Last Prisoner Project Comment on United States Sentencing Commission’s Proposed Amendment Relating to Criminal History and the Impact of Simple Marijuana Possession Offenses

The Last Prisoner Project (“LPP”) submits the following comments to the United States Sentencing Commission (“the Commission” or “USSC”) in response to the Commission’s January 12, 2023 notice of proposed amendments. Specifically, LPP is addressing Part C of Amendment #7, which concerns the impact simple possession of marijuana offenses have on criminal histories.

LPP commends the Commission for taking steps to better reflect the current legal and policy landscape surrounding cannabis activity in the United States. According to the Commission’s research, despite twenty-one states having legalized marijuana for adult use, simple possession of marijuana offenses still result in criminal history points being added to sentencing calculations. This policy leads to longer sentences for thousands of Americans each year.1 As most jurisdictions, including the federal government, are moving away from criminalizing marijuana, LPP supports the Commission’s proposal to exclude marijuana offenses from criminal history score sentencing calculations. Furthermore, given the growing momentum behind cannabis legalization, LPP urges the Commission to consider implementing additional reforms to federal sentencing guidelines for cannabis crimes.

Sentencing Guidelines Should Reflect Current Notions of Criminality

A seismic shift in attitudes and laws in the United States has thoroughly changed the way Americans approach the issue of marijuana production, sales, and consumption.2 These shifting societal sentiments have resulted in a “green rush” that’s seen countless individuals, corporations, and state governments

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2 See Ted Van Green, “Americans overwhelmingly say marijuana should be legal for medical or recreational use,” Pew Research Center (Nov. 22, 2022), https://www.pewresearch.org/fact-tank/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/ (citing a Pew Research Center survey finding that “the overwhelming share of U.S. adults (88%) say either that marijuana should be legal for medical and recreational use by adults (59%) or that it should be legal for medical use only (30%) and just one-in-ten (10%) say marijuana use should not be legal”).
profiting from activity that the federal government continues to consider criminal.3

The U.S. cannabis market was valued at $13.2 billion in 2022, and the industry is expected to expand at a compound annual growth rate of 14.2 percent through 2030.4 The growth of the sector has proved to be a boon for governmental coffers, with California alone having netted $4.6 billion in cannabis tax revenues since 2018.5 All the while, researchers estimate that up to 40,000 people continue to languish behind bars for having engaged in the type of cannabis-related conduct that much of the nation has seen fit to decriminalize, legalize, and tax.6 In fact, there are still more arrests for marijuana possession every year than for all violent crimes combined.8

Despite marijuana remaining a Schedule I drug federally, states continue to legalize the substance. Today, only three states have no public cannabis access program.9 Additionally, local, state and federal political leaders are increasingly taking concrete action to mitigate the harms caused by decades of cannabis prohibition. In October of 2022, President Biden pardoned all federal simple marijuana possession offenses and formally encouraged state governors to do the same.10 Officials have followed suit, as evidenced by former Oregon Governor Kate Brown pardoning over 45,000 individuals with marijuana convictions and

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3 Accordingly, it is no surprise that in the decade since Washington and Colorado first legalized cannabis for adult use, nationwide, 21 states plus the District of Columbia and Guam have legalized marijuana for recreational use. See National Conference of State Legislatures Report, State Medical Cannabis Laws (2022), https://www.ncsl.org/health/state-medical-cannabis-laws.
6 See Mark Mauer, Can Marijuana reform end mass incarceration?, The Hill (Aug. 12, 2016), https://thehill.com/blogs/pundits-blog/crime/291298-can-marijuana-reform-end-mass-incarceration/ (Marc Mauer, Executive Director of The Sentencing Project, stating “of the 1.5 million people in state or federal prisons, only about 40,000 are incarcerated for a marijuana offense. The vast majority of this group is behind the walls for selling, not using, the drug, often in large quantities”); Note that more granular data will require additional research. As noted above, prior cannabis offenses have been used to enhance subsequent convictions, which may have resulted in vastly increased terms of imprisonment. Thus, a close analysis of the offenses of conviction and predicate triggers will be necessary to see the extent to which cannabis criminalization is a factor in US state and federal incarceration.
7 This is a dramatic change of course from the cannabis prohibition efforts that began in the early 20th century, first on the state level, and then in 1937 on the federal level with the enactment of the Marihuana Tax Act. Indeed, the stranglehold on use of cannabis was further tightened by the passage in 1970 of the Controlled Substances Act, the primary barrier to even conducting medical research due to cannabis being a “Schedule I” substance, the same category as heroin and a more restricted category than cocaine, a “Schedule II” substance under the Controlled Substances Act; See The Marihuana Tax Act of 1937, Pub. L. 75–238, 50 Stat. 551 (1937); Also see Controlled Substances Act, Pub. L. 91–513, title II, §101, 84 Stat. 1242 (1970).
8 According to the FBI, 545,602 people were arrested for marijuana law violations in 2019– comprising almost half (40%) of all drug arrests in the U.S and 92% of arrests were for simple possession, not for selling or manufacturing. See Emily Earlenbaugh, More People Were Arrested For Cannabis Last Year Than For All Violent Crimes Put Together, According To FBI Data, Forbes (Oct. 6, 2020), https://www.forbes.com/sites/emileyearlenbaugh/2020/10/06/more-people-were-arrested-for-cannabis-last-year-than-.for-all-violent-crimes-put-together-according-to-fbi-data/?sh=277ab91122fc.
9 See supra note 3.
Connecticut Governor Ned Lamont announcing the automatic clearing of over 44,000 cannabis records.\textsuperscript{11}\textsuperscript{12} City officials in places like New Orleans and Birmingham have also taken steps to pardon municipal marijuana possession offenses.\textsuperscript{13} These actions signify that, beyond the shifting legal landscape for cannabis use, public perception of cannabis has also changed. The vast majority of Americans, including the sitting president, no longer feel that cannabis use is something that should continue to be criminalized.\textsuperscript{14}

We have changed our approach to criminalizing cannabis, and thus, the US Sentencing Guidelines must be adjusted to reflect this current climate. Continuing to punish individuals for an activity that is legal for a majority of Americans does not comport with our country’s shared values of justice and fairness. It is only fitting that any marijuana offense, regardless of what jurisdiction it occurred within, should be eliminated from consideration as a factor in calculating an individual’s criminal history score for sentencing purposes.

**Removing Marijuana Offenses from Criminal History Scores Will Result in More Equitable Sentencing**

When one considers the well-documented racial disparities found in the enforcement of cannabis laws,\textsuperscript{15}


it is clear that excluding marijuana offenses from criminal history scores will also result in a more equitable approach to sentencing.

In 2013, a report from the American Civil Liberties Union (the “ACLU”) found that, despite virtually indistinguishable rates of cannabis consumption amongst racial groups, Black residents of the United States were 3.73 times as likely to be arrested for marijuana possession than their white counterparts. A 2020 follow-up to the ACLU report found that, despite several states legalizing or decriminalizing cannabis, these racial disparities remained essentially unchanged. Data indicates that these racial disparities appear to persist in conviction rates and sentencing.

As sentencing guidelines are meant to be considered objectively and reflect an accurate prediction of an individual’s criminality, removing marijuana convictions from individuals’ criminal history scores would be a step toward creating a more equitable sentencing process. In addition, excluding marijuana convictions from consideration altogether is also in line with the current administration’s position on the criminality of cannabis use. As President Biden stated, “sending people to prison for possessing marijuana has upended too many lives and incarcerated people for conduct that many states no longer prohibit.” If permanently enacted, this proposed amendment would help alleviate, or at the very least not further exacerbate, the racial disparities in our criminal legal system.

It’s also worth noting that the availability of avenues through which individuals can clear marijuana

Milwaukee County, Wisconsin District Attorney’s Office reported that Black Wisconsinites were 4.3 times more likely than their white counterparts to be convicted for having marijuana. The worst disparities in Wisconsin are in Ozaukee County, where Black people are 34.9 times more likely to be arrested and Manitowoc County, where Black people are 29.9 times more likely to be arrested. Paul Schwartzman and John D. Harden, D.C. legalized marijuana, but one thing didn’t change: Almost everyone arrested on pot charges is Black, Washington Post (Sep. 15, 2020), https://www.washingtonpost.com/local/legal-issues/dc-marijuana-arrest-legal/2020/09/15/65c20348-d01b-11ea-9038-af089b63ac21_story.html (according to a 2020 analysis by The Washington Post, 89% of the 3,631 marijuana arrests made in the District of Columbia between 2015 and 2019 were of Black people, even though they make up only 45% of the city’s population). Southern Poverty Law Center Report, ALABAMA’S WAR ON MARIJUANA (2018), https://www.splcenter.org/20181018/alabamas-war-marijuana (an analysis of marijuana possession arrest data in Alabama for the years 2012-2016 reported, “Black people were approximately four times as likely as white people to be arrested for marijuana possession (both misdemeanors and felonies) in 2016 – and five times as likely to be arrested for felony possession. These racial disparities exist[ed] despite robust evidence that white and black people use marijuana at roughly the same rate”). Logan Perrone, 2021 Pennsylvania data shows widened racial disparities in marijuana possession arrests: Cumberland County saw the largest disparity, with 18.6 times as many Black people arrested for marijuana possession, FOX 43 News (Jul. 15, 2022), https://www.fox43.com/article/news/crime/2021-pennsylvania-data-shows-widened-racial-disparities-in-marijuana-possession-arrests-county/521-242d35d4-7600-4205-a222-ddec10d170a (data compiled by the Pennsylvania State Police found that, in 2021, Black Pennsylvanians were arrested for marijuana possession at a rate five times higher than white Pennsylvanians in 2021).

18 A 2021 analysis of federal prison population estimated that 60% of approximately 3,016 individuals serving time in federal prison for marijuana offenses were of Hispanic descent, and over the past five years, 67% of individuals receiving prison sentences for marijuana offenses were Hispanic. Recidiviz Report, Ending Federal Prison Sentences for Marijuana Offenses (2021), https://assets.website-files.com/5c7f0484d75a9b3c5df52463/61abf4d3aafed5e6ce64a000_FED_SRA_final_12.2.21.pdf.
19 See White House Briefing Room, Statement from President Biden on Marijuana Reform (2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/#:~:text=As%20often%20said%20during,many%20states%20no%20longer%20prohibit.
possession offenses from their records is highly dependent on the jurisdiction in which the offense took place. As noted above, many executive offices (whether it be the president, state governors, or mayors) have pardoned all simple marijuana possession offenses. In some jurisdictions, like Oregon, that pardon results in automatic record clearance. However, in most jurisdictions, pardoned offenses still appear on an individual’s criminal record, perpetuating barriers to employment, housing, and educational opportunities–to name just a few of the collateral consequences accompanying even a low-level marijuana conviction.

Although several states have established methods for individuals to expunge or remove previous marijuana-related convictions, disparities still exist among those who can access this relief successfully. Clearing one’s record can be overwhelming, especially for individuals lacking a legal background, technical knowledge, or easy access to criminal records and court filings. Eligible individuals with language barriers or illiteracy also struggle to clear their records. Consequently, race and socioeconomic status often determine who can overcome these difficulties and access record clearing and expungement. Unfortunately, most eligible individuals do not complete these record-clearing processes.20

This disparity in accessing record-clearing mechanisms for marijuana offenses is yet another inequality present in the Commission’s current guidelines, which include marijuana possession offenses in criminal history scores. It is unfair that those who, for the reasons named above, could not clear their records successfully are subject to harsher sentencing ranges.

**A Marijuana Conviction is Not a Valid Predictor of Future Criminality.**

The US Sentencing Guidelines Manual states that a “defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.”21 The manual goes on to note that because “[r]epeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation,” an individual’s criminal history must be considered during the sentencing phase “[t]o protect the public from further crimes of the…defendant.”22

In the case of a simple marijuana possession offense, however, there is little correlation between cannabis use and criminality. According to a national study of recidivism, individuals convicted of drug offenses have significantly lower recidivism rates than those convicted of violent or property-related crimes.23 Additionally, a 2020 report authored by the Commission found that individuals convicted of marijuana-related offenses have one of the lowest rates of recidivism when compared to other drug offenses.24 In one of the few available studies on recidivism rates for individuals where drug possession (as opposed to trafficking) was their primary offense, the rate of recidivism was incredibly low as compared to national


22 Id.


In short, as there is no evidence that marijuana possession convictions are valid predictors of future criminal behavior (and thus do not endanger public safety), they should be excluded from individuals’ criminal history score calculations.

Conclusion

Like all components of criminal sentencing, criminal history score calculations should be proportionate to the offense and no greater than necessary to further the goal of public safety.

Additionally, sentencing guidelines should be equitable and structured in a way that works to reduce racial disparities. The amendment proposed by the Commission, which would remove marijuana possession convictions from the criminal history score calculations, moves us closer to this goal.

Given this and the sweeping changes to our nation’s approach to criminalizing cannabis, we urge the Commission to adopt the proposed amendment. In addition, we encourage the Commission to commit to conducting a further review as to how all marijuana convictions (including those beyond simple possession) factor into sentencing. We appreciate the opportunity to comment on this proposal and thank the Commission for its time and consideration.

Respectfully Submitted,

Sarah Gersten
Executive Director and General Counsel
Last Prisoner Project

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