

UNITED STATES SENTENCING COMMISSION

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THURGOOD MARSHALL FEDERAL  
JUDICIARY BUILDING

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PUBLIC MEETING

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FRIDAY  
JANUARY 19, 2018

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The United States Sentencing Commission met in the 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  
ZACHARY BOLITHO, 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: This meeting is  
4 called to order. I want to thank everyone for  
5 attending this public meeting of the United  
6 States Sentencing Commission.

7 The Commission appreciates the  
8 attendance of those joining us here as well as  
9 those watching our live-stream broadcast on the  
10 Commission's website.

11 As always, we welcome and encourage  
12 the significant public interest in Federal  
13 sentencing issues and the work of the Commission.

14 I want to start by introducing the other  
15 Members of the Commission. To my immediate left  
16 is Professor Rachel Barkow.

17 Commissioner Barkow is the Siegel  
18 Family Professor of Regulatory Law and Policy at  
19 the New York University School of Law, and serves  
20 as the faculty director of the Center for the  
21 Administration of Criminal Law at the law school.

22 To my immediate right is Judge Charles

1 Breyer.

2 Judge Breyer is a Senior District  
3 Judge for the Northern District of California and  
4 has served as the United States District Judge  
5 since 1998.

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

10 And then to my far right is Zachary  
11 Bolitho, who is the Ex Officio Commissioner from  
12 the Department of Justice.

13 Commissioner Bolitho serves as Deputy  
14 Chief of Staff and as Associate Deputy Attorney  
15 General to the Deputy Attorney General of the  
16 United States.

17 The first order of business is a vote  
18 to adopt the August 17, 2017 Public Meeting  
19 minutes. Is there a motion to do so?

20 COMMISSIONER BREYER: So moved.

21 CHAIR PRYOR: Do I have a second?

22 COMMISSIONER BARKOW: Second.

1                   ACTING CHAIR PRYOR:    Is there any  
2   discussion on the motion?  So, vote on the motion  
3   by saying aye.

4                   (Chorus of aye.)

5                   Any nays?  The motion is adopted by a  
6   voice vote.  Before we proceed to the business  
7   of today, I would like to update you all on the  
8   Commission's work.

9                   Last month, the Commission published  
10   its fourth report in its continuing series on  
11   recidivism entitled The Effects of Aging on  
12   Recidivism Among Federal Offenders, which  
13   examines the impact of aging on Federal offender  
14   recidivism, and once age is accounted for, the  
15   impact of other offense and offender  
16   characteristics.

17                  Last year, the Commission also  
18   published eleven new reports on issues ranging  
19   from mandatory minimum penalties to an analysis  
20   of demographic differences and Federal sentencing  
21   practices, and look for additional publications  
22   regarding mandatory minimums, recidivism, and

1 other sentencing issues, in the coming weeks and  
2 months.

3 In August, the Commission voted to  
4 publish several holdover amendments from the  
5 previous amendment cycle. These proposals were  
6 not able to be fully considered previously  
7 because the Commission did not have a quorum for  
8 three critical months.

9 In February, the Commission plans to  
10 hold a public hearing on some of these proposed  
11 amendments, including those that would implement  
12 the Bipartisan Budget Act of 2015 and  
13 recommendations from the Commission's Tribal  
14 Issues Advisory Group, regarding how tribal  
15 convictions are treated under Chapter Four of the  
16 guidelines.

17 In March, the Commission will also  
18 hold a public hearing on another proposed  
19 amendment that was published in August, the  
20 proposed amendment regarding alternatives to  
21 incarceration in first offenders.

22 That hearing in March would also cover

1 any amendments we vote to publish today, in  
2 particular the proposed amendment on synthetic  
3 drugs, which we will be voting on in a few  
4 minutes. The proposed amendment reflects the  
5 information we have learned from public comment  
6 and three public hearings we held on synthetic  
7 cathinones, cannabinoids, fentanyl, and fentanyl  
8 analogues last year.

9 Before we move to the announcement of  
10 our proposed guideline amendments, the Commission  
11 would like to thank the numerous individuals and  
12 groups who submitted thoughtful comments and  
13 recommendations during our most recent public  
14 comment periods.

15 And as we ordinarily do in January,  
16 the Commission will now vote on whether to  
17 publish proposed amendments for the 2017-2018  
18 amendment cycle.

19 Our general counsel, Ms. Kathleen  
20 Grilli, will now advise else the Commission on  
21 the first possible vote concerning a proposed  
22 commitment on synthetic drugs.

1 Ms. Grilli?

2 MS. GRILLI: Thank you, Judge.

3 The synthetic drug three-part  
4 amendment before you is a result of the  
5 Commission's multi-year study of offenses  
6 involving synthetic cathinones, synthetic  
7 cannabinoids, THC, fentanyl, and fentanyl  
8 analogues.

