UNITED STATES SENTENCING COMMISSION

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

WEDNESDAY
JULY 19, 2023

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

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

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

We're also joined by ex-officio
commissioner on the end there Commissioner Jonathan Wroblewski. I want to thank all of my fellow commissioners for their extensive contributions, their spirit of collaboration, and their dedication to our work. I'm honored to be sitting among such esteemed colleagues and friends.

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

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

When preparing these remarks I thought about what Congress said is the Commission's most important mission, to establish citizen policies and practices for the federal criminal justice
system that meets specific criteria.

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

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

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

Now we must decide whether people incarcerated under the old policies should get a chance to have their sentences revised in line with our new one.
In other words, today's testimony will help us decide whether to apply criminal history amendments to the sentencing guidelines retroactively.

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

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

When those persons spoke to the Commission they were heard. We heard them say this decision of retroactivity is our chance to correct past wrongs and address the systemic
disparities that have plagued our society for far too long.

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

Today these comments will be buttressed by testimony from a distinguished group of individuals. To all who are speaking with us today I promise that your extensive journeys and preparations will be worth it. When you speak to the Commission you will be heard and you will -- you will be read too as your testimony will be available for the public to access on our website, www.USSC.gov.

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

Let me reassure you, we take pains to
consider all these costs. We consider the time judges and their staffs will have to expend dealing with filings for reduced sentences. We consider the additional resources expended on reentry and supervision.

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

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

As my former colleague, Judge George Hazel, so aptly put it, liberty is the norm. Every moment of incarceration should be justified. Whatever decision the Commission makes on retroactivity I promise it will reflect every cost, every benefit, and every perspective
we hear about today.

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

Again, it is on the website. Read their statements. It is that -- those statements are on the website, again, at www.USSC.gov.

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

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

Also, this is directed to the public again. If you would like to receive updates on future events of this Commission or other
Commission or all of our Commission activities
visit us on Twitter.

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

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

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

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

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

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

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

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

Mr. Ritz was previously an assistant United States Attorney in the Western District of Tennessee for 17 years. He has held various
leadership positions in the office including serving as appellate chief and special counsel for over a decade.

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

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

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

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

When evaluating retroactivity the
guidelines instruct the Commission to consider
the purpose, the magnitude of the change, and the
difficulty of retroactive application.

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

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

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

The amendment results in a minor
downward adjustment that Congress did not intend for retroactive application. These factors weighed against retroactivity of the recency amendments in 2010 and they do so again here.

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

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

The zero point offenders amendment similarly has a minor effect, resulting in a two offense level reduction. Thus, the magnitude of the change is small and retroactivity would contravene congressional intent and Commission precedent.
The burden on the courts and the criminal justice system, on the other hand, would be significant, which is why all the judges who publicly commented on the amendment also oppose retroactivity.

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

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

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

Additionally, the Commission's numbers underestimate the number of potentially eligible
defendants. That's because the new exclusionary criteria introduce novel legal concepts that will require additional fact finding and litigation. Retroactivity here would be, in the words then Commissioner Howell, administratively burdensome to the point of impracticality.

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

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

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

Finally, retroactivity poses both
operational and reentry concerns. Retroactivity would interrupt transition planning for the BOP and increase burdens on probation.

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

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

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

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

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

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

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

I don't anticipate -- at least it didn't happen before -- that we get additional resources. The last time these things happened we diverted other resources to this task -- this very important task of sorting through these
motions and figuring out who was eligible and whether a reduction was warranted.

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

But the -- it's a big burden. We did it in the past. Frankly, I'm proud of how we handled these things in the past and I can speak for other U.S. attorneys around the country. We did a good job and that's -- we, not just us but our public defender colleagues, our probation office, court staff, BOP.
We did what it took. But the fact that it happened before does not mean that it was not a significant burden and would not be again.

VICE CHAIR MURRAY: Thanks, Mr. Ritz.

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

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

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

The department contains multitudes and a multitude of viewpoints and BOP was a piece of that, and it's safe to say BOP had concerns about how much time it would take to run up and to implement this.
Usually their processes start about 180 days before a release date. There's a shortage, as I understand, and there's already a strain on reentry and transitional housing resources.

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

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

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

MR. RITZ: Yes, Commissioner, it was -- essentially we did -- and this is just us.
We're a medium sized office, and we had one AUSA who essentially dedicated to that full time for a matter of not weeks but months and then many other AUSAs picked up cases, especially if they were their cases originally.

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

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

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

I will say one aspect of it that I'm not sure is reflected in the papers that have
been presented to this Commission is, yes, the public defenders played a role in our district and did an excellent job as they always do.

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

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

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

And I guess the last -- the last point I'll say about that process, which I'm also not sure is reflected in the submissions, is it
actually can be difficult to recreate or create for the first time a sentencing record.

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

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

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

CHAIR REEVES: Okay. Thank you.

COMMISSIONER BOOM: Good morning, and thank you for your submission. I'm your neighbor
as well, just your neighbor to the north.

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

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

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

I don't have those precise numbers in front of me. I can just tell you in our experience we dealt with a large portion of
people who were -- ended up not being eligible
but moved.

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

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

CHAIR REEVES: Vice Chair Murray?

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

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

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

MR. RITZ: We have not. Our official position is you should not be made retroactive. We have not adopted a fallback position on that front and on the dimension of whether retroactivity should be limited to only certain offenders.
I will say -- we do highlight it on materials and I'll highlight here -- that there are a lot of violent offenders that are swept in here -- the firearms offenders, robbery, there's also child exploitation.

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

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

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

COMMISSIONER WONG: I wonder if we might take advantage of your experience as a former appellate litigator, but are there -- you
described some of the application here as less mechanical than some changes in the past.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And so it is -- it is a significant burden and we do believe that 85,000 is the right number to focus on as opposed to the smaller -- much smaller numbers of people who might be
eligible, at the end of the day. I think that's how I would respond to that.

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

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

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

CHAIR REEVES: All right.

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

There she handles appeals to the Fourth Circuit Court of Appeals. Over the past 15 years she has managed the office's retroactive sentencing projects including for amendments that
reduced the basic offense level for crack cocaine offenses, gave retroactive effect to the Fair Sentencing Act guidelines, and reduced the base offense level for all drug offenses.

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

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

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

Finally, we have Steve Wasserman, who
serves as president of the National Association of Assistant United States Attorneys.

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

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

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

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

MS. MIRCHANDANI: Okay. I've worked as an assistant federal public defender in the
District of Maryland for nearly two decades where I've managed my office's retroactivity work on amendments 706, 750, and 782.

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

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

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

The data showed that two metrics used to compute criminal history scores over the last 35 years was flawed due to the original Commission's assumptions about recidivism that have been
proven not true.

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

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

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

Even though the criminal history guideline, like the drug guideline, was neutral on its face it's a reflection of the profound unfairness of our criminal justice system which communities -- where communities of color have borne the brunt of over policing and unduly harsh punishments.
Retroactive application of the Criminal History Amendment would be one small step toward restoring a sense of fairness to the system.

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

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

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

Compared to that we now -- we know that two-thirds of all districts dealing with retroactivity will have fewer than 200 cases
each, which is very small in the big scheme of things.

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

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

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

We have noticed a shift in the BOP's release planning, possibly as a result of the
First Step Act. But now my clients are generally asked to submit release plans roughly 18 months before release.

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

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

In closing, the Commission's data shows us that some guideline ranges were tainted by false assumptions about recidivism and the impact of those harsher terms landed
predominantly on Black and Hispanic individuals.

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

CHAIR REEVES: Thank you.

Mr. Nash?

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

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

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

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

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

But this is an opportunity. It's an
opportunity for this Commission to demonstrate
that when we find a problem we fix it and we fix
it for everyone.

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

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

But perhaps most fundamentally this is
an opportunity for the Commission to have a real
positive impact on thousands of lives and not
just the thousands of lives of the individuals
who are incarcerated who can potentially adjust
their sentences but the thousands upon thousands
of lives of their family members and their loved
ones.
All of these people because of fairness will have the chance to restart their lives, rebuild their lives, and rebuild their families.

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

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

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

As for the difficulty of application, this will take some work but it's not an overwhelming amount of work and us practitioners, whether we be private attorneys or whether we be
appointed under the Criminal Justice Act, we stand ready to shoulder the burden of much of that work.

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

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

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

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

CHAIR REEVES: Thank you, Mr. Nash.

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

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

These reforms are fundamentally antithetical to the sentencing guideline's progressive sentencing regime and should not be extended retroactively. The sentencing guidelines are intended to further the basic purposes of criminal punishment, deterrence, incapacitation, just punishment, and rehabilitation.
To do this the introductory commentary to Part A of Chapter 4 makes clear that one of the main purposes of the guidelines is recognizing that, quote, "a defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."

Offenders who have committed new offenses while under a criminal justice sentence are by definition recidivists. The underpinnings of the status point amendment and the proposal for retroactive application ignore this reality. Part A eliminates status points entirely for offenders with six or less criminal history points. Under Section 4(a) 1.1A a prior felony conviction in which the offender is sentenced to more than one year of imprisonment results in three criminal history points.

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

This runs counter to the fundamental
purpose set forth in Chapter 4 to establish a sentencing regime with escalating consequences for repeat offenders.

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

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

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

These are offenders who already had
multiple prior criminal convictions counted under Chapter 4 and thus were not timed out. Accordingly, these offenders have already demonstrated that they are recidivists who do not respect the law and are more likely to reoffend.

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

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

Providing retroactive sentencing adjustments to these offenders will result in more crime and fails to sufficiently recognize the sentencing factors of punishment and deterrence under 18 U.S. Code Section 3553(a).
Part B that addresses zero point offenders is similarly problematic. This provision creates a windfall to white collar defendants.

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

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

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

The rule of law relies on finality and predictability. Making sentence adjustments under the Criminal History Amendments applied retroactively undermines these values.
Accordingly, the Sentencing Commission should proceed with caution when making such decisions, particularly where public safety is likely to be negatively impacted.

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

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

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

Commissioner Wong?

COMMISSIONER WONG: Ms. Mirchandani, I noted that you've worked on retroactivity of sentencing issues for about 15 years. I wanted to ask you about -- I'm sure you're familiar with the Commission's 2010 recency point elimination.
As you know, then the Commission did not publish or comment retroactivity or hold a hearing. The Commission voted in 2011 to not make it retroactive, and Justice Ketanji Brown Jackson at the time had stated that the recency amendment was, quote, "not intended to address the same types of fairness issues involved in the circumstances where retroactivity typically had been adopted in the past."

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

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

MS. MIRCHANDANI: We do not think that you are terribly distinguishable and we argued in
favor of retroactivity for amendment 742.

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

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

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

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

But we do think that that was the right call to make that amendment apply prospectively and we wish it had applied
retrospectively. But we can do better now and we have got a lot more experience in doing that.

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

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

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

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

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

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

I'm curious that -- and it's probably just anecdotal experience or testimony you could provide with respect to how districts that don't have public defenders and how districts with public defenders coordinated their CJA attorneys
and what kind of burden they should expect and
how those districts and the CJA folks deal with
this.

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

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

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

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

But it went very smoothly and we
didn't use a lot of -- we didn't refer a lot of cases to CJA counsel because there weren't a lot of conflicts that came up. But I cannot speak to where there isn't a defender office. I can only speak to where there was one.

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

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

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

So although -- and if we did not
supplement the motion to the court that our silence was in a -- you know, basically the message that we didn't think the person qualified for relief so we didn't supplement it. The government I think takes our silence as the fact that we didn't review it. But we did. We reviewed every single case.

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

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

VICE CHAIR RESTREPO: Mr. Nash?

MR. NASH: Right. So in our district we don't have a full time defender. We just have a CJA panel and in past amend cycles all of our panel attorneys stood ready to assist in any way. If we were to be reappointed we were ready to do that. A lot of us fielded calls from our former clients. Even though we
weren't officially appointed we would field calls
and consult with them and go through the same
sort of process about advising them whether they
might be eligible or not.

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

VICE CHAIR RESTREPO: Thank you.

CHAIR REEVES: Commissioner Boom and
then Wroblewski.

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

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

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

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

    Of course, we have the DOJ position, the AUSA position and then, you know, the Bureau of Prisons, I guess, through the Department of Justice. So, you know, I don't think it's a matter of judges simply being too busy to right a past wrong I think as your letter of phrases it but, rather, every other relevant stakeholder opposes retroactivity, at least as far as I can tell.
Now, again, there's the caveat with U.S. Probation Office. So what do you say in light of that, I guess, that the burden is not significant?

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

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

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

The number of people who -- in the past who filed motions who were ineligible have actually went down with each cycle. I think communicating with people who are incarcerated
and letting them know what the criteria are will help reduce that more and I don't -- it will be a burden. It will be work. I don't want to call it a burden because even Mr. Ritz said he was proud of the work he did on amendment 782. He was proud because it was good work and it was the right thing to do. And I think we're looking at the people who will have to work a little harder over the next couple of years.

