

UNITED STATES SENTENCING COMMISSION

+ + + + +

PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

+ + + + +

PUBLIC MEETING

+ + + + +

THURSDAY
DECEMBER 13, 2018

+ + + + +

The United States Sentencing Commission met in Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 10:30 a.m., the Honorable William H. Pryor, Jr., Acting Chair, presiding.

PRESENT

WILLIAM H. PRYOR, JR., Acting Chair
RACHEL E. BARKOW, Commissioner
CHARLES R. BREYER, Commissioner
DANNY C. REEVES, Commissioner
DAVID RYBICKI, Ex Officio Commissioner

ALSO PRESENT

KENNETH P. COHEN, Staff Director
KATHLEEN C. GRILLI, General Counsel

1 P-R-O-C-E-E-D-I-N-G-S

2 10:32 a.m.

3 ACTING CHAIR PRYOR: (presiding) Good
4 morning. I want to call this meeting to order.

5 Thank you for attending this public
6 meeting of the United States Sentencing
7 Commission. The Commission appreciates the
8 attendance of those joining us here at the
9 Thurgood Marshall building, as well as those
10 watching our livestream broadcast on the
11 Commission's website. As always, we welcome the
12 significant public interest in the ongoing work
13 of the Commission.

14 I would like to start today by
15 introducing the other members of the Commission.

16 First, to my immediate left, is
17 Commissioner Rachel Barkow. Commissioner Barkow
18 is the Segal Family Professor of Regulatory Law
19 and Policy at the New York University School of
20 Law and serves as the faculty director of the
21 Center on the Administration of Criminal Law at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the law school.

2 To my immediate right is Judge Charles
3 Breyer, who is a Senior District Judge for the
4 Northern District of California and has served as
5 a United States District Judge since 1998.

6 To my far left is Judge Danny Reeves,
7 who is a United States District Judge for the
8 Eastern District of Kentucky and has served in
9 that position since 2001.

10 David Rybicki, to my far right, joins
11 as the Ex Officio Commissioner from the
12 Department of Justice. Commissioner Rybicki was
13 appointed Deputy Assistant Attorney General for
14 the Department of Justice's Criminal Division in
15 2017.

16 Patricia Cushwa, who represents the
17 Parole Commission as the designated Ex Officio
18 member of the Commission, is not able to attend
19 today's meeting.

20 Before we proceed with the business of
21 the day, I would like to take a moment to comment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 on Commissioner Barkow's service on the
2 Sentencing Commission. Today's public meeting
3 marks Commissioner Barkow's last meeting with us
4 and caps a five-year tenure as a Commissioner.

5 We've worked alongside each other here
6 since she was confirmed, since we were both
7 confirmed by the Senate in 2013. Among our
8 accomplishments during her tenure are the
9 Commission's Drugs Minus Two Amendment and its
10 retroactivity that reduced sentences for eligible
11 offenders by about 17 percent; the comprehensive
12 rewrite of the Illegal Reentry guideline that has
13 proved very popular with district judges; last
14 year's synthetic drug amendment that responded to
15 the urgent problem of synthetic cathinones,
16 synthetic cannabinoids, and fentanyl; the
17 Commission's Report to Congress on the Career
18 Offender guideline; the series of reports on the
19 impact of federal mandatory minimum penalties,
20 and several research publications on recidivism,
21 just to name a few. Her steadfast commitment to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 fair sentencing and her quick ability to process
2 sentencing data has served the Commission and the
3 public well.

4 Commissioner Barkow, thank you for
5 your service. I will miss you.

6 The first order of business is a vote
7 to adopt the August 23, 2018 public meeting
8 minutes. Is there a motion to do so?

9 COMMISSIONER BARKOW: So moved.

10 ACTING CHAIR PRYOR: Is there a
11 second?

12 COMMISSIONER REEVES: Second.

13 ACTING CHAIR PRYOR: Is there any
14 discussion on the motion?

15 (No response.)

16 Vote on the motion by saying aye.

17 (unanimous ayes)

18 Any nays?

19 The motion is adopted by a voice vote.

20 The next item of business is the
21 report of the Chair. Let me start with an update

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 on the work of the Commission since our last
2 public meeting in August.