9 Each of the parts could be promulgated  
10 as they are not mutually exclusive.

11 Part A of the proposed amendment would  
12 amend the drug equivalency tables in §2D1.1 to  
13 adopt a class-based approach to account for  
14 synthetic cathinones, and sets forth a single  
15 marijuana equivalency for the class, bracketing  
16 three possible equivalencies, 1 gram of synthetic  
17 cathinone equal to 200, 380, or 500 grams of  
18 marijuana.

19 Part A of the proposed amendment also  
20 brackets the possibility of making this class-  
21 based marijuana equivalency applicable to  
22 methcathinone and establishes a minimum base

1 offense level of 12 for cases involving synthetic  
2 cathinones, except those in Schedules III, IV, and  
3 V.

4 Part B of the proposed amendment would  
5 amend the drug equivalency tables in §2D1.1 to  
6 adopt the class-based approach to account for  
7 synthetic cannabinoids, and sets forth a single  
8 marijuana equivalency for the class, bracketing  
9 three possible equivalencies, 1 gram of synthetic  
10 cannabinoid is equal to 167, 334, or 500 grams of  
11 marijuana.

12 Part B includes a definition of the  
13 term "synthetic cannabinoid" and brackets for  
14 comment a provision establishing a minimum base  
15 offense level of 12 for cases involving synthetic  
16 cannabinoids, except those at Schedules III, IV,  
17 and V.

18 Part C of the proposed amendment would  
19 amend §2D1.1 in several ways to account for  
20 fentanyl and fentanyl analogues.

21 First, it would provide penalties for  
22 offenses involving fentanyl that are equivalent



1 to the higher penalties currently provided for  
2 offenses involving fentanyl analogues.

3 Second, it would revise §2D1.1 by  
4 providing a definition of the term "fentanyl  
5 analogue", setting forth the single marijuana  
6 equivalency applicable to all fentanyl analogues  
7 of one gram is equal to ten kilograms of marijuana  
8 and specifying in the Drug Quantity Table that  
9 the penalties relating to fentanyl apply only to  
10 the substance with a specific chemical name.

11 Finally, Part C of the proposed  
12 amendment would amend §2D1.1 to provide an  
13 enhancement in cases in which fentanyl or  
14 fentanyl analogue is misrepresented or marketed  
15 as another substance.

16 Finally, each part includes issues for  
17 comment.

18 A motion to publish the proposed  
19 synthetic drug amendment, with an original  
20 comment period closing on March 6th and a reply  
21 comment period closing on March 28, 2018, and  
22 technical and conforming amendment authority

1 granted to Staff, would be in order at this time.

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

5 COMMISSIONER BREYER: So moved.

6 ACTING CHAIR PRYOR: Is there a  
7 second?

8 COMMISSIONER REEVES: Second.

9 ACTING CHAIR PRYOR: Is there any  
10 discussion on the motion? Vote on the motion by  
11 saying aye.

12 (Chorus of aye.)

13 Nay? No nays.

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

17 The general counsel will now advise  
18 the Commission on a possible vote concerning a  
19 proposed amendment on immigration.

20 MS. GRILLI: Yes, this proposed two-  
21 part amendment responds to issues that have  
22 arisen regarding application of the illegal re-

1 entry guideline at §2L1.2., and the Commission is  
2 considering whether to promulgate either or both  
3 parts, as they are not mutually exclusive.

4 Part A would amend §2L1.2 by revising  
5 subsection (b)(2) so that its applicability turns  
6 on whether the defendant engaged in criminal  
7 conduct before he or she was first ordered  
8 deported or ordered removed, rather than whether  
9 the defendant sustained the resulting conviction  
10 or convictions before that event.

11 Part A would also make non-  
12 substantive, conforming changes to the language  
13 of subsection (b)(3).

14 Part B of the proposed amendment  
15 responds to an issue that has arisen in  
16 litigation concerning how §2L1.2's enhancements  
17 for prior convictions apply in a situation where  
18 a defendant's prior conviction included a term of  
19 probation, parole, or supervised release, that  
20 was subsequently revoked and an additional term  
21 of imprisonment imposed.

22 This part would revise the definition

1 of "sentence imposed" in Application Note 2 of  
2 the Commentary to §2L1.2, to clarify that  
3 consistent with the meaning of sentence of  
4 imprisonment under §4A1.2, the phrase, "sentence  
5 imposed", in §2L1.2 includes any term of  
6 imprisonment given upon revocation of probation,  
7 parole, or supervised release, regardless of when  
8 the revocation occurred.

