U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 27, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1] This letter addresses the proposals and issues for comment regarding Firearms Offenses, First Step Act—Drug Offenses, Circuit Conflicts, Crime Legislation, Career Offender, Criminal History, Alternatives to Incarceration Programs, Fake Pills, and Miscellaneous and Technical Matters. We submitted a letter on the remaining matters on February 15, 2023. This letter also serves as the Department's written testimony for the Commission's upcoming hearing on March 7 and 8, 2023.

We look forward to the hearing and to working with you and the other commissioners during the remainder of the amendment year on all of the published amendment proposals.

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[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts,* 88 Fed. Reg. 7180 (Feb. 2, 2023).

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6. Criminal History

A. Status Points

The Commission has proposed three options for reducing the effect of "status points" on the Guidelines criminal history score. Status points—adding two points to the criminal history score for offenses committed while under criminal justice sentence—have been part of the Guidelines since they were first issued in 1987, and over the past five years, the provision has applied to 37.5 percent of all offenders.

The Department appreciates the concerns underlying the Commission's proposal. Because we wish to further understand the Commission's analysis of status points' predictive value for recidivism to justify such a significant amendment, and because we are concerned that the proposal gives insufficient consideration to the just punishment goal of the criminal history score, we request that the Commission defer these changes at this stage.

1. The Proposed Amendment Lacks Sufficient Empirical Bases

The proposed amendment appears to be based on a June 2022 Commission study examining the relationship between status points and recidivism in which the Commission suggests that "status points add little to the overall predictive value associated with the criminal history score."[55] We request additional time to consider the methodology and conclusions of that study before the Commission makes the significant proposed changes based on it.

We note first that the data set used to conduct the study is not publicly available and there has been no independent analysis of the data. Given the study's importance for this significant policy shift, we believe some independent analysis is critical.

Second, we believe additional analysis is necessary before implementation of the proposed amendment. The synopsis for the proposed amendment notes that status points add "little to the overall predictive value" of recidivism; however, a model that predicts recidivism is methodologically very different from a model that seeks to analyze how status points causally *affect* recidivism. The latter requires experimental or quasi-experimental techniques that control for underlying differences between individuals, such as in the "doubly robust estimation"

[55] Proposed Amendment on Criminal History (citing United States Sentencing Commission, Revisiting Status Points (2022), *available at* https://www.ussc.gov/research/research-reports/revisiting-status-points).

analysis that the Commission conducted in a separate June 2022 study on the relationship between the length of incarceration and recidivism.[56] That recidivism study used propensity score matching, a widely-accepted technique that compares outcomes between similar individuals to make reliable causal inferences. By contrast, the study on status points did not use any quasi-experimental methods to identify underlying differences between those who received, and did not receive, status points. Nor does the study appear to have taken a standard recidivism approach (such as the survival analysis or time to failure model) to examine the hazards of failure or the likelihood and timing of recidivism—instead, it employs a simple binary yes/no analysis of recidivism. We believe that a more rigorous recidivism analysis which accounts for underlying differences between status and non-status offenders, and which considers the time to failure, demographic variables, offense levels, types of offenses, and other variables that may contribute to recidivism, would greatly enhance the reliability of the Commission's study and proposals.[57]

Third, we believe the recidivism rates of offenders released in 2010 warrant deeper scrutiny. *Revisiting Status Points* appears to analyze the recidivism data by individual criminal history score without further comparative analyses by total offense levels, Guidelines range, actual sentence imposed, nature of the offense, or the Criminal History Category that resulted from the application of status points.[58] Additionally, Figure 8 of the study shows that for offenders with Criminal History Scores of 1 through 4, the differences in rearrest rates between status and non-status offenders were statistically significant to some degree.[59] This group comprises a large portion of the offender pool. According to the Commission's 2021 data, 14,361 offenders had scores of 1 through 4, representing 27% of all offenders sentenced in 2021 and 40% of all offenders with at least one point.[60] In other words, the Commission's own analysis suggests that for 40% of all re-offenders, status points may have a meaningful relationship to recidivism.