3 Most significantly, I'd like to call
4 your attention to our new 2018 Guidelines Manual,
5 which incorporates guideline amendments that took
6 effect on November 1, 2018. For judges,
7 probation officers, members of the bar, and other
8 practitioners who have a hard copy of the new
9 Guidelines Manual, you may notice that this
10 year's version bears the color crimson, the color
11 of a certain football team in Tuscaloosa,
12 Alabama. Roll Tide.

13 (Laughter.)

14 You will notice that for the first
15 time there is a list and short description of
16 each of the new amendments incorporated in the
17 new Guidelines Manual.

18 In addition to being on the
19 Commission's website, the 2018 manual is
20 available as a web-based app that features
21 additional tools to assist in understanding and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 applying the federal sentencing guidelines.

2 With respect to research and
3 publications, in September, the Commission
4 published a report entitled, "Mandatory Minimum
5 Penalties for Identity Theft Offenses in the
6 Federal Criminal Justice System." This
7 publication is the fifth in the Commission's
8 series on the impact of mandatory minimum
9 penalties on federal offenders. The publication
10 examines recent trends in the charging of general
11 identity theft and aggravated identity theft
12 offenses.

13 Some of the key findings include that
14 1.6 percent of all federal offenders were
15 convicted under 18 U.S.C. § 1028A, the aggravated
16 identity theft statute that carries a mandatory
17 consecutive two-year penalty. These offenders,
18 however, comprised slightly more than half of all
19 federal identity theft offenders and have more
20 than doubled in number over the last decade.

21 The Commission will publish the final

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 report in its current series on mandatory minimum
2 penalties in January, which will study the impact
3 of mandatory minimum penalties on federal sex
4 offenders.

5 In November, the Commission also
6 updated its publication titled, "Federal
7 Sentencing: The Basics." This publication is a
8 great resource for understanding basic
9 application of the sentencing guidelines, related
10 federal statutes, and rules of procedure. This
11 publication discusses the landmark passage of the
12 Sentencing Reform Act of 1984, key Supreme Court
13 decisions concerning the guidelines, and the
14 sentencing process today.

15 The Commission will have several other
16 reports ready for publication in early 2019. In
17 January, the Commission will release another
18 report in our series of reports on recidivism,
19 this one focusing on violent offenders. Among
20 our findings are that violent federal offenders
21 recidivate much more often than non-violent

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 federal offenders, with a recidivism rate of 64
2 percent compared to 40 percent for non-violent
3 offenders. Violent offenders recidivate more
4 quickly and commit more serious offenses than
5 non-violent offenders, and violent offenders do
6 not age out of committing crime nearly to the
7 degree as non-violent offenders. Over one-third,
8 36 percent, of violent offenders older than 50 at
9 the time of release reoffend, more than double
10 the rate for non-violent offenders, 15 percent.

11 The Commission also plans to release
12 a report on recidivism and firearms offenders
13 early in 2019.

14 The last upcoming report that I'd like
15 to highlight is a part of our ongoing examination
16 of the overall structure and operation of the
17 guidelines post-Booker. As part of that
18 examination, in November 2017, we updated the
19 analysis of demographic differences in federal
20 sentencing in the 2012 Booker Report. Much like
21 the Booker Report, that updated analysis found

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that sentence length continues to be associated
2 with some demographic factors, including race.

3 In January, the Commission will
4 release a report that updates the portion of the
5 2012 Booker Report discussing different
6 sentencing practices among judges in the same
7 federal district; that is, intra-district
8 differences. For this upcoming report, we have
9 refined our methodology to focus on judges who
10 sit in the same city. It analyzes the sentencing
11 practices of judges located in 30 large
12 metropolitan areas nationwide and finds that,
13 even within individual cities, sentencing
14 practices vary significantly.

15 Before I turn to the General Counsel
16 to advise us on possible votes to publish
17 proposed amendments, I should note that, since
18 March 2017, the Commission has operated with four
19 voting Commissioners. Although only three
20 affirmative votes are required to publish
21 proposed amendments, which we are doing today, by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 statute, four affirmative votes are required to
2 promulgate amendments. As mentioned at the
3 outset, Commissioner Barkow's term will come to
4 an end when Congress adjourns sine die, as will
5 mine.