9 Each part also includes issues for  
10 comment.

11 A motion to publish the proposed  
12 amendment with an original comment period closing  
13 March 6th, reply comment period closing March 28,  
14 2018, and technical and conforming amendment  
15 authority granted to Staff, would be in order at  
16 this time.

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

20 COMMISSIONER REEVES: So moved.

21 ACTING CHAIR PRYOR: Is there a  
22 second?

1 COMMISSIONER BARKOW: Second.

2 ACTING CHAIR PRYOR: Any discussion?

3 All in favor say aye?

4 (Chorus of aye.)

5 Any nays? The motion is adopted and  
6 let the record reflect that at least three  
7 Commissioners voted in favor of the motion to  
8 publish.

9 Our General Counsel will now advise  
10 the Commission on a possible vote concerning a  
11 proposed technical amendment.

12 MS. GRILLI: Yes. This proposed  
13 amendment makes various technical changes to the  
14 Guidelines Manual.

15 First, the proposed amendment makes  
16 technical changes to provide updated references  
17 to certain sections in the United States Code  
18 that have been restated in legislation, amending  
19 §2B1.5 and Appendix A.

20 Second, the proposed amendment also  
21 makes technical changes to reflect the editorial  
22 reclassification of certain sections in the

1 United States Code, making changes to §2A3.5,  
2 §2X5.2, §5B1.3, §5D1.3, and Appendix A.

3 And finally, the proposed amendment  
4 revises Subsection §8C2.1 by deleting an outdated  
5 reference.

6 A motion to publish the technical  
7 amendment with an original comment period closing  
8 on March 6th, a reply comment period closing on  
9 March 28, 2018, and with technical and conforming  
10 amendment authority granted to Staff, would be in  
11 order at this time.

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

15 COMMISSIONER BARKOW: So moved.

16 CHAIR PRYOR: Is there a second?

17 COMMISSIONER REEVES: Second.

18 ACTING CHAIR PRYOR: Any discussion?

19 All in favor say aye?

20 (Chorus of aye.)

21 Any nays?

22 The motion is adopted and let the

1 record reflect that at least three Commissioners  
2 voted in favor of the motion to publish.

3 I would like to take a moment to  
4 discuss briefly some of the proposed amendments.

5 First, the Commission is publishing a  
6 proposed amendment regarding synthetic drugs,  
7 which includes synthetic cathinones, otherwise  
8 known as "bath salts", synthetic cannibanooids  
9 including "K2" or "spice", fentanyl and fentanyl  
10 analogues.

11 The Commission has spent the last six  
12 months publishing various issues for comment and  
13 conducting public hearings on this subject.

14 The Commission has used the expertise  
15 gathered through this process to craft a proposal  
16 to appropriately respond to this urgent issue.

17 The amendment proposes a class-based  
18 approach for synthetic cathinones and  
19 cannibanooids, and increases penalties for  
20 offenses involving fentanyl, equivalent to the  
21 higher penalties currently provided for offenses  
22 fentanyl analogues.

1           The proposed amendment also provides  
2           an enhancement in cases where fentanyl or a  
3           fentanyl analogue is misrepresented or marketed  
4           as another substance.

5           This month, the Commission will  
6           release a public data presentation for the three  
7           categories of drugs that are the focus of these  
8           amendments. Members of the public may find this  
9           information useful when preparing their public  
10          comment.

11          Second, the Commission will publish a  
12          proposed amendment that addresses two  
13          miscellaneous application issues relating to  
14          immigration offenses.

15          Finally, the Commission will publish  
16          a proposed amendment that includes technical  
17          changes to the guidelines.

18          As we wrap up, I would like to mention  
19          an upcoming event.

20          The Commission's National Seminar on  
21          the Federal Sentencing Guidelines will be held in  
22          San Antonio, Texas, on May 30th through June 1st.



1           The seminar provides training to  
2 probation officers, prosecutors, and defense  
3 attorneys, on the guidelines.

4           Registration for the event will open  
5 on January 22nd, so please look for the  
6 registration link on our website at that time.  
7 The Commission's proposed amendments and issues  
8 for comment will also be on our website soon.

9           We look forward to working with all of  
10 you as we move forward for another productive  
11 year. Thank you for joining us today.

12           Is there any further business before  
13 the Commission? Hearing none, is there a motion  
14 to adjourn?

15           COMMISSIONER BREYER: So moved.

16           ACTING CHAIR PRYOR: And is there a  
17 second?

18           COMMISSIONER BARKOW: Second.

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

21           (Chorus of aye.)

22           Any nays? The motion is adopted by a

1 voice vote. The meeting is adjourned.

2 (Whereupon, the above-entitled matter went off

3 the record at 10:46 a.m.)

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