



Witness Statement of
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The best way to predict the future is to create it.

– T. Bell, FMC Carswell

Thank you Chair Reeves, co-chairs, and commissioners for the invitation to speak with you today for FAMM as you consider whether to make Parts A and B of the criminal history amendments retroactive. My testimony today is intended to supplement FAMM’s written comment, which is attached for your convenience. This witness statement aims to address some of the concerns about retroactivity raised by the Criminal Law Committee and the Department of Justice.

Fundamental Fairness

The Criminal Law Committee of the U.S. Judicial Conference (CLC or Committee) has commendably supported retroactivity where it finds that, among other things, fundamental fairness requires it. In this instance, the Committee does not support retroactivity. The CLC’s “principal concerns . . . relate to the retroactive application of Part A given (1) the absence of any sort of countervailing, fundamental equity interests” such as were addressed by prior retroactivity decisions and (2) the burden retroactivity would place on probation services.¹ We believe the CLC is mistaken when it assumes fundamental fairness is absent in the amendments’ impact. And, even if the Commission finds addressing fundamental fairness is not one of the anticipated outcomes of retroactivity, the Commission historically has made prior amendments retroactive without a finding of fundamental fairness.

¹ Letter from Hon. Randolph D. Moss to Hon. Carlton W. Reeves 4 (June 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf.



(1) The amendments are tailored to advance the purposes of sentencing.

The Committee explains that retroactivity should reflect all the purposes of sentencing, but retroactivity of Parts A and B fail to do so and thus retroactivity is not warranted.² Assessing status points, according to the Commission, serves more than one purpose of sentencing, as the CLC observes.³ Besides properly predicting recidivism, status points account for the defendant’s perceived lack of respect for the law. The concern is that retroactivity would advance the predictive aim of status points – achieving one goal of sentencing – but not support respect for the law – another goal of sentencing. The comment then appears to conclude that because the amendments do not advance all the purposes of sentencing, they do not correct for a fundamentally unfair approach at sentencing.⁴

We think this conclusion misapprehends the amendment. The Commission’s nuanced approach to Part A and Part B retroactivity was fashioned with the purposes of punishment in mind. For example, the Commission’s retroactivity plan would retain status points for individuals with seven or more criminal history points. Far from demonstrating that the status point amendment fails to correct for fundamental unfairness, the Commission’s calibrated approach focuses relief squarely on the impact of those points on defendants with limited criminal history and for whom status points do not serve any purpose of punishment. And, the amendment is faithful to other § 3553 (a)(2) factors, such as respect for the law, by retaining status points for individuals with more than six criminal history points.⁵

Similarly, the Commission tailored Part B to provide relief to defendants with no criminal history whose instant offense is not of a crime of violence or an otherwise serious offense. It explained in the reasons for amendment that it had “‘identified circumstances in which zero-point offenders are appropriately excluded from eligibility in light of the seriousness of the instant offense of conviction or the existence of aggravating factors”⁶ As explained, this carefully tailored guideline addresses all the purposes of punishment. It provides potential relief for individuals whose criminal history score does not accurately reflect their risk of recidivism, while denying the relief to others for whom the Commission concludes it does and whose

² *Id.*

³ *Id.*

⁴ *See id.* at 4, 7.

⁵ USSG, Amendments to the Sentencing Guidelines, Reader-Friendly Version, Criminal History, Reason for Amendment 78 (Apr. 27, 2023) (pointing out that “by retaining ‘status points’ for those offenders in higher criminal history categories, the Commission continues to recognize that ‘status points,’ like other criminal history provisions . . . reflect and serve multiple purposes of sentencing, including the offender’s perceived lack of respect for the law . . .”).

⁶ *Id.* at 79-80.

conduct or impact demonstrate to the agency the need to provide for a longer sentence to deter, punish, and provide rehabilitation.

(2) To the extent that fundamental fairness is a prerequisite to retroactivity, the amendments advance that purpose.

When formulating its positions on retroactivity, the Criminal Law Committee takes into account the purposes, magnitude, and impact of retroactivity of Parts A and B. Historically it has also used its commitment to a sentencing regime that advances fundamental fairness to determine whether to support retroactivity in a given case.⁷ The Committee's steadfast adherence to fundamental fairness leads it in this instance to oppose retroactivity for Parts A and B because it concludes they do not implicate this principle.