6 Four nominations are currently
7 pending in the United States Senate, including
8 mine, to serve as a second term along with a
9 separate nomination to serve as Chair.
10 Therefore, unless the Senate confirms at least
11 two Commissioners, the Commission will lose its
12 voting quorum and not be able to vote to
13 promulgate the proposed amendments we publish
14 today until a voting quorum is restored.

15 The next item of business is a
16 possible vote to publish in the Federal Register
17 proposed guideline amendments and issues for
18 public comment.

19 The General Counsel, Kathleen Grilli,
20 will advise the Commission on the first possible
21 vote concerning a proposed technical amendment.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. GRILLI: Thank you, Judge Pryor.

2 The proposed amendment makes various
3 technical changes to the Guidelines Manual. Part
4 A makes technical changes to reflect editorial
5 reclassification of certain sections in the
6 United States Code. Part B makes certain
7 technical changes to the Commentary of §2D1.1.
8 Part C makes technical changes to the Commentary
9 of §§2A4.2, 2A6.1, 2B3.2, and to Appendix A. And
10 finally, Part D makes clerical changes to various
11 parts of the commentary in the manual.

12 A motion to publish the proposed
13 technical amendment with an original comment
14 period closing on February 19, 2019, and a reply
15 comment period closing on March 15, 2019, would
16 be in order at this time.

17 ACTING CHAIR PRYOR: Is there a motion
18 to publish the proposed amendment as suggested by
19 the General Counsel?

20 COMMISSIONER BREYER: So moved.

21 ACTING CHAIR PRYOR: Is there a

1 second?

2 COMMISSIONER BARKOW: Second.

3 ACTING CHAIR PRYOR: Any discussion of
4 the motion?

5 (No response.)

6 Vote on the motion by saying aye.

7 (unanimous ayes)

8 Any nays?

9 The motion is adopted, and let the
10 record reflect that at least three Commissioners
11 voted in favor of the motion to publish.

12 The General Counsel will now advise
13 the Commission on a possible vote concerning a
14 proposed amendment on §1B1.10.

15 MS. GRILLI: Yes. This proposed
16 amendment contains two parts. The Commission is
17 considering whether to promulgate either or both
18 parts of these, as they are not mutually
19 exclusive.

20 Part A of the proposed amendment is
21 the result of the Commission's consideration of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 miscellaneous amendment issues, including
2 possible amendments to this guideline in light of
3 Koons v. United States. Part A would revise
4 §1B1.10 in various ways and includes three
5 options for responding to United States v. Koons.

6 Part B of the proposed amendment would
7 resolve a circuit conflict concerning application
8 of §1B1.10, pursuant to the Commission's
9 authority under 28 United States Code § 991(b) in
10 Braxton v. United States. This circuit conflict
11 has arisen concerning whether the court is
12 permitted under §1B1.10 to reduce a sentence
13 below the amended guideline range to reflect
14 departures other than substantial assistance that
15 the defendant received at his original
16 sentencing.

17 The 7th and the 9th Circuits have held
18 that, if a defendant received a substantial
19 assistance departure, a court may reduce a
20 defendant's sentence further below the amended
21 guideline minimum to reflect those other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 departures, in addition to substantial
2 assistance. The 6th and 11th Circuits have held
3 that they may not.

4 Part B of the proposed amendment would
5 revise Application Note 3 of the Commentary to
6 resolve this circuit conflict and providing two
7 options for resolving that conflict. One, which
8 would adopt the approach of the 6th and the 11th
9 Circuits, the other which would adopt the
10 approach of the 7th and the 9th Circuits.

11 A motion to publish the proposed
12 amendment with an original comment period closing
13 on February 19, a reply comment period closing on
14 March 15, 2019, and technical and conforming
15 amendment authority to staff, is appropriate at
16 this time.

17 ACTING CHAIR PRYOR: Is there a motion
18 to publish the proposed amendment as suggested by
19 the General Counsel?

20 COMMISSIONER Reeves: So moved.

21 ACTING CHAIR PRYOR: Is there a

1 second?

2 COMMISSIONER Breyer: Second.

3 ACTING CHAIR PRYOR: Any discussion on
4 the motion?

5 (No response.)

6 Vote on the motion by saying aye.

7 (unanimous ayes)

8 Any nays?

9 The motion is adopted, and let the
10 record reflect that at least three Commissioners
11 voted in favor of the motion to publish.