But the flip side is that if we don't make the amendment retroactive the BOP has to bear the burden of incarcerating people 14 or 15 months longer than they need to be incarcerated. The burden is going to be paid one way or the other, either by the BOP or by the justice system. The difference is that either my clients are going to sit in a jail cell for that additional time or have a second chance at getting their freedom back. So, in my opinion, it's worth the effort on our side and it makes it easier for the
BOP. They're also suffering from overcrowding. We know that from the most recent 2023 BOP report.

MR. NASH: May I, your Honor?

COMMISSIONER BOOM: Please.

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

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

For Part A there's only 12 districts that have over 200 of those cases. For Part B there's only six districts that have over 200 cases. All the rest of the districts have 200 or less, and some of them -- a lot of them far less than 200 cases.
So those are the ones that are going to take work but it's not an unmanageable amount and we already have the mechanisms in place. We have been down this road before.

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

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

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

Is that a consideration that the
Commission should take into consideration in
deciding this retroactivity issue as far as
additional burden?

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

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

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

So if there's more of a -- you know,
some more motions filed in November, in my
district the criteria actually has narrowed
compassionate release. It hasn't expanded it.

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

COMMISSIONER BOOM: Thank you.

CHAIR REEVES: Commissioner Wroblewski?

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

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

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

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

MS. MIRCHANDANI: As a matter of policy?

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

MS. MIRCHANDANI: I think the policy is fine. But I think that what we're talking
about is not in any way a minor adjustment. The Commission itself has called a minor adjustment six months.

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

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

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

MS. MIRCHANDANI: I mean, I don't know every single amendment has been passed retroactively but I have skimmed them. I don't think that the magnitude here is too small.

Fourteen months reduction, even if it's -- because
we're talking about people where they are on the table the one level reduction means 14 months.

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

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

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

This is the -- from your written
submission. As with every prior retroactive amendment the availability of relief will depend on the record as it existed at the time of sentencing.

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

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

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

After eligibility there's still the 3553(a) analysis in every single case. So if
there -- you know, even if a person didn't personally have a gun and there were guns involved the government could argue against relief and in, you know, 40 percent of the drug cases relief was denied.

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

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

MS. MIRCHANDANI: Yes.

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

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

COMMISSIONER WROBLEWSKI: But at the first part of it and if we were to apply -- if
the Commission were to apply Part B retroactively
there are these new exclusionary criteria which
may not have been -- there may not have been
factual findings about them.

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

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

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

But we're going to have to figure out
what those exclusions mean even for prospective
clients and that is not a reason to deny
retroactivity to everyone because it will be a
very small number of people.

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

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

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

COMMISSIONER WROBLEWSKI: Mr. Nash,
can I ask you one question, and that is your
testimony suggests that every sentence imposed
under our current system -- the post Booker
system -- is sort of empirically very precise and
you talk about and Ms. Mirchandani talks about
that if we don't correct it we're not correcting a systemic and fundamental unfairness and you say when we have something that's wrong, and you described it as wrong, that, you know, we need to fix it.

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

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

MR. NASH: Well, the data that the Commission has put forth has shown that the
difference between zero point offenders and everybody else is way more significant than the difference between a four point offender and a six point offender.

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

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

But what we're talking about here is the difference between the zero point and everybody else and that difference is so significant that I think we can fairly say that the sentences that zero point offenders received were too lengthy in many cases and because they were too lengthy they deserve to be corrected.
COMMISSIONER WROBLEWSKI: But you're talking about, of course, Part B. What about Part A, where the status points is two points and it could be the difference between a four and a six or between a five and seven and that kind of thing? Do you think that that's a different analysis that the Commission needs to make?

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

COMMISSIONER WROBLEWSKI: Is that a fundamental unfairness?

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

And so that we believe, again, is enough difference in the initial sentencing to
merit correction. Can we go back at some future
date and talk about what you're talking about?
Sure. But for now we're only talking about where
the criminal history categories have changed.

COMMISSIONER WROBLEWSKI: Thank you.

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

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

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

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

VICE CHAIR MURRAY: Do you have a
sense of sort of geographic diversity or
diversity between offices? I notice the -- it
sounded like in your office you were able to
triage to the point where something like 95
percent of motions were granted.

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

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

COMMISSIONER WONG: I had two
questions for Mr. Wasserman. Mr. Wasserman,
could you respond? Mr. Nash mentioned that U.S.
Attorneys offices have the ability to triage and
we heard from the prior panelist that that
usually requires some kind of diversion of AUSA
resources from other work.
Can you just talk about on the ground in a tangible way what that triage looks like or what the tradeoffs are? That's my first.

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

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

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

We have the good fortune of having a special proceedings division that typically handles all post sentencing matters. With the pandemic and I believe with some of the other amendments that have occurred over the years those motions have overwhelmed that unit, which is still relatively small, their ability to handle the volume of motions.
So and I'm not in that unit. So I myself handled seven of -- seven compassionate release motions in 2020 between, I want to say, about May to December and that was, I think, consistent with what a lot of other people were doing, and the one saving grace in that situation is during that period the court was mostly closed.

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

So that's going to fall on the AUSA to handle the matter or an AUSA that just happens to be there if the person has left. That's going to divert their attention away from existing investigations, current cases, and I think it's also important to note that with the expansion of
the criteria for compassionate release it would seem that we are likely to face a significant increase in compassionate release motions, which will also have to be handled by the U.S. Attorneys offices.

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

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

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

So I don't anticipate that there's going to be help on the way for U.S. Attorneys
offices in personnel to handle this increase in the workload. So I do have significant concerns about the volume of work.

COMMISSIONER WONG: Do we have time?

CHAIR REEVES: Yes. Yes.

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

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

MR. WASSERMAN: Yeah. I mean, in plea agreements -- many plea agreements, you know, which most cases are ultimately resolved through
pleas, you know, we do engage in negotiation with defense counsel about the guidelines, enhancements, or bumps that can either be negotiated in or negotiated out and those are things that are part and parcel of a lot of pleas.

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


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

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

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

Like, did you -- did you as defense attorneys or you as someone who was opposing defense attorneys hear people making arguments about, look, status points don't really impact recidivism -- you shouldn't be taking -- you should be -- this criminal history overstates the seriousness of this person's background? Did you
see judges taking it seriously? Did you see the
government -- how was government reacting? I'd
be interested in hearing what you -- the three of
you saw on the ground.

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

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

So I've not seen that argument.

Perhaps maybe we'll start to see it, you know, if
this amendment passes retroactively or as the
amendments even start to kick in in November.

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

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

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

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

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

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

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

VICE CHAIR MURRAY: Thank you.

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

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

MR. WASSERMAN: Yes, of course, fairness should factor into it. I don't think
the issue --

CHAIR REEVES: Your -- oh. Okay.

MR. WASSERMAN: You don't know how

often I do this kind of thing.

Yes, fairness certainly factors into

it. It's a core part of sentencing. I don't

think -- and, again, to sort of cite to the

Criminal Law Committee of the Judicial Conference

I don't think fairness is as significantly

implicated with these amendments as perhaps some

of the other amendments -- the crack powder

disparity, the drugs minus two -- in this

particular instance.

Ultimately, though, you know, with

respect to finality and sentencing I mean parole

was eliminated for a reason because it severely

undermined, you know, the reality of what

somebody's sentence was at the time that they

were sentenced, and there was always this idea

that you were probably going to get out earlier

than what your actual sentence was and it just

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

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

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

CHAIR REEVES: The other question that I had, and this is for the panel, because what I
-- I think it's even -- I think it's in your report, Mr. Wasserman, one of the arguments you make is on the zero criminal history tend to -- might create more disparity because white collar persons are more likely to be white defendants or -- and all that and you said that that increases disparity.

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

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

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

So on the zero -- on the two point
offender or the status point offender side I
don't think racial disparity is the appropriate
means to address racial disparity in sentencing.

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

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

But to the extent that there are
racial disparities, which are undeniable, and
that there are -- there is data that shows that
some of those disparities cannot be explained by
objective factors -- and I think the department's
2012 study, you know, bore some of that out -- we
shouldn't be exacerbating those in the zero point
offender status guideline, which would seem to do
so by benefitting disproportionately white collar
offenders who are more likely to be -- more
likely to be white. So that's the distinction.
CHAIR REEVES: Ms. Mirchandani, you may answer and Mr. Nash as well.

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

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

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

CHAIR REEVES: Mr. Nash?

MR. NASH: And I would echo that. The statistics in the impact report are that the people who will benefit potentially under Part B
69.9 percent Hispanic, only 16.9 percent white.

So I'm not sure that there would be a disproportionate sort of an inverse impact on the Part B component benefitting white offenders more than people of color.

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

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

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

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

Our third group of panelists will
provide us with perspectives on this issue from
three of our advisory groups.

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

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

Second, we will hear from Francey Hakes, who serves on the Commission's Victims
Advisory Group. Ms. Hakes was a prosecutor for
16 years at both the state and federal level.
She was also appointed by the United
States Attorney General as the country's first
national coordinator for child exploitation,
prevention, and interdiction when she created the
inaugural U.S. strategy to address child sexual exploitation.

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

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

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

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

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

I want to start basically by laying out a little bit about the Tribal Issues Advisory
Group itself because it's a little different than
the other advisory groups in the sense that we
have membership that represents the entire
spectrum of interest in the -- in the sentencing
process.

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

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

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

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

It means that you are enrolled as a member of a tribe and that you are engaged in some conduct in Indian Country that exposes you to prosecution in the federal courts. And by definition most of what we're talking about here in the federal courts with Indians being sentenced in the federal court is as a result of tribes that are nonpublic law 280 tribes and that is these are cases in which the federal courts are primarily responsible for handling the prosecution of felonies in the federal system and the great bulk of these crimes fall into either the Major Crimes Act or the Assimilative Crimes
Act and when we look at what that means is that we are applying state law crimes.

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

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

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

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

Now, if you think about what this means in a practical matter it's like if a person
is a non-Indian who commits exactly the same
crime in exactly the same place and very rarely
but occasionally in concert with an Indian
person, they will be prosecuted in state court
and the state law of sentencing will apply.

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

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

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

Now, I would be wrong or I'd be amiss
if I said this was universally true because there
are a state or two that impose longer sentences
than the federal courts do and that is also a factor in this system, right.

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

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

And so on some of the issues as we look at it that our experiences are different than, say, in the previous panel, the person who was in the D.C. district, right, I mean, because it's just a different thing, although in the D.C. district they've got assimilative crimes jurisdiction over the George W. -- or the George Washington Parkway as well, which is interesting.
but neither here nor there.

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

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

When you look at the undue -- the burden on the courts we do not believe that the burden is such that it outweighs the interest of justice in this case and we think that if we're looking at a relatively small group of people who
will be actually eligible there will be a
significant number of filings made.

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

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

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

    You know, if you look at it, you know,
I've been a federal trial judge. From 2003 to
the time that I took the bench in the circuit for
2017 we went through a number of retroactive
applications. What we really found was this. The first time we had to invent the wheel it was ugly and difficult.

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

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

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

    And I think that we're better off looking at the other amendments to the guidelines directly that kind of happened while the courts were doing ordinary business.
I think that to some extent the burden that the -- that the judges are complaining about is slightly overstated. I mean, I think that they'll get it done, right, and I think that that really effectively kind of, without going through the detailed analysis, summarizes what I -- what I'd like to start with and I'd be happy to answer any questions to the extent of my ability to do so.

CHAIR REEVES: Thank you, Judge Erickson.

Ms. Hakes?

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

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

I was this country's first national coordinator for child exploitation, prevention, and interdiction. Eric Holder appointed me to that position in 2010 and when he offered me the
position and something I will never forget -- I'm quoting him directly here -- he said, "I'm going to ask you -- no, I'm going to demand that you be bold and aggressive in this position."

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

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

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

More times than I can count I
nonetheless remember every single face. Only a robot would be unmoved by their fear and their tears. I also remember their astonishing bravery in standing up against their offender in court both in trial and at sentencing.

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

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

Prosecutors and victims, advocates across this country, have made those same promises to countless victims and district judges have explained carefully to victims and to offenders that the sentence imposed in court means something, that they could be certain of the offender's incarceration for the period of time imposed by the judge.
Now the Commission proposes to open the floodgates, as the Department of Justice has also argued, to tens — potentially tens of thousands of offenders who will petition to have their sentences adjusted downward.

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

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

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

My question is why. Why are victims being ignored in the push to release offenders who have committed crimes like firearms offenses, murder, kidnapping, manslaughter, stalking, child
pornography, and sexual abuse?

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

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

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

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

CHAIR REEVES: I apologize for that.

Yeah.

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

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

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

These people who will be released -- make no mistake, who will be released are actual predators. Webster's definition of predator is one who injures or exploits others for personal gain or profit.
The crimes in this proposal perfectly illustrate that definition and we certainly appreciate at the Victims Advisory Group these public hearings.

