeat offenders  
20 throughout the sentencing guidelines.

21 So I've not seen that argument.  
22 Perhaps maybe we'll start to see it, you know, if

1 this amendment passes retroactively or as the  
2 amendments even start to kick in in November.

3 MS. MIRCHANDANI: I'm not sure exactly  
4 how much this argument was made. But what we do  
5 know is that more than 62 percent in the Part A  
6 and more than 50 percent in the Part B category  
7 people received within guideline ranges.

8 So yes, there were some cases where  
9 there was departures or variances and we don't  
10 know what the reasons were. But for the most  
11 part courts accepted what the Commission  
12 presented as the appropriate amount of time that  
13 would be sufficient but not greater than  
14 necessary to serve the purposes of sentencing and  
15 they trusted that.

16 And we know that courts look at the  
17 guideline range but they don't necessarily think  
18 about every single different factor that went  
19 into creating the guideline range.

20 So to the extent there are courts that  
21 routinely departed downward because of this those  
22 -- they don't have to give relief. Again, this

1 is just the ability to give relief.

2 VICE CHAIR MURRAY: And did you have  
3 a sense of whether your argument was being made  
4 on the ground?

5 MS. MIRCHANDANI: I don't recall it  
6 being made.

7 MR. NASH: My experience is the same.  
8 I think this would have been a very rare argument  
9 that would have been made at the time of  
10 sentencing.

11 VICE CHAIR MURRAY: Thank you.

12 CHAIR REEVES: I have -- I think I'll  
13 have the final questions.

14 Mr. Wasserman, you indicated in your  
15 testimony the rule of law relies on finality and  
16 predictability. What I've been hearing from Mr.  
17 Nash and Ms. Mirchandani they've been focusing on  
18 fairness about the rule of law. Does that really  
19 -- should fairness also play in an analysis of  
20 what the rule of law ought to be?

21 MR. WASSERMAN: Yes, of course,  
22 fairness should factor into it. I don't think



1 the issue --

2 CHAIR REEVES: Your -- oh. Okay.

3 MR. WASSERMAN: You don't know how  
4 often I do this kind of thing.

5 Yes, fairness certainly factors into  
6 it. It's a core part of sentencing. I don't  
7 think -- and, again, to sort of cite to the  
8 Criminal Law Committee of the Judicial Conference  
9 I don't think fairness is as significantly  
10 implicated with these amendments as perhaps some  
11 of the other amendments -- the crack powder  
12 disparity, the drugs minus two -- in this  
13 particular instance.

14 Ultimately, though, you know, with  
15 respect to finality and sentencing I mean parole  
16 was eliminated for a reason because it severely  
17 undermined, you know, the reality of what  
18 somebody's sentence was at the time that they  
19 were sentenced, and there was always this idea  
20 that you were probably going to get out earlier  
21 than what your actual sentence was and it just  
22 undermined public confidence in the system.

1           And I think that's a significant part  
2 of what the Commission should be considering.  
3 Can we have confidence that the people -- that  
4 offenders are going to serve the sentences that  
5 are imposed on them or are we always going to go  
6 back and lower those sentences for, you know, any  
7 number of reasons or offer, you know,  
8 opportunities to get sentencing reductions.

9           And I'm not saying that, you know, we  
10 shouldn't be revisiting and refining how we do  
11 sentencing. But I think, you know, we need to be  
12 circumspect about how we do that and I think we  
13 need to really focus, you know, in significant  
14 part on the fact that, you know, ultimately for  
15 all the recidivism studies the recidivism rate in  
16 the federal system is still about 50 percent.

17           So there's a serious public safety  
18 aspect to this about releasing offenders into the  
19 community early. So those are, I think, concerns  
20 that need to be considered.

21           CHAIR REEVES: The other question that  
22 I had, and this is for the panel, because what I

1 -- I think it's even -- I think it's in your  
2 report, Mr. Wasserman, one of the arguments you  
3 make is on the zero criminal history tend to --  
4 might create more disparity because white collar  
5 persons are more likely to be white defendants or  
6 -- and all that and you said that that increases  
7 disparity.

8           What I heard Ms. Mirchandani and Mr.  
9 Nash talk about was the increased disparity on  
10 the -- sort of the more violent criminals or  
11 criminals who did not fit into that category.  
12 How should the Commission balance that if at all?

13           I mean, because you say, well, it's  
14 going to increase the disparity in one class or  
15 group of people. You, Ms. Mirchandani, say it  
16 increases disparity in another group.

17           MR. WASSERMAN: Yeah. I think that --  
18 I mean, racial disparity in sentencing,  
19 obviously, has a lot of different causes and  
20 factors, many of which exist sort of outside the  
21 criminal justice system.

22           So on the zero -- on the two point

1 offender or the status point offender side I  
2 don't think racial disparity is the appropriate  
3 means to address racial disparity in sentencing.

4 It's not going to resolve the problem  
5 because, again, there are a lot of reasons why  
6 there are racial disparities and this, I don't  
7 think, deals with the core problem.

8 I think there's also assumptions that  
9 the primary cause or mover of racial disparities  
10 is on bias, and I don't -- I don't necessarily  
11 think that the studies bear that out.

12 But to the extent that there are  
13 racial disparities, which are undeniable, and  
14 that there are -- there is data that shows that  
15 some of those disparities cannot be explained by  
16 objective factors -- and I think the department's  
17 2012 study, you know, bore some of that out -- we  
18 shouldn't be exacerbating those in the zero point  
19 offender status guideline, which would seem to do  
20 so by benefitting disproportionately white collar  
21 offenders who are more likely to be -- more  
22 likely to be white. So that's the distinction.

1 CHAIR REEVES: Ms. Mirchandani, you  
2 may answer and Mr. Nash as well.

3 MS. MIRCHANDANI: Okay. Thank you.  
4 First of all, the white collar defendants are a  
5 pretty small proportion of the people. I'm not  
6 sure why that became a sudden focus for the DOJ  
7 and for Mr. Wasserman.

8 But, you know, more than 75 percent of  
9 people that we're talking about in Part B are  
10 drug offenders and most of them we know are  
11 people of color, and I'm not sure what it's like  
12 in D.C. but in Maryland we have a lot of white  
13 collar criminals who are people of color.

14 It's not exclusively white people who  
15 commit white collar offenses. So helping  
16 everybody is the right thing to do. Not even  
17 helping. It's not leniency. Giving people the  
18 correct sentence is the right thing to do.

19 CHAIR REEVES: Mr. Nash?

20 MR. NASH: And I would echo that. The  
21 statistics in the impact report are that the  
22 people who will benefit potentially under Part B

1 69.9 percent Hispanic, only 16.9 percent white.  
2 So I'm not sure that there would be a  
3 disproportionate sort of an inverse impact on the  
4 Part B component benefitting white offenders more  
5 than people of color.

6 CHAIR REEVES: Thank you. Thank you  
7 all, panelists. I know we ran over, but thank  
8 you so much for your time and consideration of  
9 us.

10 We will now take our morning break,  
11 and we're going to take the appropriate amount of  
12 time, 15 or 20 minutes to get back, for everybody  
13 to take a break. Thank you so much.

14 (Whereupon, the above-entitled matter  
15 went off the record at 10:55 a.m. and resumed at  
16 11:16 a.m.)

17 CHAIR REEVES: Thank you all for your  
18 patience. I think we needed a well-deserved  
19 break. That probably last a little bit longer  
20 than I anticipated -- longer than I announced. I  
21 anticipated it would last a little while.

22 Our third group of panelists will

1 provide us with perspectives on this issue from  
2 three of our advisory groups.

3 First, we will hear from the honorable  
4 Ralph Erickson, who serves as chair of the  
5 Sentencing Commission's Tribal Issues Advisory  
6 Group. Judge Erickson served as a district judge  
7 for the district of North Dakota before being  
8 elevated to the United States Court of Appeals  
9 for the Eighth Circuit.

10 Judge Erickson has a long history of  
11 service on state and local courts in North Dakota  
12 as well as state and national ethics panels,  
13 including service as chair of the Judicial  
14 Conference Committee on Codes of Conduct.

15 Second, we will hear from Francey  
16 Hakes, who serves on the Commission's Victims  
17 Advisory Group. Ms. Hakes was a prosecutor for  
18 16 years at both the state and federal level.

19 She was also appointed by the United  
20 States Attorney General as the country's first  
21 national coordinator for child exploitation,  
22 prevention, and interdiction when she created the

1 inaugural U.S. strategy to address child sexual  
2 exploitation.

3 She is now the CEO of her own  
4 consulting firm where she provides advice  
5 regarding the protection of children.

6 Finally, we will hear from Joshua  
7 Luria, who serves as vice chair of the citizen  
8 Commission's Probations Officers Advisory Group -  
9 - POAG as we call it.

10 Mr. Luria serves as a supervisory U.S.  
11 probation officer in the Middle District of  
12 Florida. He has previously served as a U.S.  
13 probation officer in Brooklyn, New York.

14 Judge Erickson, we're ready to hear  
15 from you, sir.

16 MR. ERICKSON: Thank you, Chair  
17 Reeves, members of the Commission. I want to  
18 just thank you for the opportunity to be here  
19 this morning, first of all, on behalf of the  
20 Tribal Issues Advisory Group.

21 I want to start basically by laying  
22 out a little bit about the Tribal Issues Advisory



1 Group itself because it's a little different than  
2 the other advisory groups in the sense that we  
3 have membership that represents the entire  
4 spectrum of interest in the -- in the sentencing  
5 process.

6 We have a U.S. Attorney  
7 representative. We have a federal public  
8 defender representative. We have practitioner  
9 representatives. We have a tribal court  
10 representative. We have a probation officer  
11 representative. And so like the Commission  
12 itself we represent a diverse set of views.

13 I also would like to explain that we  
14 have talked about having a substantial majority  
15 believing that the -- that both subpart A and  
16 subpart B should be retroactively applied and we  
17 have a minority, which we described as a small  
18 minority, that disagrees with that position.

19 When we talk about a small minority  
20 we're talking about a minority of one or two  
21 members, right. And so that's where our advisory  
22 group is sort of on the recommendations that we

1 have here today.

2 The second thing I'd like to talk  
3 about briefly about Indian Country is this. You  
4 know, the point of view that we bring to the  
5 table really is what happens to Indians who are  
6 convicted of federal crimes in Indian country and  
7 being an Indian under federal law is different  
8 than being a Native American, right, because  
9 being an Indian is a status.

10 It means that you are enrolled as a  
11 member of a tribe and that you are engaged in  
12 some conduct in Indian Country that exposes you  
13 to prosecution in the federal courts. And by  
14 definition most of what we're talking about here  
15 in the federal courts with Indians being  
16 sentenced in the federal court is as a result of  
17 tribes that are nonpublic law 280 tribes and that  
18 is these are cases in which the federal courts  
19 are primarily responsible for handling the  
20 prosecution of felonies in the federal system and  
21 the great bulk of these crimes fall into either  
22 the Major Crimes Act or the Assimilative Crimes

1 Act and when we look at what that means is that  
2 we are applying state law crimes.

3 We are prosecuting people for state  
4 law crimes in federal court. So the elements of  
5 the offense are established under state law and  
6 that's what we're prosecuting and it's ordinary  
7 street crime.

8 I mean, it is rape, murder, vehicular  
9 homicides, felony DUIs -- just the entire wide  
10 gamut of felonies that exist in the state courts  
11 but we're trying them in federal courts.

12 And, of course, under the federal  
13 sentencing law the federal law of sentencing  
14 applies to those cases, right, and so there's a  
15 couple of things that happen when you look at the  
16 Tribal Issues Advisory Group.

17 When we look at sentences in federal  
18 court we're really looking at state crimes that  
19 are being prosecuted in federal court and federal  
20 sentences are being imposed.

21 Now, if you think about what this  
22 means in a practical matter it's like if a person

1 is a non-Indian who commits exactly the same  
2 crime in exactly the same place and very rarely  
3 but occasionally in concert with an Indian  
4 person, they will be prosecuted in state court  
5 and the state law of sentencing will apply.

6 If they are -- if they're an Indian  
7 and the crime is in Indian Country they will be  
8 prosecuted in the federal courts and the federal  
9 law of sentencing will apply.

10 In most circumstances the sentences  
11 imposed in the state courts are significantly  
12 less than the sentences that are imposed in the  
13 federal courts. All right.

14 And so when we talk about all this  
15 group of people -- the tribal judges, the tribal  
16 prosecutors, the tribal commission members --  
17 they're looking at this and they come to this  
18 with a point of view that the sentencing laws  
19 applied to Native Americans is often unfair.

20 Now, I would be wrong or I'd be amiss  
21 if I said this was universally true because there  
22 are a state or two that impose longer sentences

1 than the federal courts do and that is also a  
2 factor in this system, right.

3 And so when we talk about Part A and  
4 B in retroactivity we come to the table with a  
5 substantial majority just with the idea that the  
6 federal sentencing rules already provide for  
7 unduly harsh and long sentences in comparison to  
8 the average person who's committed a similar  
9 crime who is not an Indian.

10 All right. Now, as a result, it's  
11 also true that we come from primarily more rural  
12 areas and we have generally smaller numbers of  
13 defendants generally and that means smaller  
14 numbers of people being sentenced.

15 And so on some of the issues as we  
16 look at it that our experiences are different  
17 than, say, in the previous panel, the person who  
18 was in the D.C. district, right, I mean, because  
19 it's just a different thing, although in the D.C.  
20 district they've got assimilative crimes  
21 jurisdiction over the George W. -- or the George  
22 Washington Parkway as well, which is interesting

1 but neither here nor there.

2 In any event when we put this all  
3 together, we think that if you apply the  
4 criterion that the Commission has already  
5 established that -- and I'm not going to go  
6 through point by point because I already did that  
7 in my letter and I've already gone on longer than  
8 I should and I figure you'll ask me questions if  
9 you think you have to.

10 And so what I'm going to say is we  
11 think as you apply the categories and you look at  
12 them that basically the question of justice for  
13 our -- the people we are concerned with, both the  
14 Native Americans who are sentenced and the Native  
15 Americans who are victims, but we believe that as  
16 a matter of justice that retroactivity is  
17 appropriate as to our defendants.

18 When you look at the undue -- the  
19 burden on the courts we do not believe that the  
20 burden is such that it outweighs the interest of  
21 justice in this case and we think that if we're  
22 looking at a relatively small group of people who

1 will be actually eligible there will be a  
2 significant number of filings made.

3 I mean, that's just in the nature of  
4 what happens anytime we apply the retroactive --  
5 retroactivity to a guideline amendment. But the  
6 reality of it is most of them will be ineligible.

7 Most of them will be relatively easily  
8 identified on the papers and will be decided  
9 relatively quickly. I mean, if you just look at  
10 what we have done with drugs minus two, the other  
11 retroactive applications, you know, the people  
12 who don't qualify are pretty easily identified  
13 and pretty easily moved out, right.

14 And so I don't -- and I understand  
15 that all of my district judge friends have all  
16 written letters and said that this is just a huge  
17 burden. That was not my experience with drugs  
18 minus two.

19 You know, if you look at it, you know,  
20 I've been a federal trial judge. From 2003 to  
21 the time that I took the bench in the circuit for  
22 2017 we went through a number of retroactive

1 applications. What we really found was this.  
2 The first time we had to invent the wheel it was  
3 ugly and difficult.

4 The second time slight modifications  
5 were made and we were able to apply it and by the  
6 third time around it really functioned pretty  
7 smoothly, right.

8 I mean, that every time we have had to  
9 do it we have been able to put together a system  
10 that functions with a little less initial input  
11 and effort, right, and I think that really when  
12 we talk about compassionate release and the COVID  
13 thing it's a unicorn.

14 It was a large number of cases. It  
15 took a large amount of time to try and figure out  
16 where we're at when nobody was in the building  
17 and everything was messed up and everything was  
18 difficult.

19 And I think that we're better off  
20 looking at the other amendments to the guidelines  
21 directly that kind of happened while the courts  
22 were doing ordinary business.



1 I think that to some extent the burden  
2 that the -- that the judges are complaining about  
3 is slightly overstated. I mean, I think that  
4 they'll get it done, right, and I think that that  
5 really effectively kind of, without going through  
6 the detailed analysis, summarizes what I -- what  
7 I'd like to start with and I'd be happy to answer  
8 any questions to the extent of my ability to do  
9 so.

10 CHAIR REEVES: Thank you, Judge  
11 Erickson.

12 Ms. Hakes?

13 MS. HAKES: Thank you to the members  
14 of the Commission.

15 My name is Francey Hakes. I'm a  
16 member of the Victims Advisory Group for this  
17 Commission. I'm also a former state and federal  
18 prosecutor.

19 I was this country's first national  
20 coordinator for child exploitation, prevention,  
21 and interdiction. Eric Holder appointed me to  
22 that position in 2010 and when he offered me the

1 position and something I will never forget -- I'm  
2 quoting him directly here -- he said, "I'm going  
3 to ask you -- no, I'm going to demand that you be  
4 bold and aggressive in this position."

5 He didn't really know it at the time  
6 but bold and aggressive pretty much defines me  
7 and my career during which I've advocated for  
8 victims of crime. I specialize in crimes against  
9 women and children and so I've advocated for a  
10 lot of victims.

11 So when I argue here as I do against  
12 the proposed retroactivity of the Criminal  
13 History Amendments I do so with a wealth of cases  
14 and victims that inform my opinion.

15 I have sat in my office and in their  
16 homes holding the hands of children as they  
17 relive the horror that they endured at the hands  
18 of a sex offender. I've held the hand of a woman  
19 terrified to go home because she's being stalked  
20 and will never feel safe unless the offender is  
21 imprisoned.

22 More times than I can count I

1 nonethless remember every single face. Only a  
2 robot would be unmoved by their fear and their  
3 tears. I also remember their astonishing bravery  
4 in standing up against their offender in court  
5 both in trial and at sentencing.

6 My promise to them was always that  
7 they would make a difference and it bolstered  
8 them as they testified. I never promised  
9 convictions but I always promised that I would  
10 fight for them and fight for justice.

11 As I went from state to federal court  
12 I was able to make an additional promise, truth  
13 in sentencing, because that is the system under  
14 which I practiced as an AUSA.

15 Prosecutors and victims, advocates  
16 across this country, have made those same  
17 promises to countless victims and district judges  
18 have explained carefully to victims and to  
19 offenders that the sentence imposed in court  
20 means something, that they could be certain of  
21 the offender's incarceration for the period of  
22 time imposed by the judge.

1           Now the Commission proposes to open  
2 the floodgates, as the Department of Justice has  
3 also argued, to tens -- potentially tens of  
4 thousands of offenders who will petition to have  
5 their sentences adjusted downward.

6           This will result in many offenders  
7 being released before the sentence runs that was  
8 imposed by the District Court.

9           The push to open the doors of the jail  
10 is shocking enough but more shocking still to me  
11 is the utter lack of any mention in any relevant  
12 way of victims or victims rights in the impact  
13 analysis that was done for the Commission.

14           It appears to me that, once again,  
15 victims are not the focus. The focus is those  
16 who literally prey on others instead of on those  
17 who are wholly innocent as they traverse the  
18 criminal justice system.

19           My question is why. Why are victims  
20 being ignored in the push to release offenders  
21 who have committed crimes like firearms offenses,  
22 murder, kidnapping, manslaughter, stalking, child

1 pornography, and sexual abuse?

2           And I will reiterate something I  
3 argued in court thousands of times. Child  
4 pornography is not a victimless crime. I don't  
5 think the general public has any idea that these  
6 crimes with real victims and which involves  
7 serious sufferings at the hands of these  
8 offenders are part of the push to open the jails.

9           I can only assume that the answer to  
10 why victims are being disregarded is because  
11 unlike me, unlike the nation's prosecutors and  
12 victim advocates, the policymakers behind the  
13 decision have not had to sit in front of victims  
14 of crime and promise to seek justice for them.

15           They haven't taken calls on weekends  
16 and at night in the middle of the night from  
17 victims fearful of what will happen to them in  
18 court or what might happen if the offender gets  
19 out.