12 The General Counsel will now advise
13 the Commission on a possible vote concerning a
14 proposed miscellaneous amendment.

15 MS. GRILLI: Yes. This proposed
16 amendment contains five parts. The Commission is
17 considering whether to promulgate any or all of
18 these parts, as they are not mutually exclusive.

19 Part A responds to the FDA
20 Reauthorization Act of 2017 and amends Appendix
21 A and the Commentary to §2N2.1 and makes a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 technical correction to the Commentary of §2N1.1.

2 Part B responds to the FAA
3 Reauthorization Act by amending Appendix A,
4 §2A5.2, and the commentaries to §§2A2.4 and
5 2X5.2.

6 Part C responds to the Allow States
7 and Victims to Fight Online Sex Trafficking Act
8 of 2017 by amending Appendix A, §§2G1.1 and
9 2G1.3.

10 Part D responds to a guideline
11 application issue concerning the interaction of
12 §§2G1.3 and 3D1.2.

13 And Part E revises the guidelines to
14 address the fact that the Bureau of Prisons no
15 longer operates a shock incarceration program, as
16 described in §5F1.7 of the Guidelines Manual.

17 A motion to publish the proposed
18 amendment with an original comment period closing
19 on February 19, a reply comment period closing on
20 March 15, 2019, and technical and conforming
21 amendment authority to staff would be in order at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 this time.

2 ACTING CHAIR PRYOR: Is there a motion
3 to publish the proposed amendment as suggested by
4 the General Counsel?

5 COMMISSIONER BARKOW: So moved.

6 ACTING CHAIR PRYOR: Is there a
7 second?

8 COMMISSIONER BREYER: Second.

9 ACTING CHAIR PRYOR: Is there any
10 discussion on the motion?

11 (No response.)

12 Vote on the motion by saying aye.

13 (unanimous ayes)

14 Any nays?

15 The motion is adopted, and let the
16 record reflect that at least three Commissioners
17 voted in favor of the motion to publish.

18 The General Counsel will now advise
19 the Commission on a possible vote concerning a
20 proposed career offender amendment.

21 MS. GRILLI: Yes. This proposed

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 amendment contains four parts, Parts A through D,
2 and the Commission is considering whether to
3 promulgate any or all of these parts, as they are
4 not mutually exclusive.

5 I'll start with Parts B through D.
6 Parts B through D address various issues that
7 came to the Commission's attention during the
8 public comment period.

9 Part B would address the concern that
10 certain robbery offenses such as Hobbs Act
11 robbery no longer constitute a crime of violence
12 under §4B1.2, as amended in 2016. Three options
13 to address this issue are presented.

14 Part C would amend §4B1.2 to address
15 certain issues regarding the commentary provision
16 stating that the terms "crimes of violence" and
17 "controlled substance offense" include the
18 offenses of aiding and abetting, conspiring to
19 commit, and attempting to commit those crimes.
20 Again, three options are presented to resolve
21 this issue.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And finally, Part D of the proposed
2 amendment would amend the definition of
3 "controlled substance defense" in §4B1.2(b) to
4 include offenses involving an offer to sell a
5 controlled substance and offenses described in
6 46 United States Code §§ 70503(a) and 70506(b).

7 A motion to publish Parts B through D
8 of the Career Offender amendment with an original
9 comment period closing on February 19th and a
10 reply comment period closing on March 15, 2019,
11 and technical and conforming amendment authority
12 to staff is appropriate at this time.

13 COMMISSIONER BREYER: So moved.

14 COMMISSIONER REEVES: Second.

15 ACTING CHAIR PRYOR: I didn't call the
16 motion yet.

17 (Laughter.)

18 But it has been moved and seconded.

19 Is there any discussion on the motion?

20 (No response.)

21 Vote on the motion by saying aye.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 (unanimous ayes)

2 Any nays?

3 The motion is adopted, and let the
4 record reflect that at least three Commissioners
5 voted in favor of the motion to publish Parts B
6 through D of the proposed Career Offender
7 amendment.

8 The General Counsel will now advise
9 the Commission on a possible vote concerning Part
10 A of the proposed Career Offender amendment.