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

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

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

CHAIR REEVES: Thank you, Ms. Hakes.

Mr. Luria?

MR. LURIA: Good morning. On behalf of the Probation Officer Advisory Group thank you for the opportunity to provide testimony
regarding the possibility of retroactively applying the amended guidelines on status points and the new Section 4C1.1.

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

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

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

Neither of these changes at its core
seems to address a newly discovered injustice nor
a recognition of an unjust sentencing practice.
These factors tend to weigh against
retroactivity.

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

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

In our written testimony POAG
discusses at length several concerns related to
the difficulty of applying these changes
retroactively, which was the focus of most of our
commentary.
With regard to status points, the retroactive application appears fairly routine in its execution. However, prior challenges to the criminal history scoring may need to be addressed as well as new challenges such as how this retroactive application may impact the guideline or statutory safety valve consideration and how safety valve could be applied.

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

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

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

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

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

It would be a significant undertaking to address factors the courts already had
discretion to consider. Further, while the structure doesn't require an assessment until requested, it has been my experience that as a matter of practice each case that had the potential to be impacted would need to be assessed regardless of whether they requested an assessment.

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

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

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

While the probation office will stand
ready to assist if one or both of the sections are made retroactive, we would ask to have a delay in the implementation by at least three to six months.

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

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

CHAIR REEVES: Thank you, Mr. Luria.

Turning to my colleagues, Judge Restrepo?

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

MR. LURIA: In previous efforts for
any retroactivity there's a substantial amount of collaboration that occurs at the onset with other stakeholders in the court.

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

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

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

There's a lot more indications of why
somebody might not be eligible. But a lot of times that front loading information to the court allows them to make rulings in advance, especially for individuals who are going to be immediate release.

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

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

CHAIR REEVES: Mr. Wroblewski?

COMMISSIONER WROBLEWSKI: Can you
describe, Mr. Luria, just how far in advance the release and reentry planning process begins? It was described earlier. I'm just curious your experience in that and what that actually entails.

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

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

Part of the reason why it was initially a six-month window is just because of how much shifting can happen last minute. But I don't think that has been as much an implementation -- as much of a problem in terms of -- in terms of making those plans work.
You know, we have supervision officers who are willing to go out and do those visits and get that information in advance so the courts know that when they're being released they're being released to a stable residence and so forth.

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

CHAIR REEVES: Vice Chair Mate?

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

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

So I know that with drugs minus two and other prior retroactivity motions there was a lot of activity in the Middle District of Florida and if you're familiar with the process, for
example, with drugs minus two whether you could
to kind of walk us through what that looked like
in the Middle District of Florida.

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

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

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

The AFPDs represented all the cases in
those circumstances by order of the court and
that made it -- that information sharing a lot easier.

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

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

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

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

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

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

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

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

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

VICE CHAIR MATE: Thank you.
CHAIR REEVES: Mr. Wroblewski?
COMMISSIONER WROBLEWSKI: Thank you.

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

And I'm curious especially because you
described the docket that we're talking about and that the Tribal Advisory Group is interested in -- that is concerned with as being street crime.

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

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

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

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

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

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

So I guess we did not spend a lot of time talking about the victims other than just to
say in those crimes in which there were victims
that we would trust the judges to make the right
call, which -- if that makes sense.

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

Okay. All right. I'm willing to do
whatever is necessary because we do want
everybody to get the opportunity to be heard.
Okay. All right. Vice Chair Murray, I'm sorry.

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

Is it a substantial number of cases?
How often will it require witnesses? What kind --
- I realize this is asking you to forecast. It's
impressionistic. But what do you think that's going to look like on the ground?

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

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

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

Being directly responsible -- that's a different finding and it's not one that we anticipated in the way that we looked at this issue in terms of the PSR.
So we haven't -- you know, we try not to lay blame unless we have to say this is definitely the defendant who did this or definitely the defendant did that.

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

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

And they've -- you know, have avoided getting a sentencing enhancement because that's a different plea and because of that that enhancement isn't applied to them because it requires that they be convicted of that to get that enhancement.
So this is an area that we wouldn't normally be looking at. You have all these cases where, you know, in recent time we have had many of these cases. It has gone from a situation where it would only be given to specialists and now everybody across the board has had them.

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

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

Yeah.

MR. LURIA: Oh, definitely. I mean, absolutely. Even now as it looms as soon as we
see the new criteria we start trying to find ways

to include information in there because even if

it isn't relevant yet in terms of guideline

consideration it absolutely is in the minds of

the defense attorneys, the judges who are looking

at this as possible variances, to confer that

benefit in advance of it becoming active in

November.

COMMISSIONER WONG: This is also a

rookie question. But to what extent is there

nationwide uniformity among probation offices for

some of these more tricky issues or interpretive

issues that you mentioned?

So, for instance, in 4C1.1, you know,

the defendant did not personally cause

substantial financial hardship as an exclusion --

personally substantial hardship -- like, all

those terms. I can see as you noted this

collaborative effort to reach consensus within a

jurisdiction.

But is there nationwide guidance that

ensures some uniformity across sort of what
probation officers -- how they would be interpreting that? Or could there be an additional layer of complexity where different districts start interpreting those exclusions differently?

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

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

If you do go beyond that oftentimes you're going into the adversarial structure where
you're going to draw objections. You're going to have people arguing back, no, that's not okay.

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

CHAIR REEVES: Judge Boom?

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

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

MS. HAKES: Thank you for the question, Judge. I want to say in answer to your question and listening to the testimony earlier today I've been in a lot of sentencing hearings.
I've advocated in a lot of sentencings and the PSR is always a source of conflict. It is never, ever, in my experience, just simply agreed to by the federal defender or the defense attorneys ever, or even the judge potentially.

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

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

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

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

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

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

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

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

And so I also wanted to say -- I'm sorry, it's a little off topic -- but I also
wanted to say I cannot believe how many people
have said that the reason for these changes is
some sort of fundamental unfairness in the prior
sentencings.

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

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

It's just playing games with words
because it is a resentencing. When you are going
to look at facts, when you have to look at things
about whether or not someone is personally
responsible for causing this financial harm or
whether there was a threat of violence these are facts that can only be given by the victim of the crime and so they deserve to be heard in this.

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

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

COMMISSIONER BOOM: Thank you.

CHAIR REEVES: Judge Erickson, I do
have a question, just one question of you. A
district judge to a court of appeals judge --
can't pass the opportunity to ask you a question.

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

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

MR. ERICKSON: I think there are
really a couple of things that happen when you're
confronted with this situation, right. You're a
district judge and there's a question of fact
that's been presented and, you know, when it's
all just presented on paper I think that -- and
circuits vary in how they -- what they allow
people to do but in our circuit, you know, if the
district judge said this fact question has been
presented and it is unresolvable on the PSR that
we have accepted, right, because once you accept
the PSR that's a statement of facts.

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

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

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

But I will tell you that in looking at
how our court and, I think, most of the appellate courts have addressed those issues when they come up they'd say, well, the judge still could correctly say that that fact wouldn't make any difference to me and my sentence would be the same.

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

Now, I know there's a circuit split on that. But I just would say that my experience would be that when you get right down to the facts that make a difference for the judge's sentencing that would require and necessitate an additional hearing to acquire new evidence beyond what's in the papers I think it's going to be relatively rare because you're going to be -- the way we have this thing set up now you'll be in the amendments that are in Part B.
That's a relatively small number of people in our district. It was only, like, 10 or 12 people total and, you know, it seems to me that holding that hearing would be a relatively unusual experience.

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

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

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

He is the thirtieth police chief of the Dallas Police Department, the ninth largest police department in the country. With nearly 31
years of law enforcement experience, Chief Garcia was appointed in 2021 and is the first Latino to serve in his position in the department's 140-year history.

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

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

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

MR. GARCIA: Thank you for the opportunity to participate. I currently serve as -- sorry. I currently serve as the chief of
police in Dallas, Texas. I'm also the president of Major Cities Chiefs Association. It is my honor to testify on behalf of my MCCA colleagues. My testimony will provide a local law enforcement perspective on whether Parts A and B of the Commission's 2023 criminal history amendments should be applied retroactively.

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

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

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

Part A of the amendment deals with the
impact of status points. The MCCA is concerned that retroactivity -- retroactively applying it will provide relief to violent offenders and offenders who are high risk at recidivism.

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

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

Let me be clear. If the Commission does move forward with retroactivity and an offender who is released as a result recidivates MCCA members and our local law enforcement
colleagues will need to act to keep our community safe.

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

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

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

There has also not been sufficient investment in reentry services to handle an influx of new individuals who require them. These services assist individuals reentering
society with meeting basic human needs such as securing food and housing, obtaining health care and assessing economic opportunities.

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

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

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

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

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

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

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

CHAIR REEVES: Thank you, sir.

Mr. Yoes?

MR. YOES: Mr. Chairman, Madam Vice
Chairman, members of the U.S. Sentencing Commission, my name is Patrick Yoes. And good afternoon, just looking at the time here.

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

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

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

The Commission is statutorily required to consider whether both parts of the amendment
should be applied retroactively to current offenders sentenced previously.

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

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

This is our system at work and its results under the rules in place at the time are just. I recognize that our criminal justice system is not static in that our system, like any other system, has to be periodically adjusted so that the results are fair and just.
It is imperative, however, for reasons of justice and continuity to apply such adjustments prospectively and not second guess, reconfigure, or relitigate prior results. The sentence for offenders currently serving time were fair and just at that time.

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

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

This is creating greater danger for the streets in our communities. We need to find strategies that improve the criminal justice
system and will reduce crime and reject policies and practices which do not prioritize public safety.

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

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

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

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

According to the Bureau of Prisons,
the average sentence for these offenders is 120 months. If the courts were to grant a full reduction possible in each case the new projected average sentence for these offenders would be 106 months, a reduction of 14 months.

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

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

The Criminal History Amendment provides a decrease of two levels of criminal history category in the sentencing table for the zero point offenders. The Bureau of Prisons estimates that there are 34,922 zero point offenders incarcerated in federal facilities of which 12,574 meet the additional criteria established in federal law.
More than half -- 57.8 percent or 7,272 offenders -- would have a lower guidance range if the Commission were to make Part B retroactive and, therefore, would be eligible to seek a modification of their sentence.

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

We know that our criminal justice system struggles to integrate released offenders back into society. From the perspective of law enforcement and public safety these challenges include a lack of communication within state and local authorities when an offender's release date is changed and they are released back into the communities we protect.
We must also consider the resources needed to make absolutely certain that victims are notified when an offender is released. The resources of the United States Probation and Pretrial Services are severely strained -- were severely strained during the Obama administration's clemency initiative in -- more recent in the implementation in the First Step Act.

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

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

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

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

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

I want to thank the Commission in advance for the consideration of the views of 367,000 members of the Fraternal Order of Police, and I'd be pleased to answer any of your
questions. Thank you.

CHAIR REEVES: Thank you, Mr. Yoes.

Any question of these panel members? Yes?

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

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

MR. GARCIA: You know, I'll take the first stab at this. You know, even in the current system right now we're seeing significant failures in the post supervision of individuals, whether that be monitoring on ankle monitor or other -- and other dynamics that simply do not work for violent criminals.
And so I'm not quite certain that any months are going to fix the failures that we're already seeing under the existing policies that we have and so, you know, up until the point that, you know, even let's fix what we're working on now, you know, before really moving on to others because we're already seeing significant true life stories and failures and victimization and recidivism currently under the current system.

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

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

Pretty much every agency in this country is working shorthanded. This just puts even more burden. Maybe not directly to your question but something for consideration.
COMMISSIONER WONG: Mr. Yoes --

MR. YOES: Yes, ma'am?

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

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

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

So I just want to know if those
failures that you've seen are a result of a
failure in the -- because as Mr. Yoes mentioned
there are more than one system of criminal
justice systems, local systems versus federal.

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

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

As to whether it's, you know, post
release or pending -- a pending trial for certain
things we have seen -- we have seen the
supervision failures on both sides.
CHAIR REEVES: Okay. Thank you.

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

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

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

We need to do a better job of preparing them prior to that. You know, obviously simple things -- making sure they're able to get their driver's license, their IDs,
you know, getting them back with regards to
financial, credit cards, you know, making sure
that we have the systems in place that if
individuals need help with job training,
education, not just for them but their families
as well that they're given those opportunities.

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

We will use every tool we have in our
toolbox to ensure that these individuals do not
hurt our communities. As one of my good friends,
and urban specialist -- his name is Antong Lucky
-- he's told me many times sometimes people need
prison ministry if they're not going to listen
and to ensure that those individuals aren't
hurting our communities and ensure that we have
no tolerance for violent crime and that the
individuals that do want help that we're able to provide that help because if they don't get the help they want and they do recidivate and they do end up going back to prison it's because someone else in our community has been victimized.