20           They've not had to look into the eyes  
21 of a child depicted in horrific images of child  
22 abuse and who can barely breathe knowing that

1 others have --

2 CHAIR REEVES: I apologize for that.

3 Yeah.

4 MS. HAKES: Okay. Knowing that other  
5 people besides the offender have seen these  
6 horrific images of the worst moments of their  
7 lives. I can assume that the policy members have  
8 not seen the terrible -- should I wait?

9 CHAIR REEVES: Yes. Judge Gleeson,  
10 please mute your microphone. All right.

11 MS. HAKES: I can only assume these  
12 policymakers have not seen firsthand the fear of  
13 someone being stalked or who's been kidnapped.  
14 They must surely not have seen the terrible  
15 wounds resulting from gun violence or spoken  
16 directly to those trying to live in neighborhoods  
17 ravaged by drug trafficking.

18 These people who will be released --  
19 make no mistake, who will be released are actual  
20 predators. Webster's definition of predator is  
21 one who injures or exploits others for personal  
22 gain or profit.

1           The crimes in this proposal perfectly  
2 illustrate that definition and we certainly  
3 appreciate at the Victims Advisory Group these  
4 public hearings.

5           But it seems as though the victims  
6 have already been forgotten by these amendments  
7 that effectively reinstate parole in a system  
8 victims have been told it didn't exist.

9           This proposal violates victims' rights  
10 under the law and I hope the Commission will  
11 remember that those preyed upon by these  
12 offenders are real people. They deserve  
13 protection.

14           I'm here for them. I speak for them.  
15 I advocate for them and I will do so boldly and  
16 aggressively. I believe this proposal is wrong.  
17 Thank you.

18           CHAIR REEVES: Thank you, Ms. Hakes.

19           Mr. Luria?

20           MR. LURIA: Good morning. On behalf  
21 of the Probation Officer Advisory Group thank you  
22 for the opportunity to provide testimony

1 regarding the possibility of retroactively  
2 applying the amended guidelines on status points  
3 and the new Section 4C1.1.

4           According to the background components  
5 of Section 1B1.10 among the factors the  
6 Commission should consider in selecting to make a  
7 new guideline retroactive are the purpose of the  
8 amendment, the magnitude of the change, and the  
9 difficulty of applying the amendment  
10 retroactively.

11           It seems like the purpose of the  
12 change to status points was to remove an  
13 enhancement that upon further study added little  
14 to the overall predictive value associated with  
15 the criminal history score.

16           As for the new 4C1.1 guideline, it  
17 appears this amendment was intended to create a  
18 structured reduction when considering defendants  
19 with zero criminal history points, formalizing  
20 what courts have historically considered at the  
21 time of sentencing.

22           Neither of these changes at its core



1 seems to address a newly discovered injustice nor  
2 a recognition of an unjust sentencing practice.  
3 These factors tend to weigh against  
4 retroactivity.

5           However, POAG believes it would be  
6 insensitive to ignore the magnitude of the change  
7 on individual lives. According to the  
8 Commission's study on the impact of  
9 retroactivity, each of these changes would on  
10 average reduce a defendant's incarceration by 14  
11 or 15 months respectively.

12           Additionally, either one of these  
13 guidelines made retroactive would impact  
14 thousands of defendants. The purpose and the  
15 magnitude should be weighed in comparison to the  
16 difficulty in applying these changes  
17 retroactively.

18           In our written testimony POAG  
19 discusses at length several concerns related to  
20 the difficulty of applying these changes  
21 retroactively, which was the focus of most of our  
22 commentary.

1           With regard to status points, the  
2 retroactive application appears fairly routine in  
3 its execution. However, prior challenges to the  
4 criminal history scoring may need to be addressed  
5 as well as new challenges such as how this  
6 retroactive application may impact the guideline  
7 or statutory safety valve consideration and how  
8 safety valve could be applied.

9           As for the new Section 4C1.1  
10 guideline, the retroactive application will be  
11 more complicated and will present the courts with  
12 having to apply a new guideline that has several  
13 qualification criteria and conduct additional  
14 fact finding with potentially missing relevant  
15 facts and do so as part of a limited  
16 resentencing.

17           Section 4C1.1 has criteria that  
18 differs linguistically from other fact finding  
19 the courts have previously engaged in which will  
20 result in additional hearings.

21           There is a further complexity to  
22 retroactivity for both amendments. It is more

1 easily seen in Section 4C1.1 but it applies  
2 somewhat to status point retroactivity as well.  
3 That is this. The criteria at Section 4C1.1  
4 gives articulation to some thought processes that  
5 courts engage in when considering a variance for  
6 defendants that have no criminal history points  
7 and those thought processes may not be  
8 sufficiently captured in the statement of reasons  
9 or sentencing transcripts.

10 This same problem may exist in part  
11 with regard to status points. A judge could  
12 simply have indicated that the criminal history  
13 category was over represented without specifying  
14 why.

15 In the post Booker era of sentencing  
16 judges have had a lot more discretion to impose a  
17 sentence they believe to be correct. Those  
18 sentences are often in consideration of many of  
19 the arguments being made in the formation of  
20 these guideline amendments.

21 It would be a significant undertaking  
22 to address factors the courts already had

1 discretion to consider. Further, while the  
2 structure doesn't require an assessment until  
3 requested it has been my experience that as a  
4 matter of practice each case that had the  
5 potential to be impacted would need to be  
6 assessed regardless of whether they requested an  
7 assessment.

8 Every case that had received status  
9 points would need an assessment. Every case that  
10 had zero points of criminal history would need an  
11 assessment.

12 Similar to amendment 782 wherein every  
13 defendant sentenced with a reference to Section  
14 2D1.1 needed an assessment a similar approach  
15 would be needed here, though I believe the 782  
16 retroactivity was easier than this would be.

17 POAG observes that we are public  
18 servants and we have handled complex  
19 retroactivity in the past. It will take effort,  
20 time, and court resources to address these  
21 changes if they are made retroactive.

22 While the probation office will stand

1 ready to assist if one or both of the sections  
2 are made retroactive, we would ask to have a  
3 delay in the implementation by at least three to  
4 six months.

5 This would give us additional time to  
6 front load filings in advance of implementation  
7 and minimize public safety implications so that  
8 our supervision officers can prepare for a  
9 temporary surge in immediate release cases.

10 Again, thank you for the opportunity  
11 to share POAG's perspective on this important  
12 issue.

13 CHAIR REEVES: Thank you, Mr. Luria.

14 Turning to my colleagues, Judge  
15 Restrepo?

16 VICE CHAIR RESTREPO: Mr. Luria, I'm  
17 curious as to -- could you walk me through how  
18 probation would use the three to six months from  
19 boots on the ground perspective to get us some  
20 idea as to how that would help you if these  
21 amendments were made retroactive?

22 MR. LURIA: In previous efforts for

1 any retroactivity there's a substantial amount of  
2 collaboration that occurs at the onset with other  
3 stakeholders in the court.

4 The U.S. Attorney's Office, the  
5 Federal Public Defender's court, the Commission,  
6 to try and get lists and understand what kind of  
7 a response we'll be looking at. Get a sense of  
8 what the protocols are going to be, what the  
9 expectations are.

10 Once we have that we can start also  
11 building out what kind of forms we're going to be  
12 using to make these more of a uniformed effort.  
13 Those forms look differently if it's eligible  
14 versus ineligible.

15 A person that we think to be eligible  
16 is going to have a lot more information necessary  
17 for the court to make determinations including  
18 sentry (phonetic) information related to their  
19 post-conviction activities while in custody,  
20 educational efforts, disciplinary history versus  
21 ineligible.

22 There's a lot more indications of why

1 somebody might not be eligible. But a lot of  
2 times that front loading information to the court  
3 allows them to make rulings in advance,  
4 especially for individuals who are going to be  
5 immediate release.

6 Getting a sense of what those numbers  
7 look like allows us to better prepare for that on  
8 the supervision side of things in terms of  
9 possibly moving additional cases out to who are  
10 lower risk so that those case loads can be  
11 absorbed.

12 The first 60 to 90 days of any new  
13 case there's a lot of activity that goes on and  
14 supervision in terms of establishing plans,  
15 assessing risks, those kinds of activities, and  
16 doing those kinds of things allow supervision to  
17 not be overwhelmed by that temporary surge of  
18 activity, mostly giving us that additional  
19 information so that we can allocate resources  
20 better.

21 CHAIR REEVES: Mr. Wroblewski?

22 COMMISSIONER WROBLEWSKI: Can you

1 describe, Mr. Luria, just how far in advance the  
2 release and reentry planning process begins? It  
3 was described earlier. I'm just curious your  
4 experience in that and what that actually  
5 entails.

6 MR. LURIA: Yeah. My experience is  
7 somewhat more limited. Because I'm on the  
8 presentence side of things I don't deal with  
9 post-conviction as often.

10 What we do see often is we see that  
11 side of it through these retroactive efforts, and  
12 while I heard earlier as well that the BOP has  
13 made an effort to get those plannings pushed from  
14 a six-month window to an 18-month window. A lot  
15 can change in 18 months when it comes to release  
16 time frames and release planning as well.

17 Part of the reason why it was  
18 initially a six-month window is just because of  
19 how much shifting can happen last minute. But I  
20 don't think that has been as much an  
21 implementation -- as much of a problem in terms  
22 of -- in terms of making those plans work.



1           You know, we have supervision officers  
2 who are willing to go out and do those visits and  
3 get that information in advance so the courts  
4 know that when they're being released they're  
5 being released to a stable residence and so  
6 forth.

7           I haven't seen anything that suggests  
8 that that window has shifted substantially. But,  
9 you know, every retroactive is different than the  
10 last.

11           CHAIR REEVES: Vice Chair Mate?

12           VICE CHAIR MATE: Thank you all very  
13 much for your testimony today. We really  
14 appreciate it.

15           Mr. Luria, I'm hoping I can impose on  
16 you in your capacity as a probation officer in  
17 the Middle District of Florida, which I know, and  
18 ask about past practices there.

19           So I know that with drugs minus two  
20 and other prior retroactivity motions there was a  
21 lot of activity in the Middle District of Florida  
22 and if you're familiar with the process, for

1 example, with drugs minus two whether you could  
2 to kind of walk us through what that looked like  
3 in the Middle District of Florida.

4 MR. LURIA: I was not involved in the  
5 planning side of it but I was certainly involved  
6 in a lot of the -- you know, the authorship of  
7 the memos and the -- some of the post initial  
8 meeting activities. There's a substantial  
9 collaborative effort.

10 Meetings occur between the FPDs, the  
11 U.S. Attorney's Office, and probation to try and  
12 collaborate in terms of our effort to generate  
13 lists together to establish, you know, some kind  
14 of basis to operate off of from that.

15 An omnibus order is put out. That  
16 omnibus order gives protocols and expectations  
17 that's easy for us to all operate under. Allows  
18 us to share information which is actually very  
19 important, especially when you're dealing with  
20 presentence reports.

21 The AFPDs represented all the cases in  
22 those circumstances by order of the court and

1 that made it -- that information sharing a lot  
2 easier.

3 We actually used -- with our Middle  
4 Florida we had slightly over 900 782s that were  
5 on the Commission list. In speaking with the  
6 person who handled that the last time I had  
7 spoken with him about it, and this was many years  
8 ago, we had a list that was closer to 1,400 or  
9 something along those lines after, you know, all  
10 was said and done, I guess.

11 But we ended up doing days where we'd  
12 do retroactive days. We'd set aside a day or two  
13 per month to try and get together as a group and  
14 work through as many of them as we could, same  
15 room. That way we could kind of troubleshoot  
16 problems as they arise and get as many filed, you  
17 know, accurately as possible.

18 If we had problems we could contact --  
19 we had a contact at the AFPDs. We have a contact  
20 at the U.S. Attorney's Office, and we could kind  
21 of kick around those more difficult problems as  
22 we tried to kind of solve those issues in

1 advance.

2 A lot of where we could build  
3 consensus we did. But there are other times  
4 where the more times that these guidelines  
5 connect to other parts the harder it is to build  
6 consensus.

7 And so drugs minus two -- the 782 --  
8 was very easy. It was very rote. You're just  
9 reducing minus two across the board. There's not  
10 a lot to it.

11 You know, 4C1.1, when you add a list  
12 of criteria here it's going to create a lot more  
13 areas where consensus cannot be easily made.  
14 Status points a little easier, I think.

15 But there are certainly jurisdictions  
16 out there where the First Step Act changes to  
17 safety valve have been pulled into the guidelines  
18 through 5C1.2 and because of that the change to a  
19 status offense will actually impact how the court  
20 might have looked at the guidelines in that  
21 structuring and that in part actually might have  
22 impacted decisions that were made by the

1 defendant.

2 If they have four criminal history  
3 points and they're already ruled out of safety  
4 valve eligibility then maybe they chose not to  
5 proffer and the fact that they chose not to  
6 proffer in a retroactive structure might remove  
7 them from consideration now for a safety valve  
8 even though that decision was made at a time when  
9 certain things were viewed a certain way.

10 And so there's a lot of moving parts  
11 to these and it makes it a lot harder to have  
12 that consensus building. Harder, I should say,  
13 than the drugs minus two issue.

14 VICE CHAIR MATE: Thank you.

15 CHAIR REEVES: Mr. Wroblewski?

16 COMMISSIONER WROBLEWSKI: Thank you.

17 Judge Erickson, thank you for being  
18 here. I've got a question for you. In your  
19 considerations within the advisory group was  
20 there a discussion of the impact on victims of  
21 retroactivity?

22 And I'm curious especially because you

1 described the docket that we're talking about and  
2 that the Tribal Advisory Group is interested in -  
3 - that is concerned with as being street crime.

4           You described it: murder, rape,  
5 robbery -- the kinds of cases where there are  
6 victims, which is very different than drugs minus  
7 two, which may or may not have victims. So I'm  
8 curious about that.

9           And do you anticipate that victims  
10 would be contacted in each of these cases, that  
11 they would come to court and have an opportunity  
12 to say something in court? I'm just curious  
13 about these issues.

14           MR. ERICKSON: Yeah. When we spoke  
15 about victims it was very briefly during the  
16 hearing and it was limited to the idea that if  
17 there were crimes that had, you know, true victim  
18 impacts that the judges are not likely to revisit  
19 those sentences in the same way in any event,  
20 right, that -- and really, we're talking about a  
21 relatively small number of judges and most of the  
22 people on our -- in our advisory group have

1 judges in mind and that's kind of where it was  
2 at.

3 And so we did not discuss whether the  
4 victims would be contacted, who would contact  
5 them, what would the process be.

6 It really is, like, if you look at it  
7 the general view in Indian Country is that the  
8 guidelines on sex offenses are not significant  
9 enough, right, and so that's unlikely to change  
10 in the 3553(a) analysis.

11 That's also true if you look at the  
12 vehicular homicide sentences which in our -- in  
13 the federal guidelines you'd compare to  
14 involuntary manslaughter and you look at those  
15 manslaughter cases and they've got, you know,  
16 sentences that are much shorter than what you're  
17 seeing in the state courts and I think that  
18 judges have taken that into consideration post  
19 Booker as well and would continue to do so in the  
20 3553 analysis.

21 So I guess we did not spend a lot of  
22 time talking about the victims other than just to

1 say in those crimes in which there were victims  
2 that we would trust the judges to make the right  
3 call, which -- if that makes sense.

4 CHAIR REEVES: Vice Chair -- hold on  
5 for one second. One of our panelists has  
6 interruption with flights I think or something.  
7 Have you been able to get one?

8 Okay. All right. I'm willing to do  
9 whatever is necessary because we do want  
10 everybody to get the opportunity to be heard.

11 Okay. All right. Vice Chair Murray, I'm sorry.

12 VICE CHAIR MURRAY: I have a question  
13 for Mr. Luria. In your capacity as someone who  
14 sees a lot of PSRs what is your sense of how  
15 often fact finding, you know, and what kind of  
16 fact finding? Will it be an evidentiary hearing  
17 will be necessary if we make Part B retroactive?  
18 Is it -- do you think this is a de minimis number  
19 of cases?

20 Is it a substantial number of cases?  
21 How often will it require witnesses? What kind -  
22 - I realize this is asking you to forecast. It's



1 impressionistic. But what do you think that's  
2 going to look like on the ground?

3 MR. LURIA: It's very tricky and I've  
4 heard previous testimony talking about reliance  
5 on the PSR and we do what we can to include  
6 information that we think is relevant always.

7 But, you know, retroactivity kind of  
8 always makes us feel myopic. When we get into  
9 that structure where, you know, why did I phrase  
10 it that way or why couldn't I have asked this  
11 question and there's a lot in there.

12 We get into it a little bit in our  
13 written testimony. The ones that kind of jump  
14 out, I think, are substantial financial hardship.  
15 That's a big one and that's a very difficult one  
16 because it actually involves coming back and  
17 getting victims to discuss it and it's -- the  
18 language is just barely not the same.

19 Being directly responsible -- that's a  
20 different finding and it's not one that we  
21 anticipated in the way that we looked at this  
22 issue in terms of the PSR.

1           So we haven't -- you know, we try not  
2 to lay blame unless we have to say this is  
3 definitely the defendant who did this or  
4 definitely the defendant did that.

5           If it says the offense included we  
6 keep it to the offense included. Kind of a  
7 similar one the criminal threats of violence in  
8 connection with the offense -- or not -- sorry.  
9 Death or serious bodily injury.

10           So under 2D1.1 you have that fentanyl  
11 with overdose kind of structuring. A lot of  
12 those that I've seen have very, very low criminal  
13 histories, oftentimes nothing, and so they will  
14 have taken fentanyl that they received and pass  
15 it on to somebody else. That person overdoses or  
16 dies and they're the direct result of that.

17           And they've -- you know, have avoided  
18 getting a sentencing enhancement because that's a  
19 different plea and because of that that  
20 enhancement isn't applied to them because it  
21 requires that they be convicted of that to get  
22 that enhancement.

1           So this is an area that we wouldn't  
2 normally be looking at. You have all these cases  
3 where, you know, in recent time we have had many  
4 of these cases. It has gone from a situation  
5 where it would only be given to specialists and  
6 now everybody across the board has had them.

7           So those types of cases that have zero  
8 points we would now have to have additional fact  
9 finding to go back and say were you the direct  
10 cause or did you cause serious bodily injury or  
11 death in your conduct, and it kind of connects in  
12 there. And there's a lot of these additional  
13 things like that.

14           VICE CHAIR MURRAY: And is your  
15 thought -- sorry, this is a rookie question. But  
16 is your thought that going forward probation  
17 officers will now start asking and now they have  
18 a defendant who has zero criminal history points  
19 will start asking those questions for sure?

20       Yeah.

21           MR. LURIA: Oh, definitely. I mean,  
22 absolutely. Even now as it looms as soon as we

1 see the new criteria we start trying to find ways  
2 to include information in there because even if  
3 it isn't relevant yet in terms of guideline  
4 consideration it absolutely is in the minds of  
5 the defense attorneys, the judges who are looking  
6 at this as possible variances, to confer that  
7 benefit in advance of it becoming active in  
8 November.

9 COMMISSIONER WONG: This is also a  
10 rookie question. But to what extent is there  
11 nationwide uniformity among probation offices for  
12 some of these more tricky issues or interpretive  
13 issues that you mentioned?

14 So, for instance, in 4C1.1, you know,  
15 the defendant did not personally cause  
16 substantial financial hardship as an exclusion --  
17 personally substantial hardship -- like, all  
18 those terms. I can see as you noted this  
19 collaborative effort to reach consensus within a  
20 jurisdiction.

21 But is there nationwide guidance that  
22 ensures some uniformity across sort of what

1 probation officers -- how they would be  
2 interpreting that? Or could there be an  
3 additional layer of complexity where different  
4 districts start interpreting those exclusions  
5 differently?

6 MR. LURIA: This is in terms of  
7 previous fact finding efforts of those sections.  
8 I think the adversarial process kind of creates  
9 that uniformity because if I were to without  
10 necessity say that a defendant was the proximate  
11 cause of the serious bodily injury or death of  
12 the defendant I would expect that that would be  
13 objected to and that would probably because it  
14 doesn't need to be considered be removed from the  
15 PSR.