11 MS. GRILLI: Yes. Part A of the
12 proposed amendment would amend §4B1.2 to
13 establish that the categorical approach and
14 modified categorical approach do not apply in
15 determining whether a conviction is a crime
16 violence or controlled substance offense.
17 Specifically, it would provide that, in making
18 that determination, a court shall consider any
19 element or alternative means for meeting an
20 element of the offense committed by the defendant
21 as well as the conduct that formed the basis of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the offense of conviction.

2 Part A would also allow courts to look
3 at sources from the judicial record beyond the
4 statute of conviction in determining the conduct
5 that formed the basis of the conviction, and
6 would make similar revision to §2L1.2 as well as
7 additional conforming changes to the guidelines
8 that use the terms "crime of violence" and
9 "controlled substance offense."

10 A motion to publish Part A of the
11 Career Offender amendment with an original
12 comment period closing on February 19, 2019, and
13 a reply comment period closing on March 15, 2019,
14 technical and conforming amendment authority to
15 staff would be in order at this time.

16 ACTING CHAIR PRYOR: Is there a motion
17 to publish Part A of the proposed amendment as
18 suggested by the General Counsel?

19 COMMISSIONER REEVES: So moved.

20 ACTING CHAIR PRYOR: Second?

21 COMMISSIONER BREYER: Second.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 ACTING CHAIR PRYOR: Any discussion?

2 (No response.)

3 Hearing no discussion, will the
4 General Counsel please call the roll?

5 MS. GRILLI: Yes.

6 Commissioner Barkow?

7 COMMISSIONER BARKOW: I vote no on
8 this for the reasons that I gave at our prior
9 meeting.

10 MS. GRILLI: Judge Breyer?

11 COMMISSIONER BREYER: Aye.

12 MS. GRILLI: Judge Reeves?

13 COMMISSIONER REEVES: Aye.

14 MS. GRILLI: Judge Pryor?

15 ACTING CHAIR PRYOR: Aye.

16 The motion is adopted. Let the record
17 reflect that at least three Commissioners voted
18 in favor of the motion to publish Part A of the
19 proposed Career Offender amendment.

20 Is there any further discussion before
21 the Commission?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 COMMISSIONER RYBICKI: I'd like to
2 make a comment, Judge Pryor.

3 ACTING CHAIR PRYOR: Okay.

4 COMMISSIONER RYBICKI: Thank you,
5 Judge Pryor.

6 On behalf of the Department of
7 Justice, I'd like to thank the Commission for
8 taking up the Department's top priority for this
9 amendment cycle; namely, the categorical
10 approach. As the Department explained at length
11 in its annual report to the Commission, the
12 categorical approach often results in arbitrary,
13 inconsistent, and unjust sentencing outcomes.
14 The approach has severely impaired the proper
15 functioning of sentencing enhancements under the
16 Armed Career Criminal Act, the Career Offender
17 guideline, and §2K2.1.

18 We appreciate that the draft amendment
19 language for public comment, which you voted on
20 today, addresses many of the problems created by
21 the categorical approach, which we highlighted to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you in our report. Here's just a few of those
2 problems:

3 First, state robbery offenses often do
4 not qualify as crimes of violence at all. So, in
5 the 9th Circuit, neither California nor Nevada
6 state robbery is a crime of violence, even when,
7 as in one case, the defendant put a gun to the
8 victim's head and shot a second victim. This is
9 a problem in other federal circuits as well.

10 Second, unbelievably enough,
11 conspiracy to commit murder and aid of
12 racketeering under 19 U.S.C. § 1959 is not a
13 crime of violence in some federal circuits.

14 And third, as has been mentioned,
15 Hobbs Act robbery does not constitute a crime of
16 violence in the 10th Circuit.

17 Today's draft amendment suggests
18 making additional documents available to federal
19 judges when they determine whether a previous
20 conviction constitutes a crime of violence. The
21 draft amendments also simplify the procedure for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 inchoate offenses.

2 And finally, the Commission has
3 invited comment on the threshold issue, as to
4 whether Part A of the proposed amendment is
5 consistent with Commission authority under
6 28 U.S.C. § 994. The Department does not think
7 this is a particularly close question and will
8 further explain our reasoning in a letter in
9 response to the proposed amendments.