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

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

MR. YOES: I'll just -- I'm not too sure I can -- I can improve on that other than to say that every dollar we spend and every effort we spend in order to be able to break that cycle
of violence, that cycle of crime, is a dollar well spent.

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

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

Thank you.

CHAIR REEVES: Vice Chair Murray?

VICE CHAIR MURRAY: One of the questions that's been coming up a lot is what role -- what purposes did status points serve when they existed in full? And, obviously, one
of them was specific deterrence in terms of --
and that was to some degree undermined by
research on recidivism.

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

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

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

You know, one thing that -- one thing
that I think is out there that we don't talk
about either is and I'll just say there's been a demoralization of law enforcement nationally with respect to honorable men and women that serve and sacrifice for the community knowing and thinking that individuals that are committing crimes are getting more chances than our victims and that the rule of law has become less, and that has led to a lack of engagement in communities in both ways, right, where the law enforcement is on one end, the community is on one end and there's no one in the middle keeping our communities safe because there's been a perception that the rule of law has decreased.

And that can't -- and that has to be spoken about because as changes are being made to our criminal justice system we have to remember that the boots on the ground and the honorable men and women that are sacrificing every day, that they're doing it for something, that they're doing it for a reason, and that does impact our men and women nationally and that has led to an increase in violent crime in the country because
honorable men and women in this profession have disengaged from communities and that is a fact.

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

And so it's incredibly important for us to continue to build on those other services to ensure that if individuals have -- you know, have, you know, have been held accountable and if the process is that they are to be released whatever, whether it's pre trial or post or what have you, that the proper systems are in place to
supervise them because we have seen -- many
examples when it's not done right we have seen
some heinous crimes being committed and then I
have to look at my community and, again, we're
always a front, right.

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

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

MR. YOES: I'd just echo exactly what
the chief said. There is no question the last
few years have been a challenge for law
enforcement. The very powers that law enforcement officers have are directly related to trust in your community.

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

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

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

In places where we see fractures I think that's where our problem comes in and I
think that's where I expressed the concern of the resources necessary in order to effectively do this.

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

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

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

It can be resource intensive for the probation officer, and one thing I'm hearing in your testimony is interesting because there's been a lot of focus in the testimony before you on sort of the modification of actual sentences.
But is what you're getting at also that with a greater pool of people to supervise you might also see a lot of motions to modify or terminate supervised release as well on the back end and, therefore, sort of less supervision with more people to supervise?

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

MR. YOES: I agree.

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

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

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

(Laughter.)
MR. YOES: Thank you very much.

CHAIR REEVES: Thank you all so much.

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

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

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

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

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

Ms. Price is the founder of the Compassionate Release Clearinghouse, which recruits, trains, and supports attorneys to
provide pro bono representation to people in federal prison seeking compassionate release.

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

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

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

Finally, we have Frank Russo, who is associate general counsel and director of the American Conservative Union Foundation Prosecutors and Law Enforcement Advisory Council at the Nolan Center for Justice.
Mr. Russo previously served as the director of government and legislative affairs at the National District Attorneys Association. He also worked with the House Judiciary Committee and the Senate Judiciary Committee.

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

So Ms. Price, you may start.

MS. PRICE: Now I'm on.

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

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

You've heard a fair amount today about how magnitude and purpose and manageability of support retroactivity and we agree with that.
Equally important, I believe -- we believe it's required in the interest of justice and fundamental fairness.

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

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

The disparate impact of status points and the treatment of zero point offends fundamental justice and fairness. Several prior retroactivity decisions explicitly address the racial delta of the crack cocaine disparity is hardly an argument against making this particular
disparity of criminal history scoring retroactive
today.

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

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

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

How can we permit the incarceration to continue for months or years longer than necessary? I'm speaking to the Commission in 2014 about drug retroactivity.
Judge Eileen Keeley, speaking on behalf of the CLC, called fundamental fairness the driving factor in their deliberations and she said we do not believe that the date a sentence was imposed should dictate the date of punishment.

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

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

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

But I want to share with you the words today of people who are still incarcerated. I
wrote to our members. We have membership in the BOP. I wrote to our members in the BOP recently and asked them to tell me in a few words what a day in prison means compared to a day of freedom.

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

Marty said a day in freedom would entail doing something I love surrounded by those who love me. When I get done with work or school I could go home, I could have dinner with my family, and talk about our days instead of having to call them and not having enough time to talk to everybody or really understand or be a part of what they're going through. A day in freedom would mean more than I can ever put into words for you.
I also asked them what a reduction in 14 months would look like to them and Jimmy said, well, most people would think 14 months off my sentence is nothing big, which is easy from on the outside looking in.

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

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

It would mean the world for me to be able to do this as a mother and to have him here with me not only as we start this new life together but to be able to have just one milestone memory with me in it.
And finally, Aaron said when I was locked up my son was only six months old and now he's 12 and I owe him from my mistakes and the decisions that left me in this situation.

With that in mind, in order for me to be the best me and the best father I know I need to take care of all the things that lead in that direction -- jobs, housing, relationships -- and all the things that make up a healthy and productive person to society and in his life. And that's what I would do with 14 months. That's what I would do with a 14-minute head start.

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

Judge Reeves, you opened the hearing earlier today and talked about the moral cost of incarcerating or moral cost of incarcerating somebody for longer than they deserve. I'm
confident that the Commission will not lose sight of the very human impact of the decision that you're going to make today. Thank you.

CHAIR REEVES: Thank you, Ms. Price.

Mr. Vinegrad?

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

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

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

The zero point amendment is a conscious effort to better tailor the amount of punishment and the history and characteristics of
the defendants -- in other words, a data-supported judgment that zero point defendants should not be punished as harshly as their one point counterparts because they do not need to be.

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

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

The degree of potential benefit to zero point defendants also supports retroactive application. According to the Commission's informative and impressive impact analysis over 7,000 defendants would on average be eligible for a 15-month reduction in their sentences, more than double the less than six-month standard of 1B1.10.
This is not really a mathematical point. Every day, every week, every month, and every year of incarceration matters profoundly not just to the defendants who are deprived of the many features of normal lives but their immediate families or their loved ones and others who depend on them, all of whom suffer and offer suffer greatly from their absence.

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

It will help free up much needed space and programmatic resources in a still overcrowded federal prison system so that they can be devoted to serving those defendants who need them most. This will enhance the opportunity for meaningful rehabilitation, which in turn will help reduce recidivism and it will save hundreds of millions of dollars.

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

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

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

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

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

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

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

This is empirical proof of what is
already understood to be true, that district judges can be trusted to implement retroactive guideline amendments responsibly with due regard for the various competing considerations.

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

CHAIR REEVES: Thank you, Mr. Vinegrad.

Mr. Russo?

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

First of all, members of Commission, thank you for having CPAC here today. Many of you know CPAC as the Conservative Political
Action Committee but we also operate the Nolan Center for Justice.

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

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

Yes, we believe there are some people that do need to serve long sentences. But there are also plenty of others who deserve a second chance and this is where you, the Commission, have the power to make a lasting impact, providing that second chance by increasing public safety, saving taxpayer dollars, and investing in the people that you've heard earlier will be getting out and returning to our communities.
The purpose of our criminal justice system is first and foremost to protect the communities that these individuals serve. To achieve this we focus on four key principles: proportionality, accountability, fiscal responsibility, and human dignity, maybe the most important.

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

At its core the retroactive application of Part B addresses a limitation in the sentencing guidelines. Previously, as you well know, the guidelines differentiate between zero point offenders and one point offenders despite a significant difference in their recidivism rates.
Zero point offenders, those without any prior criminal history points, are actually 16 percent less likely to reoffend compared to one point offenders.

The Commission acknowledged this disparity with Part B, providing for a two level reduction for zero point offenders by considering an offender's recidivism potential and by doing that we can ensure that the severity of these sentences align with the actual risk to public safety.

It is important to note that these amendments do not establish a blanket reduction, as you've heard earlier. Retroactivity is designed to create a pathway for individuals who meet specific criteria and fall within specific exclusions or outside of those exclusions and have worked hard to earn that sentence reduction.

We saw this proven to be effective with the retroactive application of the 2007 crack cocaine amendment where only 64.2 percent of the requests that were made for reductions
were actually granted.

Further, those who did receive a sentencing reduction through those retroactivities did not exhibit a higher recidivism rate compared to individuals who did not receive that reduction or got out on their base time at the beginning.

Therefore, history shows us that retroactivity can be successfully implemented without compromising public safety. I mentioned this earlier but the advantages of retroactivity also extend outside of the public safety argument.

They also extend this -- on the scope of recidivism. It has the potential to generate substantial cost savings. In the federal prison system we are well aware that it is expensive to incarcerate individuals and we must do so carefully and with a scalpel, not with a hammer.

As each federal inmate costs taxpayers nearly $40,000 per year this is something that is on the top of mind of communities across this
country.

Now, consider this. The Commission estimates that the retroactive application of Part B can result in the average sentence reduction of 15 months for over 10,000 zero point offenders. If we do the math and as my colleague stole from me just a minute ago, that's nearly half a billion dollars in savings.

These considerable savings not only alleviate the financial burden on taxpayers but they allow for a smarter investment in our justice system. The evidence is clear. To achieve long term reduction in crime we actually need to address the drivers of recidivism.

We need to address the drivers of crime that affect not just the individuals who are incarcerated but the law enforcement who serve on their behalf.

Instead of keeping zero point offenders for a longer term than needed who have demonstrated -- those who have demonstrated significantly lower recidivism rates we can
strategically allocate our system's resources towards higher risk individuals.

For example, we can invest our resources in education and prison programming. We know that those programs are proven to reduce recidivism. Even more importantly, we know that every dollar that gets spent in prison education and programming saves nearly $4 to $5 in reincarceration costs when those recidivism rates drop.

This proves a financial incentive for this work is actually rooted in public safety. Ultimately, when we grant reductions solely based on the fortunate timing of an offender's sentencing hearing it shakes the public's faith in our justice system.

We don't make decisions based on polling but it is valuable that there is trust in the law enforcement officers, the courts, the probation, and the defense that serve on behalf of these communities and when people perceive this system is unfair they are less likely to
work with the system and less likely to be beneficiaries of it.

The distrust in our justice system, in turn, would undercut public safety. If this amendment is applied retroactively we are confident that giving zero -- certain zero point offenders the ability to earn a sentence reduction will benefit our communities in more ways than one.

By providing narrowly tailored retroactivity that requires a comprehensive review of each individual case the Commission is ensuring that reducing recidivism is at the core of the work that you do.

When you reduce recidivism one of the things I always think is important is that we don't just use it as a talking point. Reducing recidivism means there's one less case for law enforcement to investigate, one less case that my poor old profession, prosecutors, do not have to take up. And most importantly, it's one less case that a victim has to suffer because of the
failures of our justice system to rehabilitate
those that are in its care.

Thank you for your time today and we
look forward to any questions you have.

CHAIR REEVES: Thank you. Thank you,
Mr. Russo. I open this panel up to any questions
from my colleagues.

Commissioner Gleeson?

COMMISSIONER GLEESON: Red is red.
Green is green. Okay. Can I be heard right now?

Great. Thank you for your -- I want
to focus my first question. I don't necessarily
have more than one question but I want to focus
my first question to Mr. Russo, and we applaud
your attention to the data and data-driven
decisions.

We also applaud Mr. Vinegrad's
applauding of the staff that produced the data.
They deserve it. But what would you say to --
what would you say to the victims of crimes?

They're not always specifically
identifiable in federal cases but often enough,
and what would you say to them when they push
back on your support of making these amendments
retroactive?

MR. RUSSO: Absolutely, I can handle
it first and then let my colleagues.

But one of the things that I think is
so important in this process that you all have
discussed earlier is the victim input and victim
input cannot just be a sheet of paper that's
provided by an underfunded office or the
opportunity for that victim to only provide
something in passing.

They need a valuable and just as they
did at their sentencing hearing opportunity to
speak out in whatever form or fashion is most
appropriate. That's one, but two is this and I
think it's something that gets lost in this
process.

Oftentimes, the healing of those
incarcerated individuals can be paired with the
hearings of the victim or the healing of the
victims that they have caused harm to.
When those victims see that those incarcerated individuals have turned their life around, have taken that mistake and that horrible -- and I hate to call it -- we say it's just a mistake. It is worse for the victim than it is for anybody else in the system when a crime is committed.

When they're able to see that that individual is working towards a better life, oftentimes -- and we have seen this in a space that I was involved in in my last professional prosecutor initiated resentencing -- where the victim actually becomes invested in the success of the incarcerated individual and vice versa.

So there's a healing that occurs from both sides of the process. That won't be in every case. I can't promise that.

What I can say is when victims are actually involved in the early release the individual who has earned -- not just every individual, the individual who has taken programming, who has worked to reduce their
recidivism rates by improving their life, returning to their families, oftentimes, that can be part of the healing process.