16 And so looking at that, you know, if  
17 we don't have to lay blame then we won't. We'll  
18 just meet the criteria. If the criteria doesn't  
19 require that the defendant be the one who's  
20 responsible there's no need to go beyond that.

21 If you do go beyond that oftentimes  
22 you're going into the adversarial structure where

1 you're going to draw objections. You're going to  
2 have people arguing back, no, that's not okay.

3 So while there's no national guidance  
4 that says, hey, don't ask if they directly cause  
5 substantial financial hardship, if they're the  
6 direct cause of it the process itself kind of  
7 tailors the responses, if that makes sense.

8 CHAIR REEVES: Judge Boom?

9 COMMISSIONER BOOM: I have a question  
10 for Ms. Hakes. Thanks to all of you for your  
11 submissions. We really appreciate it and the  
12 time you've taken to come talk to us.

13 I understand the Victims Advisory  
14 Group's position is against retroactivity. But  
15 if the Commission were to make these amendments  
16 retroactive what would your recommendations be  
17 for how to inform and involve victims as part of  
18 that resentencing process?

19 MS. HAKES: Thank you for the  
20 question, Judge. I want to say in answer to your  
21 question and listening to the testimony earlier  
22 today I've been in a lot of sentencing hearings.

1 I've advocated in a lot of sentencings  
2 and the PSR is always a source of conflict. It  
3 is never, ever, in my experience, just simply  
4 agreed to by the federal defender or the defense  
5 attorneys ever, or even the judge potentially.

6 So you've got a document that is  
7 viciously sometimes attacked inside the  
8 sentencing hearing. So for some of the people  
9 who on the panel earlier had said, oh, we're just  
10 going to do this retroactivity -- we're just  
11 going to lower sentences on the paper -- it is  
12 never going to work because you have prosecutors  
13 and defense attorneys who don't agree about the  
14 content of that at a sentencing hearing.

15 How can they agree three years later  
16 or five years later or if they're not even the  
17 same people or you have a new judge?

18 You're talking about potentially  
19 people who have no experience in the case.  
20 They've never talked to the victim. They don't  
21 know the offender.

22 They weren't at the sentencing. They

1 didn't hear from witnesses. They didn't hear  
2 from character witnesses. They have no context  
3 other than potentially the paper and paper does  
4 not give context and paper does not give voice to  
5 victims, and when you're talking about a process  
6 that is going to impose, effectively, a parole  
7 system now when victims were told there was no  
8 parole in federal sentencing, truth in sentencing  
9 meant something. You absolutely have to include  
10 the victims. There has to be fact finding.

11           There's just simply no way to lower  
12 sentences, certainly in Part B -- there's no way  
13 to lower sentences without going back to fact  
14 finding because I think you're going to be hard  
15 pressed to find federal defenders in spite of  
16 what we heard earlier who are going to look at  
17 the PSR and go, let's just accept all those  
18 facts.

19           They fought tooth and nail against  
20 those facts at the sentencing hearing. So  
21 they're not going to just accept them now,  
22 especially if it's a new defense attorney who



1 sees weaknesses in those PSRs.

2 As Mr. Luria said, they are not  
3 tailored to the new guidelines changes that you  
4 are proposing here and so we certainly oppose it.  
5 If it does go retroactive then we would certainly  
6 say there simply must be a hearing because to say  
7 that you can lower these sentences based solely  
8 on paper is to completely misapprehend the nature  
9 of sentencing hearings altogether because these  
10 sentencing hearings are hard fought and the  
11 guidelines are advisory.

12 So you have judges post Booker who've  
13 already imposed these sentences based on what  
14 they believe is in the best interests of the case  
15 based on their hearing from victims and looking  
16 at victims' letters and hearing victims'  
17 testimony, hearing from the defendant,  
18 potentially, character witnesses of the  
19 defendant. All of these things the judge has  
20 already taken into account.

21 And so I also wanted to say -- I'm  
22 sorry, it's a little off topic -- but I also

1 wanted to say I cannot believe how many people  
2 have said that the reason for these changes is  
3 some sort of fundamental unfairness in the prior  
4 sentencings.

5 Most of you are judges. You all know  
6 these sentencings are many trials. You've got  
7 advocates fighting hard for the government side,  
8 advocates fighting hard for the defendant side,  
9 and then you've got a judge who has to play  
10 referee and make a decision on sentences.

11 So to say that this has been  
12 fundamentally unfair I think is just completely  
13 wrong. But as the Victims Advisory Group what we  
14 would say is there simply must be hearings and  
15 victims deserve and by law have the right to be  
16 heard at a resentencing, and arguing that this is  
17 not a resentencing is just semantics.

18 It's just playing games with words  
19 because it is a resentencing. When you are going  
20 to look at facts, when you have to look at things  
21 about whether or not someone is personally  
22 responsible for causing this financial harm or

1 whether there was a threat of violence these are  
2 facts that can only be given by the victim of the  
3 crime and so they deserve to be heard in this.

4 They deserve to be notified. They're  
5 going to have to be notified by victim witness at  
6 U.S. Attorneys' offices who are already  
7 overburdened, underpaid, and understaffed, in  
8 trying to make the communication that they're  
9 required to make. When there is every single  
10 kind of hearing they have to contact victims.

11 But they're going to have to take on  
12 that burden and contact the victims who will have  
13 a right to come into court. And I just want to  
14 remind the panel, the Commission, that when these  
15 -- every single time these victims are contacted,  
16 every time they have to think about the crime,  
17 every time they have to talk about the crime is  
18 another revictimization of them. But they  
19 deserve the right to be notified and the right to  
20 be heard. So we would ask for hearings.

21 COMMISSIONER BOOM: Thank you.

22 CHAIR REEVES: Judge Erickson, I do

1 have a question, just one question of you. A  
2 district judge to a court of appeals judge --  
3 can't pass the opportunity to ask you a question.

4 In your submission you indicate that  
5 in the mechanistic side of things probably won't  
6 take much of anything mechanics. You look at it  
7 and come up with that.

8 But you do indicate that when there is  
9 additional fact finding it would not be unduly  
10 burdensome to the system, from your perspective  
11 and, you know, you've sat as a trial judge and  
12 you sit on a court of appeals to review some of  
13 these decisions that might be made by courts.  
14 Tell us what your view on that is.

15 MR. ERICKSON: I think there are  
16 really a couple of things that happen when you're  
17 confronted with this situation, right. You're a  
18 district judge and there's a question of fact  
19 that's been presented and, you know, when it's  
20 all just presented on paper I think that -- and  
21 circuits vary in how they -- what they allow  
22 people to do but in our circuit, you know, if the

1 district judge said this fact question has been  
2 presented and it is unresolvable on the PSR that  
3 we have accepted, right, because once you accept  
4 the PSR that's a statement of facts.

5 It is what it is, right, and you'll  
6 say, okay, this fact isn't in there. All right.  
7 And I think an awful lot of judges are going to  
8 get to the point where they're going to say,  
9 doesn't matter to me because under 3553(a) I'd  
10 arrive at exactly the same sentence, right.

11 Because whether the loss was directly  
12 caused by the defendant or whether the loss was  
13 just indirectly caused because he participated in  
14 a conspiracy that cost people a million dollars I  
15 think a lot of times you're going to look at that  
16 and say that is a fact that doesn't make any  
17 difference to me in my 3553(a) analysis.

18 Now, there is a requirement that you  
19 correctly find the guideline range to start with,  
20 right, and so you could make an argument that  
21 somehow that that's a procedural error.

22 But I will tell you that in looking at

1 how our court and, I think, most of the appellate  
2 courts have addressed those issues when they come  
3 up they'd say, well, the judge still could  
4 correctly say that that fact wouldn't make any  
5 difference to me and my sentence would be the  
6 same.

7 I mean, we do that in our circuit on  
8 all sorts of things. You know, if the sentencing  
9 judge states, you know, I don't think that a  
10 particular enhancement applies but even if I'm  
11 wrong I'm imposing the same sentence I would  
12 anyhow and we have said that's okay.

13 Now, I know there's a circuit split on  
14 that. But I just would say that my experience  
15 would be that when you get right down to the  
16 facts that make a difference for the judge's  
17 sentencing that would require and necessitate an  
18 additional hearing to acquire new evidence beyond  
19 what's in the papers I think it's going to be  
20 relatively rare because you're going to be -- the  
21 way we have this thing set up now you'll be in  
22 the amendments that are in Part B.

1           That's a relatively small number of  
2 people in our district. It was only, like, 10 or  
3 12 people total and, you know, it seems to me  
4 that holding that hearing would be a relatively  
5 unusual experience.

6           CHAIR REEVES: Thank you, sir. Thank  
7 you to this panel. Thank you for your testimony.  
8 We appreciate -- we appreciate you. All right.

9           I'd like to introduce our fourth  
10 panel, and after this panel we'll take our lunch  
11 break but I'd like to introduce them, and they  
12 will provide the perspectives from law  
13 enforcement officials on our question before the  
14 Commission, retroactivity.

15           First we have Chief Eddie Garcia, who  
16 was recently elected as president of the Major  
17 Cities Chiefs, a professional organization of  
18 police executives from across the United States  
19 and Canada.

20           He is the thirtieth police chief of  
21 the Dallas Police Department, the ninth largest  
22 police department in the country. With nearly 31

1 years of law enforcement experience, Chief Garcia  
2 was appointed in 2021 and is the first Latino to  
3 serve in his position in the department's 140-  
4 year history.

5 Second, we have -- second, we have  
6 Patrick Yoes, who serves as president of the  
7 Fraternal Order of Police. With nearly 36 years  
8 as an active law enforcement officer Mr. Yoes  
9 retired in 2020 from the St. Charles Sheriff's  
10 Office in Louisiana where he had oversight of the  
11 department's Special Services Division,  
12 responsible for a number of community outreach  
13 programs.

14 During his career Mr. Yoes worked as a  
15 patrol deputy, patrol sergeant, school resource  
16 officer, and detective in the Criminal  
17 Investigation Division.

18 Mr. Garcia, we're ready to hear from  
19 you, sir.

20 MR. GARCIA: Thank you for the  
21 opportunity to participate. I currently serve as  
22 -- sorry. I currently serve as the chief of



1 police in Dallas, Texas. I'm also the president  
2 of Major Cities Chiefs Association. It is my  
3 honor to testify on behalf of my MCCA colleagues.

4 My testimony will provide a local law  
5 enforcement perspective on whether Parts A and B  
6 of the Commission's 2023 criminal history  
7 amendments should be applied retroactively.

8 The MCCA generally does not support  
9 retroactivity as the criminal justice system  
10 needs some degree of finality to operate  
11 properly.

12 The limited circumstances where  
13 retroactivity may be appropriate must be narrowly  
14 scoped, address pervasive issues such as a  
15 historical shortcoming in the criminal justice  
16 system and focus exclusively on nonviolent  
17 offenders.

18 The MCCA strongly believes that Parts  
19 A and B of the Commission's amendment do not meet  
20 these criteria and as a result should not be  
21 applied retroactively.

22 Part A of the amendment deals with the

1 impact of status points. The MCCA is concerned  
2 that retroactivity -- retroactively applying it  
3 will provide relief to violent offenders and  
4 offenders who are high risk at recidivism.

5 The Commission data indicates that if  
6 Part A is applied retroactively 11,495 offenders  
7 would be able to seek a sentence reduction. This  
8 includes offenders convicted of drug trafficking,  
9 firearms offenses, robbery, child pornography,  
10 sex offenses, murder, and kidnapping.

11 Many of these offenders also are at  
12 high risk of recidivating. As status point  
13 offenders they already have a history of doing  
14 so. Furthermore, 91 percent of these offenders  
15 fall into criminal history categories three  
16 through six. According to a recent Commission  
17 study, the rearrest rate for these categories is  
18 greater than 60 percent.

19 Let me be clear. If the Commission  
20 does move forward with retroactivity and an  
21 offender who is released as a result recidivates  
22 MCCA members and our local law enforcement

1 colleagues will need to act to keep our community  
2 safe.

3 The concerns about violent offenders  
4 and recidivism are less applicable to Part B of  
5 the amendment, which pertains to zero point  
6 offenders.

7 However, the MCCA has additional  
8 concerns and does not believe Part B should be  
9 made retroactive either. Making Parts A and B of  
10 the Commission's amendment retroactive will make  
11 thousands of additional offenders eligible for  
12 release within a year, many of whom could be  
13 released immediately.

14 The MCCA believes this will create  
15 several implementation challenges. For example,  
16 post release supervision services, which are  
17 already stretched thin, will likely become  
18 overwhelmed.

19 There has also not been sufficient  
20 investment in reentry services to handle an  
21 influx of new individuals who require them.  
22 These services assist individuals reentering

1 society with meeting basic human needs such as  
2 securing food and housing, obtaining health care  
3 and assessing economic opportunities.

4           When these needs are met it helps  
5 address the root causes of criminal behavior and  
6 prevent recidivism. Instead of releasing  
7 additional offenders via retroactivity, the MCCA  
8 believes we should focus on ensuring those who  
9 have already been released do not recidivate by  
10 adequately and appropriately preparing them for  
11 life outside of prison.

12           Over the past few years communities  
13 nationwide has struggled with increased violence  
14 and violent crime rates. According to MCCA data,  
15 in the first quarter of 2023 homicides were up  
16 over 50 percent and aggravated assaults up 34  
17 percent compared to 2019.

18           MCCA members have reported that lack  
19 of accountability within the criminal justice  
20 system is contributing to this trend. The MCCA  
21 is concerned that making Parts A and B of the  
22 Commission's amendment retroactive will

1       exacerbate these challenges.

2                   Making tens of thousands of convicted  
3 offenders, many of whom will repeat, and violent  
4 offenders eligible for a sentence modification  
5 will without question contribute to the notion  
6 that the criminal justice system is simply not  
7 holding people accountable.

8                   In closing, while ongoing evaluation  
9 and assessment of federal sentencing policy is  
10 important, a different analytical lens is  
11 required when determining whether a policy should  
12 be applied retroactively.

13                   The MCCA encourages the Commission not  
14 to make Parts A and B of the 2023 Criminal  
15 History Amendment retroactive as doing so will be  
16 detrimental to public safety.

17                   Thank you again for the opportunity to  
18 testify and I look forward to any questions you  
19 may have. Thank you.

20                   CHAIR REEVES: Thank you, sir.

21                   Mr. Yoes?

22                   MR. YOES: Mr. Chairman, Madam Vice

1 Chairman, members of the U.S. Sentencing  
2 Commission, my name is Patrick Yoes. And good  
3 afternoon, just looking at the time here.

4 I'm the national president of the  
5 Fraternal Order of Police, our nation's oldest  
6 and largest rank and file labor organization  
7 representing 367,000 members from every region of  
8 this country.

9 I want to thank you, Mr. Chairman, and  
10 the rest of the Commission for inviting me to  
11 share the views of America's rank and file law  
12 enforcement officers while potentially applying  
13 Parts A and B of the 2023 Criminal History  
14 Amendment retroactively.

15 Specifically, Part A of the amendment  
16 reduces the impact of status points for offenders  
17 and Part B provides a decrease of two levels of  
18 the offense level for offenders who did not  
19 receive criminal history points and whose offense  
20 did not involve specific eligibility criteria.

21 The Commission is statutorily required  
22 to consider whether both parts of the amendment

1 should be applied retroactively to current  
2 offenders sentenced previously.

3           The Fraternal Order of Police opposes  
4 the retroactive application of both parts of the  
5 Criminal History Amendment. Our rank and file  
6 officers put themselves in harm's way to  
7 investigate, arrest, and assist in a conviction  
8 of these offenders who were justly sentenced  
9 under the rules promulgated by this Commission in  
10 accordance with federal law.

11           The offenders knew what the penalties  
12 might be at the time of their -- they committed  
13 their crimes. The prosecutors charged and  
14 convicted them under existing rules and they were  
15 sentenced under guidelines that were in place --  
16 then in place.

17           This is our system at work and its  
18 results under the rules in place at the time are  
19 just. I recognize that our criminal justice  
20 system is not static in that our system, like any  
21 other system, has to be periodically adjusted so  
22 that the results are fair and just.

1           It is imperative, however, for reasons  
2 of justice and continuity to apply such  
3 adjustments prospectively and not second guess,  
4 reconfigure, or relitigate prior results. The  
5 sentence for offenders currently serving time  
6 were fair and just at that time.

7           We must also assess the impact the  
8 retroactivity will have on safety of the public.  
9 The American public is currently experiencing a  
10 nationwide spike in crime. All across the United  
11 States communities are seeing the real life  
12 consequences and feeling the immense pain caused  
13 by a recent surge in violent crime.

14           More and more citizens in our country  
15 are justifiably living in fear, constantly  
16 wondering if they too will become victims. In  
17 too many of our communities the rule of law is  
18 set aside in favor of so-called reforms or to  
19 advance reform agendas.

20           This is creating greater danger for  
21 the streets in our communities. We need to find  
22 strategies that improve the criminal justice



1 system and will reduce crime and reject policies  
2 and practices which do not prioritize public  
3 safety.

4 The Fraternal Order of Police does not  
5 believe that the retroactive application of Parts  
6 A and B of the criminal history amendment will do  
7 that. According to the Bureau of Prisons, there  
8 are 50,545 currently incarcerated offenders who  
9 are assigned status points.

10 Of these 20,598 -- 40.8 percent of the  
11 total -- have been assigned a criminal history  
12 score of six or lower when they were sentenced  
13 under the existing guidelines.

14 Yet, Part A is applied retroactively  
15 and the criminal history score of these offenders  
16 were reduced by two points and the scores of the  
17 other 59.2 percent of offenders would be reduced  
18 by one.

19 This would result in approximately  
20 11,495 of the 50,545 status point offenders being  
21 eligible to petition for a reduction of sentence.

22 According to the Bureau of Prisons,

1 the average sentence for these offenders is 120  
2 months. If the courts were to grant a full  
3 reduction possible in each case the new projected  
4 average sentence for these offenders would be 106  
5 months, a reduction of 14 months.

6 More than three-quarters of the  
7 eligible offenders could be released within the  
8 next five years and approximately 2,000 eligible  
9 for immediate release. This will have a  
10 considerable impact on public safety.

11 Similarly, we oppose the retroactive  
12 application of Part B, which would apply  
13 offenders -- to offenders with one or more  
14 criminal history points.

15 The Criminal History Amendment  
16 provides a decrease of two levels of criminal  
17 history category in the sentencing table for the  
18 zero point offenders. The Bureau of Prisons  
19 estimates that there are 34,922 zero point  
20 offenders incarcerated in federal facilities of  
21 which 12,574 meet the additional criteria  
22 established in federal law.

1 More than half -- 57.8 percent or  
2 7,272 offenders -- would have a lower guidance  
3 range if the Commission were to make Part B  
4 retroactive and, therefore, would be eligible to  
5 seek a modification of their sentence.

6 According to the Commission's own  
7 data, the current average sentence for these  
8 eligible zero point offenders is 85 months. If  
9 the courts were to grant a full reduction  
10 possible in each case to project a new average  
11 sentence for these offenders would be 70 months,  
12 a reduction of 15 months. Approximately 1,200  
13 offenders would be eligible for immediate  
14 release.

15 We know that our criminal justice  
16 system struggles to integrate released offenders  
17 back into society. From the perspective of law  
18 enforcement and public safety these challenges  
19 include a lack of communication within state and  
20 local authorities when an offender's release date  
21 is changed and they are released back into the  
22 communities we protect.

1           We must also consider the resources  
2 needed to make absolutely certain that victims  
3 are notified when an offender is released. The  
4 resources of the United States Probation and  
5 Pretrial Services are severely strained -- were  
6 severely strained during the Obama  
7 administration's clemency initiative in -- more  
8 recent in the implementation in the First Step  
9 Act.

10           The Fraternal Order of Police is very  
11 proud of our work in enacting the First Step Act,  
12 one of the most sweeping and comprehensive  
13 changes in the criminal justice system in  
14 decades.