10 We think these amendments represent a
11 positive first step in resolving the systemic
12 problems created by the categorical approach.
13 However, while the Department commends the
14 Commission for the guideline amendment language
15 under consideration today, we are disappointed
16 that the Commission is not publishing language
17 that more forcefully suggests that courts should
18 consider the actual conduct of defendants in
19 determining whether a prior conviction for
20 purposes of the advisory guideline calculation
21 is, in fact, a violent crime.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Allowing judges to consider the facts
2 of a previous conviction will help to ensure that
3 violent conduct is not overlooked and that
4 recidivist defendants receive sentences
5 sufficient to protect the public.

6 Publishing amendment language that
7 allows courts to consider actual conduct would
8 have given future Commissioners the benefit of
9 thoughtful submissions from law professors,
10 defenders, victims' groups, and other
11 stakeholders on this important issue. We are
12 disappointed that the Commission chose not to
13 follow this course.

14 Many federal courts have noted the
15 absurd results that the categorical approach has
16 produced. Just last month, Judge Jerry Smith,
17 writing for the en banc 5th Circuit in a decision
18 involving a defendant who beat the victim to
19 death with a baseball bat, said, quote, "It is
20 time for this Court to take a mulligan on crimes
21 of violence. The well-intentioned experiment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that launched 15 years ago has crashed and
2 burned. By requiring sentencing courts and this
3 Court to ignore the specifics of prior
4 convictions well beyond what the categorical
5 approach and Supreme Court precedent instruct,
6 our jurisprudence has proven unworkable and
7 unwise. By employing the term 'crime of
8 violence,' Congress and the U.S. Sentencing
9 Commission obviously meant to implement a policy
10 penalizing felons for past crimes that are, by
11 any reasonable reckoning, violent; hence, the
12 term." Unquote.

13 The Department of Justice sincerely
14 hopes that, when the Commission regains its
15 quorum next year, it promulgates amendments that
16 allow federal courts to consider conduct at
17 sentencing. The Commission has a statutory duty
18 to ensure that federal sentencing accurately
19 reflects the seriousness of offenses committed by
20 criminal defendants. And in the Department's
21 view, the Commission cannot satisfy this duty by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 leaving unaddressed the serious and unjust
2 inconsistencies that the categorical approach
3 creates.

4 Acting Chair Pryor, I thank you, and
5 I look forward to working with the Commission on
6 behalf of the Department in the new year.

7 ACTING CHAIR PRYOR: Commissioner
8 Barkow?

9 COMMISSIONER BARKOW: Yes. I just
10 wanted to say a few words, since this is my last
11 official hearing here.

12 First, I'd like to thank you, Chair
13 Pryor, and prior Chair Saris, and my fellow
14 Commissioners, current and past, as well as the
15 amazing staff here at the Commission, for making
16 my time really a wonderful experience. The
17 people here work really hard. They're the best
18 public servants you can imagine, and it's really
19 been a joy to work with everyone. So, I want to
20 thank you.

21 I also want to say how grateful I am

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to the various stakeholders and citizens who take
2 the time to comment on our proposals, offer us
3 priorities that we should consider, keep us
4 informed about what's happening on the ground.
5 There are many committed advocates out there, and
6 I've been really thankful to have your input over
7 the years. It's been tremendously helpful to me
8 as we have considered our proposals.

9 I am proud of what the Commission has
10 accomplished, almost always with unanimous and
11 bipartisan agreement, in my time here, which I
12 think is too infrequently happening in other
13 parts of government. But I do believe it happens
14 here uniquely because we focus on facts and data,
15 and then, we let them guide us to the right policy
16 outcomes that are consistent with the law.

17 And I should add that I do believe
18 that we could achieve even better results, that
19 would be better for public safety and more
20 proportional sentences, if some of those laws
21 were changed. But, within the bounds of what we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 are authorized to do here at the Commission, I
2 think we've passed many amendments in my time
3 here that have improved sentencing.

4 And I won't catalog them all, but the
5 highlight for me that I do want to mention was
6 our vote on Drugs Minus Two and, in particular,
7 making it retroactive as well. It allowed more
8 than 31,000 people to obtain more proportionate
9 sentences, it saved prison resources, and it did
10 not compromise public safety.