And so, certainly, we want victims to have first and foremost their biggest voice in this process. But, two, we want them to be a part of that healing and I think there's a process that this can play -- a role this can play in that process.

COMMISSIONER GLEESON: Thank you. Chair Reeves, I do have one follow-up. May I --

CHAIR REEVES: Yes, you may.

COMMISSIONER GLEESON: This really arguably transcends the specific purpose of this hearing. But your testimony brings -- puts on the table this reality that a diminution in the federal prison population -- and you've identified the average cost per inmate per year -- a diminution in the federal inmate population doesn't -- there's no straight line between that and a $40,000 per prisoner per year savings that gets reallocated to the resources that you've
identified as a -- maybe a better way of
expending those funds.

What do you have to say about that
issue and the fact that BOP budget is not --
doesn't seem to meaningfully track the prison
population in this dimension?

MR. RUSSO: It's a fantastic question.

Unfortunately, one we also see at the state level
and with our colleagues who are just across the
street.

I would like to say that we like to
put pressure on them to make sure that those
costs are reinvested in the system and when I say
the system I mentioned educational programming
but I also want to mention that the staff
salaries and overtime pay for BOP staff or
supervisory release staff or your staff is just
as important because it's a system wide problem.

It's not just the programming that's
struggling. It's also the cost around it. So to
answer your question, I think specifically by
freeing up that money, yes, I can't draw a
straight line but what I can do is advocate strongly in other settings or with this Commission to our partners across the street to say we have saved you these costs but these problems still exist and they exist because of your lack of reinvestment.

It gives us a very strong argument and one that I think we need to continue to make regardless of what cost savings end up looking like.

COMMISSIONER GLEESON: Thank you, sir.

CHAIR REEVES: Mr. Wroblewski?

COMMISSIONER WROBLEWSKI: I thank you very much, Mr. Chair, and thank you both -- thank you all for being here and for your written submissions.

In the past for basically the history of the Commission retroactivity has been the exception and not the rule and it seems pretty clear from both the Sentencing Reform Act from 994(u) and from the legislative history that Congress intended for the Commission to make a
decision and that there had to be -- and that
there were going to be certain kinds of changes
that would reduce sentences that would not be
applied retroactively.

From what I heard from your testimony
it seems like all of the arguments you're making
suggest that every reduction should be made or
nearly every reduction should be made
retroactively.

The very moving testimony from folks
in prison that's going to be true in every case
where there's a possible reduction. Everybody
would like a head start. If my family were in
prison I would want them to have a head start
coming home.

Judge Keeley's comments that you
quoted from the Criminal Law Committee about it
shouldn't matter what date that's going to apply
in every single circumstance and there were a
number of other things that were mentioned in
terms of cost savings and other arguments. Those
are going to apply in every single situation.
I'm just curious if you can articulate what do you think Congress had in mind for the Commission to do? What are the kinds of decisions that when the Commission has reduced a sentence would lead to a no retroactivity and specifically go back to the recency amendment that was made some years ago?

Do you think just the Commission was wrong on what they did there or can you make a distinction between the recency amendment and the one that we're so faced with now?

MR. VINEGRAD: So I can start with your first question and maybe defer to one of my colleagues for the recency amendment discussion. I actually did -- it was mentioned, I think, earlier -- actually I went back and looked at the summary of each and every guideline amendment that this Commission has made retroactive and my takeaway from that is that these amendments are much more in line with or consistent with the recent amendments involving crack minus two and drug minus two in the Fair Sentencing Act in the
sense of being data driven to correct true unjustness or disparity based on empirical evidence and the experience of the Commission, not some refinement of the process or improvement in the way that guidelines are administered.

There was a substantive thoroughness element or component to them that I think puts this in that group of the amendments as opposed to many of the other ones that I read.

There's the magnitude element. I mean, really just the guidance is right in the Commission's guidelines. It's in 1B1.10. The magnitude of the amendment that said data driven, you've done a terrific job of estimating down to the person how many people will be eligible.

It's significant by any measure but not overwhelming. It's a good balance. It's the sweet spot, as somebody said this morning, significant enough to make a difference and to work retroactive application but not so much that it will overwhelm the system.

And to the extent that people will get
more than a year off of their sentence, well, that's more than the threshold that's in the guideline commentary.

And in terms of administrative ability, you know, I think the case has been made well that, you know, the system has been there. It's done it time and time again. I would harken back to my previous life as a prosecutor and things like this would happen. Had it been the retroactive guideline amendment it was worse. It was Supreme Court decisions that would then lead to a flood of 2255 motions not only asking for changes in sentencing but even attacking convictions.

So it's even more significant and more substantial. And what did we all do? We worked harder and we got it done and when I say we I mean the prosecutors, the defense lawyers, the courts, sometimes probation, and we got it done.

If you had to spread, you know, those responsibilities throughout the U.S. Attorney's Office we did that. There was one of those
occasions where there was this, you know, big
decision where we had to kind of shoulder the
burden of the work that was going to follow.
Then anybody in the office, line people,
assistants, criminal chiefs, everybody in between
rolled up their sleeves and took that burden and
got it done.

And if that's what's necessary here to
further and achieve the kinds of criminal justice
sentencing, smart lists and reform that's
embedded in these amendments, the system should
shoulder that responsibility and should be happy
about it.

I suspect there are a lot of judges
out there who may not say it but quietly think to
themselves this is a step in the right direction.

MS. PRICE: You won't find me
supporting or defending the recency decision that
was made. We --
CHAIR REEVES: Is your microphone on,
Ms. Price?

MS. PRICE: Yes, it is.
CHAIR REEVES:  Bring it a little closer.

MS. PRICE:  How's that?


MS. PRICE:  I'm sorry.  I started to say that Commissioner Wroblewski will not expect me to defend the recency decision that was made.  I think it was wrongly made.

There wasn't a hearing about it I'm pretty sure.  We participated in the comment period and explained why we thought the recency amendment ought to be made retroactive.

We talked about the purposes and the impact and the magnitude and all of those support this here but what we didn't talk about and it's a shame -- none of us really looked at what the demographic disparity was.

Eighty percent of the people who would have been affected had recency been passed were people of color and I do think that that has been not a limiting principle to this Commission, to
any Commission, but it's been -- it's been an illuminating principle when looking at some of the past history.

And so that's why I talk about it here today because I don't think we have talked enough about how this isn't just a minor adjustment both on a very personal level but also just looking systemically, that this is -- the Commission has identified for us ways in which criminal history overstates seriousness or lumps together people who do not share recidivism risk with their one point counterparts.

So, yeah, I mean, recency was, I think, wrongly decided and I hope that it's not the touchstone for what, you know, you decide to do.

But that's why I wanted to bring -- and, you know, it's a shame because we should have raised that issue but nobody considered it at the time and all I can think of is that we were in the midst of several crack cocaine reduction periods, one on top of the other, and
we were pretty laser focused on it.

COMMISSIONER WONG: May I follow up?

Mr. Vinegrad, you mentioned going through and cataloging kind of all the different sentence reduction amendments that the Commission has made and some fell on the substantive fairness side of the line.

Some felt more like refinements and this felt to you more like a substantive fairness issue. Can you -- which ones did you think were refinements?

MR. VINEGRAD: I mean, I can't delineate them for you. They're in my book here. I suppose I could follow up and do that. But they were more of the kind of the procedural variety is I guess is what I would say and didn't deal with sort of, you know, data-driven information that showed that, you know, recidivism has not been achieved by these greater punishments in these categories.

They certainly didn't have, to my eye from what I saw, on any goal were an effect of
reducing the pronounced racial disparity in some of the sentencing adjustments that were -- that were promulgated.

So those things. It was more not so much what they did but those elements to my eye were missing from those. I see them in some of the more recent amendments that had been given retroactive application.

CHAIR REEVES: Vice Chair Murray?

VICE CHAIR MURRAY: Thanks to all three of you. I guess I'd like to follow up on recency a little bit. I very much appreciate FAMM's view that recency was not decided correctly -- the retroactivity issue.

But the Commission at the time did think it was very clear, right. You know, Justice Jackson, Chief Judge Howell both voted along with the entire Commission to say they didn't even need hearings on recency it was so clear that recency should not be retroactive.

From where I sit recency looks a lot like status. I mean, it's also driven by a new
report saying that the enhancement is not tied to recidivism as closely as people thought.

It has a similar racial impact. The numbers are similar in terms of numbers of potential filings, percent of filings likely to be granted or eligible.

If we don't agree with FAMM, if we think that the Commission was right about recency or we just think that Commission precedent matters is there a way to distinguish those two or should we vote against retroactivity? So I guess that's a question for Ms. Price and Mr. Vinegrad.

MS. PRICE: Well, I wouldn't encourage you to vote against retroactivity, coming from my position, and I'd want to think a little bit more about distinguishing them otherwise.

I feel like we didn't have the opportunity to have a hearing and you've asked for a hearing on this. So that says something to me about how seriously you take these 18,500 people and their appropriateness.
So, I mean, that's one signal to me.
This is a new Commission. I agree that precedent
is important. But we learn from our past, not
only how we should operate in the same ways but
somehow -- sometimes how we need to distinguish
ourselves and do something different and I think
I'm asking us to look at one more piece that we
didn't look at in recency which is that there is
a genuine racially disparate impact or
demographically disparate impact that, going
forward, you're going to do something about
correcting and I can't see a principled reason
why we wouldn't want to make that change
available to the people whose experiences you
learned about and learned from when you drew the
data and you looked at the individual.

So I'm not going to be very much help
on that side of it. But thank you.

CHAIR REEVES: I have a question, Mr.
Vinegrad, and then one to the panel. I'm not
sure when you were the U.S. Attorney in the
Eastern District, Mr. Vinegrad, if you were a
U.S. Attorney at any point in time during these other iterations of crack minus two or anything like that before -- before because I was going to ask about what process your office might have used and do you -- are you aware of the process that the office used in handling those motions and cases?

MR. VINEGRAD: Well, I am very familiar with the process that was used in what I would describe as analogous situations where there was some -- a little pronouncement that caused a whole raft of, you know, motions and petitions and the like from a significant number of the defendants who are being prosecuted and the manner in which those were handled and dealt with the Federal Defender's Office to kind of have a process by which those would be addressed.

Certainly within the U.S. Attorney's Office I mentioned before, you know, whether it be an assignment system, whether we are relying upon people who did our appellate work or some combination of them to be able to address them in
an efficient way.

But, essentially, you know, we got the system to work and to do so efficiently where it didn't, you know, overwhelm the office, from my own perspective. I mean, I personally did some of those matters.

I wasn't happy about it but I did it and I never felt that it was interfering with my ability to carry out the rest of my responsibilities.

And as I said, I mean, now we have a track record. Not mine but, you know, the track record of the three recent retroactivity amendments, and I think this Commission has heard and read a great deal of testimony from different people, the punch line of which is this could work and it won't pull the system to a halt.

The estimate that you received from the Justice Department seems significantly overstated when you compare it to the data of past retroactive amendments to see how many motions were actually filed compared to the
number of people who were eligible.

CHAIR REEVES: The other question, which, again, pivots off of what we heard earlier today, with respect to whether or not if we were to make the provision retroactive immediately, three months down the road, as POAG might have suggested, six months, nine months, 12 months, this is to all three panelists because you're here talking to us from your perspective.

What is your perspective on any delay or how long the delay or whatever? I'll start with Ms. Price and then -- yes.

MS. PRICE: This somewhat depends on how quickly you make your decision. If you were to make a decision relatively soon we are months away still from November 1st. That is time in which the parties can prepare for retroactivity.

I don't know what your process is so that may be unrealistic. You know, it's our preference that it start as quickly as possible. Immediately, I hope. But given that we have some time here it feels like that time could be well
used in service of -- in service of preparation and coordination.

CHAIR REEVES: Thank you. Mr. Vinegrad?

MR. VINEGRAD: Yeah, I guess I have a bit of a different perspective. I mean, I think the concern about proper implementation is well founded.

I would point out that to the extent it was suggested earlier that the reentry process starts in prison six months before release there's actually much more recent evidence of that from the Bureau of Prisons itself that if they actually start 18 months before there's much more of a lead up time. Having said that, there's certainly a burden on probation as well.

I think that's where the major burden would, frankly, be in terms of additional supervision. To the extent there would be people released in the short term who will not be held because they're not U.S. citizens and they're not getting out in any event that reduces the number
significantly.

But I think, you know, the Commission would not be faulted if it built in some modest period to allow all the constituent parts of the criminal justice process to get ready for those who will be released.

I'll also say, also going back to what -- support our victims I think, you know, the Commission could certainly do what it did with respect to the recent compassionate release amendments where I think it specifically had a provision to ensure that victims got a reasonable notice and the opportunity to be heard, which I completely agree with.

Whether or not it's, you know, already provided for under 3771 of Title 18 I think the Commission would be well advised to explicitly state that because victims' voices do matter.