15           However, we strongly believe --  
16 however, we strongly believed at that time that  
17 greater resources were necessary, especially in  
18 personnel, to ensure that the release of  
19 offenders would have the support they needed to  
20 maximize their chances of successful integration  
21 back into communities.

22           Unfortunately, those resources were

1 never materialized. The First Step Act has only  
2 been in place for five years and a prisoner  
3 assessment tool targeting estimated risk and  
4 needs, better known as PATTERN, which measures an  
5 offender's rehabilitation during incarceration,  
6 already provides an opportunity for inmates to  
7 expedite their release.

8 We believe that the Bureau of Prisons  
9 and the federal criminal justice system is doing  
10 everything that it can to ensure that the  
11 ultimate goal of integrating former offenders  
12 into law-abiding society is met.

13 The Fraternal Order of Police sees no  
14 compelling reason to apply Parts A and B  
15 retroactive as they do not correct an injustice.  
16 In fact, quite the opposite. They change the  
17 rules after a just result is simply unfair to  
18 victims.

19 I want to thank the Commission in  
20 advance for the consideration of the views of  
21 367,000 members of the Fraternal Order of Police,  
22 and I'd be pleased to answer any of your

1 questions. Thank you.

2 CHAIR REEVES: Thank you, Mr. Yoes.

3 Any question of these panel members? Yes?

4 VICE CHAIR MURRAY: Thank you both for  
5 your testimony, just as an initial matter. But  
6 you both spoke about issues with reentry and  
7 supervision, that, you know, the probation office  
8 and the Department of Justice, the BOP, have  
9 asked us to sort of delay implementation if we do  
10 this to three or six or nine or 12 months to give  
11 time for probation and reentry services to be  
12 ready to be up and running.

13 Would that alleviate or mitigate to  
14 some degree your concerns about public safety or  
15 not really?

16 MR. GARCIA: You know, I'll take the  
17 first stab at this. You know, even in the  
18 current system right now we're seeing significant  
19 failures in the post supervision of individuals,  
20 whether that be monitoring on ankle monitor or  
21 other -- and other dynamics that simply do not  
22 work for violent criminals.

1                   And so I'm not quite certain that any  
2 months are going to fix the failures that we're  
3 already seeing under the existing policies that  
4 we have and so, you know, up until the point  
5 that, you know, even let's fix what we're working  
6 on now, you know, before really moving on to  
7 others because we're already seeing significant  
8 true life stories and failures and victimization  
9 and recidivism currently under the current  
10 system.

11                   MR. YOES: And I'll add -- maybe it's  
12 not specific to your question but it's something  
13 that should be considered as well.

14                   The vast majority of law enforcement  
15 in the country are local and state agencies and  
16 we are in an existential threat right now in  
17 personnel in trying to attract the next wave of  
18 law enforcement.

19                   Pretty much every agency in this  
20 country is working shorthanded. This just puts  
21 even more burden. Maybe not directly to your  
22 question but something for consideration.

1 COMMISSIONER WONG: Mr. Yoes --

2 MR. YOES: Yes, ma'am?

3 COMMISSIONER WONG: -- you've made it  
4 -- you stated that FOP supported the First Step  
5 Act but that, unfortunately, resources for  
6 community reintegration that you described as  
7 necessary for implementation did not materialize.  
8 I was just hoping you could flush that out.

9 MR. YOES: I think -- if I could just  
10 I think our previous panelist identified it quite  
11 well, that the resources necessary in order to be  
12 able to do the adequate job were something was of  
13 a strain, even today. So at that time you had an  
14 influx of requirements on the -- on the probation  
15 and presentencing to process all of these  
16 applications and I just feel that it's going to  
17 create a similar situation.

18 CHAIR REEVES: Chief Garcia, I want to  
19 follow up with -- to a response that you made  
20 about failures in the system with respect to --  
21 and I know you're from Dallas and from Texas.

22 So I just want to know if those



1 failures that you've seen are a result of a  
2 failure in the -- because as Mr. Yoes mentioned  
3 there are more than one system of criminal  
4 justice systems, local systems versus federal.

5 Are you talking about the failures  
6 specifically in the federal system of recidivism  
7 and failures of persons who were in the -- who  
8 had been convicted of a federal crime vis-a-vis  
9 failures of persons who might have been under  
10 supervision under various local or state systems?

11 MR. GARCIA: So I've seen -- we have  
12 seen failures in both, quite frankly. We have  
13 seen failures at the local level, at the state  
14 level, and we have also seen failures at the  
15 federal level with individuals that simply have  
16 not -- that the systems and the infrastructure  
17 has not been in place to be able to supervise  
18 them properly.

19 As to whether it's, you know, post  
20 release or pending -- a pending trial for certain  
21 things we have seen -- we have seen the  
22 supervision failures on both sides.

1 CHAIR REEVES: Okay. Thank you.

2 VICE CHAIR RESTREPO: Gentlemen, just  
3 I'm very curious to hear your expertise with  
4 respect to folks coming home and in the  
5 systematic failures you've identified what should  
6 be done to improve somebody's chances of  
7 successful reintegration that's not happening  
8 right now?

9 MR. GARCIA: That's a great question,  
10 Commissioner. You know, one of the things in  
11 Dallas that we're doing and it's been implemented  
12 nationally too is with our focused deterrence  
13 model as an example, and understanding two  
14 things.

15 Number one, preparing individuals --  
16 the time to prepare individuals that are coming  
17 out of custody is not when they come out of  
18 custody.

19 We need to do a better job of  
20 preparing them prior to that. You know,  
21 obviously simple things -- making sure they're  
22 able to get their driver's license, their IDs,

1 you know, getting them back with regards to  
2 financial, credit cards, you know, making sure  
3 that we have the systems in place that if  
4 individuals need help with job training,  
5 education, not just for them but their families  
6 as well that they're given those opportunities.

7           And the thing is, and particularly in  
8 Dallas and I would imagine that this is  
9 nationally, there's a lot of hands ready to help  
10 in that -- in that dynamic. And so really it's  
11 reinvesting in people and places but also  
12 understanding and giving a clear message to  
13 individuals we will not tolerate violent crime.

14           We will use every tool we have in our  
15 toolbox to ensure that these individuals do not  
16 hurt our communities. As one of my good friends,  
17 and urban specialist -- his name is Antong Lucky  
18 -- he's told me many times sometimes people need  
19 prison ministry if they're not going to listen  
20 and to ensure that those individuals aren't  
21 hurting our communities and ensure that we have  
22 no tolerance for violent crime and that the

1 individuals that do want help that we're able to  
2 provide that help because if they don't get the  
3 help they want and they do recidivate and they do  
4 end up going back to prison it's because someone  
5 else in our community has been victimized.

6 And so I think more needs to be done  
7 in the preparation of these individuals coming  
8 out of incarceration. More needs to be done with  
9 not just letting them out and not having  
10 wraparound services available to them for the  
11 simple things.

12 You know, I know, we jump immediately  
13 to getting them jobs and job training. But if  
14 individuals can't have an ID, if individuals  
15 can't start some sort of credit, you know,  
16 they're going to be back on that conveyor belt to  
17 prison. And so those are some of the things I  
18 think we need to do collectively.

19 MR. YOES: I'll just -- I'm not too  
20 sure I can -- I can improve on that other than to  
21 say that every dollar we spend and every effort  
22 we spend in order to be able to break that cycle

1 of violence, that cycle of crime, is a dollar  
2 well spent.

3 I think it's very obvious, at least in  
4 my 36 years of law enforcement, that the vast  
5 majority of crime is committed by a small  
6 percentage of people. We take them off the  
7 streets. We stop the crime. We put them back on  
8 the streets, potentially. If we don't break that  
9 cycle it's going to continue.

10 So that is -- that is the big  
11 question, one that I'm sure there'll be  
12 commissions for years will be asking that same  
13 question and I'm not sure we'll ever fully wrap  
14 our arms completely around it until we're  
15 invested in making sure that we take those steps  
16 to break the cycle.

17 Thank you.

18 CHAIR REEVES: Vice Chair Murray?

19 VICE CHAIR MURRAY: One of the  
20 questions that's been coming up a lot is what  
21 role -- what purposes did status points serve  
22 when they existed in full? And, obviously, one

1 of them was specific deterrence in terms of --  
2 and that was to some degree undermined by  
3 research on recidivism.

4 But another question that's come up is  
5 how much of a role -- how much did the fact of  
6 having reoffended while you were on status,  
7 especially in the state system, reflect a lack of  
8 respect for the law or an increased culpability?

9 And I'd love to hear what both of you  
10 think about state supervision. How when -- how  
11 often is there a state or local offender who  
12 doesn't even really understand they're on  
13 supervision or doesn't realize that it's -- it  
14 has not been conveyed to them that it's really a  
15 big deal not to reoffend while you're on  
16 supervision?

17 MR. GARCIA: Well, I think we probably  
18 have a lot to say on this. But I'd say it  
19 matters greatly, I believe, from the  
20 accountability piece.

21 You know, one thing that -- one thing  
22 that I think is out there that we don't talk

1 about either is and I'll just say there's been a  
2 demoralization of law enforcement nationally with  
3 respect to honorable men and women that serve and  
4 sacrifice for the community knowing and thinking  
5 that individuals that are committing crimes are  
6 getting more chances than our victims and that  
7 the rule of law has become less, and that has led  
8 to a lack of engagement in communities in both  
9 ways, right, where the law enforcement is on one  
10 end, the community is on one end and there's no  
11 one in the middle keeping our communities safe  
12 because there's been a perception that the rule  
13 of law has decreased.

14 And that can't -- and that has to be  
15 spoken about because as changes are being made to  
16 our criminal justice system we have to remember  
17 that the boots on the ground and the honorable  
18 men and women that are sacrificing every day,  
19 that they're doing it for something, that they're  
20 doing it for a reason, and that does impact our  
21 men and women nationally and that has led to an  
22 increase in violent crime in the country because

1 honorable men and women in this profession have  
2 disengaged from communities and that is a fact.

3           You know, I'll say that, you know,  
4 from a local level, you know, individuals do you  
5 know, right, and so the lack of the consequences  
6 with respect to individuals that have committed  
7 crimes while on supervision, that, you know,  
8 there's several horrible examples that I have  
9 locally in Dallas and I'm sure nationally that  
10 really attend to the fact that there's -- the  
11 infrastructure simply is not put in place to  
12 supervise these individuals properly and then  
13 when we're dealing with violent criminals, you  
14 know, the post supervision simply is not -- is  
15 not enough oftentimes.

16           And so it's incredibly important for  
17 us to continue to build on those other services  
18 to ensure that if individuals have -- you know,  
19 have, you know, have been held accountable and if  
20 the process is that they are to be released  
21 whatever, whether it's pre trial or post or what  
22 have you, that the proper systems are in place to



1 supervise them because we have seen -- many  
2 examples when it's not done right we have seen  
3 some heinous crimes being committed and then I  
4 have to look at my community and, again, we're  
5 always a front, right.

6           They don't -- they don't -- our  
7 community oftentimes thinks that the police  
8 departments are the only cog in the wheel and we  
9 have to spend time explaining to them that we're  
10 not, right. And so it's very difficult to look  
11 at our communities that are getting impacted by  
12 violent crime and when individuals then a commit  
13 these heinous crimes when, you know, the question  
14 is asked, well, why weren't they held accountable  
15 the first time.

16           And so it's incredibly important to  
17 us. I know it's incredibly important to my  
18 neighborhoods and communities that are impacted  
19 by violent crime as well.

20           MR. YOES: I'd just echo exactly what  
21 the chief said. There is no question the last  
22 few years have been a challenge for law

1 enforcement. The very powers that law  
2 enforcement officers have are directly related to  
3 trust in your community.

4 If we know anything in the past few  
5 years that trust has been really, really pushed  
6 to its limits as sort of an adversarial  
7 relationship where law enforcement is called upon  
8 to do everything and handle everything -- is put  
9 in a position of a really poor light.

10 So that lack of respect certainly has  
11 had an impact. I'm going to maybe shift it a  
12 little bit and just answer it in a little bit  
13 different direction.

14 I think if we look across the country  
15 and we see those communities where all of these  
16 spokes in that wheel are working together, all  
17 the resources are in place, if you look at those  
18 communities where everyone has a vested interest  
19 in the well-being of a community we see thriving  
20 communities.

21 In places where we see fractures I  
22 think that's where our problem comes in and I

1 think that's where I expressed the concern of the  
2 resources necessary in order to effectively do  
3 this.

4 While we may be talking about  
5 sentencing on a federal level all of these  
6 offenders are going back into local communities.

7 So that's -- it's much bigger than  
8 just the federal -- a federal picture. It  
9 affects every one of our communities and there  
10 needs to be more resources. Everyone needs to be  
11 working together on all of those folks in order  
12 to provide healthy communities.

13 COMMISSIONER WONG: Not infrequently I  
14 think district judges get motions for early  
15 termination of supervised release from probation  
16 offices. Supervised release terms can be very  
17 long.

18 It can be resource intensive for the  
19 probation officer, and one thing I'm hearing in  
20 your testimony is interesting because there's  
21 been a lot of focus in the testimony before you  
22 on sort of the modification of actual sentences.

1                   But is what you're getting at also  
2 that with a greater pool of people to supervise  
3 you might also see a lot of motions to modify or  
4 terminate supervised release as well on the back  
5 end and, therefore, sort of less supervision with  
6 more people to supervise?

7                   MR. GARCIA: I would absolutely agree.  
8 I mean, again, as I mentioned earlier, I hate  
9 this but the way it's currently -- the way the  
10 system is currently set up is not working very  
11 well and so, yes, this will absolutely add to  
12 that burden in my -- in my opinion.

13                  MR. YOES: I agree.

14                  CHAIR REEVES: Well, thank you,  
15 gentlemen, for your testimony and I hope you're  
16 able to get another flight or something, Mr.  
17 Garcia. Otherwise, we'll see you --

18                  MR. GARCIA: We'll see. I'm open to  
19 more questions. I already changed it. So --

20                  CHAIR REEVES: You're a guy from  
21 Dallas. You never --

22                   (Laughter.)

1 MR. YOES: Thank you very much.

2 CHAIR REEVES: Thank you all so much.

3 All right. We're now going to take our lunch  
4 break. I ask that -- you know, we got behind  
5 this morning so we'll start back up at 2:10 this  
6 afternoon. Thank you all. We're in recess.

7 (Whereupon, the above-entitled matter  
8 went off the record at 12:35 p.m. and resumed at  
9 2:21 p.m.)

10 CHAIR REEVES: Welcome back. I hope  
11 everyone enjoyed their lunch. We are ready for  
12 the last half of this hearing today.

13 We have two panels left. The fifth  
14 panel will provide us with community perspectives  
15 on retroactivity.

16 Our first panelist is Mary Price, who  
17 serves as general counsel of FAMM, a national  
18 nonpartisan advocacy organization that focuses on  
19 criminal justice reform.

20 Ms. Price is the founder of the  
21 Compassionate Release Clearinghouse, which  
22 recruits, trains, and supports attorneys to

1 provide pro bono representation to people in  
2 federal prison seeking compassionate release.

3 Ms. Price also serves as a special  
4 adviser to the American Bar Association's  
5 criminal justice section and as a member of the  
6 National Association of Criminal Defense Lawyers  
7 First Step Implementation Task Force.

8 Our second panelist is Alan Vinegrad,  
9 who serves on the board of the Center for Justice  
10 and Human Dignity. The center aims to reduce  
11 prison incarceration while improving prison  
12 conditions.

13 Mr. Vinegrad is a former United States  
14 Attorney for the Eastern District of New York and  
15 currently works as a senior counsel in Covington  
16 & Burling's white collar defense and trial  
17 practice groups.

18 Finally, we have Frank Russo, who is  
19 associate general counsel and director of the  
20 American Conservative Union Foundation  
21 Prosecutors and Law Enforcement Advisory Council  
22 at the Nolan Center for Justice.

1           Mr. Russo previously served as the  
2 director of government and legislative affairs at  
3 the National District Attorneys Association. He  
4 also worked with the House Judiciary Committee  
5 and the Senate Judiciary Committee.

6           Before we turn to Ms. Price I want to  
7 announce and for those who are watching we have  
8 been joined, I guess, not just in spirit but  
9 personally by Commissioner John Gleeson.

10           So Ms. Price, you may start.

11           MS. PRICE: Now I'm on.

12           CHAIR REEVES: I can hear you because  
13 I'm right here with you. We need Deb to hear  
14 you.

15           MS. PRICE: Thanks a lot. Good  
16 afternoon, Chair Reeves and Vice Chairs and  
17 Commissioners, and thank you for the invitation  
18 to testify today in support of retroactivity of  
19 Parts A and B.

20           You've heard a fair amount today about  
21 how magnitude and purpose and manageability of  
22 support retroactivity and we agree with that.

1 Equally important, I believe -- we believe it's  
2 required in the interest of justice and  
3 fundamental fairness.

4 The Commission's had a long-standing  
5 commitment to identifying and amending the  
6 guidelines to address demographic and racial  
7 disparity and that history should inform this  
8 decision.

9 The Commission has found that status  
10 points make -- are disproportionately assessed on  
11 people of color. More than 70 percent of  
12 eligible -- people eligible for retroactivity  
13 often are people of color and people of color  
14 make up 83.1 percent of individuals eligible for  
15 zero point adjustments were they made  
16 retroactive.

17 The disparate impact of status points  
18 and the treatment of zero point offends  
19 fundamental justice and fairness. Several prior  
20 retroactivity decisions explicitly address the  
21 racial delta of the crack cocaine disparity is  
22 hardly an argument against making this particular



1 disparity of criminal history scoring retroactive  
2 today.

3 It's true that widespread knowledge of  
4 the crack powder structure undermine confidence  
5 in the fairness of the criminal justice system.  
6 But this Commission does not take its cues from  
7 public opinion polls.

8 The Commission's retroactivity  
9 analysis has exposed a somewhat hidden issue in  
10 terms of disparity. It's no less egregious  
11 because it's hidden, and a hidden disparity is  
12 still a disparity and now in plain sight it  
13 should be addressed.

14 Retroactivity is also called for  
15 because the sentences for 18,500 people have been  
16 increased by anywhere between 14 and 15 months  
17 for reasons that the Commission can no longer  
18 justify.

19 How can we permit the incarceration to  
20 continue for months or years longer than  
21 necessary? I'm speaking to the Commission in  
22 2014 about drug retroactivity.

1                    Judge Eileen Keeley, speaking on  
2                    behalf of the CLC, called fundamental fairness  
3                    the driving factor in their deliberations and she  
4                    said we do not believe that the date a sentence  
5                    was imposed should dictate the date of  
6                    punishment.

7                    Rather, it should be the defendant's  
8                    conduct and characteristics that drive the  
9                    sentence whenever possible. Her insight applies  
10                   with equal force today.

11                   I want to talk a little more about  
12                   magnitude. This is not a minor downward  
13                   adjustment. Unquestionably, the number of people  
14                   affected and the time saved show that the  
15                   magnitude test is met.

16                   But magnitude of retroactivity can  
17                   also be measured in a different way, in a most  
18                   personal and intimate way. You'll hear in the  
19                   next panel from people who benefitted from  
20                   retroactivity decisions of the Commission.

21                   But I want to share with you the words  
22                   today of people who are still incarcerated. I

1 wrote to our members. We have membership in the  
2 BOP. I wrote to our members in the BOP recently  
3 and asked them to tell me in a few words what a  
4 day in prison means compared to a day of freedom.

5 I'm going to share some of those  
6 comments with you now. Deshawn said a day in  
7 prison to me it's like boulders on my shoulders.  
8 Every step it's getting harder and harder and it  
9 feels and means to me that I'm losing my true  
10 self every day more and more. I'm becoming  
11 institutionalized and that day in freedom would  
12 look like everything to me.