11 I should just add, I will never forget
12 the public hearing we had on retroactivity. That
13 hearing was more crowded than this one, way more
14 crowded than this one. And there were a lot of
15 family members there that day who knew what the
16 decision could mean for them. And I remember
17 vividly many tearful, happy tearful responses,
18 when we voted to make that amendment retroactive.
19 And for me, it put a personal face on the very
20 important work that this Commission does every
21 day, and it vividly demonstrated why proportional

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sentencing has to be at the core of everything
2 that the Commission does.

3 So, I am grateful to President Obama
4 for giving me the opportunity to serve on the
5 Commission. It may not be the dream government
6 job of many to serve on the Sentencing
7 Commission, but it was mine, and it was even more
8 wonderful than I hoped it would be. So, I want
9 to thank everyone for being such wonderful
10 colleagues in my time here.

11 ACTING CHAIR PRYOR: Thank you.

12 Judge Breyer?

13 COMMISSIONER BREYER: Yes. This is,
14 of course, a bittersweet time for me because we
15 are losing two Commissioners, one I trust
16 temporarily and one a little bit longer than
17 temporarily.

18 So, let me address Commissioner
19 Barkow's tenure while I've served with her. And,
20 you know, I was thinking of what can I say about
21 her, and then, I thought, you know, listening to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 what you said today is like the best evidence of
2 what kind of Commissioner she was. Her
3 priorities, her goals, her thoughtfulness, her
4 experience, she brought to bear on everything
5 that we did from the technical and miscellaneous
6 amendments to the far more substantive amendments
7 and far-reaching proposals that were enacted by
8 the Commission.

9 Her attitude towards these matters was
10 never ideological. It was always, what does the
11 evidence show? What are the facts? What has
12 been our experience? Indeed, it is the
13 experience and the facts that ought to guide us
14 through sentencing policies and sentencing
15 changes.

16 People can be very farsighted about
17 what is the perfect world, what is the ideal world
18 of sentencing? I've said, and I've done it now
19 more than 50 years, I can't tell you what the
20 right sentence is; I have a better idea of what
21 the wrong sentence is, and that's all been borne

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 out by experience.

2 And what Commissioner Barkow has done
3 is always bring us back to the point of "what do
4 the facts show?" While we are going out of
5 business as a quorum, we are very much remaining
6 in business in terms of gathering the facts,
7 gathering the evidence.

8 The staff of the Sentencing Commission
9 does a number of really wonderful things in the
10 discharge of their obligation to Congress and to
11 the public. One of which is, I think the most
12 significant, the gathering of information, the
13 digesting of information, the understanding of
14 the information, and seeing what conclusions that
15 information, which is all the experience of the
16 sentencings, every year of thousands upon
17 thousands of federal sentences, what does it all
18 show. In our Commission meetings, Commissioner
19 Barkow has always looked at "what does the
20 evidence show?"

21 It has been a pleasure, Rachel,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 working with you. You are my counsel, and you
2 will continue to be so in the years to come,
3 because I know that your interest in sentencing
4 remains just as firm and just as much of a guiding
5 light to your life, whether you are on the
6 Commission or not. So, I want to thank you
7 personally for all that you have given to this
8 Commission, and I think will give over the years.

9 As to you, our Acting Chair, now it
10 puts me in somewhat of a ticklish position
11 because, as an appointment filling a slot of a
12 Democrat on this Commission -- it is a bipartisan
13 Commission, not a nonpartisan Commission, it's
14 bipartisan by statute -- it is hard to say
15 whether, if I urge the United States Senate to
16 confirm Chair Pryor as the next permanent Chair,
17 whether that will help him or hurt him.

18 (Laughter.)

19 And so, I'll simply say that what he
20 has brought to the Commission, in my experience,
21 as he serves as Acting Chair and formerly as a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 member, is a strong desire to work together and
2 to seek an accommodation. Understanding that the
3 perfect is the enemy of the good, he has
4 tirelessly tried to achieve some consensus on the
5 proposals that we put forward. That's a noble
6 task. Sometimes it works; sometimes it doesn't.
7 But he has never ceased in his efforts to bring
8 about some workable consensus.

9 It has been a pleasure working with
10 him. He has always been polite. He has always
11 been deferential. He's always focused on the
12 right issues. He has brought a sense of intellect
13 and commitment and effort to achieve a workable
14 solution to the problems that we confront.