The Center for Justice believes that, I believe it, and I know you all believe it and you should be explicit about that.

MR. RUSSO: Yeah. I'm sorry. I'll be
very brief. Thank you, Mr. Chairman.

And really I come down kind of on your side, which is I think the burden will fall mostly on supervisory release at this point as well as -- you know, the court system itself will quickly pick up that burden but the supervisory release system is already under significant pressure, as you've probably heard this morning.

And so I think it's important to build in whether that be a three, six, nine -- I don't want to put an arbitrary number on it. One of the things that I do not want to see happen, I think, from our organization's perspective is it turn into 12, 15, 18 because then it becomes an excuse for those who may not be in support of this effort to try to push in unique and different ways to hold up its implementation.

So I think we have seen that a little bit with application of some of the First Step Act and the fair sentencing provisions and the drop twos.

But I think building in a reasonable
amount of time for both the supervisory release end of it to play a little bit of catch up and then build in the time for the court system to be prepared, which I think in many ways it already is, would be appropriate. But going too long, I think, has a negative impact as well.

CHAIR REEVES: Thank you. Go ahead, Vice Chair Murray.

VICE CHAIR MURRAY: Mr. Russo, does the Nolan Center have a view on Part A retroactivity? I wonder, given your focus on public safety, if your views differ or --

MR. RUSSO: Most of our focus has been on Part B and I'll kind of outline that and one reason is that that is where our research was in the area of making sure that zero point offenders were eligible.

In Part A we are not opposed to our partners' view. I think one of the things that we would want to make sure we see is as robust a victims' support and services where you have cases that involve, you know, more identifiable
victims, more identifiable individuals who may
have been a part of some of those offenses, and
then making sure that the system -- and this kind
of gets at the chair's question which is making
sure we build in the proper time to implement
those types of processes, something I saw on its
more state level.

So I'm not picking on my federal
partners as the victims services are in itself
within a crisis at the moment of both staff,
talent, and attention and time.

And so making sure that those
processes are able to catch up as we're doing
these things is incredibly important in making
sure that the state and federal partners are
talking.

It's going to be a bigger challenge
with Part A than Part B, in our mind. But I
think the focus on Part B is because we do think
there is a clear history of both the Commission's
work and of the data side that shows that those
individuals will be successful upon release,
given the proper resources.

VICE CHAIR MURRAY: And are any of you aware of any legal authority that we have to mandate victim services or notification?

Obviously, the CVRA says if there is a hearing they have to be heard and notified. But outside of that, are you aware of any authority that we have to prescribe that?

MR. RUSSO: I'll say quickly that the VRA does apply and that both, you know, federal and when you have your co-cases so work through the Attorney General Office those are -- you also have your state laws that are going to require basically anything that fits within that.

I would say it's important to include in any type of guidance because it's a reemphasis to both the field and the practitioners that it needs to be a priority.

So even though it may not be a legal authority even if it's just a referral authority or making sure that it's highlighted as something that the Commission found to be incredibly
invaluable and important and key to the success of this process I do think it's worth including for that reason because oftentimes it will be referred to as those cases begin to proceed, you know, the notes and comments that you included in your advisory councils.

MR. VINEGRAD: And the statute actually uses the phrase public court proceeding. So it's a little ambiguous. I suppose, you know, a re-sentencing done on papers could be considered a public proceeding to the extent the filings are public.

But I guess putting it differently, Vice Chair Murray, I don't know of any authority that would prohibit the Commission from, in its discretion, stating that judges should give to the extent practicable reasonable notice and an opportunity to be heard, make them for -- four a day, make a determination on a motion for a reduction under either one of these amendments.

CHAIR REEVES: Any other questions? Panelists, thank you so much for your
time today. We appreciate you.

Judge Restrepo is coming back. I don't want anybody to be worried. He told me he'll be right back, okay. But we're going to -- he did give me permission to go ahead and get started.

So our sixth and final group of panelists will provide us with perspectives of formerly incarcerated people.

First, we will hear from Jerome Brough, who currently resides in his hometown of Chicago, Illinois, where he has worked as an independent contractor delivery driver for three years.

In June 2000 Mr. Brough received a federal sentence of life in prison for his participation in a conspiracy to possess with intent to distribute crack cocaine.

At the time his final offense level was 44 and his criminal history category was six. In 2010, after serving 10 years of imprisonment, his sentence was reduced from life to 360 months
pursuant to retroactive changes to the guidelines made in response to the Fair Sentencing Act.

Nine years later, his sentence was again reduced thanks to the First Step Act and he was released after serving over 20 years in prison. Mr. Brough is an active parent -- he has five children -- and a proud grandfather to his three grandchildren.

Second, we will hear from Bernard Gibson, Jr., who currently resides in his hometown of Prince Georges County, Maryland, where he works as a mentor with Lead4Life, an organization that offers mentoring and reentry services to children.

In 1997 Mr. Gibson was sentenced to 324 months in federal prison for participation in a drug conspiracy. At the time of his sentencing Mr. Gibson had zero criminal history points and no prior convictions and a final offense level of 41.

In 2017 his sentence was reduced to 262 months pursuant to retroactive changes to the
sentencing guidelines. After his release Mr. Gibson married his high school sweetheart. He is a doting grandfather and social justice advocate who plans to continue providing reentry services to formerly incarcerated individuals.

Finally, we have -- we will hear from Jeffery McReynolds, who currently runs a logistics company with his wife. In 2005 Mr. McReynolds was sentenced to a term of 235 months in federal prison after being convicted of conspiracy to possess with the intent to distribute crack cocaine.

At the time of his original sentencing Mr. McReynolds' final offense level was 33 and his criminal history category was four.

Mr. McReynolds' sentence was reduced twice pursuant to the retroactive changes in the guidelines, first by 84 months for the crack minus two amendment, then by 30 months for the drug minus two amendment.

In terminating Mr. McReynolds' supervised release early the court explained
that, quote, "He has changed his behavior and remains eager to continue being a law-abiding citizen," close quote.

Today, Mr. McReynolds advocates for sentencing reform and mentors others -- returning citizens on starting small businesses.

Mr. Brough, we're ready to hear from you when you're ready, sir.

MR. BROUGH: Good afternoon, Chairman Reeves and this honorable Commission.

In serving over 20 years in prison there were many days and nights that I've begged, pleaded, prayed for the opportunity to speak before a body such as this to see if something I could say could make a change so that I myself could get released.

Unfortunately, I wasn't able to do that. I am humbly here today to say I am here to speak for the people that I left behind, hoping that there is something you will hear from this panel that will get you to yes on these retroactive amendments.
I still personally know people that are serving over 30 years. Two names come to mind. Carmen Tate, Eddie Richardson have served over 30 years in prison. So I'd like to give you guys my perspective.

My time started in Terre Haute Federal Prison, one of the most dangerous at the time. In fact, I was there when Timothy McVeigh was executed. I was there learning the law trying to desperately find out, of course, like everybody else there how I could turn this thing around and get out of prison.

Unfortunately, Apprendi -- the United States v. Apprendi Supreme Court decision didn't help. The progeny of those cases didn't help because they were not made retroactive.

Only after I served over 10 years did I finally get some relief from a life sentence and then an additional nine years that I get relief and come home.

In my time there, despite having a life sentence and not knowing when I would come
home, I dedicated myself to education, to become better, to prove that only to the people that I had disappointed, first and foremost, my wife and my children, but also to the judges, to the prosecutor who spoke glowingly about me and then asked for a life sentence, to prove to them that I am not going to be that person ever again and to say that maybe with the people that I could possibly touch inside that I could effect change as well as be change.

There are numerous things that are going on in the federal prison that I think you guys need to hear about. We all in here, despite the negatives that you hear, take advantage of every single educational opportunity.

Every class -- I took everything from real estate to bookkeeping. I even took yoga and calligraphy writing. I wanted to spend as much time engaged in positive activity as I possibly could and in doing that, believe it or not, more people joined.

So they saw despite the fact that I
wasn't getting relief immediately that it was -- it was beneficial to stay engaged in positive activity.

It didn't matter what your sentence was because I was surrounded by people with life sentences. I had two and I thought I was special. That wasn't the case. I met people with three, four, five life sentences.

Unfortunately, most of those were for what was described by -- when I started reading the law what was described in the U.S. Code as victimless nonviolent offense and I was blown away because I couldn't understand how I had committed a crime but there was no violence and there wasn't a victim but my life was taken away.

I am blessed to be before you today to have my life back and be a fine upstanding member of the community doing every possible thing that I can to not only not reoffend but to be the example.

There are educational opportunities there that we take advantage of. There are so
many things that we need to do in there and I've seen change over the course of the 20 years I was in prison when nobody participated to there was a waiting list for courses.

So I know people are changing. You might want to give them a chance, as well as -- I'm just riffing here -- once I was released, and this is going to be interesting -- once I was released I continued that. With those relationships that I made inside they continue outside.

We now have a community. I didn't even find out till last week Thursday that Jeffery was going to be on this panel. But over two years ago we were together at Jeffery's house with a collection of people who benefitted from retroactivity and we had no idea we would be here today, and none of these people have reoffended.

So if you have a worry or a concern about whether or not you should vote for retroactivity, what I have to say to you is please don't let perfect be the enemy of good.
Weigh this decision heavily because you affect people's lives.

Earlier in the earlier panel I heard people speaking about whether or not there should be a delay in starting this. Well, if I would not have received retroactivity I would still be in prison right now.

So when you think about a delay please take into consideration that people are waiting to get out, put their lives back together, and to do good not just to benefit themselves but to benefit others and when they do good they make your job easier.

They make the jobs of the probation officers easier. I was literally released from probation in 17 months. I was supposed to be on probation for five years. Nobody involved -- the judge who released it, the probation officer whose care I was under, or the assistant U.S. attorney thought that I needed any more supervision.

We may be the success stories that you
need to hear. Yes, there are going to be people that reoffend. But I can guarantee you there are going to be more people like us and less people who reoffend. Thank you.

CHAIR REEVES: Thank you, Mr. Brough.

Mr. Gibson?

MR. GIBSON: Good afternoon. Can you all hear me? Good afternoon.

First off, I want to thank you all for allowing me to be here. This is something special, like Jerome said, just to be able to come in and stand before you and testify to think about those who are left behind.

I also want to acknowledge my family who is here with me right here, my cousin Michael, my wife, my high school sweetheart I married, and if it wasn't for retroactivity it never would have happened. She is right here. One of my best friends. The 18« years I was there Milburn was there with me.

I'm coming from my head because I didn't really write anything down and I want to
thank Mary, Alan, and Frank that was just here because of all the things they said I wanted to say.

So today I come as a person telling you that people can change, that people really need a second chance. As you all just heard I have no criminal history. I had never been in trouble in my life. I was working when I caught this case. I was doing a conspiracy case, and I'm not going to get into that part of it, but I got -- I was 27, I believe, and I got 27 years. That's just unheard of.

I understand that people have to be punished for the things that they've done. But some punishment is just too much. I remember after the first day or two I was incarcerated I was never coming back to jail again. Never. I work right now with a bunch of youth that has been in and out of jail and, I believe, for life and a lot of times they call me to relate because most of the mentors -- a lot of the mentors haven't been in the situation so they can't
relate. Had one kid who wouldn't go to the hospital. And it was free. He could get anything done free. He wouldn't go. Well, I came and shared my story with him and he's -- he's similar to me. You know, we talked about, well, my mom was 17, 18 years old when she had me. Well, my mom was 15 when she had me.

You know, we are a product of our society and I heard earlier when you were talking about disparities and about what would cause this, what would cause that, how much pressure we put on probation, how much pressure -- well, we all know the judicial system and the system itself is overcrowded.

So whether we do it in jail, outside of jail, something has to change. It's going to affect either probation or it's going to affect the COs in the jail.

If the Commission came to the conclusion that these sentences should be lowered why is it that two people could be charged in two separate days get two separate sentences because
it's a different day?

If there's change -- needs to be
change it needs to be fair across the board.
This is America. This is the land of fair and
opportunity. So if we're going to be fair let's
be fair.

You know, we can't leave those behind.
Let's show some grace. Let's help people and
those who are in because, I mean, for me, you
know, you heard the thing about the time, how
much time it's going to be.

My grandmother stood behind me the
whole time. She died seven months after I got
home. So if I didn't get retroactivity I would
never have seen her. She once said to me I hope
you -- I hope I do not pass and because of
retroactivity I made it home seven months later.

Many years right after that my
grandfather passed. I lost so much in those
years I was gone, and like Jerome said we learned
so much. I took every class.

I have a stack of papers from COs
saying how great I would be in society and there's so many people just like me that's doing the same thing.

I just went to a funeral and there was four guys there that I was locked up with. Four other guys. Not neither one of them has been back. I can't tell you about recidivism anywhere else. I can only tell you my community and in my community these guys aren't going back to jail.