13 Marty said a day in freedom would  
14 entail doing something I love surrounded by those  
15 who love me. When I get done with work or school  
16 I could go home, I could have dinner with my  
17 family, and talk about our days instead of having  
18 to call them and not having enough time to talk  
19 to everybody or really understand or be a part of  
20 what they're going through. A day in freedom  
21 would mean more than I can ever put into words  
22 for you.

1           I also asked them what a reduction in  
2 14 months would look like to them and Jimmy said,  
3 well, most people would think 14 months off my  
4 sentence is nothing big, which is easy from on  
5 the outside looking in.

6           However, in my shoes, I would take  
7 this and be very grateful for it because it would  
8 put me closer to freedom, family, and a chance to  
9 show all those I hurt and affected and my victims  
10 that I'm changed and possibly make those I've  
11 hurt proud of who I am now.

12           Marty said, if my sentence was  
13 shortened by 14 months I'd be able to attend my  
14 son's high school graduation after missing his  
15 childhood due to my sentence. I'd be able to  
16 have this one piece of his childhood to be able  
17 to take with me into a future at home.

18           It would mean the world for me to be  
19 able to do this as a mother and to have him here  
20 with me not only as we start this new life  
21 together but to be able to have just one  
22 milestone memory with me in it.

1                   And finally, Aaron said when I was  
2                   locked up my son was only six months old and now  
3                   he's 12 and I owe him from my mistakes and the  
4                   decisions that left me in this situation.

5                   With that in mind, in order for me to  
6                   be the best me and the best father I know I need  
7                   to take care of all the things that lead in that  
8                   direction -- jobs, housing, relationships -- and  
9                   all the things that make up a healthy and  
10                  productive person to society and in his life.

11                  And that's what I would do with 14 months.

12                  That's what I would do with a 14-minute head  
13                  start.

14                  So I share these reactions with you  
15                  because thousands of people -- good people just  
16                  like these people -- are serving sentences that  
17                  the Commission can no longer justify as needed to  
18                  advance the purposes of punishment.

19                  Judge Reeves, you opened the hearing  
20                  earlier today and talked about the moral cost of  
21                  incarceration or moral cost of incarcerating  
22                  somebody for longer than they deserve. I'm

1 confident that the Commission will not lose sight  
2 of the very human impact of the decision that  
3 you're going to make today. Thank you.

4 CHAIR REEVES: Thank you, Ms. Price.  
5 Mr. Vinegrad?

6 MR. VINEGRAD: Chairman Reeves,  
7 members of the Commission, I'm Alan Vinegrad, a  
8 lawyer with the law firm Covington & Burling, and  
9 I'm here today on behalf of the Center for  
10 Justice and Human Dignity.

11 Previously I worked for the Department  
12 of Justice for a total of 12 years. The center  
13 supports retroactive application of the zero  
14 point and status point amendments.

15 Both of these amendments are data  
16 driven, measured, and sensible reforms that will  
17 ensure greater fairness in the treatment of  
18 defendants in the federal criminal justice  
19 system.

20 The zero point amendment is a  
21 conscious effort to better tailor the amount of  
22 punishment and the history and characteristics of

1 the defendants -- in other words, a data-  
2 supported judgment that zero point defendants  
3 should not be punished as harshly as their one  
4 point counterparts because they do not need to  
5 be.

6 It's consistent with the fundamental  
7 principle of federal sentencing embodied in 18  
8 U.S.C. Section 3553(a) that a sentence must be  
9 sufficient but not greater than necessary to  
10 achieve the purposes of sentencing.

11 It is, in short, an important  
12 improvement in sentencing policy that deserves  
13 broad application both prospectively and  
14 retrospectively.

15 The degree of potential benefit to  
16 zero point defendants also supports retroactive  
17 application. According to the Commission's  
18 informative and impressive impact analysis over  
19 7,000 defendants would on average be eligible for  
20 a 15-month reduction in their sentences, more  
21 than double the less than six-month standard of  
22 1B1.10.

1                   This is not really a mathematical  
2 point. Every day, every week, every month, and  
3 every year of incarceration matters profoundly  
4 not just to the defendants who are deprived of  
5 the many features of normal lives but their  
6 immediate families or their loved ones and others  
7 who depend on them, all of whom suffer and offer  
8 suffer greatly from their absence.

9                   For all of them the magnitude of the  
10 change embodied in the zero point amendment is  
11 significant indeed and the impact on our  
12 correctional system also supports retroactive  
13 application.

14                   It will help free up much needed space  
15 and programmatic resources in a still overcrowded  
16 federal prison system so that they can be devoted  
17 to serving those defendants who need them most.

18                   This will enhance the opportunity for  
19 meaningful rehabilitation, which in turn will  
20 help reduce recidivism and it will save hundreds  
21 of millions of dollars.

22                   Applying the zero point amendment



1 retroactively should not present an undue burden  
2 on the system. Determining whether the  
3 amendment's exclusions apply will, of course, add  
4 a step to the eligibility determination.

5 But district judges will have plenty  
6 of guidance from the Commission, from the case  
7 law, and importantly from the case file itself to  
8 assist in that process.

9 The Commission's own experience with  
10 the crack minus two, the Fair Sentencing Act, and  
11 the drugs minus two retroactive amendment  
12 supports that retroactive implementation of the  
13 zero point amendment should be well within the  
14 capacity of the criminal justice system to  
15 handle.

16 Each of the 1B1.10 factors also  
17 supports retroactive application of the status  
18 points amendment. The effect of the amendment is  
19 to eliminate an instance of excessive multiple  
20 punishment for the same conduct and to reduce  
21 racial disparity in sentencing, worthy  
22 substantive reforms that deserve broad

1 application.

2           The magnitude of the change is  
3 substantial with over 11,000 defendants eligible  
4 on average for a 14-month reduction in their  
5 sentence and implementation will be even easier  
6 than the zero point amendment since it requires  
7 only a potential recalculation of a defendant's  
8 criminal history category with no exclusions.

9           Finally, retroactive application of  
10 both amendments can be achieved consistent with  
11 the goals of sentencing. Reduction of a sentence  
12 could only be granted after consideration of the  
13 3553(a) factors including providing just  
14 punishment and protecting the public from further  
15 crimes.

16           These are not empty platitudes.  
17 Experience has shown over and over again that  
18 district judges frequently deny motions by  
19 already sentenced defendants for reductions in  
20 their prison terms even when they qualify for the  
21 reduction.

22           This is empirical proof of what is

1 already understood to be true, that district  
2 judges can be trusted to implement retroactive  
3 guideline amendments responsibly with due regard  
4 for the various competing considerations.

5 And so, in the end, if the system ends  
6 up temporarily working somewhat harder to  
7 implement commendable sentencing reforms that  
8 will improve the criminal justice system and the  
9 lives of tens of thousands of individuals  
10 directly and indirectly affected by it it is well  
11 worth it. Thank you.

12 CHAIR REEVES: Thank you, Mr.  
13 Vinegrad.

14 Mr. Russo?

15 MR. RUSSO: Thank you, Chair Reeves,  
16 and I greatly appreciate the opportunity to be  
17 here today and we're thankful for the coveted  
18 spot after lunch so we'll try to keep our  
19 comments as short as possible.

20 First of all, members of Commission,  
21 thank you for having CPAC here today. Many of  
22 you know CPAC as the Conservative Political

1 Action Committee but we also operate the Nolan  
2 Center for Justice.

3           Within this Nolan Center for Justice  
4 we are dedicated to fostering conservative  
5 leadership on criminal justice initiatives. We  
6 fight for policies that provide the best outcome  
7 for both our communities and the individuals who  
8 are impacted by the criminal justice system.

9           We strive for results because  
10 defunding the police or throwing money at our  
11 problems both fall short of the needs of our  
12 system and the needs of our communities that are  
13 impacted by it.

14           Yes, we believe there are some people  
15 that do need to serve long sentences. But there  
16 are also plenty of others who deserve a second  
17 chance and this is where you, the Commission,  
18 have the power to make a lasting impact,  
19 providing that second chance by increasing public  
20 safety, saving taxpayer dollars, and investing in  
21 the people that you've heard earlier will be  
22 getting out and returning to our communities.

1           The purpose of our criminal justice  
2 system is first and foremost to protect the  
3 communities that these individuals serve. To  
4 achieve this we focus on four key principles:  
5 proportionality, accountability, fiscal  
6 responsibility, and human dignity, maybe the most  
7 important.

8           The Sentencing Commission can and is  
9 working towards achieving all four of these by  
10 tailoring its guidance to offer sentence  
11 reductions only in cases where it would benefit  
12 public safety and be in the best interest of  
13 communities and applying Part B of the Criminal  
14 History Amendment retroactively will do just  
15 that.

16           At its core the retroactive  
17 application of Part B addresses a limitation in  
18 the sentencing guidelines. Previously, as you  
19 well know, the guidelines differentiate between  
20 zero point offenders and one point offenders  
21 despite a significant difference in their  
22 recidivism rates.

1           Zero point offenders, those without  
2 any prior criminal history points, are actually  
3 16 percent less likely to reoffend compared to  
4 one point offenders.

5           The Commission acknowledged this  
6 disparity with Part B, providing for a two level  
7 reduction for zero point offenders by considering  
8 an offender's recidivism potential and by doing  
9 that we can ensure that the severity of these  
10 sentences align with the actual risk to public  
11 safety.

12           It is important to note that these  
13 amendments do not establish a blanket reduction,  
14 as you've heard earlier. Retroactivity is  
15 designed to create a pathway for individuals who  
16 meet specific criteria and fall within specific  
17 exclusions or outside of those exclusions and  
18 have worked hard to earn that sentence reduction.

19           We saw this proven to be effective  
20 with the retroactive application of the 2007  
21 crack cocaine amendment where only 64.2 percent  
22 of the requests that were made for reductions

1 were actually granted.

2 Further, those who did receive a  
3 sentencing reduction through those  
4 retroactivities did not exhibit a higher  
5 recidivism rate compared to individuals who did  
6 not receive that reduction or got out on their  
7 base time at the beginning.

8 Therefore, history shows us that  
9 retroactivity can be successfully implemented  
10 without compromising public safety. I mentioned  
11 this earlier but the advantages of retroactivity  
12 also extend outside of the public safety  
13 argument.

14 They also extend this -- on the scope  
15 of recidivism. It has the potential to generate  
16 substantial cost savings. In the federal prison  
17 system we are well aware that it is expensive to  
18 incarcerate individuals and we must do so  
19 carefully and with a scalpel, not with a hammer.

20 As each federal inmate costs taxpayers  
21 nearly \$40,000 per year this is something that is  
22 on the top of mind of communities across this

1 country.

2 Now, consider this. The Commission  
3 estimates that the retroactive application of  
4 Part B can result in the average sentence  
5 reduction of 15 months for over 10,000 zero point  
6 offenders. If we do the math and as my colleague  
7 stole from me just a minute ago, that's nearly  
8 half a billion dollars in savings.

9 These considerable savings not only  
10 alleviate the financial burden on taxpayers but  
11 they allow for a smarter investment in our  
12 justice system. The evidence is clear. To  
13 achieve long term reduction in crime we actually  
14 need to address the drivers of recidivism.

15 We need to address the drivers of  
16 crime that affect not just the individuals who  
17 are incarcerated but the law enforcement who  
18 serve on their behalf.

19 Instead of keeping zero point  
20 offenders for a longer term than needed who have  
21 demonstrated -- those who have demonstrated  
22 significantly lower recidivism rates we can



1 strategically allocate our system's resources  
2 towards higher risk individuals.

3 For example, we can invest our  
4 resources in education and prison programming.  
5 We know that those programs are proven to reduce  
6 recidivism. Even more importantly, we know that  
7 every dollar that gets spent in prison education  
8 and programming saves nearly \$4 to \$5 in  
9 reincarceration costs when those recidivism rates  
10 drop.

11 This proves a financial incentive for  
12 this work is actually rooted in public safety.  
13 Ultimately, when we grant reductions solely based  
14 on the fortunate timing of an offender's  
15 sentencing hearing it shakes the public's faith  
16 in our justice system.

17 We don't make decisions based on  
18 polling but it is valuable that there is trust in  
19 the law enforcement officers, the courts, the  
20 probation, and the defense that serve on behalf  
21 of these communities and when people perceive  
22 this system is unfair they are less likely to

1 work with the system and less likely to be  
2 beneficiaries of it.

3 The distrust in our justice system, in  
4 turn, would undercut public safety. If this  
5 amendment is applied retroactively we are  
6 confident that giving zero -- certain zero point  
7 offenders the ability to earn a sentence  
8 reduction will benefit our communities in more  
9 ways than one.

10 By providing narrowly tailored  
11 retroactivity that requires a comprehensive  
12 review of each individual case the Commission is  
13 ensuring that reducing recidivism is at the core  
14 of the work that you do.

15 When you reduce recidivism one of the  
16 things I always think is important is that we  
17 don't just use it as a talking point. Reducing  
18 recidivism means there's one less case for law  
19 enforcement to investigate, one less case that my  
20 poor old profession, prosecutors, do not have to  
21 take up. And most importantly, it's one less  
22 case that a victim has to suffer because of the

1 failures of our justice system to rehabilitate  
2 those that are in its care.

3 Thank you for your time today and we  
4 look forward to any questions you have.

5 CHAIR REEVES: Thank you. Thank you,  
6 Mr. Russo. I open this panel up to any questions  
7 from my colleagues.

8 Commissioner Gleeson?

9 COMMISSIONER GLEESON: Red is red.  
10 Green is green. Okay. Can I be heard right now?

11 Great. Thank you for your -- I want  
12 to focus my first question. I don't necessarily  
13 have more than one question but I want to focus  
14 my first question to Mr. Russo, and we applaud  
15 your attention to the data and data-driven  
16 decisions.

17 We also applaud Mr. Vinegrad's  
18 applauding of the staff that produced the data.  
19 They deserve it. But what would you say to --  
20 what would you say to the victims of crimes?

21 They're not always specifically  
22 identifiable in federal cases but often enough,

1 and what would you say to them when they push  
2 back on your support of making these amendments  
3 retroactive?

4 MR. RUSSO: Absolutely, I can handle  
5 it first and then let my colleagues.

6 But one of the things that I think is  
7 so important in this process that you all have  
8 discussed earlier is the victim input and victim  
9 input cannot just be a sheet of paper that's  
10 provided by an underfunded office or the  
11 opportunity for that victim to only provide  
12 something in passing.

13 They need a valuable and just as they  
14 did at their sentencing hearing opportunity to  
15 speak out in whatever form or fashion is most  
16 appropriate. That's one, but two is this and I  
17 think it's something that gets lost in this  
18 process.

19 Oftentimes, the healing of those  
20 incarcerated individuals can be paired with the  
21 hearings of the victim or the healing of the  
22 victims that they have caused harm to.

1           When those victims see that those  
2 incarcerated individuals have turned their life  
3 around, have taken that mistake and that horrible  
4 -- and I hate to call it -- we say it's just a  
5 mistake. It is worse for the victim than it is  
6 for anybody else in the system when a crime is  
7 committed.

8           When they're able to see that that  
9 individual is working towards a better life,  
10 oftentimes -- and we have seen this in a space  
11 that I was involved in in my last professional  
12 prosecutor initiated resentencing -- where the  
13 victim actually becomes invested in the success  
14 of the incarcerated individual and vice versa.

15           So there's a healing that occurs from  
16 both sides of the process. That won't be in  
17 every case. I can't promise that.

18           What I can say is when victims are  
19 actually involved in the early release the  
20 individual who has earned -- not just every  
21 individual, the individual who has taken  
22 programming, who has worked to reduce their

1 recidivism rates by improving their life,  
2 returning to their families, oftentimes, that can  
3 be part of the healing process.

4 And so, certainly, we want victims to  
5 have first and foremost their biggest voice in  
6 this process. But, two, we want them to be a  
7 part of that healing and I think there's a  
8 process that this can play -- a role this can  
9 play in that process.

10 COMMISSIONER GLEESON: Thank you.

11 Chair Reeves, I do have one follow-up. May I --

12 CHAIR REEVES: Yes, you may.

13 COMMISSIONER GLEESON: This really  
14 arguably transcends the specific purpose of this  
15 hearing. But your testimony brings -- puts on  
16 the table this reality that a diminution in the  
17 federal prison population -- and you've  
18 identified the average cost per inmate per year --  
19 - a diminution in the federal inmate population  
20 doesn't -- there's no straight line between that  
21 and a \$40,000 per prisoner per year savings that  
22 gets reallocated to the resources that you've

1 identified as a -- maybe a better way of  
2 expending those funds.

3 What do you have to say about that  
4 issue and the fact that BOP budget is not --  
5 doesn't seem to meaningfully track the prison  
6 population in this dimension?

7 MR. RUSSO: It's a fantastic question.  
8 Unfortunately, one we also see at the state level  
9 and with our colleagues who are just across the  
10 street.

11 I would like to say that we like to  
12 put pressure on them to make sure that those  
13 costs are reinvested in the system and when I say  
14 the system I mentioned educational programming  
15 but I also want to mention that the staff  
16 salaries and overtime pay for BOP staff or  
17 supervisory release staff or your staff is just  
18 as important because it's a system wide problem.

19 It's not just the programming that's  
20 struggling. It's also the cost around it. So to  
21 answer your question, I think specifically by  
22 freeing up that money, yes, I can't draw a

1 straight line but what I can do is advocate  
2 strongly in other settings or with this  
3 Commission to our partners across the street to  
4 say we have saved you these costs but these  
5 problems still exist and they exist because of  
6 your lack of reinvestment.

7 It gives us a very strong argument and  
8 one that I think we need to continue to make  
9 regardless of what cost savings end up looking  
10 like.

11 COMMISSIONER GLEESON: Thank you, sir.

12 CHAIR REEVES: Mr. Wroblewski?

13 COMMISSIONER WROBLEWSKI: I thank you  
14 very much, Mr. Chair, and thank you both -- thank  
15 you all for being here and for your written  
16 submissions.

17 In the past for basically the history  
18 of the Commission retroactivity has been the  
19 exception and not the rule and it seems pretty  
20 clear from both the Sentencing Reform Act from  
21 994(u) and from the legislative history that  
22 Congress intended for the Commission to make a



1 decision and that there had to be -- and that  
2 there were going to be certain kinds of changes  
3 that would reduce sentences that would not be  
4 applied retroactively.

5 From what I heard from your testimony  
6 it seems like all of the arguments you're making  
7 suggest that every reduction should be made or  
8 nearly every reduction should be made  
9 retroactively.

10 The very moving testimony from folks  
11 in prison that's going to be true in every case  
12 where there's a possible reduction. Everybody  
13 would like a head start. If my family were in  
14 prison I would want them to have a head start  
15 coming home.

16 Judge Keeley's comments that you  
17 quoted from the Criminal Law Committee about it  
18 shouldn't matter what date that's going to apply  
19 in every single circumstance and there were a  
20 number of other things that were mentioned in  
21 terms of cost savings and other arguments. Those  
22 are going to apply in every single situation.

1 I'm just curious if you can articulate  
2 what do you think Congress had in mind for the  
3 Commission to do? What are the kinds of  
4 decisions that when the Commission has reduced a  
5 sentence would lead to a no retroactivity and  
6 specifically go back to the recency amendment  
7 that was made some years ago?

8 Do you think just the Commission was  
9 wrong on what they did there or can you make a  
10 distinction between the recency amendment and the  
11 one that we're so faced with now?

12 MR. VINEGRAD: So I can start with  
13 your first question and maybe defer to one of my  
14 colleagues for the recency amendment discussion.  
15 I actually did -- it was mentioned, I think,  
16 earlier -- actually I went back and looked at the  
17 summary of each and every guideline amendment  
18 that this Commission has made retroactive and my  
19 takeaway from that is that these amendments are  
20 much more in line with or consistent with the  
21 recent amendments involving crack minus two and  
22 drug minus two in the Fair Sentencing Act in the

1 sense of being data driven to correct true  
2 unjustness or disparity based on empirical  
3 evidence and the experience of the Commission,  
4 not some refinement of the process or improvement  
5 in the way that guidelines are administered.

6 There was a substantive thoroughness  
7 element or component to them that I think puts  
8 this in that group of the amendments as opposed  
9 to many of the other ones that I read.

