UNITED STATES SENTENCING COMMISSION

PUBLIC MEETING

THURSDAY
AUGUST 17, 2017


PRESENT
WILLIAM H. PRYOR, Acting Chair
CHARLES R. BREYER, Vice Chair (via telephone)
RACHEL E. BARKOW, Commissioner
DANNY C. REEVES, Commissioner
ZACHARY BOLITHO, Ex Officio Commissioner

ALSO PRESENT
KATHLEEN C. GRILLI, General Counsel
KENNETH P. COHEN, Staff Director
Vote to Adopt December 2016 Meeting ............ 4
Minutes
Report of the Chair ............................. 5
Vote on Final Policy Priorities for .......... 8
2017-2018
Possible Vote to Publish Proposed .......... 15
Amendments to the Federal Sentencing
Guidelines and Issues for Comment
Issues for Public Comment .................... 31
Adjourn ........................................ 34
The meeting is called to order. I want to 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 our live stream broadcast on the Commission website.

As always, we welcome and encourage the significant public interest and federal sentencing issues, and the work of the Commission.

Before we get started, I would like to introduce the other members of the Commission. Judge Charles Breyer joins us by telephone today. Judge Breyer, can you hear us?

VICE CHAIR BREYER: Yes, I can.

ACTING CHAIR PRYOR: Good. Judge Breyer is the Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998.
To my left, Commissioner Rachel Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law, and serves as the Faculty Director of the Center on the Administration of Criminal Law at the law school.

To my right, Judge Danny Reeves was appointed to the Commission this year. Judge Reeves is a District Judge for the Eastern District of Kentucky and has served in that position since 2001.

And to his right, finally, Zachary Bolitho is here as the new ExOfficio Commissioner from the Department of Justice. Commissioner Bolitho serves as Counsel to the Deputy Attorney General of the United States.

Previously, he was an Assistant Professor at Campbell University School of Law in Raleigh, North Carolina from 2013 to 2017. Before his work as a law professor, he was an Assistant United States Attorney in the Eastern District of Tennessee from 2009 to 2013 where he
served in both the appellate and general crime sections. Welcome to the Commission.

EX OFFICIO COMMISSIONER BOLITHO:

Thank you.

ACTING CHAIR PRYOR: The first order of business is a vote to adopt the December 9th, 2016 public meeting minutes. Is there a motion to do so?

COMMISSIONER BARKOW: So moved.

ACTING CHAIR PRYOR: Is there a second?

VICE CHAIR BREYER: Second.

ACTING CHAIR PRYOR: Judge Breyer seconded. Is there any discussion on the motion?

COMMISSIONER REEVES: I'll need to abstain since I was not present.

ACTING CHAIR PRYOR: Judge Reeves is going to abstain since he was not at the meeting.

Vote on the motion by saying aye.

(Chorus of ayes)

ACTING CHAIR PRYOR: Any nays?

(No audible response)
ACTING CHAIR PRYOR: The motion is adopted by voice vote. The next item of business is the report of the Chair. Before we proceed with the business of the day I would like to update you on the Commission's work.

As always, the Commission has continued its research and analysis of criminal cases in the federal system. The Commission has published several reports and publications this year, all of which can be found on our website, including our 2016 Annual Report and Source Book of Federal Sentencing Statistics.

The Commission received approximately 315,000 documents for nearly 68,000 federal offenders sentenced in fiscal year 2016. The Annual Source Book provides policy makers and the public with critical federal sentencing data, all available on our website.

Most recently, the Commission published our 2017 Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System. The 2017 overview analyzes the most recently
The Commission's overview found that mandatory minimum penalties continue to result in long sentences in the federal system. These penalties also have a significant impact on the size and composition of the federal prison population.

The overview also found significant demographic shifts in the data relating to the application of mandatory minimum penalties from 2010 to 2016. This publication is part of a series of publications about mandatory minimum penalties.

The Commission will be releasing more reports this year including an analysis of President Obama's Clemency Initiative that began in 2014, as well as an analysis of alternative to incarceration programs in the federal courts.

Along with this research, the Commission continues to collect and report on available federal sentencing data to supplement the data presented in the 2011 Mandatory Minimum Report.
sentencing data related to the retroactive application of the 2014 Drug Guidelines Amendment, often referred to as Drugs Minus Two.

As of July, federal courts have considered 47,100 motions for retroactive application of the Drugs Minus Two amendment. The courts have approved 30,730, or 65.2 percent, of these applications.