For the above reasons, we recommend that the Commission conduct additional studies on how effectively the status points provision functions within §4A1.1 to advance the recidivism

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[56] United States Sentencing Commission, Length of Incarceration and Recidivism, at 16 (2022), *available at* https://www.ussc.gov/research/research-reports/length-incarceration-and-recidivism.

[57] For example, the Department of Justice's Bureau of Justice Statistics (BJS) has produced reports on recidivism of state offenders in 1983, 1994, 2005, 2008, and 2012. Also, in 2021, the BJS released ten-year (2008-2018) and five-year (2012-2017) follow-up studies of state prisoners released in 2008 and 2012. *See* Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018) (2021), *available at* https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-24-states-2008-10-year-follow-period-2008-2018; Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012–2017) (2021), *available at* https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-34-states-2012-5-year-follow-period-2012-2017. Both studies examined recidivism patterns by demographic characteristics, commitment offense, and prior criminal history. These studies have aided the public and state policy makers to understand reliably, among other things, the relationship between specific offender characteristics and recidivism. Additional evaluations of federal offenders' recidivism data in conjunction with the BJS's studies will enhance the Commission's and the public's understanding and deepen confidence in proposed policy changes.

[58] *See* Revisiting Status Points, Figure 8 and Appendix B.

[59] The differences in rearrest rates were evaluated at the 1% level of significance. Note that at the 5% level of significance differences in rearrest rates were also statistically significant between status and non-status offenders who had a criminal history score of 5. *See* Revisiting Status Points, Figure 8 & Appendix B (Table B-2).

[60] Revisiting Status Points, Figure 8.

reduction goal of sentencing. Such studies should be conducted with a rigorous methodology that investigates the causal, not just predictive, impact of status points on recidivism.

2. The Proposed Amendment Places a Disproportionate Emphasis on the Crime Control Goal of Sentencing

The Department also believes the proposal unduly minimizes other purposes of sentencing, especially the just punishment goal. Since the inaugural 1987 edition of the Guidelines Manual, the provisions in §4A1.1 shared the twin goals of recidivism reduction and just punishment for the committed crimes. In a report accompanying the 1987 Guidelines, the Commission declared, "[b]ecause the elements selected are compatible both with a just punishment and crime control approach, the conflict that otherwise might exist between these two purposes of sentencing is diminished."[61]

Any proposed amendment here should meaningfully address both goals, as an offender's continued engagement in crime is probative of the need for deterrence, protection of the public, and just punishment. Even if additional studies show that status points have little predictive value for recidivism, that conclusion should not necessarily lead to elimination or weakening of the status points provision. While further study may lend support to the Commission's proposal, the Commission should also consider whether the just punishment goal, as well as the other purposes of sentencing articulated in 18 U.S.C. § 3553(a), justifies retaining the status points provision in the Guidelines.

3. If the Commission Adopts One of the Proposed Options, the Commission Should Adopt Option 1—Retention of the Current Provision with a New Downward Departure Provision

Among the three options in the proposed amendment, the Department believes retention of the current status points provision along with a new downward departure provision in the application notes is the most appropriate. We view this option as an extension of the existing provision in §4A1.3(b) that a downward departure may be warranted after an individualized assessment of each case. If, however, the Commission adopts this proposal, we recommend that the first sentence of the proposed paragraph end with "or the likelihood that the defendant will commit other crimes," consistent with the language of the Guidelines primary criminal history downward departure provision in §4A1.3(b).

The proposed removal of status points in Option 3 stands in significant tension with the approach taken by Congress and other provisions of the Guidelines toward offenses committed while under criminal justice supervision and court order—18 U.S.C. § 3147 (offense committed while on release), §3C1.3 (commission of offense while on release), §4A1.3, cmt. n.2(A)(iv) (upward departure for offense committed while on bail or pretrial release for another serious offense), and §2B1.1(b)(9) (fraud in contravention of prior judicial order). As Application Note 8(C) to §2B1.1(b)(9) states, "[a] defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment." Indeed, § 3147, §3C1.3, §4A1.3, and §2B1.1(b)(9) embody Congress's

[61] Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987) at 41-42.

and the Commission's policy of heightening penalties for offenses committed while under court order and supervision and for offenses committed while under any criminal justice sentence, in disregard for judicial authority. The placement of the commission of the instant offense while under criminal justice sentence as a mere example in application notes will lessen accountability for such conduct.