As the Commission points out, retroactivity "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing."⁸ It also examines the magnitude of the change and the impact of implementing retroactivity on the criminal justice system. These three considerations are not exclusive, as evidenced by the Commission's concern for fundamental fairness in its crack based-retroactivity decisions. In 2010, Congress passed the Fair Sentencing Act and directed the Sentencing Commission to make conforming changes to the guidelines. While the Commission did not cite fundamental fairness in its decision to make those changes retroactive, it noted that "[t]he Fair Sentencing Act of 2010 specified in its statutory text that its purpose was to 'restore fairness to Federal cocaine sentencing' and provide 'cocaine sentencing disparity reduction.'"⁹ Two commissioners, Ketanji Brown Jackson and William B. Carr, Jr., addressed fundamental fairness in their remarks at the meeting during which the Commission voted to make Amendment 750 retroactive.¹⁰ Fairness was also a big feature of the Commission's promulgation of the so-called "crack minus two" amendment and its decision to make that amendment retroactive.¹¹

But fundamental fairness is not a limiting principle. This is evident from the fact that it was not cited by the Commission as a reason for the largest retroactivity decision in the Commission's history: the so-called drugs-minus-two amendment. The reasons for amendment 782, which

⁷ See *supra* n.1 at 4-5.

⁸ USSG §1B1.10, comment. (backg'd.)

⁹ U.S. Sentencing Comm'n, Reader-Friendly Version of Amendment on Retroactivity of Amendment 750 at 2, *citing* 124 Stat. at 2372 (June 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20110630_RF_Amendment_Retro_0.pdf.

¹⁰ U.S. Sentencing Comm'n, Public Meeting Minutes 3, 4 and 8 (June 30, 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting_Minutes.pdf.

¹¹ U.S. Sentencing Comm'n, Transcript of Meeting on Retroactivity *passim* (Dec. 11, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting_Minutes.pdf.

reduced drug guidelines by two levels, were “to reflect the Commission's determination that setting the base offense levels above mandatory minimum penalties is no longer necessary and that a reduction would be an appropriate step toward alleviating the overcapacity of the federal prisons.”¹² The reasons for amendment did not cite fundamental fairness. Indeed, at the hearing proceeding the Commission’s decision, then-Commissioner Ketanji Brown Jackson expressed skepticism that retroactivity was in part intended to correct a fundamental unfairness.¹³

(3) It would be fundamentally unfair to allow the date an unjust sentence was imposed to dictate whether it should be continued.

FAMM believes that even though fundamental fairness is not a necessary consideration, it is nonetheless met here. Leaving behind more than 18,000 people to serve months or years more in prison than the Commission has deemed sufficient to comply with § 3553 (a)(2) is fundamentally unfair. In the sentencing realm, the measure of justice is whether the punishment fulfills the purposes of punishment. Courts are commanded to impose a sentence that is sufficient but no longer than necessary to meet those purposes. Once the Commission has realized that the punishment is longer than necessary to meet those purposes, it is obliged to address the delta. The Commission has done so here. To deny retroactive application to people serving such sentences, leaving them to endure incarceration the Commission has determined is greater than necessary would be fundamentally unfair.

We are reminded of the analysis Judge Irene M. Keeley, then Chair of the Criminal Law Committee, applied when announcing the Committee’s support for retroactivity of Amendment 782 reducing all drug sentences by two levels. “Here, the driving factor for the Committee’s decision was fundamental fairness. We do not believe that the date a sentence was imposed should dictate the length of imprisonment. Rather, it should be the defendant’s conduct and characteristics that drive the sentence whenever possible.”¹⁴

Her insight applies with equal force here. It would be fundamentally unfair to deny access to retroactive relief to the many people whose incarceration was enhanced by status points or whose sentence were too long despite their lack of criminal history, while providing their similarly

¹² U.S. Sentencing Comm’n, Amendment to the Sentencing Guidelines, Reader-Friendly Version 1 (July 18, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782_0.pdf.