These guys are mentors. These guys have nonprofits. They're doing stuff with kids. They're starting their own businesses. But they're back paying taxes. They're home with their families.

You take -- when you go to jail this many years you take something -- something special out of the family. It puts a burden not just on us and the victims. Your family becomes victims too because you take -- you take a money-earning person out of the family. You take a father. My son was four when I left. When I came home he was 22.
I'm still building that relationship with him. It's gotten a lot better but I'm still building. So I beg of you to look at this thing seriously, to look at the whole avenues of it and understand that this affects a whole bunch of people.

It affected my family very harshly, and for me to come home and to be back is a big blessing to my family and for me to see my grandmother, to be there for her, to see her smile and to say you made it home was a blessing. It's a blessing that if it wasn't for retroactivity I would have never gotten it.

So I ask that we be fair. I ask that we have some empathy for those in. I ask that we bestow grace upon them and that we give them the same chances that I had to start their life over, to be better, to give back to the community, to give back to their families because that's what I'm doing and I'm going to continue to do that and I'm going to continue to instill that in these youngsters that I'm dealing with each and
every day. Thank you.

CHAIR REEVES: Thank you, Mr. Gibson.

Mr. McReynolds?

MR. MCREYNOLDS: Thank you. Thank

you, Chairman Reeves and the members of the

Commission. I appreciate this opportunity to
testify before you today.

My name is Jeffery McReynolds, which

you all know. I'm chief operations officer of

JSM Logistics. I'm testifying as a direct

impacted person of the retroactivity not once but
twice in five years -- in a five-year period. I

got the first crack minus two amendment and

second for the drugs minus two.

I come before you today as a proponent

for retroactivity in the proposed Criminal

History Amendment. Retroactivity may be the only

possible relief for men and women that are

serving lengthy unjust prison sentences due to

their criminal history.

I want you to know the man I am today.

I'm a husband of a beautiful and amazing wife.
I'm a proud father of four beautiful intelligent daughters and an amazing son. In January 2000 I became the world's happiest grandfather of a little beautiful girl. Excuse me. I'm sorry about that.

On October 20th of 2005 I was sentenced to 235 months in the federal Bureau of Prisons. I remember it like yesterday. On November 14th of 2005 I arrived at Greenville Federal Correctional Institution in Greenville, Illinois.

I remember walking into the prison and thinking to myself I'm going to be a better person for my family once I'm released from this place. Being sentenced two decades in prison including for the -- for actions I'd already paid my debt to society for was mind boggling.

During my incarceration my youngest sister passed away from cancer. Excuse me. I never had a chance to say goodbye. Nine years later I'm still suffering with this daily.

I think back to numerous motions I
filed pro se and subsequently all denials. Four years into my sentence on February 3rd, 2009, I received my first two harm reduction due to the crack minus two amendment that later included retroactivity.

The amendment allowed me to give back the 84 months off the 235-month sentence I originally had. After additional years of legal work and persistence, not impatience, finally, I reaped the harvest of my dedication.

On December 2nd of 2014 I received a second two point reduction as a result of the drugs minus two and the retroactivity amendment. What a blessing. Because of retroactivity I was given a second chance to live.

It allowed me to spend a year with my mom before she passed away. Retroactivity turned hope into a reality and the opportunity to give back to the community I once committed crimes against.

In 2016 and one year after my release my wife and I started a logistics company. In
this next chapter of our lives our goal is to
start a trucking school and in my spare time I
need to return to citizens a small business
startup so they can too be successful in their
second chance.

I am also an advocate for census
reform and recently participated on Capitol Hill
Lobby Day with -- they were featuring 70 former
incarcerated people and their loved ones.

I had the opportunity to visit
Senators Durbin, Reps. Kelly, Budzinski, and
Schneider's congressional offices to tell my
story. Retroactivity permits people -- excuse
me, retroactivity permits people's sentences
under the guideline range to have been lowered, a
chance to make their case to the court that they
deserve a reduced sentence.

Because the Commission make crack in
drug amendment retroactivity I was able to tell
Judge Barbara Crabb that I was deserving of those
chances, too. She believed in me and in my
rehabilitation without retroactivity and her
faith in me I would not be here today.

I'd be in prison with a release date
two years away. No words can describe what it
means to see the Commission not only lower
sentences that were too long but also to do the
right thing by making sure that people serving
those sentences like me got a chance to prove
they deserve a lower sentence.

Those changes restore hope and making
the Criminal History Amendment will also give
people the opportunity to return home to their
second chance. Thank you all.

CHAIR REEVES: Thank you, Mr.
McReynolds. I turn to my colleagues to see if
there are any questions. Commissioner Gleeson?

COMMISSIONER GLEESON: Thank you,
Chair Reeves. It's not so much a question as a
expression of gratitude that you're here. We
hear from many stakeholders and many folks who
deserve to be heard to influence policy and none
of them can do what you've done today in the
content of your testimony but in your presence
and, you know, I think it's from my perspective what you've done is place in the clearest possible relief three things.

One is just because someone's committed a serious federal crime - and I'll bet none of you would deny that you committed a serious federal crime - it doesn't mean you can't get a grossly excessive sentence that shames us all.

The other thing is, you know, the degree to which related to that is anybody who thinks that those grossly excessive sentences don't get meted out just hasn't been hanging around federal courtrooms the last 30 years.

The second thing you place in the clearest possible relief is just because folks are serving excessive sentences doesn't mean they can't transform themselves in prison into completely admirable people and anybody who thinks otherwise has no idea what people are capable of, and you just by being who you are prove that.
And I think the third thing that you place in the sharpest possible relief is how important it is for policymakers -- judges too, but for policymakers to consider all the other things we consider -- the data, the stakeholders -- but to never lose sight of the fact that on the receiving end of the sentences are three-dimensional human beings with families who love them, communities who need them, and I have a colleague at NYU, Bryan Stevenson, who says if you really want to know an issue you got to get proximate and what you do is you bring us proximate to the result of the decisions that we make, and as far as I'm concerned we can't thank you enough.

Thank you, Chair Reeves.

CHAIR REEVES: Mr. Wroblewski?

Commissioner Wroblewski, excuse me.

COMMISSIONER WROBLEWSKI: Thank you very much, Mr. Chairman, and thank you all for being here and for your testimony.

Mr. McReynolds, I just want to share
my condolences about your sister and your mom
and, Mr. Gibson, about your grandparents.

Mr. Brough, you talked a little bit
about the fact that there was a time in prison
when people did not take advantage of programming
and there was another time when people started to
take advantage of programming. Could you
describe a little bit about what changed?

What brought about people
participating more and taking advantage of the
opportunities? And also if any of you can talk a
little bit about what happened when you went
home, what kind of interactions you had with the
probation service, probation officers, supervised
release, both positive and negative, about what
worked and what didn't work.

MR. BROUGH: In relation to your
question on education and what changed, honestly,
there had been so long a period of time where
guys such as myself who were serving life
sentences had absolutely no way of getting out of
prison.
In fact, we're familiar, and I don't know if you and anyone on the panel is -- we do a biannual review. It's called Team. For lifers there's a -- well, on that sheet of paper that we get there's a section on there that answers the question your months to release, and when I was first incarcerated as a lifer that answer was deceased.

Sometime later the people who put that answer in there realized that it had negative effects and they changed it to 540 months. But I did 20 years.

The first 10 years they say 540 months so it wasn't much better than deceased. What changed was, honestly -- and I worked in the law library for many years and discussed law and read law.

There were 20 years almost exactly from 1989 -- I'm sorry, from 1979 to, like, 1999 and Apprendi was the huge case that came out where there was some change and people started getting relief.
Lifers started getting relief, and they started noticing that the lifers that did get the relief were the guys that were taking advantage of the educational opportunities that were there and it created like the famous book "A Tipping Point" where more people would take advantage of the educational programs more people will get relief because they participated in the education.

Whenever there was a change in the law that people could be reviewed again by a court, education, rehabilitation was the focus. So people started -- inmates, I should say -- offenders -- I don't know if they use the word inmates. I'm sorry.

But offenders in there were taking advantage of the educational opportunities not just to get the benefit. What they realized was they were changing. They were becoming better people, better parents, better children. They were apologizing to family members that they had let down.
And so that's when it changed. When you start seeing somebody get relief and why -- you ask why did they get it -- you're reading the opinion written by the judges -- education was always there. Rehabilitation, those -- those were watchwords that were there and we took advantage of that.

MR. GIBSON: I have something to add to that, too. Not -- you know, he's exactly right. But also the programs today are very limited. You know, when I was in Memphis there I think it was 1,200 people on the panel, and I actually taught the cabinet making class. I finished and I ended up being the teacher and one of the instructors in the class. It had a waiting list to get in.

And for someone that has so much time, you know, like you said -- I think you said it before to me about if you had life you get to the back of the waiting lists. So it's hard to even get into these classes. They don't have enough of them and, you
know, you want to do it but, you know, we have --
you're looking at, like you said, 300 or 400
months and they tell you each time you can't get
in.

What do you do? And it's just hard to
even maintain when you don't have anything
because they really don't. I think the class I
was in we had maybe eight students, you know, at
a time and each class was maybe a few months.

So if you had -- and I was on that
particular path for 15 years and many students
were able to come through and a lot wanted to
come. Because I was an instructor they asked me
all the time, wow, when can I get in, when can we
-- it's not like they don't want to.

You know, there's so many people --
I've been around so many guys in the facility
that I've learned so much from. I've learned a
lot from these guys, and people change and people
realize the mistakes they had.

I even had one class and they took us
out. When I got to -- I finally got to the camp
before I came home and they had a program called Back to Reality and they took me to VCU. They took me to Fort Lee.

They took me to all the courts to talk to you -- to talk to the military people who had got into some type of trouble. And the panel was really diverse.

It was a really good panel because every walk of life was in the panel from drugs to one guy had burned something up. It was just a big diverse. The purpose was to show that anybody can make a mistake.

Anybody could turn left or turn right and end up in jail. And with that panel it really got me to where I wanted to be today with the kids because the first time a kid came up to me -- we weren't supposed to touch these kids or anything.

One kid came up the first time -- the first kid came and hugged me and cried and it really showed me that, you know, we can make a difference and they can really -- and with
Lead4Life now they can really relate to when you've been through what they've been through. Like you said, putting a face to it. You know, I think we make decisions on different things but to put a actual face and a person to those decisions makes a big difference.

And to answer your question, a lot of times we just don't have the opportunity to do it. You know, I even got my CDL license when I was incarcerated. We didn't even have a class. You had to do it on your own. We studied.

They had a truck. They allowed us to -- I was at the camp. They allowed us to go around the facility at the camp and they took us -- I had my license when I came home but it was only a certain amount of people that can do it.

So it's not like these guys are sitting in there not wanting to do stuff. There's nothing sometimes for them to do and if you don't have family because -- you know, I was -- I was turned down because of Apprendi, too. Actually my dad's name is on Apprendi. If you
look his name is on there. And I -- when I got
turned down it was hard because I'm saying to
myself, I've done everything.

I've taken every class. I'm teaching.
I have -- I have -- you can ask anyone at the
facility about me. And I get -- and I get a
letter stating that you're absolutely right but
because of retroactivity you don't get it.

That's hard. And if it wasn't for
that grandmother telling me, baby, hold on -- God
has something else for you -- if it wasn't for
Milburn and Mike and Christie coming to see me,
and a lot of these guys don't have this.

I've seen guys 10, 15 years not get
one visit. You know, I've had arguments because
my family was so close to me with councils
because I had too many people in the room with
us. I said isn't this rehabilitate -- this is
what you want, right?

I literally had to get a grandfather
clause. I had to go get my grandfather clause to
prove that I can have these on my list. They cut
it down to 10 people. What if you got -- you
know, I grew up in a household. I've got nine
sisters. My mother was 15. She was like my
sister. So my -- her sisters are like my
sisters.

So you're telling me that the person
that raised me and took care of me can't come and
see me but you want me to be rehabilitated? It's
hard.

It's hard, and you guys have power to
make change, to really help someone who really,
really if you just normally would see them, see
that they need it, see that they deserve it.

And I understand the victims. I
understand it, and I know so many guys that are
so remorseful for the things that they've done.
But you're a product of your society and the same
thing with the incarceration.

If you don't have nothing for them to
do then what do they do? They get into other
stuff. It's not like they're not trying to
change but there has to be an avenue for change.
If there's no avenue for change how do we have change?

I don't want to talk too much. I don't want to take up his time. You know, it's personal to me.

MR. MCREYNOLDS: I'm going to talk to you about the U.S. Probation Department and, like, when I -- when I was released it was real, real, real hard financially because they told me I couldn't go home.

I'm married. You know, I was married while I was incarcerated. I was supposed to move back to Huntsville, Alabama, and I can say the name. The young lady there at the probation department her name is Candy Cheatham. She told me I couldn't come home.