At minimum, if Option 3 is adopted, the Commission should preserve status points at least for recent and violent prior offenses. The Commission's 2021 study on recidivism of federal offenders shows that nearly one-half (49.3%) were rearrested within eight years of release, and 35.4% recidivated within three years of release[62]—the typical length of time of supervised release for defendants released from prison. Thus, for specific deterrence purposes, the definition of "recent" for status points purposes should be at least three years. The 2021 recidivism study also shows that those sentenced for a federal firearms offense had the highest rearrest rate, at 70.6 percent, followed by those sentenced for robbery, 63.2%, and that those who were released following sentencing for a violent offense were more likely to be rearrested than non-violent offenders, at 59.9 percent compared to 48.2 percent.[63] [64]

B. Zero-Point Offenders

The Commission has proposed adding a new criminal history category for those offenders with no criminal history points. Since the Guidelines Manual was first issued in 1987, there have been six criminal history categories. The proposed amendment would provide for a one- or two-level reduction for offenders who fall within the new category. The Commission has proposed three options, under any of which, the number of cases affected would be significant and far-reaching. In Fiscal Year 2021, 17,491 federal offenders had zero criminal history points. This amounts to 32.6% of all federal offenders for that year. According to the Commission's own data, the proposed amendments would have affected between approximately 13,203 and 17,491 defendants, depending on the option ultimately selected. As a result, the proposed amendment is one of the most significant under consideration.

While the Department appreciates the Commission's interest in leniency for first-time offenders, the proposal would sweep in defendants who committed serious offenses, including hate-based or civil rights offenses, public corruption offenses, national security offenses, and serious economic and corporate crimes. The proposed amendment would also offset in part the Commission's proposed amendment to raise the base offense level for §2A2.3, which covers sexual abuse of a ward. As the Department has explained in previous submissions, defendants sentenced under these Guidelines—who are largely BOP employees or other federal law enforcement officers—typically do not have a prior criminal history, and the Commission's proposal targeting zero-point offenders would therefore cover them.

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[62] *Id.* at 4.

[63] *Id.* at 32.

[64] If the Commission adopts Option 3, it should make an additional conforming change to Application Note 8(C) of §2B1.1. That application note references the status points provision as follows: "This enhancement does not apply if the same conduct resulted in an enhancement pursuant to . . . a violation of probation addressed in §4A1.1 (Criminal History Category))."

District courts already can—and regularly do—vary downward for zero-point defendants, and the Department will continue to support such departures in appropriate cases. The proposed amendments would sweep too broadly and introduce unnecessary complexity and litigation. The Department therefore opposes the proposed amendment under any of the proposed options.

1. The Proposed Amendment Would Add Unnecessary Complexity and Litigation

The proposed amendment appears to be based on a concern that the Guidelines' range for offenders with limited or no criminal history is too high *and* that these offenders are being sentenced to terms of imprisonment greater than necessary. An examination of the Commission's data shows otherwise. The current Guidelines and statutory sentencing law already provide mechanisms—downward departures and variances—that sentencing courts regularly use to provide the reductions intended by the proposed amendment.

The Commission's data shows that in Fiscal Year 2021, the average low end of the Guidelines range for defendants with zero criminal history points and zero prior convictions called for 40 months of imprisonment.[65] The Commission's data also shows that the actual average sentence imposed on these same offenders is 29 months,[66] which equates to an offense level of 18. Thus, district courts are, on average, effectively already departing three levels for the zero-point offenders. This equates to an eleven-month reduction or roughly 27%. In fact, according to the Commission's data for Fiscal Year 2021, only 38% of offenders with zero prior convictions were sentenced within the recommended Guidelines range. Moreover, many of these within-Guidelines range zero-point offenders are in Zones A and B and thus are already eligible for a probationary sentence. Thus, the vast majority of the offenders targeted by the proposal are already receiving below Guidelines sentences or are already eligible for probation.