10 There's the magnitude element. I  
11 mean, really just the guidance is right in the  
12 Commission's guidelines. It's in 1B1.10. The  
13 magnitude of the amendment that said data driven,  
14 you've done a terrific job of estimating down to  
15 the person how many people will be eligible.

16 It's significant by any measure but  
17 not overwhelming. It's a good balance. It's the  
18 sweet spot, as somebody said this morning,  
19 significant enough to make a difference and to  
20 work retroactive application but not so much that  
21 it will overwhelm the system.

22 And to the extent that people will get

1 more than a year off of their sentence, well,  
2 that's more than the threshold that's in the  
3 guideline commentary.

4 And in terms of administrative  
5 ability, you know, I think the case has been made  
6 well that, you know, the system has been there.  
7 It's done it time and time again. I would harken  
8 back to my previous life as a prosecutor and  
9 things like this would happen. Had it been the  
10 retroactive guideline amendment it was worse. It  
11 was Supreme Court decisions that would then lead  
12 to a flood of 2255 motions not only asking for  
13 changes in sentencing but even attacking  
14 convictions.

15 So it's even more significant and more  
16 substantial. And what did we all do? We worked  
17 harder and we got it done and when I say we I  
18 mean the prosecutors, the defense lawyers, the  
19 courts, sometimes probation, and we got it done.

20 If you had to spread, you know, those  
21 responsibilities throughout the U.S. Attorney's  
22 Office we did that. There was one of those

1 occasions where there was this, you know, big  
2 decision where we had to kind of shoulder the  
3 burden of the work that was going to follow.

4 Then anybody in the office, line people,  
5 assistants, criminal chiefs, everybody in between  
6 rolled up their sleeves and took that burden and  
7 got it done.

8 And if that's what's necessary here to  
9 further and achieve the kinds of criminal justice  
10 sentencing, smart lists and reform that's  
11 embedded in these amendments, the system should  
12 shoulder that responsibility and should be happy  
13 about it.

14 I suspect there are a lot of judges  
15 out there who may not say it but quietly think to  
16 themselves this is a step in the right direction.

17 MS. PRICE: You won't find me  
18 supporting or defending the recency decision that  
19 was made. We --

20 CHAIR REEVES: Is your microphone on,  
21 Ms. Price?

22 MS. PRICE: Yes, it is.

1 CHAIR REEVES: Bring it a little  
2 closer.

3 MS. PRICE: How's that?

4 CHAIR REEVES: How's that? Okay.  
5 Good.

6 MS. PRICE: I'm sorry. I started to  
7 say that Commissioner Wroblewski will not expect  
8 me to defend the recency decision that was made.  
9 I think it was wrongly made.

10 There wasn't a hearing about it I'm  
11 pretty sure. We participated in the comment  
12 period and explained why we thought the recency  
13 amendment ought to be made retroactive.

14 We talked about the purposes and the  
15 impact and the magnitude and all of those support  
16 this here but what we didn't talk about and it's  
17 a shame -- none of us really looked at what the  
18 demographic disparity was.

19 Eighty percent of the people who would  
20 have been affected had recency been passed were  
21 people of color and I do think that that has been  
22 not a limiting principle to this Commission, to

1 any Commission, but it's been -- it's been an  
2 illuminating principle when looking at some of  
3 the past history.

4 And so that's why I talk about it here  
5 today because I don't think we have talked enough  
6 about how this isn't just a minor adjustment both  
7 on a very personal level but also just looking  
8 systemically, that this is -- the Commission has  
9 identified for us ways in which criminal history  
10 overstates seriousness or lumps together people  
11 who do not share recidivism risk with their one  
12 point counterparts.

13 So, yeah, I mean, recency was, I  
14 think, wrongly decided and I hope that it's not  
15 the touchstone for what, you know, you decide to  
16 do.

17 But that's why I wanted to bring --  
18 and, you know, it's a shame because we should  
19 have raised that issue but nobody considered it  
20 at the time and all I can think of is that we  
21 were in the midst of several crack cocaine  
22 reduction periods, one on top of the other, and

1 we were pretty laser focused on it.

2 COMMISSIONER WONG: May I follow up?

3 Mr. Vinegrad, you mentioned going  
4 through and cataloging kind of all the different  
5 sentence reduction amendments that the Commission  
6 has made and some fell on the substantive  
7 fairness side of the line.

8 Some felt more like refinements and  
9 this felt to you more like a substantive fairness  
10 issue. Can you -- which ones did you think were  
11 refinements?

12 MR. VINEGRAD: I mean, I can't  
13 delineate them for you. They're in my book here.  
14 I suppose I could follow up and do that. But  
15 they were more of the kind of the procedural  
16 variety is I guess is what I would say and didn't  
17 deal with sort of, you know, data-driven  
18 information that showed that, you know,  
19 recidivism has not been achieved by these greater  
20 punishments in these categories.

21 They certainly didn't have, to my eye  
22 from what I saw, on any goal were an effect of



1 reducing the pronounced racial disparity in some  
2 of the sentencing adjustments that were -- that  
3 were promulgated.

4 So those things. It was more not so  
5 much what they did but those elements to my eye  
6 were missing from those. I see them in some of  
7 the more recent amendments that had been given  
8 retroactive application.

9 CHAIR REEVES: Vice Chair Murray?

10 VICE CHAIR MURRAY: Thanks to all  
11 three of you. I guess I'd like to follow up on  
12 recency a little bit. I very much appreciate  
13 FAMM's view that recency was not decided  
14 correctly -- the retroactivity issue.

15 But the Commission at the time did  
16 think it was very clear, right. You know,  
17 Justice Jackson, Chief Judge Howell both voted  
18 along with the entire Commission to say they  
19 didn't even need hearings on recency it was so  
20 clear that recency should not be retroactive.

21 From where I sit recency looks a lot  
22 like status. I mean, it's also driven by a new

1 report saying that the enhancement is not tied to  
2 recidivism as closely as people thought.

3 It has a similar racial impact. The  
4 numbers are similar in terms of numbers of  
5 potential filings, percent of filings likely to  
6 be granted or eligible.

7 If we don't agree with FARM, if we  
8 think that the Commission was right about recency  
9 or we just think that Commission precedent  
10 matters is there a way to distinguish those two  
11 or should we vote against retroactivity? So I  
12 guess that's a question for Ms. Price and Mr.  
13 Vinegrad.

14 MS. PRICE: Well, I wouldn't encourage  
15 you to vote against retroactivity, coming from my  
16 position, and I'd want to think a little bit more  
17 about distinguishing them otherwise.

18 I feel like we didn't have the  
19 opportunity to have a hearing and you've asked  
20 for a hearing on this. So that says something to  
21 me about how seriously you take these 18,500  
22 people and their appropriateness.

1                   So, I mean, that's one signal to me.  
2                   This is a new Commission. I agree that precedent  
3                   is important. But we learn from our past, not  
4                   only how we should operate in the same ways but  
5                   somehow -- sometimes how we need to distinguish  
6                   ourselves and do something different and I think  
7                   I'm asking us to look at one more piece that we  
8                   didn't look at in recency which is that there is  
9                   a genuine racially disparate impact or  
10                  demographically disparate impact that, going  
11                  forward, you're going to do something about  
12                  correcting and I can't see a principled reason  
13                  why we wouldn't want to make that change  
14                  available to the people whose experiences you  
15                  learned about and learned from when you drew the  
16                  data and you looked at the individual.

17                  So I'm not going to be very much help  
18                  on that side of it. But thank you.

19                  CHAIR REEVES: I have a question, Mr.  
20                  Vinegrad, and then one to the panel. I'm not  
21                  sure when you were the U.S. Attorney in the  
22                  Eastern District, Mr. Vinegrad, if you were a

1 U.S. Attorney at any point in time during these  
2 other iterations of crack minus two or anything  
3 like that before -- before because I was going to  
4 ask about what process your office might have  
5 used and do you -- are you aware of the process  
6 that the office used in handling those motions  
7 and cases?

8 MR. VINEGRAD: Well, I am very  
9 familiar with the process that was used in what I  
10 would describe as analogous situations where  
11 there was some -- a little pronouncement that  
12 caused a whole raft of, you know, motions and  
13 petitions and the like from a significant number  
14 of the defendants who are being prosecuted and  
15 the manner in which those were handled and dealt  
16 with the Federal Defender's Office to kind of  
17 have a process by which those would be addressed.

18 Certainly within the U.S. Attorney's  
19 Office I mentioned before, you know, whether it  
20 be an assignment system, whether we are relying  
21 upon people who did our appellate work or some  
22 combination of them to be able to address them in

1 an efficient way.

2 But, essentially, you know, we got the  
3 system to work and to do so efficiently where it  
4 didn't, you know, overwhelm the office, from my  
5 own perspective. I mean, I personally did some  
6 of those matters.

7 I wasn't happy about it but I did it  
8 and I never felt that it was interfering with my  
9 ability to carry out the rest of my  
10 responsibilities.

11 And as I said, I mean, now we have a  
12 track record. Not mine but, you know, the track  
13 record of the three recent retroactivity  
14 amendments, and I think this Commission has heard  
15 and read a great deal of testimony from different  
16 people, the punch line of which is this could  
17 work and it won't pull the system to a halt.

18 The estimate that you received from  
19 the Justice Department seems significantly  
20 overstated when you compare it to the data of  
21 past retroactive amendments to see how many  
22 motions were actually filed compared to the

1 number of people who were eligible.

2 CHAIR REEVES: The other question,  
3 which, again, pivots off of what we heard earlier  
4 today, with respect to whether or not if we were  
5 to make the provision retroactive immediately,  
6 three months down the road, as POAG might have  
7 suggested, six months, nine months, 12 months,  
8 this is to all three panelists because you're  
9 here talking to us from your perspective.

10 What is your perspective on any delay  
11 or how long the delay or whatever? I'll start  
12 with Ms. Price and then -- yes.

13 MS. PRICE: This somewhat depends on  
14 how quickly you make your decision. If you were  
15 to make a decision relatively soon we are months  
16 away still from November 1st. That is time in  
17 which the parties can prepare for retroactivity.

18 I don't know what your process is so  
19 that may be unrealistic. You know, it's our  
20 preference that it start as quickly as possible.  
21 Immediately, I hope. But given that we have some  
22 time here it feels like that time could be well

1 used in service of -- in service of preparation  
2 and coordination.

3 CHAIR REEVES: Thank you. Mr.  
4 Vinegrad?

5 MR. VINEGRAD: Yeah, I guess I have a  
6 bit of a different perspective. I mean, I think  
7 the concern about proper implementation is well  
8 founded.

9 I would point out that to the extent  
10 it was suggested earlier that the reentry process  
11 starts in prison six months before release  
12 there's actually much more recent evidence of  
13 that from the Bureau of Prisons itself that if  
14 they actually start 18 months before there's much  
15 more of a lead up time. Having said that,  
16 there's certainly a burden on probation as well.

17 I think that's where the major burden  
18 would, frankly, be in terms of additional  
19 supervision. To the extent there would be people  
20 released in the short term who will not be held  
21 because they're not U.S. citizens and they're not  
22 getting out in any event that reduces the number

1 significantly.

2 But I think, you know, the Commission  
3 would not be faulted if it built in some modest  
4 period to allow all the constituent parts of the  
5 criminal justice process to get ready for those  
6 who will be released.

7 I'll also say, also going back to what  
8 -- support our victims I think, you know, the  
9 Commission could certainly do what it did with  
10 respect to the recent compassionate release  
11 amendments where I think it specifically had a  
12 provision to ensure that victims got a reasonable  
13 notice and the opportunity to be heard, which I  
14 completely agree with.

15 Whether or not it's, you know, already  
16 provided for under 3771 of Title 18 I think the  
17 Commission would be well advised to explicitly  
18 state that because victims' voices do matter.

19 The Center for Justice believes that,  
20 I believe it, and I know you all believe it and  
21 you should be explicit about that.

22 MR. RUSSO: Yeah. I'm sorry. I'll be



1 very brief. Thank you, Mr. Chairman.

2 And really I come down kind of on your  
3 side, which is I think the burden will fall  
4 mostly on supervisory release at this point as  
5 well as -- you know, the court system itself will  
6 quickly pick up that burden but the supervisory  
7 release system is already under significant  
8 pressure, as you've probably heard this morning.

9 And so I think it's important to build  
10 in whether that be a three, six, nine -- I don't  
11 want to put an arbitrary number on it. One of  
12 the things that I do not want to see happen, I  
13 think, from our organization's perspective is it  
14 turn into 12, 15, 18 because then it becomes an  
15 excuse for those who may not be in support of  
16 this effort to try to push in unique and  
17 different ways to hold up its implementation.

18 So I think we have seen that a little  
19 bit with application of some of the First Step  
20 Act and the fair sentencing provisions and the  
21 drop twos.

22 But I think building in a reasonable

1 amount of time for both the supervisory release  
2 end of it to play a little bit of catch up and  
3 then build in the time for the court system to be  
4 prepared, which I think in many ways it already  
5 is, would be appropriate. But going too long, I  
6 think, has a negative impact as well.

7 CHAIR REEVES: Thank you. Go ahead,  
8 Vice Chair Murray.

9 VICE CHAIR MURRAY: Mr. Russo, does  
10 the Nolan Center have a view on Part A  
11 retroactivity? I wonder, given your focus on  
12 public safety, if your views differ or --

13 MR. RUSSO: Most of our focus has been  
14 on Part B and I'll kind of outline that and one  
15 reason is that that is where our research was in  
16 the area of making sure that zero point offenders  
17 were eligible.

18 In Part A we are not opposed to our  
19 partners' view. I think one of the things that  
20 we would want to make sure we see is as robust a  
21 victims' support and services where you have  
22 cases that involve, you know, more identifiable

1 victims, more identifiable individuals who may  
2 have been a part of some of those offenses, and  
3 then making sure that the system -- and this kind  
4 of gets at the chair's question which is making  
5 sure we build in the proper time to implement  
6 those types of processes, something I saw on its  
7 more state level.

8 So I'm not picking on my federal  
9 partners as the victims services are in itself  
10 within a crisis at the moment of both staff,  
11 talent, and attention and time.

12 And so making sure that those  
13 processes are able to catch up as we're doing  
14 these things is incredibly important in making  
15 sure that the state and federal partners are  
16 talking.

17 It's going to be a bigger challenge  
18 with Part A than Part B, in our mind. But I  
19 think the focus on Part B is because we do think  
20 there is a clear history of both the Commission's  
21 work and of the data side that shows that those  
22 individuals will be successful upon release,

1 given the proper resources.

2 VICE CHAIR MURRAY: And are any of you  
3 aware of any legal authority that we have to  
4 mandate victim services or notification?  
5 Obviously, the CVRA says if there is a hearing  
6 they have to be heard and notified. But outside  
7 of that, are you aware of any authority that we  
8 have to prescribe that?

9 MR. RUSSO: I'll say quickly that the  
10 VRA does apply and that both, you know, federal  
11 and when you have your co-cases so work through  
12 the Attorney General Office those are -- you also  
13 have your state laws that are going to require  
14 basically anything that fits within that.

15 I would say it's important to include  
16 in any type of guidance because it's a reemphasis  
17 to both the field and the practitioners that it  
18 needs to be a priority.

19 So even though it may not be a legal  
20 authority even if it's just a referral authority  
21 or making sure that it's highlighted as something  
22 that the Commission found to be incredibly

1       invaluable and important and key to the success  
2       of this process I do think it's worth including  
3       for that reason because oftentimes it will be  
4       referred to as those cases begin to proceed, you  
5       know, the notes and comments that you included in  
6       your advisory councils.

7                   MR. VINEGRAD:   And the statute  
8       actually uses the phrase public court proceeding.  
9       So it's a little ambiguous.  I suppose, you know,  
10      a re-sentencing done on papers could be  
11      considered a public proceeding to the extent the  
12      filings are public.

13                   But I guess putting it differently,  
14      Vice Chair Murray, I don't know of any authority  
15      that would prohibit the Commission from, in its  
16      discretion, stating that judges should give to  
17      the extent practicable reasonable notice and an  
18      opportunity to be heard, make them for -- four a  
19      day, make a determination on a motion for a  
20      reduction under either one of these amendments.

21                   CHAIR REEVES:   Any other questions?

22                   Panelists, thank you so much for your

1 time today. We appreciate you.

2 Judge Restrepo is coming back. I  
3 don't want anybody to be worried. He told me  
4 he'll be right back, okay. But we're going to --  
5 he did give me permission to go ahead and get  
6 started.

7 So our sixth and final group of  
8 panelists will provide us with perspectives of  
9 formerly incarcerated people.

10 First, we will hear from Jerome  
11 Brough, who currently resides in his hometown of  
12 Chicago, Illinois, where he has worked as an  
13 independent contractor delivery driver for three  
14 years.

15 In June 2000 Mr. Brough received a  
16 federal sentence of life in prison for his  
17 participation in a conspiracy to possess with  
18 intent to distribute crack cocaine.

19 At the time his final offense level  
20 was 44 and his criminal history category was six.  
21 In 2010, after serving 10 years of imprisonment,  
22 his sentence was reduced from life to 360 months

1 pursuant to retroactive changes to the guidelines  
2 made in response to the Fair Sentencing Act.

3           Nine years later, his sentence was  
4 again reduced thanks to the First Step Act and he  
5 was released after serving over 20 years in  
6 prison. Mr. Brough is an active parent -- he has  
7 five children -- and a proud grandfather to his  
8 three grandchildren.

9           Second, we will hear from Bernard  
10 Gibson, Jr., who currently resides in his  
11 hometown of Prince Georges County, Maryland,  
12 where he works as a mentor with Lead4Life, an  
13 organization that offers mentoring and reentry  
14 services to children.

15           In 1997 Mr. Gibson was sentenced to  
16 324 months in federal prison for participation in  
17 a drug conspiracy. At the time of his sentencing  
18 Mr. Gibson had zero criminal history points and  
19 no prior convictions and a final offense level of  
20 41.

21           In 2017 his sentence was reduced to  
22 262 months pursuant to retroactive changes to the

1 sentencing guidelines. After his release Mr.  
2 Gibson married his high school sweetheart. He is  
3 a doting grandfather and social justice advocate  
4 who plans to continue providing reentry services  
5 to formerly incarcerated individuals.

6 Finally, we have -- we will hear from  
7 Jeffery McReynolds, who currently runs a  
8 logistics company with his wife. In 2005 Mr.  
9 McReynolds was sentenced to a term of 235 months  
10 in federal prison after being convicted of  
11 conspiracy to possess with the intent to  
12 distribute crack cocaine.

13 At the time of his original sentencing  
14 Mr. McReynolds' final offense level was 33 and  
15 his criminal history category was four.

16 Mr. McReynolds' sentence was reduced  
17 twice pursuant to the retroactive changes in the  
18 guidelines, first by 84 months for the crack  
19 minus two amendment, then by 30 months for the  
20 drug minus two amendment.

21 In terminating Mr. McReynolds'  
22 supervised release early the court explained



1 that, quote, "He has changed his behavior and  
2 remains eager to continue being a law-abiding  
3 citizen," close quote.

4 Today, Mr. McReynolds advocates for  
5 sentencing reform and mentors others -- returning  
6 citizens on starting small businesses.

7 Mr. Brough, we're ready to hear from  
8 you when you're ready, sir.

9 MR. BROUGH: Good afternoon, Chairman  
10 Reeves and this honorable Commission.

11 In serving over 20 years in prison  
12 there were many days and nights that I've begged,  
13 pleaded, prayed for the opportunity to speak  
14 before a body such as this to see if something I  
15 could say could make a change so that I myself  
16 could get released.

17 Unfortunately, I wasn't able to do  
18 that. I am humbly here today to say I am here to  
19 speak for the people that I left behind, hoping  
20 that there is something you will hear from this  
21 panel that will get you to yes on these  
22 retroactive amendments.

1           I still personally know people that  
2           are serving over 30 years. Two names come to  
3           mind. Carmen Tate, Eddie Richardson have served  
4           over 30 years in prison. So I'd like to give you  
5           guys my perspective.