So she said I had to go back to where I was originally arrested. So I had a home in Huntsville, Alabama, and my wife had to take out a $90,000 refi on my home to come to Chicago and build another home for me.

So now we have two homes. I had to
uproot my children to move them to Chicago and now we have to maintain all this just for a few months until I'm actually under a probation officer, which was November the 1st as it came around.

So you have all these things in your way. Like, if you need to go grocery shopping or to any store or -- you have to have an itinerary. You don't know which -- in life you don't know what store you have to go to so how can you set up a schedule to go somewhere?

What if you need a hairbrush or a comb or anything? So it doesn't matter. Like, you have to have an itinerary in order to move around and you're supposed to be out but it's, like, you're not out.

So you have to adjust to all these rules and it really affects you, like -- you know, it's like, wow, I should have just stayed in prison.

Like, I know you heard this thing -- people say I'm going to go to jail and I'm going
to do the whole six months and I'm just going to
stay here. I don't want to be on no supervised
release until this time. You know what I'm
saying?

So the thing is the woman didn't want
me to come to Alabama at all. So I waited until
the period -- it was six months I had to wait.
My wife had to come and build a home months
before that. We had to have land line phones. I
don't know how many people have landline phones
anymore.

You know, it's the hardest -- it's a
hard thing. You know, who answers the house
phone? You got a cell phone in your pocket. So
they want a land line. They call you numerous
times in the night.

If I wasn't fortunate enough to have a
support system with transportation -- they will
call you 2:00, 3:00 in the morning and say you
need to come down here and take a UA. What if I
don't have transportation in the city that you
said is violent? Now you had to cross over all
these neighborhoods to get to somewhere on public
transportation just to take a UA.

It doesn't make any sense. It's hard. It's hard on our families. There's so much but
I'm going to go -- that's the bad side. But the
great side is I met a great -- a great probation
officer. His name was Andy Ysaulgue. He helped
me so much.

Like, he should be the poster child
for a probation officer. So he was cool with my
career. You know, he made it work. Like, I was
over -- I had to go over the road which most
probation officers say you can't leave a certain
amount of radius. But he said all you got to do
is keep me with an email chain. Let me know
where you're going and then just send me your
financials in when you're done, which he went
above and beyond.

I got so far in working the email
chain was so long he said, Jeff, just don't --
you got to stop. He said -- he said, I know
you're working it. So we were great.
He actually left the office down in Huntsville and he moved over to Florence, somewhere in Alabama. But there's great people out there and there's people that need to know work. You know what I'm saying?

I don't like badgering people or nothing like that. But it's the point, you know. You got some gems out there and you got some coal. So you got to just know. It's good and bad. So, no, thank you. I don't want to go on -

MR. BROUGH: Excuse me, if I may. I would be remiss if I did not mention my probation officer. Her name is Alicia Sturgess and she was fantastic. On the first day we met until I was released from supervised release and even to this day I still communicate with her. She's probably watching this. If not she's got a link to watch it because she wants to watch it.

She told me when I emailed her about it, I'm telling everybody in my office. And it's a great feeling to know that and we all share
this, that there are people that play a role in
the process -- the probation office, the U.S.
Attorney's Office, the Federal Defender's Office
-- that they are aware that we are contributing,
we are productive, we did not reoffend, and we
are growing in a positive way.

It means a lot to us that -- I mean,
outside of our nuclear family and friends we
actually care that you people -- the people like
you, the policymakers, the people who have those
jobs that are -- that come in from what --
sometimes because they had to deal with somebody
not like us and go oh. We care that you know
that we're out here and we're not a problem. It
means a lot to us.

MR. GIBSON: I mean, just to be asked
to come here, I didn't even know that we were
able to even speak just for you guys just to hear
us -- to hear us out. You know, this is --
because like I said, it's a big thing to put a
face to it.

And I know there are a lot of pros and
cons but you see the table here as pros. I don't have any cons when it came to retroactivity. Everything worked out for me. You know, same with the probation officer.

The first day he came and met me we talked. He told me what he wanted and we had a conversation. And we talked maybe for an hour and a half and when he said -- when I left -- when he left my house he shook my hand.

He said, I don't see any -- us having any problems and we didn't have any problems. And I'm telling you, I'm in touch with a bunch of guys that -- the funeral I just went to was a guy that keeps everybody together and he accidentally got killed. It was an accident. And it's a bunch of guys.

I'm talking 40 or 50 guys. Mike was there, and these guys come together all the time, keep each other up. You know, I told one guy, I said, man, I ain't Dr. Phil. He'll call me for everything. But we look out for one another.

It's really -- it's really a family
because, you know, I never -- I never understood when they said you can't talk with -- under probation, though, that you shouldn't talk with other guys that were incarcerated.

So you mean to tell me I'm 27 and I go to jail and you give me 27 years. I've been with this guy 18 years. We had each other's back. You know, when I needed a few dollars he gave me money.

When he needed a few dollars I gave him. We looked out for each other 18 years. But I can't call him and say hello? This is who I'm with. This is my friend.

This is a person that we grew -- this is maybe the person that got me to change because I know I've changed a lot of guys. I take credit for it. I do. I see them to this day some of these guys.

They grew up in jail with me and now they're home doing the right thing. They're all working. I don't -- I don't know one person that I was close to and I was close to a lot of guys
because I did a lot when I was in.

I taught the class. I refereed the games. I'm learning in the system where I was in. These guys are not going back. They're just not. And they are very productive. I'm talking -- you know, I got one buddy who owns 40 dump trucks. He's a multimillionaire right now.

So it is wrong to say that people can't change because I seen it over and over and over again and I can only tell you from what I've seen. I don't know all the statistics. I don't have all the graphs.

But in my community these guys have changed. They're not going back and for all of us that I know that got this retroactivity I don't know not one that had a problem.

COMMISSIONER BOOM: Good afternoon. I just want to thank each and every one of you for your testimony. I read your materials. They were extremely moving and compelling.

Throughout -- there was a thread throughout each of your submissions and your
testimony today that, you know, while you were incarcerated you had hope that you were going to get out, notwithstanding I think you threw your first two letters in the trash you said and you didn't even open them from the federal defender, I believe it was, and because you just -- you know, at the time just thought, well, this is just something else that is not going to end up as, you know, fruitful.

But you each had hope along the way and you each engaged in a lot of programming. And so, you know, my question is what can we -- you know, what can the Bureau of Prisons or we do in addition to -- you know, I understand your position on retroactivity.

But what can we do within that system to inspire more hope? You know, is it additional classes? Is it -- you know, what can we do to affect, you know, and produce more folks like you who are, you know, you're telling us are already there? What are the tools that they need to succeed?
MR. GIBSON: Well, first of all, we got to understand that a lot of them guys didn't get jobs. They didn't -- they never had the opportunities or family or -- I know one guy who was -- they used to call him can't get it right. He wouldn't --

COMMISSIONER BOOM: What?

MR. GIBSON: Can't get it right. But how do you get it right when you was living on the streets since you were five years old? He didn't know his mom. He didn't know his dad. I mean, he literally was in the street.

I'm talking literally, and people will say things. You know, it used to get me mad when they would say them things and I was, like, you know, you've never been in his shoes.

So the opportunities just to even have -- I taught a class how to tie a tie. These were grown men that didn't know how to tie a tie. So you're looking at people who didn't know any better.

If you keep, you know, doing the same
thing you're going to keep getting the same results. Unless you change -- I said it to one of the young ladies back there. I said, you know, my dad was on my case too and I grew up in a time where they were really in the streets and I knew a bunch of people.

And I said to her, you know, if my dad was a carpenter or a plumber or a mechanic, I thought I would be one of those things, too. So you're a product of your society.

So if there's nothing, like I said before, for you to learn to do then you're going to be stuck. These are guys that you're looking at that comes back because they didn't learn anything.

I think that they need more programs. They need more funding for programs. They need more people to come in to talk to because I had a family and friends. I didn't need -- I didn't need a visit.

You have a lot of people that -- at one time they had a thing where people was coming
in just to visit people, just to give them a visit. That matters. All of these things matters. And if you want to stop something, you know, you're going to have to change something.

And if you put someone in for 20 or 30 years -- you put a young man there 21, 22 years old and it was me, because I thought of my case like you. I looked and I said, wow, when I got out I seen so many of them just like mine and then I'm, like wow, these young guys got all this time. And it gives you a different perspective and I'm talking about guys that don't have no resources. None.

You know, even with the CDL class a lot of guys wanted to take it. They didn't have the money to pay for it. So there's a lot of things that needs to be implemented, especially education, though, to get them ready to be able to do some things and not just -- not just them doing it themselves because a lot of that stuff I did myself and I was blessed. I was blessed -- I had a praying grandmother -- to get into these
programs.

    But they need more programs. They need more help to teach and to show in many different ways writing skills, educational skills, GEDs.

    I was surprised to see so many people that didn't have a GED and you wonder why these people are doing the things that they're doing. They have no other way sometimes. They need better ways.

    MR. MCREYNOLDS: I say the same thing. The Education Department can be expanded, like, with more programs, probably a little more staff as well because you have -- you have certain programs in -- when I was in Greenville they had Greenville College coming in and doing certain programs. They had -- they have a culinary program, which is small.

    You know, you have the truck and the CDL classes. You had college courses but you have to pay for the college courses yourself.

    But most of the people in education
that work the education, staff that work in
education, they did become proctors to us,
though. It just needs to expand because they
only have room for so many.

Like, if you have a class that you
only can run, what, eight times a year and you
got 1,200 people on the compound you only could
fit 10 or 12 people in the class.

So that's not really -- it ain't even
scratching the surface. And people are coming in
every day, like, but people not going home every
day.

MR. BROUGH: Other than education, to
your point BOP has something in place for every
negative situation. They have something in place
for every possible negative, every disciplinary
action, and one of the worst is called a step
down program.

Like, if you are at a low level
security facility and you do something, violate
the rules, their discipline is to see you up in
security and then you step down once you've
proven that you could conduct yourself accordingly.

I think that that needs to be applied in a positive way. I was in Terre Haute USP with two life sentences and the unwritten rule was nobody with a life sentence could transfer to a medium security facility until they've served 10 calendar years.

That was the unwritten rule. It was nowhere in a book. No counselor could point to it in a manual. But if you had medium security points like I did they tell me come back. You don't have 10 years.

Until I started taking every single possible class, until I started making relationships with the staff in education, speaking with the assistant warden of education who later went on to become a warden and he's probably working in the region if I can remember his name.

And in fact, he would come through on tours. I left Terre Haute. He came through on a
tour in Pekin. I saw him there. I left Pekin.
I was at Rochester FMC. He came through on a
tour and I saw him there.

He would always make a point if I saw
him he'd stop me, we'd speak, and it meant
something to the staff for him to stop and speak
to me.

But I think that what would really
help and what would incentivize more people to
engage in these educational programs is that
despite what your sentence is -- your sentence
length -- if you show change -- positive change
and growth then that carrot becomes a transfer to
a lower level security facility, not for the
security aspect but at these lower level security
institutions the educational programming
availability widens.

When I was at Terre Haute there were
some and I moved down to FCI Pekin, medium
security, there were more. I moved down to
Rochester, which was technically a low, and there
were even more.
I was able to acquire a forklift driving license using the forklift in the warehouse. They had apprenticeships in plumbing, electrical, HVAC. I know people right now that were released after 15-plus, 20 years that are licensed master electricians.

I still stay in contact with these people all over the world. I know three of them in Minnesota alone, two in California, one in Ireland through that program.

That's a five-year program and they were able to not only participate, they were able to complete it and they are all fine, upstanding, productive members of society.

In fact, if you lived next door to one of them you wouldn't know they had ever been in prison unless they told you. Some of the people that I know I would say -- I would go out on a limb and say most, if we could afford it you wouldn't mind having us as a neighbor.

CHAIR REEVES: Any other questions or comments?
Gentlemen, thank you so much for your testimony today. It is archived permanently on our website, www.USSC.gov. Show those kids that you are inspiring back home and at -- for the Life program and everything else where you are dealing with these young people.

Even back at the people who you know who you left behind they can go back and watch it as well. So please tell them. They need to hear your story.

With that, I'd like to bring our hearing on retroactivity to an end. On behalf of my fellow commissioners and my friends here at this table I want to again thank each of our panelists who came before us today.

I want to thank the members of the public who sent in comments on this subject. I want to thank all those who have participated in any way possible, especially our staff.

I want to thank all those who have taken the time to listen in. We have heard powerful testimony today. We will consider that
testimony and we will use that testimony to make sentencing policy that we believe is right, that is fair, and that is just.

With that, this hearing is now adjourned. Thank you.

(Whereupon, the above-entitled matter went off the record at 4:04 p.m.)
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Neal R. Gross and Co., Inc.
Washington DC

www.nealrgross.com


CERTIFICATE

This is to certify that the foregoing transcript

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.

Neal R. Gross
Court Reporter