All of the options under consideration, by contrast, would add a significant layer of complexity and litigation to the sentencing process. Under all options, the Commission would adopt up to six different exclusionary criteria for the parties to debate whenever a defendant has zero criminal history points. Each would lead to litigation based on both legal issues and factual challenges. For example, one of the proposed exclusionary criteria relates to the financial hardship caused by the offense. In 2015, §2B1.1(b)(2)(A)(iii) was amended to include, for the first time, the same language: "caused substantial financial hardship." Since then—just over seven years—there have been over 400 published appellate opinions that discuss or address this language. Similarly, objections to and litigation surrounding the application of leadership role enhancements are everyday occurrences in federal courts. The same is true for use of a dangerous weapon when, for example, a firearm is present with or possessed by the offender but not fired. In short, given the other avenues courts can use—and are using—to account for offender characteristics, the costs of this proposed amendment will outweigh any sentencing benefit.

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[65] U.S. Sentencing Commission, Public Data Presentation for Proposed Criminal History Amendment, at 41, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230112/20230120_DB_Criminal-History.pdf (document accompanying the Commission's video presentation of proposed 2023 criminal history amendments).

[66] *Id.*

2. The Proposed Amendments Will Adversely Affect Prosecution of Crimes for Which General Deterrence is a Primary Factor

An across-the-board departure for those with zero criminal history points may reduce general deterrence in certain kinds of prosecutions in which general deterrence is a primary factor, including economic crimes. The Commission has previously recognized that "the definite prospect of prison, even though the term may be short, will serve as a significant deterrent in economic crime cases, particularly when compared with pre-guidelines practice where probation, not prison, was the norm." USSG Ch. 1 Pt. A(4)(d) (Probation and Split Sentences). Courts have agreed. *See United States v. Engle*, 592 F.3d 495, 502 (4th Cir. 2010) ("Given the nature and number of tax evasion offenses as compared to the relatively infrequent prosecution of those offenses, we believe that the Commission's focus on incarceration as a means of third-party deterrence is wise.").

History shows that those convicted of economic crimes tend to have little to no criminal history. Thus, the proposed amendments will result in lower Guidelines ranges and thus potentially lower sentences for those offenders by disregarding the size or scope of the crime—thus jettisoning the Commission's decades-long determination that certain fraud crimes warrant serious treatment and its recognition that general deterrence is critical given the sheer breadth of the potential crime problem.

3. A Two-Level Reduction Conflicts with the Structure of the Guidelines.

The Commission's proposal for a two-level decrease is particularly problematic, given the structure of the Guidelines and the Sentencing Table. As currently constructed, the Sentencing Table typically equates an increase in a criminal history category (such as from Criminal History Category I to II) with a one-level increase in the Guidelines' range. For example, if an offender has a Total Offense Level of 30 and a Criminal History Category of I, the Guidelines' range is 97-121 months. With the same Total Offense Level, but a Criminal History Category of II, the Guidelines range bumps up to 108-135 months. Equally, if the Total Offense Level is increased by one level to 31, with a Criminal History Category of I, the Guidelines range is 108-135 months. In short, a one-level increase in the Total Offense Level is designed to have the same impact as a one category jump in the Criminal History Category. Providing for a two-level decrease if an offender falls within a newly created Criminal History Category 0 is inconsistent with the Sentencing Table design. A one-level decrease is the only structurally sound one if the proposed new category is adopted.