¹³ U.S. Sentencing Comm’n, Transcript of Public Hearing on Retroactivity of the 2014 Drug Amendment, 252-253 (June 10, 2014), https://www.ussc.gov/sites/default/files/transcript_1.pdf (asking “We’ve heard a lot about fairness, the moral imperative, et cetera, et cetera. And, I have to say that I saw that very clearly in the crack cocaine retroactivity. Here it’s not as clear. And I’m wondering is crack retroactivity a different animal or not?”).

¹⁴ *Id.* at 20 (Remarks of Judge Irene M. Keeley, Chair, Criminal Law Committee), https://www.ussc.gov/sites/default/files/transcript_1.pdf.

situated but not yet sentenced cohorts the benefits at sentencing. Courts can use conduct and characteristics to determine whether an incarcerated individual deserves relief, rather than letting the calendar dictate the sentence.

(4) Fundamental fairness requires retroactivity to correct for glaring racial and ethnic disparities in the use of status points and treatment of defendants with zero points.

The fact that amendments to the guidelines reducing crack cocaine sentences addressed disparities that were widely known and that had long undermined public confidence in the fairness of the criminal justice system is not an argument against addressing disparities in criminal history scoring.¹⁵ The Commission’s retroactivity analysis exposes demographic disparities in the provision of status points and the treatment of zero point defendants. That disparate treatment is no less egregious because it has only recently been brought to light by this Commission. A hidden disparity is still a disparity. Now known, it should be addressed.

In this case, status points are disproportionately assessed on people of color. Demographic data on incarcerated people who would be eligible for status point retroactivity reveal that 4,941 or 43 percent are Black and 3,194 or almost 28 percent are Hispanic.¹⁶ Of defendants assessed status points between fiscal years 2017 and 2021, 32.7 percent were Black,¹⁷ but only 20.5 percent of all defendants sentenced in that period were Black.¹⁸ Similarly, demographic data demonstrate that 6,035 eligible people of color make up 83.1 percent of individuals eligible for the zero-point adjustment; nearly 70 percent are Hispanic.¹⁹

FAMM appreciates that the Commission declined to make the recency amendments retroactive in 2010.²⁰ Several commissioners explained their view that the burden of applying the amendment retroactively was not outweighed by the need to advance fundamental fairness. They also addressed public safety concerns, given the seriousness of offenses and criminal history

¹⁵ *Supra* n. 1 at 9.

¹⁶ U.S. Sentencing Comm’n, Memorandum to Chair Reeves and Commissioners from Office of Research and Data, Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment, Tbl. 3A (May 15, 2023), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2023-criminal-history-amendment/202305-Crim-Hist-Amdt-Retro.pdf>.

¹⁷ U.S. Sentencing Comm’n, *Revisiting Status Points* 7, Tbl. 1 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.

¹⁸ U.S. Sentencing Comm’n, *Interactive Data Analyzer* (select “Sentencing Outcomes” from the top bar; select “2017” through “2021” in the “Fiscal Year” dropdown), <https://ida.ussc.gov/analytics/saw.dll?Dashboard>.

¹⁹ *Supra* n. 16 at 21, Tbl. 3A.

²⁰ U.S. Sentencing Comm’n, Public Meeting Minutes 2-3 (Sept. 16, 2010), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100916/20100916_Minutes.pdf.

scores of some of the potential beneficiaries. We continue to believe that recency retroactivity was wrongly decided but also recognize that the commissioners had been laser focused for years on the well-publicized and criticized crack-powder disparity. Lost in the discussion about recency at the Commission and in commentary it received, including from FAMM, was the recognition that the majority of people, 80 percent, who would have been eligible were people of color.²¹ In the 13 years since that decision, we have learned more about structural disparities in sentencing and more attention is paid to significant demographic disparities in sentencing outcomes. Fundamental fairness is grounded in eliminating instances where systemic disparities in policing and prosecution practices are reflected in sentencing outcomes without a countervailing purpose. We know more now and knowing that, are obliged to act.

The Commission’s longstanding commitment to identifying disparate outcomes and amending guidelines that result in disparity grounded in race or ethnicity when such treatment does not advance the purposes of punishment should compel this decision. The Commission should act today, as it did not act in 2010, to recognize and correct for disparate outcomes.

Administrability

As we said in our comment letter, FAMM defers to system actors who have served on the front lines of retroactivity on the administrability consideration. That said, a few observations seem in order here.