Before we move on with the business of the day and the announcement of our final priorities, the Commission would like to thank the numerous individuals and groups who submitted thoughtful comments and recommendations during our most recent public comment period.

The Commission received a record number of public comments. Over 81,000 letters and emails were submitted during this public comment period, illustrating the continued public interest in the Commission's work.

As we ordinarily do in August, the Commission will now vote on the final policy priorities for the 2017-2018 amendment cycle.
Our General Counsel, Kathleen Grilli, will now advise the Commission on that matter.

MS. GRILLI: Thank you, Judge. In June of this year, as the Chair just mentioned, the Commission published a Notice of Proposed Policy Priorities for the amendment cycle which would end on May 1st, 2018.

After reviewing public comment, you have finalized a Notice of Final Priorities for this amendment cycle. That notice is before you. A motion to adopt the Notice of Final Priorities and publish in the Federal Register would be in order at this time.

ACTING CHAIR PRYOR: Is there a motion to adopt and publish into the Federal Register the Final Notice of Policy Priorities for the Commission's 2017-2018 amendment cycle as suggested by our General Counsel?

COMMISSIONER REEVES: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER BARKOW: Second.
ACTING CHAIR PRYOR: Is there any discussion on the motion?

(No audible response)

ACTING CHAIR PRYOR: I would like to take a moment to briefly discuss some of the priorities. Our policy priorities fall into three major categories. First, there are several broad priorities that require close collaboration among all three branches of government.

Chief among them are ongoing efforts to make the federal sentencing guidelines stronger and more effective. To that end, the Commission will continue its ongoing multi-year examination of the overall structure of the guidelines post-Booker, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments.

As part of that examination, the Commission will study possible approaches to simplify the operation of the guidelines, promote proportionality and certainty, and reduce
sentencing disparities including demographic, geographic, and inter-judge disparities.

This effort is important to ensure that the federal sentencing guidelines provide clear and effective guidance for federal courts across the country. This work will take time, and presents us with a significant opportunity to collaborate with Congress, the courts, the Department of Justice, and other stakeholders.

As part of that ongoing collaboration, the Commission will continue to study mandatory minimum penalties and will release a series of publications analyzing the impact of mandatory minimum penalties on offenders convicted of specific events types.

We will also continue the work stemming from our 2016 Report to Congress: Career Offender Enhancements in which the Commission recommended that Congress revise the Directive in Section 994(h) pertaining to career offenders to focus on offenders who commit violent offenses and either their instant federal offense or in
their criminal history.

The Commission's report also urged Congress to establish one definition of “crime of violence” for all criminal law purposes and proposed that it adopt the Commission's definition of “crime of violence” as the single uniform definition.

Our second major category is an emerging area and an urgent issue of public concern, synthetic drugs. The Commission is acutely aware of the increasing prevalence of synthetic drugs including fentanyl.

Within weeks of having our quorum reconstituted, we held a public hearing on synthetic drugs on April 18th, and we published an issue for comment on ecstasy and methylene in July.

We have already received very helpful comments about these drugs. Later during this meeting, we will publish two issues for public comment that will focus specifically on issues related to synthetic cathinones and synthetic
cannabinoids.

The Commission is already planning a second public hearing on synthetic cathinones this fall, and another hearing soon after on synthetic cannabinoids.

The Commission will continue to seek input from Congress, the Department of Justice, expert scientists, law enforcement, concerned citizens, and other stakeholders as we study this important topic, one that we fully intend to tackle this amendment cycle.

Lastly, there are several proposals that we were not able to fully consider last amendment cycle because we lost our quorum for three critical months. Implementation of federal legislation is always a top priority for the Commission.

As one example, we will complete our work to implement the statutory changes made by the Bipartisan Budget Act. These changes relate to fraudulent claims under certain social security programs, and we will discuss a proposed
amendment to address this issue in a moment.

The Commission will also consider proposals for providing adjustments of the guidelines for first time offenders, as well as further consideration of the availability of alternatives to incarceration for certain federal offenders.

In addition, the Commission continues to act on the recommendations from the Tribal Issues Advisory group. In May, the Commission released its own report detailing its own review and research related to youthful offenders in the federal system.

Informed by that work, the Commission will consider how juvenile sentences are treated under the criminal history guidelines, also informed by the recommendations of the Tribal Issues Advisory group.

The Commission will consider whether to provide a uniform definition of court protection order that would apply throughout the guidelines.
Hearing no further discussion, vote on the motion by saying aye.

