

Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
Remarks for Public Meeting
January 8, 2016

Thank you for attending this public meeting of the United States Sentencing Commission. The Commission appreciates the attendance of those joining us here as well as those watching through our livestream broadcast on the Commission's website. As always, we welcome and encourage the significant public interest in sentencing issues.

Those of you who regularly attend our meetings may notice that we are joined by two new faces today. I will introduce them momentarily, but first want to take a moment to acknowledge the service of Jonathan Wroblewski, who served as the *ex officio* member of the Commission representing the Attorney General since 2008. Mr. Wroblewski is currently serving as the Acting Principal Deputy Assistant Attorney General, head of the Office of Legal Policy, at the Department of Justice. As a result of his new job responsibilities, he will not be serving as the Attorney General's representative to the Commission. Mr. Wroblewski's service to the Commission was exemplary, and he is already deeply missed. We wish him great success in his new position.

Michelle Morales, seated to my far right, replaces Jonathan Wroblewski, as the designated *ex officio* member of the Commission representing the Department of Justice. Commissioner Morales is the Acting Director of the Office of Policy and Legislation in the Criminal Division of the Department. She first joined that office on 2002 and has served as its Deputy Director since 2009. Commissioner Morales previously served as an Assistant United States Attorney in the District of Puerto Rico.

Seated on my far left, is Patricia Wilson Smoot, the designated *ex officio* member of the Commission representing the United States Parole Commission. Commissioner Smoot was nominated to the Parole Commission by President Obama and was confirmed by the U.S. Senate on September 16, 2010. She was designated as Chairman of the Parole Commission effective May 29, 2015. Immediately before joining the Parole Commission, she served as the Deputy State Attorney for Prince George's County, Maryland. Commissioner Smoot has also been an Assistant United States Attorney in the District of Columbia and a Public Defender in Prince George's County, Maryland.

I would also note that Chuck Breyer, our Vice Chair, is not present in the room today. Judge Breyer is a district judge in Northern California and is currently presiding over a criminal case in which the jury is deliberating. As a result, he was not able to join us in person but consistent with our Rules of Practice and Procedure, he is joining us telephonically.

While he is also not here with us today, I would like to take a moment to acknowledge the service of Rick Holloway, the former Vice Chair of the Probation Officer's Advisory Group.

After a long career of distinguished service, Rick is retiring as a federal probation officer and, as a result, will be stepping down from his role as Vice Chair of this important advisory group. The Commission is grateful for his contributions both in his service to the country as well as his additional contributions to the Commission.

In addition, I would like to acknowledge Jennifer Bishop Jenkins and Judge Paul Cassell for their respective second and final terms on the Commission's Victims Advisory Group (VAG). Each of them has contributed immensely to our understanding of the needs and perspectives of victims in the federal criminal justice system and the Commission has benefited significantly from their work. We look forward to opportunities for ongoing collaboration with them in future work.

Before we begin, I would also like to highlight the Commission's successful national training seminar in 2015. Approximately 1,000 attendees, including nearly 100 federal judges appointed within the past five years, participated in the event held in New Orleans, Louisiana. Given the robust attendance and participation in this event, we look forward to continuing a wide range of training activities, including next year's National Training Seminar in Minneapolis, Minnesota, on September 7th through the 9th.

Before we proceed with the other business of the day, I thought I'd take a few moments to update the public on implementation of the retroactivity of the Commission's 2014 "drugs-minus-two" amendment. That amendment and its retroactivity were an important part of the Commission's ongoing policy priority of reducing the costs of incarceration and overcapacity in federal prisons consistent with our statutory obligation and our commitment to public safety. Following a one-year delay in implementation, eligible offenders began receiving early release on November 1, 2015.

To be clear, there were no automatic sentence reductions. Every offender seeking retroactivity was required to seek review from a federal district court judge. In each case, a judge carefully determined whether any reduced sentence was appropriate. In doing so, the court considered all the circumstances and factors in the case, including their behavior in prison, as well as input from the probation service. Throughout the process, there continues to be explicit attention to public safety and deterrence.

As of November 1, 2015, the Commission had received and analyzed documentation for 27,824 motions for retroactivity, and the courts had granted 21,003 – or three-quarters – of them. The average sentence reduction was 23 months, from 134 months to 110 months. And we are informed by the Bureau of Prisons that about 6,000 offenders were released on or about November 1.

The Commission continues to monitor and to review this measure and the most recent implementation report was posted on the Commission's website last month.

At the same time, the Commission continues to look to Congress to fully address the issue of excessive federal prison populations and costs through a reexamination of existing statutory

mandatory minimum penalties, particularly related to drug crimes. As in the past, we continue to strongly support bicameral, bipartisan Congressional action to address these pressing issues which will then inform the Commission's ongoing work.

As we normally do each January, in a few minutes, the Commission will vote on whether to publish a number of proposed amendments the Commission is considering this amendment cycle. As a reminder, those proposed amendments are just preliminary proposals that we put forward for public comment. I'll talk a little more about those at the end of the meeting.

At this point, however, we are also considering a vote to adopt amendments to the current federal sentencing guideline definitions relating to the nature and impact of a defendant's prior convictions for a "crime of violence." These amendments stem from the proposed amendment we published for comment in August. As I said then, those of you who regularly follow the Commission's work know that publishing in August and possibly promulgating an amendment today is a little different than our usual practice.