In its comment, the Criminal Division of the Department of Justice explained it believes that “more than half of all individuals housed in the Bureau of Prisons,” in excess of 85,000 people, will file motions seeking retroactivity of Part A or B when only 18,767 would benefit.²² The sheer number of applicants would dwarf the relatively small number of eligible applicants. The Criminal Division explained that “[e]xperience teaches as much”

But in fact nothing in the history of retroactivity supports the assertion that tens of thousands of ineligible people will apply for retroactivity. For example, the 2014 reduction by two levels in the drug table prompted nearly 51,000 people to apply for retroactive consideration and of those 12,000 were found ineligible.²³ The Department at that time had predicted 60,000 people would apply for relief and urged the Commission to limit drug retroactivity to low level, non-violent

²¹ U.S. Sentencing Comm’n, Memorandum from Office of Research and Data to Chair Sessions et al. 12, Tbl. 4 (September 1, 2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/recency/20100901_Recency_Retro.pdf.

²² Letter from Jonathan J. Wroblewski to The Hon. Carlton W. Reeves 3 (June 22, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=33.

²³ U.S. Sentencing Comm’n, 2014 Drug Guidelines Amendment Retroactivity Data Report Tbls. 1 & 8 (May 2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf>.

drug defendants with limited criminal history.²⁴ While not insignificant, the number of people who failed to qualify made up 23 percent of all applicants. But the author relies on this outcome to support the assertion that only 22 percent of applicants would even be eligible to apply for the relief, while courts would have to deal with 66,233 ineligible individuals.

Similarly, of the 13,990 people who applied for relief under Amendment 759, making the changes directed by the Fair Sentencing Act retroactive, just over 5,000 or 35 percent were deemed ineligible.²⁵ And, 7,795 people were deemed ineligible to benefit from Amendment 706 of the 25,736 who applied, or 30 percent.²⁶

Recent experience during the COVID pandemic should also provide some comfort to those concerned with an onslaught of meritless motions. Between FY 2020 and 2022 a total of 27,789 people sought a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A).²⁷ In 2020, the federal prison population was 155,562.²⁸ The fear of contracting and being sickened by or even dying from COVID outbreaks in federal prison was of the utmost concern to the people incarcerated in facilities and compassionate release was a well-known option among the population. Even when facing the emergency of a pandemic, the filing rates for compassionate release were nowhere near 50 percent and did not reach even 20 percent.

Fielding motions from 50 percent of the federal prison population would indeed be a big chore, but there is no evidence in past practice to support such an alarming prospect.

While several commenters expressed concerns related to timing and resources about the difficulty of handling a large number of requests for retroactivity,²⁹ suggestions were offered that would mitigate the impact. The Probation Officers Advisory Group made several suggestions to ease the process, including by providing lists of potentially eligible people and

²⁴ Statement of Sally Quillian Yates for Hearing on Retroactive Application of the Pending Drug Guideline Amendment 7 (June 10, 2014), https://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_DOJ.pdf.

²⁵ U.S. Sentencing Comm'n, Final Crack Retroactivity Data Report, Fair Sentencing Act Tbls.1 & 9 (Dec. 2014) https://www.usc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.

²⁶ *Supra* n. 9 at Tbls. 1 & 9.

²⁷ U.S. Sentencing Comm'n, Compassionate Release Data Report Fiscal Years 2020 to 2022 Tbl. 1 (Dec. 2022), <https://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

²⁸ Federal Bureau of Prisons, Past Inmate Population Totals, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited July 10, 2023).

²⁹ *Supra* n. 1; *see also, Supra* n. 22; *see also* Letter from Probation Officer's Advisory Group to the Hon. Carlton W. Reeves (June 23, 2023), https://www.usc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf.

their discharge dates to help district establish priorities.³⁰ The Federal Public and Community Defenders reminded commissioners about the collaborative processes the parties adopted for earlier retroactivity efforts.³¹ Those working groups could be called together again to ensure the orderly investigation into, filing, and consideration of motions.

Public Safety

The Criminal Division of the Department of Justice urges this Commission to reject retroactivity due to public safety concerns. Pointing out that Part A would include “serious or violent” offenders, the Department would deny retroactivity to all individuals who meet the status points criteria. And, with respect to Part B, the Department urges the Commission to deny all eligible first offenders because “many serious offenders” would be eligible, and because, due to the public safety exclusions many are white collar offenders and their release would lead to inequitable results.³² (Presumably this latter point is a critique aimed at the Commission’s careful work to calibrate this adjustment precisely to alleviate public safety concerns).

First, such arguments were made by the Department but rejected by the Commission in the amendment cycle. Failing to consider those individuals whose sentences were inflated using status points that the Commission has found fail to advance the purposes of punishment while eliminating or reducing those enhancements for everyone going forward is not only unjust, it is contrary to reason. It ignores the fact that thousands of people will serve longer sentences not because they pose a greater threat of recidivism, but due simply to the accident of timing. They pose no greater threat to public safety than their post-November 1 cohorts that the Commission has determined should receive shorter sentences.

Second, the Commission has repeatedly rejected such arguments from the Criminal Division in prior retroactivity cycles. For example, in 2007, the Department opposed retroactivity of the amendment lowering cocaine base offenses by two levels, arguing that it would result in the release of “serious and often violent offenders, who are more likely to recidivate than other offenders”³³ The Commission nonetheless made the change retroactive. In 2011, the

³⁰ Letter from Probation Officer’s Advisory Group to the Hon. Carlton W. Reeves 1-2 (June 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=68.

³¹ Letter from Michael Caruso to Hon. Carlton W. Reeves 8 (June 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=43.

³² *Supra* n. 22 at 6.

³³ Letter from Alice Fisher to The Hon. Ricardo H. Hinojosa 6 (Nov. 1, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_001.pdf; *See also*, Statement of Gretchen C.F. Schappert (Nov. 13, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20071113/Shappert_Testimony.pdf.

Department supported retroactivity of the amendments adopted pursuant to the Fair Sentencing Act, but urged that retroactivity be limited to those without a weapons' enhancement and argued that no one in Criminal History Category IV or higher should be eligible based in part on public safety concerns.³⁴ The Commission did not follow this recommendation. And in 2014, the Department urged the Commission to strictly limit retroactivity of the drug amendment, predicting that 60,000 people would apply for relief. It pressed the Commission to grant eligibility only to people in Criminal History Categories I and II who had neither a gun bump nor a conviction under 18 U.S.C. § 924 (c) and who did not have a variety of enhancements, including for aggravated role or obstruction of justice.³⁵ It recognized that the exclusions it proposed were not a "perfect proxy for dangerousness," but argued they were nonetheless reasonable.³⁶ The Commission rejected this surgical approach in favor of complete retroactivity. It should reject the less than surgical approach urged on it here by the Criminal Division.

Third, the Commission built public safety guardrails around the criminal history amendments by retaining a status point for people with seven or more criminal history points and excluding a rather large set of defendants from the zero point adjustment. And, courts are obliged to assess every eligible individual using the public safety screen contained in 18 U.S.C. § 3553(a) and apply a special public safety screen in determining whether to reduce a sentence and if so by how much.³⁷ The Division urges the Commission to nonetheless, ban all remaining otherwise eligible individuals, despite these targeted measures. FAMM believes this position is wrong because it would deny every worthy movant, including those the court would find no threat to reoffend, any opportunity to make the case that their sentence was unfairly enhanced by factors the Commission has abandoned or adjusted for in Parts A and B. We call on the Commission to reject it.

Conclusion

I opened this statement with a quote from a FAMM member. She said: "the best way to predict the future is to create it." Her words helped me think about everyone's role in constructing the criminal justice system we want to see. The Commission's role is unique. It can not only correct for unjust sentences going forward, it can also predict a better and more just future for people trapped in unjust sentences today. I urge you to do so by making Parts A and B retroactive.

³⁴ Statement of Stephanie M. Rose for Hearing on Retroactive Application of the Proposed Amendment Implementing the Fair Sentencing Act of 2010 at 8-9 (June 1, 2011), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Stephanie_Rose.pdf.

³⁵ *Supra* n. 24 at 7.

³⁶ *Id.* at 9.

³⁷ U.S.S.G. §1B1.10, comment. (n. 1.B.ii).