6           My time started in Terre Haute Federal  
7           Prison, one of the most dangerous at the time.  
8           In fact, I was there when Timothy McVeigh was  
9           executed. I was there learning the law trying to  
10          desperately find out, of course, like everybody  
11          else there how I could turn this thing around and  
12          get out of prison.

13          Unfortunately, Apprendi -- the United  
14          States v. Apprendi Supreme Court decision didn't  
15          help. The progeny of those cases didn't help  
16          because they were not made retroactive.

17          Only after I served over 10 years did  
18          I finally get some relief from a life sentence  
19          and then an additional nine years that I get  
20          relief and come home.

21          In my time there, despite having a  
22          life sentence and not knowing when I would come

1 home, I dedicated myself to education, to become  
2 better, to prove that only to the people that I  
3 had disappointed, first and foremost, my wife and  
4 my children, but also to the judges, to the  
5 prosecutor who spoke glowingly about me and then  
6 asked for a life sentence, to prove to them that  
7 I am not going to be that person ever again and  
8 to say that maybe with the people that I could  
9 possibly touch inside that I could effect change  
10 as well as be change.

11 There are numerous things that are  
12 going on in the federal prison that I think you  
13 guys need to hear about. We all in here, despite  
14 the negatives that you hear, take advantage of  
15 every single educational opportunity.

16 Every class -- I took everything from  
17 real estate to bookkeeping. I even took yoga and  
18 calligraphy writing. I wanted to spend as much  
19 time engaged in positive activity as I possibly  
20 could and in doing that, believe it or not, more  
21 people joined.

22 So they saw despite the fact that I

1 wasn't getting relief immediately that it was --  
2 it was beneficial to stay engaged in positive  
3 activity.

4           It didn't matter what your sentence  
5 was because I was surrounded by people with life  
6 sentences. I had two and I thought I was  
7 special. That wasn't the case. I met people  
8 with three, four, five life sentences.

9           Unfortunately, most of those were for  
10 what was described by -- when I started reading  
11 the law what was described in the U.S. Code as  
12 victimless nonviolent offense and I was blown  
13 away because I couldn't understand how I had  
14 committed a crime but there was no violence and  
15 there wasn't a victim but my life was taken away.

16           I am blessed to be before you today to  
17 have my life back and be a fine upstanding member  
18 of the community doing every possible thing that  
19 I can to not only not reoffend but to be the  
20 example.

21           There are educational opportunities  
22 there that we take advantage of. There are so

1 many things that we need to do in there and I've  
2 seen change over the course of the 20 years I was  
3 in prison when nobody participated to there was a  
4 waiting list for courses.

5 So I know people are changing. You  
6 might want to give them a chance, as well as --  
7 I'm just riffing here -- once I was released, and  
8 this is going to be interesting -- once I was  
9 released I continued that. With those  
10 relationships that I made inside they continue  
11 outside.

12 We now have a community. I didn't  
13 even find out till last week Thursday that  
14 Jeffery was going to be on this panel. But over  
15 two years ago we were together at Jeffery's house  
16 with a collection of people who benefitted from  
17 retroactivity and we had no idea we would be here  
18 today, and none of these people have reoffended.

19 So if you have a worry or a concern  
20 about whether or not you should vote for  
21 retroactivity, what I have to say to you is  
22 please don't let perfect be the enemy of good.

1 Weigh this decision heavily because you affect  
2 people's lives.

3 Earlier in the earlier panel I heard  
4 people speaking about whether or not there should  
5 be a delay in starting this. Well, if I would  
6 not have received retroactivity I would still be  
7 in prison right now.

8 So when you think about a delay please  
9 take into consideration that people are waiting  
10 to get out, put their lives back together, and to  
11 do good not just to benefit themselves but to  
12 benefit others and when they do good they make  
13 your job easier.

14 They make the jobs of the probation  
15 officers easier. I was literally released from  
16 probation in 17 months. I was supposed to be on  
17 probation for five years. Nobody involved -- the  
18 judge who released it, the probation officer  
19 whose care I was under, or the assistant U.S.  
20 attorney thought that I needed any more  
21 supervision.

22 We may be the success stories that you

1 need to hear. Yes, there are going to be people  
2 that reoffend. But I can guarantee you there are  
3 going to be more people like us and less people  
4 who reoffend. Thank you.

5 CHAIR REEVES: Thank you, Mr. Brough.

6 Mr. Gibson?

7 MR. GIBSON: Good afternoon. Can you  
8 all hear me? Good afternoon.

9 First off, I want to thank you all for  
10 allowing me to be here. This is something  
11 special, like Jerome said, just to be able to  
12 come in and stand before you and testify to think  
13 about those who are left behind.

14 I also want to acknowledge my family  
15 who is here with me right here, my cousin  
16 Michael, my wife, my high school sweetheart I  
17 married, and if it wasn't for retroactivity it  
18 never would have happened. She is right here.  
19 One of my best friends. The 18« years I was  
20 there Milburn was there with me.

21 I'm coming from my head because I  
22 didn't really write anything down and I want to

1       thank Mary, Alan, and Frank that was just here  
2       because of all the things they said I wanted to  
3       say.

4                So today I come as a person telling  
5       you that people can change, that people really  
6       need a second chance. As you all just heard I  
7       have no criminal history. I had never been in  
8       trouble in my life. I was working when I caught  
9       this case. I was doing a conspiracy case, and  
10      I'm not going to get into that part of it, but I  
11      got -- I was 27, I believe, and I got 27 years.  
12      That's just unheard of.

13               I understand that people have to be  
14      punished for the things that they've done. But  
15      some punishment is just too much. I remember  
16      after the first day or two I was incarcerated I  
17      was never coming back to jail again. Never. I  
18      work right now with a bunch of youth that has  
19      been in and out of jail and, I believe, for life  
20      and a lot of times they call me to relate because  
21      most of the mentors -- a lot of the mentors  
22      haven't been in the situation so they can't



1 relate. Had one kid who wouldn't go to the  
2 hospital. And it was free. He could get  
3 anything done free. He wouldn't go. Well, I  
4 came and shared my story with him and he's -- he  
5 similar to me. You know, we talked about, well,  
6 my mom was 17, 18 years old when she had me.  
7 Well, my mom was 15 when she had me.

8           You know, we are a product of our  
9 society and I heard earlier when you were talking  
10 about disparities and about what would cause  
11 this, what would cause that, how much pressure we  
12 put on probation, how much pressure -- well, we  
13 all know the judicial system and the system  
14 itself is overcrowded.

15           So whether we do it in jail, outside  
16 of jail, something has to change. It's going to  
17 affect either probation or it's going to affect  
18 the COs in the jail.

19           If the Commission came to the  
20 conclusion that these sentences should be lowered  
21 why is it that two people could be charged in two  
22 separate days get two separate sentences because

1 it's a different day?

2 If there's change -- needs to be  
3 change it needs to be fair across the board.  
4 This is America. This is the land of fair and  
5 opportunity. So if we're going to be fair let's  
6 be fair.

7 You know, we can't leave those behind.  
8 Let's show some grace. Let's help people and  
9 those who are in because, I mean, for me, you  
10 know, you heard the thing about the time, how  
11 much time it's going to be.

12 My grandmother stood behind me the  
13 whole time. She died seven months after I got  
14 home. So if I didn't get retroactivity I would  
15 never have seen her. She once said to me I hope  
16 you -- I hope I do not pass and because of  
17 retroactivity I made it home seven months later.

18 Many years right after that my  
19 grandfather passed. I lost so much in those  
20 years I was gone, and like Jerome said we learned  
21 so much. I took every class.

22 I have a stack of papers from COs

1 saying how great I would be in society and  
2 there's so many people just like me that's doing  
3 the same thing.

4 I just went to a funeral and there was  
5 four guys there that I was locked up with. Four  
6 other guys. Not neither one of them has been  
7 back. I can't tell you about recidivism anywhere  
8 else. I can only tell you my community and in my  
9 community these guys aren't going back to jail.

10 These guys are mentors. These guys  
11 have nonprofits. They're doing stuff with kids.  
12 They're starting their own businesses. But  
13 they're back paying taxes. They're home with  
14 their families.

15 You take -- when you go to jail this  
16 many years you take something -- something  
17 special out of the family. It puts a burden not  
18 just on us and the victims. Your family becomes  
19 victims too because you take -- you take a money-  
20 earning person out of the family. You take a  
21 father. My son was four when I left. When I  
22 came home he was 22.

1           I'm still building that relationship  
2 with him. It's gotten a lot better but I'm still  
3 building. So I beg of you to look at this thing  
4 seriously, to look at the whole avenues of it and  
5 understand that this affects a whole bunch of  
6 people.

7           It affected my family very harshly,  
8 and for me to come home and to be back is a big  
9 blessing to my family and for me to see my  
10 grandmother, to be there for her, to see her  
11 smile and to say you made it home was a blessing.  
12 It's a blessing that if it wasn't for  
13 retroactivity I would have never gotten it.

14          So I ask that we be fair. I ask that  
15 we have some empathy for those in. I ask that we  
16 bestow grace upon them and that we give them the  
17 same chances that I had to start their life over,  
18 to be better, to give back to the community, to  
19 give back to their families because that's what  
20 I'm doing and I'm going to continue to do that  
21 and I'm going to continue to instill that in  
22 these youngsters that I'm dealing with each and

1 every day. Thank you.

2 CHAIR REEVES: Thank you, Mr. Gibson.

3 Mr. McReynolds?

4 MR. MCREYNOLDS: Thank you. Thank  
5 you, Chairman Reeves and the members of the  
6 Commission. I appreciate this opportunity to  
7 testify before you today.

8 My name is Jeffery McReynolds, which  
9 you all know. I'm chief operations officer of  
10 JSM Logistics. I'm testifying as a direct  
11 impacted person of the retroactivity not once but  
12 twice in five years -- in a five-year period. I  
13 got the first crack minus two amendment and  
14 second for the drugs minus two.

15 I come before you today as a proponent  
16 for retroactivity in the proposed Criminal  
17 History Amendment. Retroactivity may be the only  
18 possible relief for men and women that are  
19 serving lengthy unjust prison sentences due to  
20 their criminal history.

21 I want you to know the man I am today.  
22 I'm a husband of a beautiful and amazing wife.

1 I'm a proud father of four beautiful intelligent  
2 daughters and an amazing son. In January 2000 I  
3 became the world's happiest grandfather of a  
4 little beautiful girl. Excuse me. I'm sorry  
5 about that.

6 On October 20th of 2005 I was  
7 sentenced to 235 months in the federal Bureau of  
8 Prisons. I remember it like yesterday. On  
9 November 14th of 2005 I arrived at Greenville  
10 Federal Correctional Institution in Greenville,  
11 Illinois.

12 I remember walking into the prison and  
13 thinking to myself I'm going to be a better  
14 person for my family once I'm released from this  
15 place. Being sentenced two decades in prison  
16 including for the -- for actions I'd already paid  
17 my debt to society for was mind boggling.

18 During my incarceration my youngest  
19 sister passed away from cancer. Excuse me. I  
20 never had a chance to say goodbye. Nine years  
21 later I'm still suffering with this daily.

22 I think back to numerous motions I

1 filed pro se and subsequently all denials. Four  
2 years into my sentence on February 3rd, 2009, I  
3 received my first two harm reduction due to the  
4 crack minus two amendment that later included  
5 retroactivity.

6 The amendment allowed me to give back  
7 the 84 months off the 235-month sentence I  
8 originally had. After additional years of legal  
9 work and persistence, not impatience, finally, I  
10 reaped the harvest of my dedication.

11 On December 2nd of 2014 I received a  
12 second two point reduction as a result of the  
13 drugs minus two and the retroactivity amendment.  
14 What a blessing. Because of retroactivity I was  
15 given a second chance to live.

16 It allowed me to spend a year with my  
17 mom before she passed away. Retroactivity turned  
18 hope into a reality and the opportunity to give  
19 back to the community I once committed crimes  
20 against.

21 In 2016 and one year after my release  
22 my wife and I started a logistics company. In

1 this next chapter of our lives our goal is to  
2 start a trucking school and in my spare time I  
3 need to return to citizens a small business  
4 startup so they can too be successful in their  
5 second chance.

6 I am also an advocate for census  
7 reform and recently participated on Capitol Hill  
8 Lobby Day with -- they were featuring 70 former  
9 incarcerated people and their loved ones.

10 I had the opportunity to visit  
11 Senators Durbin, Reps. Kelly, Budzinski, and  
12 Schneider's congressional offices to tell my  
13 story. Retroactivity permits people -- excuse  
14 me, retroactivity permits people's sentences  
15 under the guideline range to have been lowered, a  
16 chance to make their case to the court that they  
17 deserve a reduced sentence.

18 Because the Commission make crack in  
19 drug amendment retroactivity I was able to tell  
20 Judge Barbara Crabb that I was deserving of those  
21 chances, too. She believed in me and in my  
22 rehabilitation without retroactivity and her



1 faith in me I would not be here today.

2 I'd be in prison with a release date  
3 two years away. No words can describe what it  
4 means to see the Commission not only lower  
5 sentences that were too long but also to do the  
6 right thing by making sure that people serving  
7 those sentences like me got a chance to prove  
8 they deserve a lower sentence.

9 Those changes restore hope and making  
10 the Criminal History Amendment will also give  
11 people the opportunity to return home to their  
12 second chance. Thank you all.

13 CHAIR REEVES: Thank you, Mr.  
14 McReynolds. I turn to my colleagues to see if  
15 there are any questions. Commissioner Gleeson?

16 COMMISSIONER GLEESON: Thank you,  
17 Chair Reeves. It's not so much a question as a  
18 expression of gratitude that you're here. We  
19 hear from many stakeholders and many folks who  
20 deserve to be heard to influence policy and none  
21 of them can do what you've done today in the  
22 content of your testimony but in your presence

1 and, you know, I think it's from my perspective  
2 what you've done is place in the clearest  
3 possible relief three things.

4 One is just because someone's  
5 committed a serious federal crime - and I'll bet  
6 none of you would deny that you committed a  
7 serious federal crime - it doesn't mean you can't  
8 get a grossly excessive sentence that shames us  
9 all.

10 The other thing is, you know, the  
11 degree to which related to that is anybody who  
12 thinks that those grossly excessive sentences  
13 don't get meted out just hasn't been hanging  
14 around federal courtrooms the last 30 years.

15 The second thing you place in the  
16 clearest possible relief is just because folks  
17 are serving excessive sentences doesn't mean they  
18 can't transform themselves in prison into  
19 completely admirable people and anybody who  
20 thinks otherwise has no idea what people are  
21 capable of, and you just by being who you are  
22 prove that.

1                   And I think the third thing that you  
2 place in the sharpest possible relief is how  
3 important it is for policymakers -- judges too,  
4 but for policymakers to consider all the other  
5 things we consider -- the data, the stakeholders  
6 - but to never lose sight of the fact that on the  
7 receiving end of the sentences are three-  
8 dimensional human beings with families who love  
9 them, communities who need them, and I have a  
10 colleague at NYU, Bryan Stevenson, who says if  
11 you really want to know an issue you got to get  
12 proximate and what you do is you bring us  
13 proximate to the result of the decisions that we  
14 make, and as far as I'm concerned we can't thank  
15 you enough.

16                   Thank you, Chair Reeves.

17                   CHAIR REEVES: Mr. Wroblewski?

18                   Commissioner Wroblewski, excuse me.

19                   COMMISSIONER WROBLEWSKI: Thank you  
20 very much, Mr. Chairman, and thank you all for  
21 being here and for your testimony.

22                   Mr. McReynolds, I just want to share

1 my condolences about your sister and your mom  
2 and, Mr. Gibson, about your grandparents.

3 Mr. Brough, you talked a little bit  
4 about the fact that there was a time in prison  
5 when people did not take advantage of programming  
6 and there was another time when people started to  
7 take advantage of programming. Could you  
8 describe a little bit about what changed?

9 What brought about people  
10 participating more and taking advantage of the  
11 opportunities? And also if any of you can talk a  
12 little bit about what happened when you went  
13 home, what kind of interactions you had with the  
14 probation service, probation officers, supervised  
15 release, both positive and negative, about what  
16 worked and what didn't work.

17 MR. BROUGH: In relation to your  
18 question on education and what changed, honestly,  
19 there had been so long a period of time where  
20 guys such as myself who were serving life  
21 sentences had absolutely no way of getting out of  
22 prison.

1           In fact, we're familiar, and I don't  
2 know if you and anyone on the panel is -- we do a  
3 biannual review. It's called Team. For lifers  
4 there's a -- well, on that sheet of paper that we  
5 get there's a section on there that answers the  
6 question your months to release, and when I was  
7 first incarcerated as a lifer that answer was  
8 deceased.

9           Sometime later the people who put that  
10 answer in there realized that it had negative  
11 effects and they changed it to 540 months. But I  
12 did 20 years.

13           The first 10 years they say 540 months  
14 so it wasn't much better than deceased. What  
15 changed was, honestly -- and I worked in the law  
16 library for many years and discussed law and read  
17 law.

18           There were 20 years almost exactly  
19 from 1989 -- I'm sorry, from 1979 to, like, 1999  
20 and Apprendi was the huge case that came out  
21 where there was some change and people started  
22 getting relief.

1           Lifers started getting relief, and  
2 they started noticing that the lifers that did  
3 get the relief were the guys that were taking  
4 advantage of the educational opportunities that  
5 were there and it created like the famous book "A  
6 Tipping Point" where more people would take  
7 advantage of the educational programs more people  
8 will get relief because they participated in the  
9 education.

10           Whenever there was a change in the law  
11 that people could be reviewed again by a court,  
12 education, rehabilitation was the focus. So  
13 people started -- inmates, I should say --  
14 offenders -- I don't know if they use the word  
15 inmates. I'm sorry.

16           But offenders in there were taking  
17 advantage of the educational opportunities not  
18 just to get the benefit. What they realized was  
19 they were changing. They were becoming better  
20 people, better parents, better children. They  
21 were apologizing to family members that they had  
22 let down.

1                   And so that's when it changed. When  
2 you start seeing somebody get relief and why --  
3 you ask why did they get it -- you're reading the  
4 opinion written by the judges -- education was  
5 always there. Rehabilitation, those -- those  
6 were watchwords that were there and we took  
7 advantage of that.

8                   MR. GIBSON: I have something to add  
9 to that, too. Not -- you know, he's exactly  
10 right. But also the programs today are very  
11 limited. You know, when I was in Memphis there I  
12 think it was 1,200 people on the panel, and I  
13 actually taught the cabinet making class. I  
14 finished and I ended up being the teacher and one  
15 of the instructors in the class. It had a  
16 waiting list to get in.

17                   And for someone that has so much time,  
18 you know, like you said -- I think you said it  
19 before to me about if you had life you get to the  
20 back of the waiting lists.

21                   So it's hard to even get into these  
22 classes. They don't have enough of them and, you

1 know, you want to do it but, you know, we have --  
2 you're looking at, like you said, 300 or 400  
3 months and they tell you each time you can't get  
4 in.

5           What do you do? And it's just hard to  
6 even maintain when you don't have anything  
7 because they really don't. I think the class I  
8 was in we had maybe eight students, you know, at  
9 a time and each class was maybe a few months.

10           So if you had -- and I was on that  
11 particular path for 15 years and many students  
12 were able to come through and a lot wanted to  
13 come. Because I was an instructor they asked me  
14 all the time, wow, when can I get in, when can we  
15 -- it's not like they don't want to.

16           You know, there's so many people --  
17 I've been around so many guys in the facility  
18 that I've learned so much from. I've learned a  
19 lot from these guys, and people change and people  
20 realize the mistakes they had.

21           I even had one class and they took us  
22 out. When I got to -- I finally got to the camp



1 before I came home and they had a program called  
2 Back to Reality and they took me to VCU. They  
3 took me to Fort Lee.

4 They took me to all the courts to talk  
5 to you -- to talk to the military people who had  
6 got into some type of trouble. And the panel was  
7 really diverse.