15 You know, it's rather remarkable. In
16 this lame duck session, every now and
17 then -- judges I know are not supposed to look at
18 the politics of what's going on, but, as somebody
19 famously remarked, even the Supreme Court looks
20 at election results, and judges do too. And so,
21 we do look out and we do see that right now is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 pending before the Senate and before the Congress
2 a bill for criminal justice reform.

3 All I would say about that is, if it
4 does pass, it is testimony to the fact that, No.
5 1, there can be a bipartisan solution to a
6 problem, and, No. 2, it is a very, very high
7 priority of the public. It's not just people who
8 are confined in prison, but's also for the
9 protection of the public, we must engage in
10 criminal justice reform. It's essential that it
11 change and reflect the circumstances that
12 surround each of us in carrying out our
13 responsibilities.

14 So, I would say that it is my hope
15 that the Senate will act on nominees for this
16 Commission. It's important that we continue with
17 our work. It serves the public and, in fact, if
18 legislation is enacted, it will become even more
19 crucial that the Commission be given a quorum in
20 order to try to implement the will of Congress,
21 as demonstrated by any statute that's enacted.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So, I hope that you will continue. I
2 hope the next time we meet it will be in your
3 capacity as Chair of the Commission. I am
4 confident -- confident -- that a Commission under
5 the Chair of Judge Pryor will be productive, will
6 reach accommodations on any number of things.
7 And I hope, I sincerely hope, that it will bring
8 about some proposals with respect to
9 simplification of the Guidelines which will
10 enable judges, basically our audience, the people
11 that we serve, it will enable these judges to
12 carry out their responsibilities, their
13 sentencing responsibilities, which are the most
14 difficult responsibilities for district court
15 judges.

16 So, thank you.

17 And to Rachel, bon voyage. I have
18 your telephone number. I guess we have to say
19 now I have your email.

20 And to Judge Pryor, I hope that it
21 will be soon that you'll be returning to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Commission.

2 Thank you.

3 ACTING CHAIR PRYOR: Thank you. Thank
4 you for those very kind words, Judge Breyer. It's
5 been a great pleasure working with you as well.
6 And I, too, hope to be able to return to working
7 with you.

8 Your remarks reminded me of a
9 conversation I had with a man who served as the
10 Attorney General of Alabama before I assumed that
11 office. And he called me when I became the
12 Attorney General of Alabama and said, "Bill, let
13 me know whether you would need me to be for ya or
14 agin ya, whichever will help you the most."

15 (Laughter.)

16 And I want to thank again Commissioner
17 Barkow for her service to the Commission.

18 I also want to thank publicly, and
19 express my personal appreciation, for the
20 important service and contributions made by
21 members of the Commission's Victims Advisory

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Group, who are departing us. The distinguished
2 departing members include the Chair of the
3 Victims Advisory Group, T. Michael Andrews;
4 Elizabeth Cronin; Kimberley Garth-James; Keli
5 Luther; James Marsh; and Virginia Swisher.

6 Similarly, I would like to acknowledge
7 and praise the service and work of Ronald Levine,
8 whose term as Chair of the Commission's
9 Practitioners Advisory Group, has expired, and
10 the other members who are departing us: James
11 Boren, Pamela Mackey, Gordon Armstrong, and Steve
12 Nolder.

13 Finally, I would like to thank Wendy
14 Bremner, a member of the Tribal Issues Advisory
15 Group, for her service.

16 Is there any further business of the
17 Commission?

18 (No response.)

19 Hearing none, is there a motion to
20 adjourn?

21 COMMISSIONER REEVES: So moved.

1 ACTING CHAIR PRYOR: Is there a
2 second?

3 COMMISSIONER BARKOW: Second.

4 ACTING CHAIR PRYOR: Vote on the
5 motion by saying aye.

6 (unanimous ayes)

7 All in favor?

8 Anyone opposed?

9 All right. The motion is adopted by
10 a voice vote, and the meeting is adjourned. Thank
11 you for joining us today, and, pending further
12 action in the Senate, I hope that I will see you
13 again soon.

14 (Laughter.)

15 (Whereupon, at 11:09 a.m., the meeting
16 was adjourned.)

17

18

19

20

21