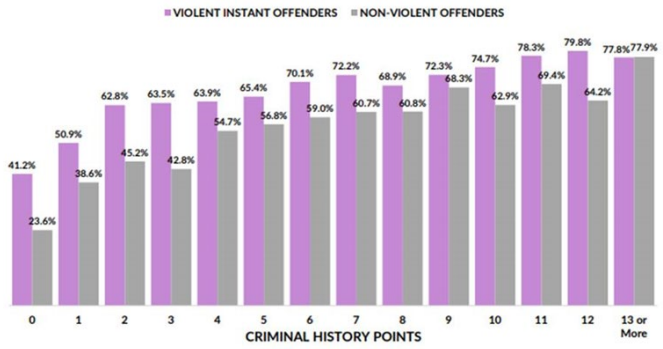
4. If a Decrease is to be Granted, it Should be Limited to "True Zeros" with an Expanded Set of Exclusionary Criteria

As the Commission's own proposal (under any option) acknowledges, and as judges across the country have shown, a departure is not warranted for every offender who has a zero criminal history score. Instead, if the Commission is to enact any of the options, it should do so for a smaller subset of offenders with zero criminal history points.

If the Commission seeks to enact the proposed amendment, the Department recommends limiting application to those who are "true zeros" in terms of criminal history scores (as proposed in Option 1) and using an expanded set of exclusionary criteria. If the Commission uses an approach that awards the reduction to anyone with zero points, regardless of the number of prior convictions, hundreds of convicted violent criminals will benefit. For example, according to the Commission's own data, in 2021, of those with zero criminal history points, there were 11 convicted murderers, 119 offenders with sexual assault convictions, 53 offenders convicted of robberies, and 454 offenders with convictions for assault. But, because of the timing of these convictions, those prior convictions did not "score" for purposes of criminal history calculations.

Similarly, the Department recommends expanding the exclusionary criteria to include those who have committed violent crimes not captured under the existing proposals—such as federal assault and civil rights offenses, which may be committed through intimidation that does not involve the use of violence or a credible threat of violence; arson, which may be committed without a dangerous weapon; and conspiracy, attempt, and solicitation of homicide and other violent crimes, which are not covered by the proposed criteria—whether as their instant offense of conviction or through prior uncounted criminal history. The Commission's chart below shows a vast disparity in recidivism rates for those who engage in violent crimes, as opposed to non-violent offenders, even for zero-point defendants. Over 41% of those with zero points who commit a violent crime are rearrested within eight years of release from custody.

Figure 28. Rearrest Rates by Criminal History Points for Violent Instant and Non-Violent Federal Offenders Released in 2010



The Department also proposes additional exclusionary criteria based on the type of offense of conviction. This includes terrorism offenses, civil rights offenses, hate offenses, and all child sex offenses, including possession of receipt of child pornography and child sexual abuse material trafficking that would not be included in the definition of "covered sex crime." This also includes economic offenses, for which general deterrence is a primary factor.

Finally, the Department urges the Commission to include, in the exclusionary criteria, cases involving vulnerable victims, as defined in §3A1.1(b), and cases involving loss amounts beyond a certain threshold, as determined under §2B1.1 or §2T4.1. There are many cases involving an egregious amount of loss that the offender caused, where the victim is the government alone (*i.e.,* health care fraud cases), meaning that the already proposed exclusionary

criteria regarding the number of victims and the substantial hardship placed upon the victims would not apply. In such cases, given the nature of the offenses—which typically occur over a substantial period of time and cause a significant loss to the U.S. taxpayer—an award of a one-or-two level reduction would be inappropriate.

Alternatively, any case where the total offense level exceeds 30 should be excluded from the reduction.

C. Incorporating 28 U.S.C. § 994(j)

The Commission has also proposed adding new commentary regarding the appropriateness of a non-incarceration sentence for certain zero-point offenders. This proposal is based on language taken from 28 U.S.C. § 994(j), which directs the Commission to "[e]nsure the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." The Department opposes this proposed amendment because the Guidelines already reflect the appropriateness of a non-incarceration sentence for non-serious offenses through the operation of the sentencing table, particularly with respect to sentencing zones and the total offense levels.