(Chorus of ayes)

ACTING CHAIR PRYOR: Any nays?

(No audible response)

ACTING CHAIR PRYOR: The motion is adopted. And let the record reflect that at least three commissioners voted in favor of the motion.

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

Our General Counsel will advise the Commission on the first possible vote concerning a proposed amendment on the Bi-Partisan Budget Act.

MS. GRILLI: Thank you, Judge. The first proposed amendment for your consideration responds to the Bi-Partisan Budget Act which added new subdivisions prohibiting conspiracy to commit fraud for substance offenses that were already contained in title 42, United States
Code, Sections 408, 1011, and 1383(a).

The three amended statutes were already referenced in Appendix A to §2B1.1. The proposed amendment would also reference them to §2X1.1, which is the attempt solicitation or conspiracy guideline.

The Bi-Partisan Budget Act also amended those statutes to add increased penalties of ten years' imprisonment for certain persons who commit fraud offenses under relevant social security programs.

The new increase penalties apply to all of the fraudulent conduct in Subsection A of the three statutes.

The proposed amendment would amend §2B1.1 to address those types of cases on which a defendant was specifically convicted under the statute's reference and the statutory maximum term of ten years applies.

It provides an enhancement of either four or two levels and a minimum offense level of 14 or 12 for such cases. It also adds commentary
specifying whether an adjustment under §3B1.3, which is the abuse of position of trust or use of a special skill/enhancement, applies by bracketing two possibilities.

If the new enhancement were to apply, then §3B1.3 would not, or if the enhancement applies, the adjustment is not precluded from applying. Issues for comment are also included.

A motion to publish the proposed amendment on the Bi-Partisan Budget Act would be in order at this time with an original comment period closing October 10th, a reply comment period closing November 6, and technical and conforming amendment authority to staff.

ACTING CHAIR PRYOR: Is there a motion to publish the proposed amendment as suggested by the general counsel?

COMMISSIONER BARKOW: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER REEVES: Second.

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

(No audible response)

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

(Chorus of ayes)

ACTING CHAIR PRYOR: Any nays?

(No audible response)

ACTING CHAIR PRYOR: Let the record reflect that at least three commissioners voted in favor of the motion.

MS. GRILLI: The next amendment for your --

ACTING CHAIR PRYOR: Actually that was four, all four of us voted. We need that. The motion is adopted and we'll go now to the next one. The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment on the Bi-Partisan Budget Act.

MS. GRILLI: On the Tribal Issues, Judge.

ACTING CHAIR PRYOR: You're right. My script actually says Bi-Partisan Budget Act -
MS. GRILLI: Sorry, Judge.

ACTING CHAIR PRYOR: -- but we need to return to Tribal Issues.

MS. GRILLI: The next proposed amendment arises from recommendations contained in the Tribal Issues Advisory Group report that was submitted to the Commission in summer of 2016.

The proposed amendment contains two parts, neither of which is mutually exclusive. Part A would amend the commentary to §4A1.3 on departures for an inadequacy of criminal history category to set forth a non-exclusive list of factors for the court to consider in determining whether or to what extent an upward departure based on a tribal court conviction is appropriate.

Part B of the proposed amendment would amend the commentary to §1B1.1 to provide a definition of court protection order which is derived from title 18, United States Code,
Section 2266(b) with a provision that it be consistent with 18 USC Section 2265(b).

Each part of the proposed amendment also includes issues for comment. A motion to publish the proposed amendment with an original comment period closing October 10th, a reply comment period closing November 6, and technical and conforming amendment authority to staff would be in order at this time.

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

COMMISSIONER REEVES: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER BARKOW: Second.

ACTING CHAIR PRYOR: Any discussion?

(No audible response)

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

(Chorus of ayes)

ACTING CHAIR PRYOR: Any nays?
(No audible response)

ACTING CHAIR PRYOR: So that motion is adopted. And let the record reflect that at least three commissioners voted in favor of the motion. The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment on first offenders and alternatives to incarceration.

MS. GRILLI: Yes. This next amendment relates to first offenders and alternatives to incarceration, and contains two parts, Parts A and B, either of which may be promulgated again as they are not mutually exclusive.

Part A sets forth a new Chapter 4 guideline at §4C1.1 called First Offenders that would provide lower guideline ranges for first offenders generally, and increase the availability of alternatives to incarceration for such offenders at the lower levels of the sentencing table.

Part A of the proposed amendment
includes two options for defining a first offender who would be eligible for a decrease in offense under the new guideline.