8 It was a really good panel because  
9 every walk of life was in the panel from drugs to  
10 one guy had burned something up. It was just a  
11 big diverse. The purpose was to show that  
12 anybody can make a mistake.

13 Anybody could turn left or turn right  
14 and end up in jail. And with that panel it  
15 really got me to where I wanted to be today with  
16 the kids because the first time a kid came up to  
17 me -- we weren't supposed to touch these kids or  
18 anything.

19 One kid came up the first time -- the  
20 first kid came and hugged me and cried and it  
21 really showed me that, you know, we can make a  
22 difference and they can really -- and with

1       Lead4Life now they can really relate to when  
2       you've been through what they've been through.

3                 Like you said, putting a face to it.  
4       You know, I think we make decisions on different  
5       things but to put a actual face and a person to  
6       those decisions makes a big difference.

7                 And to answer your question, a lot of  
8       times we just don't have the opportunity to do  
9       it. You know, I even got my CDL license when I  
10      was incarcerated. We didn't even have a class.  
11     You had to do it on your own. We studied.

12                They had a truck. They allowed us to  
13      -- I was at the camp. They allowed us to go  
14      around the facility at the camp and they took us  
15      -- I had my license when I came home but it was  
16      only a certain amount of people that can do it.

17                So it's not like these guys are  
18      sitting in there not wanting to do stuff.  
19      There's nothing sometimes for them to do and if  
20      you don't have family because -- you know, I was  
21      -- I was turned down because of Apprendi, too.  
22      Actually my dad's name is on Apprendi. If you

1 look his name is on there. And I -- when I got  
2 turned down it was hard because I'm saying to  
3 myself, I've done everything.

4 I've taken every class. I'm teaching.  
5 I have -- I have -- you can ask anyone at the  
6 facility about me. And I get -- and I get a  
7 letter stating that you're absolutely right but  
8 because of retroactivity you don't get it.

9 That's hard. And if it wasn't for  
10 that grandmother telling me, baby, hold on -- God  
11 has something else for you -- if it wasn't for  
12 Milburn and Mike and Christie coming to see me,  
13 and a lot of these guys don't have this.

14 I've seen guys 10, 15 years not get  
15 one visit. You know, I've had arguments because  
16 my family was so close to me with councils  
17 because I had too many people in the room with  
18 us. I said isn't this rehabilitate -- this is  
19 what you want, right?

20 I literally had to get a grandfather  
21 clause. I had to go get my grandfather clause to  
22 prove that I can have these on my list. They cut

1       it down to 10 people.  What if you got -- you  
2       know, I grew up in a household.  I've got nine  
3       sisters.  My mother was 15.  She was like my  
4       sister.  So my -- her sisters are like my  
5       sisters.

6                   So you're telling me that the person  
7       that raised me and took care of me can't come and  
8       see me but you want me to be rehabilitated?  It's  
9       hard.

10                   It's hard, and you guys have power to  
11       make change, to really help someone who really,  
12       really if you just normally would see them, see  
13       that they need it, see that they deserve it.

14                   And I understand the victims.  I  
15       understand it, and I know so many guys that are  
16       so remorseful for the things that they've done.  
17       But you're a product of your society and the same  
18       thing with the incarceration.

19                   If you don't have nothing for them to  
20       do then what do they do?  They get into other  
21       stuff.  It's not like they're not trying to  
22       change but there has to be an avenue for change.

1 If there's no avenue for change how do we have  
2 change?

3 I don't want to talk too much. I  
4 don't want to take up his time. You know, it's  
5 personal to me.

6 MR. MCREYNOLDS: I'm going to talk to  
7 you about the U.S. Probation Department and,  
8 like, when I -- when I was released it was real,  
9 real, real hard financially because they told me  
10 I couldn't go home.

11 I'm married. You know, I was married  
12 while I was incarcerated. I was supposed to move  
13 back to Huntsville, Alabama, and I can say the  
14 name. The young lady there at the probation  
15 department her name is Candy Cheatham. She told  
16 me I couldn't come home.

17 So she said I had to go back to where  
18 I was originally arrested. So I had a home in  
19 Huntsville, Alabama, and my wife had to take out  
20 a \$90,000 refi on my home to come to Chicago and  
21 build another home for me.

22 So now we have two homes. I had to

1 uproot my children to move them to Chicago and  
2 now we have to maintain all this just for a few  
3 months until I'm actually under a probation  
4 officer, which was November the 1st as it came  
5 around.

6 So you have all these things in your  
7 way. Like, if you need to go grocery shopping or  
8 to any store or -- you have to have an itinerary.  
9 You don't know which -- in life you don't know  
10 what store you have to go to so how can you set  
11 up a schedule to go somewhere?

12 What if you need a hairbrush or a comb  
13 or anything? So it doesn't matter. Like, you  
14 have to have an itinerary in order to move around  
15 and you're supposed to be out but it's, like,  
16 you're not out.

17 So you have to adjust to all these  
18 rules and it really affects you, like -- you  
19 know, it's like, wow, I should have just stayed  
20 in prison.

21 Like, I know you heard this thing --  
22 people say I'm going to go to jail and I'm going

1 to do the whole six months and I'm just going to  
2 stay here. I don't want to be on no supervised  
3 release until this time. You know what I'm  
4 saying?

5 So the thing is the woman didn't want  
6 me to come to Alabama at all. So I waited until  
7 the period -- it was six months I had to wait.  
8 My wife had to come and build a home months  
9 before that. We had to have land line phones. I  
10 don't know how many people have landline phones  
11 anymore.

12 You know, it's the hardest -- it's a  
13 hard thing. You know, who answers the house  
14 phone? You got a cell phone in your pocket. So  
15 they want a land line. They call you numerous  
16 times in the night.

17 If I wasn't fortunate enough to have a  
18 support system with transportation -- they will  
19 call you 2:00, 3:00 in the morning and say you  
20 need to come down here and take a UA. What if I  
21 don't have transportation in the city that you  
22 said is violent? Now you had to cross over all

1 these neighborhoods to get to somewhere on public  
2 transportation just to take a UA.

3           It doesn't make any sense. It's hard.  
4 It's hard on our families. There's so much but  
5 I'm going to go -- that's the bad side. But the  
6 great side is I met a great -- a great probation  
7 officer. His name was Andy Ysaulgue. He helped  
8 me so much.

9           Like, he should be the poster child  
10 for a probation officer. So he was cool with my  
11 career. You know, he made it work. Like, I was  
12 over -- I had to go over the road which most  
13 probation officers say you can't leave a certain  
14 amount of radius. But he said all you got to do  
15 is keep me with an email chain. Let me know  
16 where you're going and then just send me your  
17 financials in when you're done, which he went  
18 above and beyond.

19           I got so far in working the email  
20 chain was so long he said, Jeff, just don't --  
21 you got to stop. He said -- he said, I know  
22 you're working it. So we were great.



1                   He actually left the office down in  
2                   Huntsville and he moved over to Florence,  
3                   somewhere in Alabama. But there's great people  
4                   out there and there's people that need to know  
5                   work. You know what I'm saying?

6                   I don't like badgering people or  
7                   nothing like that. But it's the point, you know.  
8                   You got some gems out there and you got some  
9                   coal. So you got to just know. It's good and  
10                  bad. So, no, thank you. I don't want to go on -  
11                  -

12                  MR. BROUGH: Excuse me, if I may. I  
13                  would be remiss if I did not mention my probation  
14                  officer. Her name is Alicia Sturgess and she was  
15                  fantastic. On the first day we met until I was  
16                  released from supervised release and even to this  
17                  day I still communicate with her. She's probably  
18                  watching this. If not she's got a link to watch  
19                  it because she wants to watch it.

20                  She told me when I emailed her about  
21                  it, I'm telling everybody in my office. And it's  
22                  a great feeling to know that and we all share

1 this, that there are people that play a role in  
2 the process -- the probation office, the U.S.  
3 Attorney's Office, the Federal Defender's Office  
4 -- that they are aware that we are contributing,  
5 we are productive, we did not reoffend, and we  
6 are growing in a positive way.

7 It means a lot to us that -- I mean,  
8 outside of our nuclear family and friends we  
9 actually care that you people -- the people like  
10 you, the policymakers, the people who have those  
11 jobs that are -- that come in from what --  
12 sometimes because they had to deal with somebody  
13 not like us and go oh. We care that you know  
14 that we're out here and we're not a problem. It  
15 means a lot to us.

16 MR. GIBSON: I mean, just to be asked  
17 to come here, I didn't even know that we were  
18 able to even speak just for you guys just to hear  
19 us -- to hear us out. You know, this is --  
20 because like I said, it's a big thing to put a  
21 face to it.

22 And I know there are a lot of pros and

1       cons but you see the table here as pros. I don't  
2       have any cons when it came to retroactivity.  
3       Everything worked out for me. You know, same  
4       with the probation officer.

5               The first day he came and met me we  
6       talked. He told me what he wanted and we had a  
7       conversation. And we talked maybe for an hour  
8       and a half and when he said -- when I left --  
9       when he left my house he shook my hand.

10              He said, I don't see any -- us having  
11       any problems and we didn't have any problems.  
12       And I'm telling you, I'm in touch with a bunch of  
13       guys that -- the funeral I just went to was a guy  
14       that keeps everybody together and he accidentally  
15       got killed. It was an accident. And it's a  
16       bunch of guys.

17              I'm talking 40 or 50 guys. Mike was  
18       there, and these guys come together all the time,  
19       keep each other up. You know, I told one guy, I  
20       said, man, I ain't Dr. Phil. He'll call me for  
21       everything. But we look out for one another.

22              It's really -- it's really a family

1 because, you know, I never -- I never understood  
2 when they said you can't talk with -- under  
3 probation, though, that you shouldn't talk with  
4 other guys that were incarcerated.

5 So you mean to tell me I'm 27 and I go  
6 to jail and you give me 27 years. I've been with  
7 this guy 18 years. We had each other's back.  
8 You know, when I needed a few dollars he gave me  
9 money.

10 When he needed a few dollars I gave  
11 him. We looked out for each other 18 years. But  
12 I can't call him and say hello? This is who I'm  
13 with. This is my friend.

14 This is a person that we grew -- this  
15 is maybe the person that got me to change because  
16 I know I've changed a lot of guys. I take credit  
17 for it. I do. I see them to this day some of  
18 these guys.

19 They grew up in jail with me and now  
20 they're home doing the right thing. They're all  
21 working. I don't -- I don't know one person that  
22 I was close to and I was close to a lot of guys

1 because I did a lot when I was in.

2 I taught the class. I refereed the  
3 games. I'm learning in the system where I was  
4 in. These guys are not going back. They're just  
5 not. And they are very productive. I'm talking  
6 -- you know, I got one buddy who owns 40 dump  
7 trucks. He's a multimillionaire right now.

8 So it is wrong to say that people  
9 can't change because I seen it over and over and  
10 over again and I can only tell you from what I've  
11 seen. I don't know all the statistics. I don't  
12 have all the graphs.

13 But in my community these guys have  
14 changed. They're not going back and for all of  
15 us that I know that got this retroactivity I  
16 don't know not one that had a problem.

17 COMMISSIONER BOOM: Good afternoon. I  
18 just want to thank each and every one of you for  
19 your testimony. I read your materials. They  
20 were extremely moving and compelling.

21 Throughout -- there was a thread  
22 throughout each of your submissions and your

1 testimony today that, you know, while you were  
2 incarcerated you had hope that you were going to  
3 get out, notwithstanding I think you threw your  
4 first two letters in the trash you said and you  
5 didn't even open them from the federal defender,  
6 I believe it was, and because you just -- you  
7 know, at the time just thought, well, this is  
8 just something else that is not going to end up  
9 as, you know, fruitful.

10 But you each had hope along the way  
11 and you each engaged in a lot of programming.  
12 And so, you know, my question is what can we --  
13 you know, what can the Bureau of Prisons or we do  
14 in addition to -- you know, I understand your  
15 position on retroactivity.

16 But what can we do within that system  
17 to inspire more hope? You know, is it additional  
18 classes? Is it -- you know, what can we do to  
19 affect, you know, and produce more folks like you  
20 who are, you know, you're telling us are already  
21 there? What are the tools that they need to  
22 succeed?

1                   MR. GIBSON: Well, first of all, we  
2 got to understand that a lot of them guys didn't  
3 get jobs. They didn't -- they never had the  
4 opportunities or family or -- I know one guy who  
5 was -- they used to call him can't get it right.  
6 He wouldn't --

7                   COMMISSIONER BOOM: What?

8                   MR. GIBSON: Can't get it right. But  
9 how do you get it right when you was living on  
10 the streets since you were five years old? He  
11 didn't know his mom. He didn't know his dad. I  
12 mean, he literally was in the street.

13                   I'm talking literally, and people will  
14 say things. You know, it used to get me mad when  
15 they would say them things and I was, like, you  
16 know, you've never been in his shoes.

17                   So the opportunities just to even have  
18 -- I taught a class how to tie a tie. These were  
19 grown men that didn't know how to tie a tie. So  
20 you're looking at people who didn't know any  
21 better.

22                   If you keep, you know, doing the same

1 thing you're going to keep getting the same  
2 results. Unless you change -- I said it to one  
3 of the young ladies back there. I said, you  
4 know, my dad was on my case too and I grew up in  
5 a time where they were really in the streets and  
6 I knew a bunch of people.

7 And I said to her, you know, if my dad  
8 was a carpenter or a plumber or a mechanic, I  
9 thought I would be one of those things, too. So  
10 you're a product of your society.

11 So if there's nothing, like I said  
12 before, for you to learn to do then you're going  
13 to be stuck. These are guys that you're looking  
14 at that comes back because they didn't learn  
15 anything.

16 I think that they need more programs.  
17 They need more funding for programs. They need  
18 more people to come in to talk to because I had a  
19 family and friends. I didn't need -- I didn't  
20 need a visit.

21 You have a lot of people that -- at  
22 one time they had a thing where people was coming



1 in just to visit people, just to give them a  
2 visit. That matters. All of these things  
3 matters. And if you want to stop something, you  
4 know, you're going to have to change something.

5 And if you put someone in for 20 or 30  
6 years -- you put a young man there 21, 22 years  
7 old and it was me, because I thought of my case  
8 like you. I looked and I said, wow, when I got  
9 out I seen so many of them just like mine and  
10 then I'm, like wow, these young guys got all this  
11 time. And it gives you a different perspective  
12 and I'm talking about guys that don't have no  
13 resources. None.

14 You know, even with the CDL class a  
15 lot of guys wanted to take it. They didn't have  
16 the money to pay for it. So there's a lot of  
17 things that needs to be implemented, especially  
18 education, though, to get them ready to be able  
19 to do some things and not just -- not just them  
20 doing it themselves because a lot of that stuff I  
21 did myself and I was blessed. I was blessed -- I  
22 had a praying grandmother -- to get into these

1 programs.

2 But they need more programs. They  
3 need more help to teach and to show in many  
4 different ways writing skills, educational  
5 skills, GEDs.

6 I was surprised to see so many people  
7 that didn't have a GED and you wonder why these  
8 people are doing the things that they're doing.  
9 They have no other way sometimes. They need  
10 better ways.

11 MR. MCREYNOLDS: I say the same thing.  
12 The Education Department can be expanded, like,  
13 with more programs, probably a little more staff  
14 as well because you have -- you have certain  
15 programs in -- when I was in Greenville they had  
16 Greenville College coming in and doing certain  
17 programs. They had -- they have a culinary  
18 program, which is small.

19 You know, you have the truck and the  
20 CDL classes. You had college courses but you  
21 have to pay for the college courses yourself.

22 But most of the people in education

1 that work the education, staff that work in  
2 education, they did become proctors to us,  
3 though. It just needs to expand because they  
4 only have room for so many.

5 Like, if you have a class that you  
6 only can run, what, eight times a year and you  
7 got 1,200 people on the compound you only could  
8 fit 10 or 12 people in the class.

9 So that's not really -- it ain't even  
10 scratching the surface. And people are coming in  
11 every day, like, but people not going home every  
12 day.

13 MR. BROUGH: Other than education, to  
14 your point BOP has something in place for every  
15 negative situation. They have something in place  
16 for every possible negative, every disciplinary  
17 action, and one of the worst is called a step  
18 down program.

19 Like, if you are at a low level  
20 security facility and you do something, violate  
21 the rules, their discipline is to see you up in  
22 security and then you step down once you've

1 proven that you could conduct yourself  
2 accordingly.

3 I think that that needs to be applied  
4 in a positive way. I was in Terre Haute USP with  
5 two life sentences and the unwritten rule was  
6 nobody with a life sentence could transfer to a  
7 medium security facility until they've served 10  
8 calendar years.

9 That was the unwritten rule. It was  
10 nowhere in a book. No counselor could point to  
11 it in a manual. But if you had medium security  
12 points like I did they tell me come back. You  
13 don't have 10 years.

14 Until I started taking every single  
15 possible class, until I started making  
16 relationships with the staff in education,  
17 speaking with the assistant warden of education  
18 who later went on to become a warden and he's  
19 probably working in the region if I can remember  
20 his name.

21 And in fact, he would come through on  
22 tours. I left Terre Haute. He came through on a

1 tour in Pekin. I saw him there. I left Pekin.  
2 I was at Rochester FMC. He came through on a  
3 tour and I saw him there.

4 He would always make a point if I saw  
5 him he'd stop me, we'd speak, and it meant  
6 something to the staff for him to stop and speak  
7 to me.

8 But I think that what would really  
9 help and what would incentivize more people to  
10 engage in these educational programs is that  
11 despite what your sentence is -- your sentence  
12 length -- if you show change -- positive change  
13 and growth then that carrot becomes a transfer to  
14 a lower level security facility, not for the  
15 security aspect but at these lower level security  
16 institutions the educational programming  
17 availability widens.

18 When I was at Terre Haute there were  
19 some and I moved down to FCI Pekin, medium  
20 security, there were more. I moved down to  
21 Rochester, which was technically a low, and there  
22 were even more.

1 I was able to acquire a forklift  
2 driving license using the forklift in the  
3 warehouse. They had apprenticeships in plumbing,  
4 electrical, HVAC. I know people right now that  
5 were released after 15-plus, 20 years that are  
6 licensed master electricians.

7 I still stay in contact with these  
8 people all over the world. I know three of them  
9 in Minnesota alone, two in California, one in  
10 Ireland through that program.

11 That's a five-year program and they  
12 were able to not only participate, they were able  
13 to complete it and they are all fine, upstanding,  
14 productive members of society.

15 In fact, if you lived next door to one  
16 of them you wouldn't know they had ever been in  
17 prison unless they told you. Some of the people  
18 that I know I would say -- I would go out on a  
19 limb and say most, if we could afford it you  
20 wouldn't mind having us as a neighbor.

21 CHAIR REEVES: Any other questions or  
22 comments?

1           Gentlemen, thank you so much for your  
2 testimony today. It is archived permanently on  
3 our website, [www.USSC.gov](http://www.USSC.gov). Show those kids that  
4 you are inspiring back home and at -- for the  
5 Life program and everything else where you are  
6 dealing with these young people.

7           Even back at the people who you know  
8 who you left behind they can go back and watch it  
9 as well. So please tell them. They need to hear  
10 your story.

11           With that, I'd like to bring our  
12 hearing on retroactivity to an end. On behalf of  
13 my fellow commissioners and my friends here at  
14 this table I want to again thank each of our  
15 panelists who came before us today.

16           I want to thank the members of the  
17 public who sent in comments on this subject. I  
18 want to thank all those who have participated in  
19 any way possible, especially our staff.

20           I want to thank all those who have  
21 taken the time to listen in. We have heard  
22 powerful testimony today. We will consider that

1 testimony and we will use that testimony to make  
2 sentencing policy that we believe is right, that  
3 is fair, and that is just.

4 With that, this hearing is now  
5 adjourned. Thank you.

6 (Whereupon, the above-entitled matter  
7 went off the record at 4:04 p.m.)

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## A

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In the matter of: Public Hearing

Before: United States Sentencing Commission

Date: 07-19-23

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.



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Court Reporter

**NEAL R. GROSS**

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