Sections 5B1.1 and 5C1.1 already make clear when a non-incarceration sentence is authorized and appropriate. This is done through reference to the zones set forth in the sentencing table (Zones A, B, C, and D). For example, §5C1.1(b) states that "if the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required." Similarly, Guidelines exist for the very purpose of determining an offense level that reflects the overall seriousness of the offense. As the Supreme Court and numerous other courts have stated "[g]uideline offense levels are designed to reflect the seriousness of the offense for which a convicted criminal is being sentenced." *United States v. Savin*, 349 F.3d 27, 37 (2d Cir. 2003); *see also Nichols v. United States*, 511 U.S. 738, 740 n.3 (1994). Higher offense levels equate with more serious offenses, while lower scores equate with less serious offenses. The total offense level, when combined with a criminal history category, provides for placement on the sentencing table within one of the zones.

The proposal also does not specify how to discern which offenses are "otherwise serious."[67] Without clearer guidance, this provision could be misconstrued as a generally applicable override of the Guidelines. Some judges may use the total offense level as a guide. Others will use their own methodology. This will increase disparity and undermine the very purposes of the Commission, as articulated in the Sentencing Reform Act.

The proposed amendment is also at odds with the Guidelines Manual's ordinary approach. The Guidelines generally do not dictate the type of sentence that should be imposed. Instead, they provide the court with the appropriate considerations and suggested parameters. One of the Commission's proposed options, however, explicitly instructs the court when a

[67] Notably, the Commission has previously recognized that certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, are and, thus should be considered, "otherwise serious offense[s] under Section 994(j)." USSG Ch. 1 Pt. A(4)(d) (Probation and Split Sentences).

sentence of non-incarceration is appropriate. We do not believe this is what § 994(j) intended. Section 994(j) instructs the Commission to "[e]nsure that the guidelines *reflect*" the appropriateness of such a sentence (emphasis added). The Commission can achieve this end through appropriate construction and application of the guidelines leading to a recommended Guidelines range.

Even if the Commission adopts the "generally appropriate" language for zero-point offenders in Zones A and B, the Department opposes the "generally appropriate" or "may be considered" language for zero-point offenders who are in Zones C and D. The Department would be happy to provide the Commission with the many examples of zero-point defendants in Zones C and D who meet the more restrictive eligibility criteria under Option 1 but have committed significant economic, public corruption, drug trafficking, racketeering, firearms, national security, and other serious offenses rendering a non-incarceration sentence inappropriate.

D. Impact of Simple Possession of Marijuana Offenses

The Department supports the proposed amendment to insert, in Application Note 3 to §4A1.3, "criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person," as an additional example when a downward departure may be warranted. The President has made clear his views that "no one should be in jail just for using or possessing marijuana," and on October 6, 2022, he issued a pardon proclamation meant to "help relieve the collateral consequences arising from these convictions."[68] The Commission's proposal would accord with that sentiment, and also account for the twenty-one states and territories that have removed legal prohibitions, including criminal and civil penalties, for the possession of small quantities of marijuana for recreational use.

The Commission has requested comments about whether it should provide more guidance on this proposed departure. To provide guidance on determining "personal use, without an intent to sell or distribute it to another person," we recommend adding the following sentence to proposed Application Note 3(A)(ii) (similar to Application Note 2(C)'s guidance for determining upward departures for tribal convictions): "In determining whether, or to what extent, a downward departure based on a possession of marihuana for personal use is appropriate, the court shall consider the factors set forth in §4A1.3(a) and, in addition, may consider relevant factors such as the following: the nature of the original charges, the facts surrounding the offense (including the quantity of marihuana possessed, the manner in which the marihuana was packaged, the presence of large quantities of cash, the presence of drug ledgers, the possession of firearms, and other evidence of drug trafficking activity), whether the defendant's conviction was the result of a plea agreement that involved the dismissal of drug trafficking charges, and whether the offense was subsequently pardoned."

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[68] Statement from President Biden on Marijuana Reform (October 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together.

Sincerely,

Jonathan J. Wroblewski

Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel