

STATUS POINTS AND  
ZERO-POINT  
OFFENDERS, TSR  
VIOLATIONS &  
RETROACTIVE  
APPLICATION:  
*PRACTICE POINTS &  
HOW-TOS*



NB-Much of this PP was lifted from the USSC National Seminar training materials which were *"produced and published at U.S. taxpayer expense."*

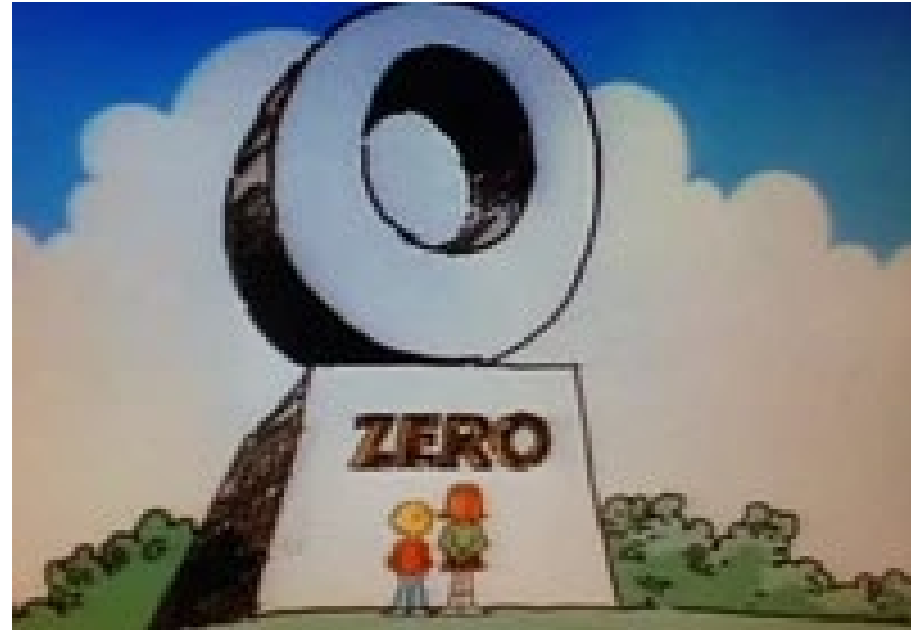
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# Zero Point Offenders

**Promulgated §4C1.1(a)-** Part B of Amendment 821 creates a new §4C1.1 guideline that provides a decrease of 2 offense levels for “Zero-Point Offenders”, defendants with no criminal history points whose offense did not involve specific aggravating factors.



*The Commission’s recidivism studies also found that offenders with zero criminal history points were less likely to be rearrested following their release than other federal offenders. The Commission also observed consistently high departure and variance rate for zero-point offenders. -USSC NATIONAL SEMINAR, 2023: Commission Presentation*

# Does the defendant qualify?

→ ***START WITH THE PSR....***

Criminal History Computation



The defendant has no criminal convictions; therefore, she has zero criminal history points. According to the Sentencing Table (Chapter 5, Part A), 0-1 criminal history point(s) establishes a criminal history category of I.

\*Zero criminal history points doesn't necessarily mean this case is defendant's first arrest or first criminal conviction

# But...does an exclusion apply?

## Specific Offense Characteristics:

If the offense resulted in substantial financial hardship to five or more victims, increase by 4 levels. According to the government, 8 victims in this case suffered financial hardship.... USSG §2B1.1(b)(2)(B).

## §4C1.1(a)(2)–(10)

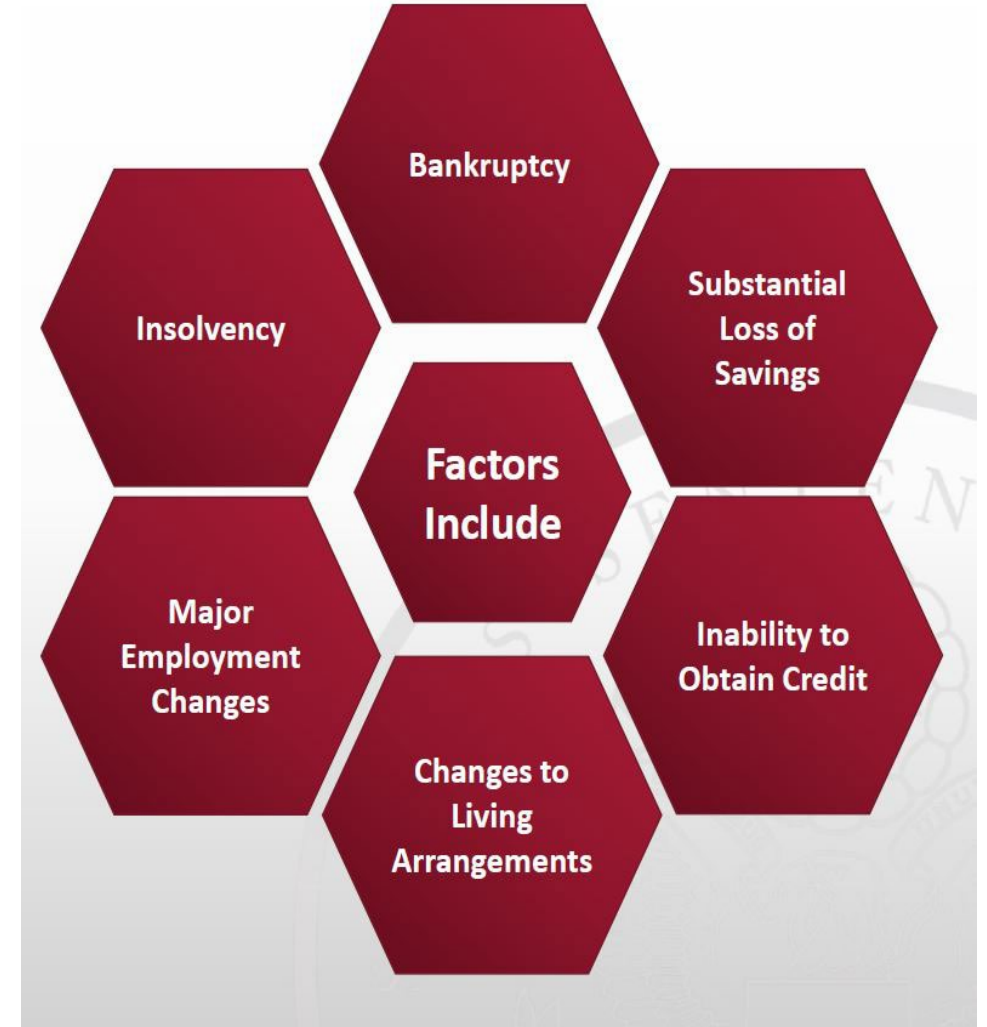
Terrorism Adjustment Applied (§3A1.4)	Defendant did not use violence/threats	No death or serious bodily injury
Not a sex offense conviction	Defendant did not cause substantial financial hardship	<i>Defendant</i> did not possess, transfer, receive firearm
Offenses against individual rights	No adjustment for vulnerable victim or hate crime	No aggravating role under §3B1.1

# Does the exclusion truly apply?

- **Substantial Financial Hardship Test**
  - **Promulgated §4C1.1(b)(3)**
- §4C1.1(b)(3) – the defendant did not **personally** cause substantial financial hardship.
- See §2B1.1, App. Note (4)(F) – In determining whether the **offense** resulted in substantial financial hardship to a victim...

*To be determined independently of the application of § 2B1.1(b)(c)*

**Maybe not?**



# Aggravating Role Adjustment - §3B1.1

**The government bears the burden** of proving by a preponderance of the evidence that the defendant should receive an aggravating role adjustment. See, e.g., *United States v. Al-Rikabi*, 606 F.3d 11, 14 (1st Cir. 2010); *United States v. Cruz Camacho*, 137 F.3d 1220, 1224 (10th Cir.1998) (“The burden is on the government to prove, by a preponderance of the evidence, the facts necessary to establish a defendant’s leadership role.”). Upon finding that the government has met its burden of proving the requisite facts, the district court must apply the appropriate enhancement and has no discretion to decide whether to apply §3B1.1. See *United States v. Jimenez*, 68 F.3d 49 (2d Cir. 1995). “[T]he determination of a defendant’s role in an offense is necessarily fact-specific. Appellate courts review such determinations only for clear error. Thus, absent a mistake of law, battles over a defendant’s status and over the scope of the criminal enterprise will almost always be won or lost in the district court.” *United States v. Graciani*, 61 F.3d 70, 75 (1st Cir. 1995) (citations omitted).

# *Weapons:*

*Sometimes you have them, sometimes you don't...in the same case/conspiracy and PSR*

## **Weapon Enhancement**

**Section 2D1.1(b)(1) & App. Note 11(A) (pp. 143, 162)**

If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.



Charlotte and Jonah Byrde (Ozark)

**versus**



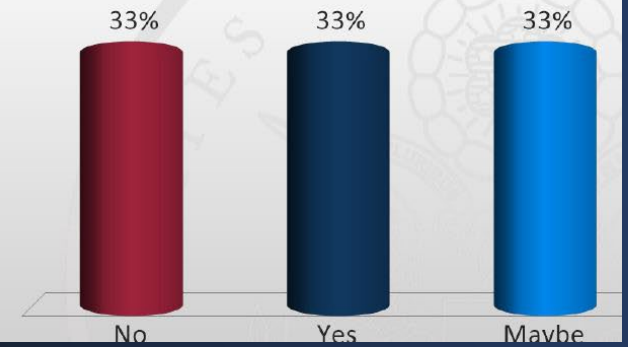
Bonnie Parker & Clyde Barrow

Defendant  
did not  
possess,  
transfer,  
receive  
firearm

Assuming no other exclusions, does the defendant  
qualify for a reduction under the new §4C1.1?

The defendant has zero criminal history points but received a 2-level  
increase under §2D1.1(b)(1) because a firearm was possessed.

- A. No
- B. Yes
- ✓ C. Maybe



*Dig deeper into the offense conduct*



## **An Enhancement Does Not Automatically Preclude Eligibility for Zero Point Offender or Safety Valve**

### True or False

A defendant who receives a **firearm** enhancement at §2D1.1(a)(1) is automatically precluded from a 2-level reduction for guidelines safety valve at §2D1.1(b)(18).

A. True

B. False

**Some ineligible offenses are pretty easy to spot, however.**

# Charlotte's Guideline Range

BOL

30

§2D1.1 – Base Offense Level (Mitigating Cap)

+2

§2D1.1(b)(1) - Weapon

-2

§2D1.1(b)(18) – Safety Valve

-2

§3B1.2(b) – Mitigating Role

-3

§3E1.1 – Acceptance of Responsibility

-2

§4C1.1 – Zero-Point Offender

Final OL

23

CHC: I

46–57  
months

# Downward Departure for Simple Possession Marijuana Convictions

*Part C of the amendment amends the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to include sentences resulting from possession of marijuana offenses as an example of when a downward departure from the defendant's criminal history may be warranted. Specifically, Part C of the proposed amendment would provide that a downward departure may be warranted if the defendant received criminal history points from a sentence for possession of marijuana for personal use, without an intent to sell or distribute it to another person.*

But... if defendant's prior MJ convictions are eligible for expungement under state law, like Rhode Island.....

# EXPUNGE IT!


Rhode Island Supreme Court  
No. 2023-02  
Amended Executive Order

In 2022, pursuant to G.L. 1956 § 21-28.11 -1, et seq., the General Assembly enacted the Rhode Island Cannabis Act (Act) which decriminalized possession of certain quantities of recreational cannabis in Rhode Island.

[https://www.courts.ri.gov/PDF/CC\\_18\\_Notice\\_to\\_Expunge\\_Marijuana\\_March\\_2023.pdf](https://www.courts.ri.gov/PDF/CC_18_Notice_to_Expunge_Marijuana_March_2023.pdf)

Cases where possession of marijuana was the only charge will be expunged by April 30, 2023. Cases where possession of marijuana was one of multiple charges or counts will be expunged by July 1, 2024.

\*Be sure to check expungement options for out-of-state convictions



**The Status Amendment eliminates status points for defendants with 6 or less criminal history points and reduces from 2 to 1 status point for defendants with 7 or more points**

The Commission found that “Status points” do not improve predictive value of criminal history score and recidivism studies show “zero-point offenders are less likely to be arrested than even “one-point offenders”.

The deduction of 2 points or even 1 point, may very well move the defendant into a lower criminal history category and lower their guideline range as a result.

# A New Zone May Create a New Sentence Presumption

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*If it drops to A or B*

## Implementation of 28 U.S.C. § 994(j)

If defendant **qualifies under §4C1.1:**

### **Zone A or B**

a sentence other than imprisonment is generally appropriate.

### **Zone C or D**

a departure, other than imprisonment may be appropriate, if offense is not a crime of violence or otherwise serious offense.

# A WHOLE NEW ZONE

## Before 11/1/23

The defendant has 6 criminal convictions that result in 6 criminal history points. As the defendant committed the instant offense while under a criminal justice sentence, 2 additional points are added pursuant to USSG §4A1.1(d), for a total of 8 criminal history points. According to the Sentencing Table (Chapter 5, Part A), 7 – 9 criminal history points establishes a criminal history category of **IV**.

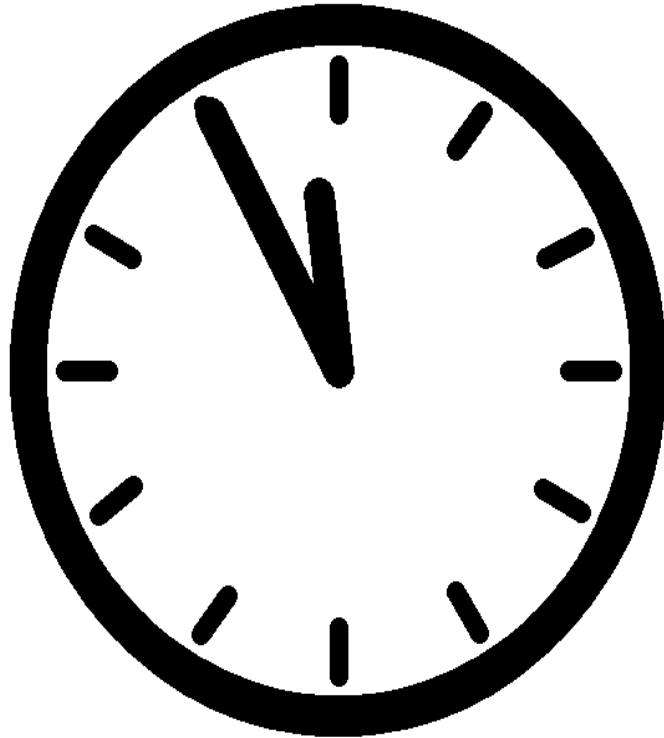
Based upon a total offense level of 9 and a criminal history category of **IV**, the guideline imprisonment range is **10 months to 16 months**. This guideline range is in **Zone C** of the Sentencing Table.

## As of 11/1/23

The defendant has 6 criminal convictions that result in 6 criminal history points. According to the Sentencing Table (Chapter 5, Part A), 4 – 6 criminal history points establishes a criminal history category of **III**.

Based upon a total offense level of 9 and a criminal history category of **III**, the guideline imprisonment range is **8 months to 14 months**. This guideline range is in **Zone B** of the Sentencing Table.

# IT'S RETROACTIVE!



## **18 U.S.C. § 3582(c)(2)**

“In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has **subsequently been lowered by the Sentencing Commission** pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion...”

“**The court may** reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a **reduction is consistent with applicable policy statements issued by the Sentencing Commission.**”

## **§1B1.10 (Reduction in Term of Imprisonment)**

“Status points” and “Zero-Point Offenders” added to the list at §1B1.10.

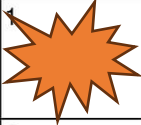
## **Reduction is not Automatic**

## **18 U.S.C. § 3582(c)(2)**

If an offender is eligible for a reduction, the judge will review his or her case and decide whether a sentence reduction is appropriate.



# FEBRUARY 2024

SUN	MON	TUE	WED	THU	FRI	SAT
				1 	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29		

Holidays and Observances: 14: Valentine's Day, 19: Presidents' Day

Wiki Calendar

**The Court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court's order is February 1, 2024, or later.**



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- **Note 7 to USSG 1B1.10:**

- The special instruction at subsection (e)(2) delays the effective date of orders reducing a defendant's term of imprisonment to a date no earlier than February 1, 2024. A reduction based on the retroactive application of Part A or Part B, Subpart 1 of Amendment 821 that does not comply with the requirement that the order take effect no earlier than February 1, 2024, is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

- **Subsection (e)(2), however, does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before February 1, 2024, provided that any order reducing the defendant's term of imprisonment has an effective date of February 1, 2024, or later.**



let's get to  
**WORK**

§1B1.10.  
Reduction in Term  
of Imprisonment as  
a Result of  
Amended  
Guideline Range  
(Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.



## (b) Determination of Reduction in Term of Imprisonment

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

## (2) Limitation and Prohibition on Extent of Reduction

### (A) LIMITATION

Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

### (C) PROHIBITION


In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.



What about  
departures  
under 5K?

(B) Exception for Substantial Assistance

If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.



# EXAMPLE - 5K

## Before 11/1/23

Government made a 5K motion for a downward departure and recommended a total offense level of 25. Defendant has criminal history category IV, with a resulting guideline range of 84-105 months. The government recommended a sentence of 84 months, at the bottom end of the range. The Court granted the motion for a downward departure and imposed 84 months with TOL of 25 and CH of IV.

## As of 11/1/23 and 2/1/24

Defendant is entitled to 2-point elimination of status points, resulting in a criminal history category III, and a new guideline range of 70-87 months. Sentence is now at the high end of the range.



# Applying the Amendments to Supervised Release Violations

*NB:Retroactive application in TSR context seemingly creates a procedural issue since USMJ hears violation, but only Article III judge can resentence. Also, defendant is not yet serving a term of imprisonment.....*

**Revocation Table  
(in months of imprisonment)**

Grade of Violation	Criminal History Category*					
	I	II	III	IV	V	VI
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A	(1)	Except as provided in subdivision (2) below:				
	12-18	15-21	18-24	24-30	30-37	33-41
	(2)	Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:				
	24-30	27-33	30-37	37-46	46-57	51-63.

\*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.



# HELP



USSC HELPLINE  
202-502-4545

If you are a defender employee or a member of the CJA panel working on these

cases, make sure that you are on the listserv devoted to discussion of these matters:

[SRC\\_SentenceReduction@list.fd.org](mailto:SRC_SentenceReduction@list.fd.org). To get added or for additional help, you can

reach out to SRC's [Davina\\_Chen@fd.org](mailto:Davina_Chen@fd.org) and/or [Shelley\\_Fite@fd.org](mailto:Shelley_Fite@fd.org).