Part B of the proposed amendment would expand Zone B of the Sentencing Table by consolidating Zones B and C. Part B also amends the commentary to §5F1.2 regarding home detention to remove language that required electronic monitoring.

Each part includes issues for comment.

A motion to publish the proposed amendment with an original comment period closing October 10th, a reply comment period closing November 6, and technical and conforming amendment authority to staff would be in order at this time.

ACTING CHAIR PRYOR: Is there a motion to publish the proposed amendment as suggested?

VICE CHAIR BREYER: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER BARKOW: Second.

ACTING CHAIR PRYOR: Is there any
discussion?

(No audible response)

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

(Chorus of ayes)

ACTING CHAIR PRYOR: Any nays?

(No audible response)

ACTING CHAIR PRYOR: Let the record reflect that at least three Commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment on acceptance of responsibility.

MS. GRILLI: Yes. This proposed amendment responds to concern that the commentary to §3E1.1 encourages courts to deny a reduction in sentence when a defendant pleads guilty, accepts responsibility for the offense conduct, but unsuccessfully challenges the pre-sentence report assessment of relevant conduct.

The proposed amendment amends the commentary to §3E1.1 to revise how the
defendant's challenge of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. An issue for comment is also included.

A motion to publish the proposed amendment with an original comment period closing October 10th, a reply comment period closing November 6, and technical and conforming amendment authority to staff would be in order at this time.

ACTING CHAIR PRYOR: Is there a motion to publish the proposed amendment as suggested by the general counsel?

COMMISSIONER BARKOW: So moved.

ACTING CHAIR PRYOR: Is there a second?

VICE CHAIR BREYER: Second.

ACTING CHAIR PRYOR: Any discussion?

(No audible response)

ACTING CHAIR PRYOR: Vote on the motion by saying aye.
(Chorus of ayes)

ACTING CHAIR PRYOR: Any nays?

COMMISSIONER REEVES: Nay.

ACTING CHAIR PRYOR: The motion is adopted. Let the record reflect that at least three Commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment for miscellaneous guideline issues.

MS. GRILLI: Yes, the next amendment responds to recently enacted legislation and miscellaneous guideline issues. It is a multi-part amendment. Again, each part is not mutually exclusive.

Part A responds to the Transnational Drug Trafficking Act of 2015 by amending §2B5.3, the criminal infringement of copyright or trademark guideline.

Part B responds to the International Megan's Law to prevent child exploitation and other sexual crimes by amending §2A3.5, §2A3.6,
and Appendix A. Issues for comment are included in this section.

Part C responds to the Frank Lautenberg Chemical Safety for the 21st Century Act by amending Appendix A. Part D amends §2G1.3 to clarify how the use of computer enhancement in subsection (b) interacts with its correlating commentary.

And Part E responds to the Justice for All Reauthorization Act of 2016 by amending §5D1.3 regarding conditions and supervised release.

A motion to publish the proposed amendment with an original comment period closing October 10th, a reply comment period closing November 6th, and technical and conforming amendment authority to staff would be in order at this time.

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

COMMISSIONER REEVES: So moved.
ACTING CHAIR PRYOR: Any second?

COMMISSIONER BARKOW: Second.

ACTING CHAIR PRYOR: Any discussion?

(No audible response)

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

(Chorus of ayes)

ACTING CHAIR PRYOR: No nays, so that motion is adopted. And let the record reflect that at least three Commissioners voted in favor of the motion to publish.

The General Counsel would now advise the Commission on a possible vote concerning a proposed technical amendment to replace the term marijuana equivalency.

MS. GRILLI: Thank you, Judge. The next proposed amendment makes technical changes to §2D1.1, the drug trafficking guideline by amending §2D1.1 to replace the term “marihuana equivalency” in the Drug Equivalency Tables.

It replaces that term throughout the guideline with the term “converted drug weight.”
It also changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.”

The proposed amendment is not intended as a substantive change in policy.

A motion to publish the proposed amendment with an original comment period closing October 10th, reply comment closing November 6, and technical and conforming amendment authority to staff would be in order.

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

COMMISSIONER BARKOW: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER REEVES: Second.

ACTING CHAIR PRYOR: Any discussion?

(No audible response)

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

(Chorus of ayes)

ACTING CHAIR PRYOR: No nays, so the
motion is adopted. And let the record reflect that at least three Commissioners voted in favor of the motion to publish.

The General Counsel will now advise the Commission on a possible vote concerning a proposed multi-part technical amendment.

MS. GRILLI: Yes, Judge, thank you. This technical amendment makes various technical changes to the guideline manual. Part A makes certain clarifying changes to Chapter One, Part A, Subpart 1(4)(b) and Application Note 2(a) to §2B1.1.

Part B makes technical changes to §§2Q1.3, 2R1.1, 4A1.2, and 4B1.4, to correct title references to §4A1.3.

And finally, Part C of the proposed amendment makes clerical changes to correct typographical errors and correct or add statutory or Appendix A references.

A motion to publish the proposed amendment with an original comment period ending October 10th, a reply comment period closing
November 6th, and technical and conforming amendment authority to staff would be in order at this time.

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

COMMISSIONER REEVES: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER BARKOW: Second.

ACTING CHAIR PRYOR: Any discussion?

EX OFFICIO COMMISSIONER BOLITHO: Judge Pryor, the only thing I would mention, and I may have missed this, was whether we were going to look at that technical amendment regarding the $2L1.2 issue, the gap, that we had discussed. And I don't remember if we were going to look at that this time or another time.

ACTING CHAIR PRYOR: So that is something that would be within our authority under the miscellaneous guidelines issue amendment that we have already adopted.
EX OFFICIO COMMISSIONER BOLITHO:

Okay, thank you.

ACTING CHAIR PRYOR: So, where was I?

MS. GRILLI: Discussion.

ACTING CHAIR PRYOR: We second it.

Any discussion?

(No audible response)

ACTING CHAIR PRYOR: So vote on the motion by saying aye.

(Chorus of ayes)

ACTING CHAIR PRYOR: No nays, so the motion is adopted. And let the record reflect that at least three Commissioners voted in favor of the motion to publish.

As mentioned previously, the Commission's published amendments relate to the Bi-Partisan Budget Act, First Time Offenders, Tribal Issues, Alternatives to Incarceration, and other miscellaneous and technical amendments.

As our final item on the agenda, we will now vote on the Commission's issues for public comment.
MS. GRILLI: Yes, Judge. The issue for comment before you relates to your priority concerning the study of synthetic cathinones and synthetic cannabinoids, among others.

In August, you have indicated that one of your priorities will be the study of these offenses, including synthetic cathinones, cannabinoids, THC, fentanyl, and fentanyl analogues.

The issue for comment before you for consideration contains two parts, Parts A and Part B. Part A focuses on issues related to synthetic cathinones. Part B focuses on issues relating to THC and synthetic cannabinoids.

The proposed issue for comment seeks comment on factors relating to those drugs, including the chemical structure, the pharmacological effects, the potential for addiction and abuse, the pattern of abuse and harms associated with abuse, the patterns of trafficking and harms associated with trafficking, and additionally seeks information
about whether the Commission should adopt a
broad, class based approach to synthetic drugs
for sentencing purposes.

A motion to publish the proposed
amendment with a public comment period closing
October 27th, 2017, and technical and conforming
amendment authority to staff would be in order at
this time.

ACTING CHAIR PRYOR: Is there a motion
to publish the proposed issue for comment as
suggested by the General Counsel?

COMMISSIONER BARKOW: So moved.

ACTING CHAIR PRYOR: Is there a
second?

COMMISSIONER REEVES: Second.

ACTING CHAIR PRYOR: Any discussion?

(No audible response)

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

(Chorus of ayes)

ACTING CHAIR PRYOR: No nays, so the
motion is adopted. Let the record reflect that
at least three Commissioners voted in favor of the motion to publish.

As we wrap up, I would like to mention an upcoming event, the Commission's National Seminar on the Federal Sentencing Guidelines in Denver, Colorado, next month.

This seminar will provide training to probation officers, prosecutors, and defense attorneys on the guidelines. We look forward to another big crowd in Denver where we expect over 500 attendees.

All of the Commission's policy priorities and proposed amendments will be on the Commission website soon. We look forward to working with all of you as we move forward to another productive year. Thank you for joining us today.

Is there any further business before the Commission?

(No audible response)

ACTING CHAIR PRYOR: Hearing none, is there a motion to adjourn?
COMMISSIONER BARKOW: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER REEVES: Second.

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

(Chorus of ayes)

ACTING CHAIR PRYOR: The motion is adopted by voice vote, and the meeting is adjourned. Thank you very much.

(Whereupon, the above-entitled matter went off the record at 11:30 a.m.)