Nevertheless, we felt that it was appropriate to take action as soon as possible in light of ongoing litigation in this area and the added uncertainty resulting from the Supreme Court's recent decision in *Johnson v. United States*. In *Johnson*, the Supreme Court struck down as unconstitutionally vague a portion of the statutory definition of "violent felony" used in a similar penalty provision in the Armed Career Criminal Act (ACCA). While the Supreme Court in *Johnson* did not consider or address sentencing guidelines, the statutory language the Court found unconstitutionally vague, often referred to as the "residual clause," is identical to language contained in the "career offender" sentencing guideline. As I noted in August, since the *Johnson* decision, we have been considering whether – as a matter of policy – the Commission should also eliminate the residual clause in the guidelines.

The amendment we are considering today would do just that by eliminating the residual clause in the career offender guideline definition of "crime of violence." In its place, the proposal would revise the list of specific enumerated offenses that qualify as a prior crime of violence, and, for easier application, moves the entire list into the guidelines. While a few select definitions are provided, the proposed amendment would continue to rely on long-existing case law for purposes of defining the enumerated offenses. In addition, the amendment also includes a departure provision that allows courts to depart in cases in which the predicate offenses were classified as a misdemeanor under the laws of the convicting jurisdiction.

While we view these potential amendments as significant, this is not necessarily the Commission's final work in this area. This is a very complex area of law that continues to evolve and garner a great deal of discussion, and we intend to continue to study recidivist enhancements in the guidelines throughout the upcoming amendment cycle. For example, we plan to publish a report on career offenders and other recidivist provisions later this year, which could include recommendations to Congress for statutory changes. Finally, as part of our broader look at the immigration guidelines, we are continuing to consider whether conforming

changes should be made in the illegal reentry guideline's treatment for enhancements based on prior convictions.

I do want to briefly discuss the topic of retroactivity as I am aware that several commenters have asked the Commission to make any changes it makes in this area retroactive. In deciding whether to make an amendment retroactive, the Commission considers several factors, including the purpose of the amendment, the magnitude of the change and the difficulty of applying the amendment retroactively.

While the potential change in the applicable guideline range could be significant for individual defendants, the amendment's purpose is to address the complexity and the litigation associated with the "crime of violence" definition in the career offender guideline, which has been exacerbated by the Supreme Court's decision in *Johnson*.

With respect to relevant facts, it would be extremely difficult to identify those offenders who might be retroactively impacted by the elimination of the residual clause. Specifically, two major data limitations would preclude staff from being able to complete a retroactivity analysis of this proposed amendment. First, sentencing documentation does not consistently report, and Commission data does not include, information about which prong of the "crime of violence" definition at §4B1.1 was applied.

Therefore, staff cannot identify cases in which the residual clause alone qualified an offender for the career offender provision. Similarly, sentencing documentation does not consistently report which criminal history events the courts used as predicates in order to apply the guideline. Furthermore, a predicate that was counted under the residual clause still may qualify under another prong of the crime of violence definition such as the elements clause.

Under these circumstances, it is difficult, if not impossible, to ascertain the overall effect of the various amendments, and would likely make retroactive application complex and time intensive. The very issue of retroactivity is already being litigated. As a result, the Commission has determined that a meaningful and complete retroactivity analysis is not possible.

As I mentioned earlier, the Commission is continuing to evaluate study the career offender guideline. The Commission acknowledges this is a very complicated area of law that continues to challenge courts and litigants alike. The Commission will continue to study this issue and plans to issue a report to Congress later this year.

I want to briefly address this year's proposed amendments.

First, the Commission is publishing a proposed amendment on immigration related offenses. The Commission has received comment expressing concern that the guidelines provide for inadequate sentences for alien smugglers, including those who bring in unaccompanied minors.

As soon as possible, the Commission will include a data presentation on the Commission's website to inform public comment on this proposed amendment. For those interested in obtaining this information, you can subscribe to our email list or Twitter account to receive a notification when this information is posted.

Separately, the Commission is also publishing a series of proposed amendments. First, there is an amendment that revises the guideline pertaining to animal fighting. The proposed amendment would allow for higher penalties for animal fighting offenses and responds to the enactment of two new crimes relating to attending an animal fighting venture, particularly in cases where a child under 16 is brought to one of these events. The proposed amendment also revises the existing upward departure provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.

The Commission's proposed amendment for public comment on supervised release is a result of a collaboration with the Criminal Law Committee which has studied the current conditions in light of recent court precedent as well as the Commission's own multi-year review of federal sentencing practices relating to conditions of probation and supervised release. In general, the Commission seeks to make the conditions more tailored to a defendant's needs and problems as well as easier for defendants to understand and probation officers to enforce.

Each year, the Commission considers resolving circuit court splits emerging from conflicting interpretations of the guidelines by federal courts. This year, the Commission has put forward an amendment to address circuit splits dealing with child pornography offenses.

One of the issues typically arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. Another issue typically arises when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses.

The Commission is also publishing a proposed amendment on compassionate release that seeks further comment on whether changes should be made to the Commission's policy statement found in the guidelines, and if so, how? The proposed amendment contemplates changes to the Commission's policy statement that would revise the list of extraordinary and compelling reasons for an offender to be considered for compassionate release.

Lastly, as always, the Commission is publishing a proposed amendment to respond to recently enacted legislation and other guideline issues where an update was both appropriate and timely.

I mentioned earlier the need for the Commission to work to make the guidelines more effective and more efficient. We hope that many of the amendments proposed today will do so.

The Commission will continue to provide updates about further opportunities for public comment and future public meetings and hearings through its website and Twitter account.

Please note that the Commission will hold its next public hearings on February 17th and March 16th.

Again, I thank you for your interest in these important issues, and I look forward as always to your further comments and feedback.