

**Public Meeting Remarks of Circuit Judge William H. Pryor Jr.,
Acting Chair of the United States Sentencing Commission
April 12, 2018
Washington D.C.**

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 livestream broadcast on the Commission's website. As always, we welcome and encourage the significant public interest in federal sentencing issues and the work of the Commission.

I would like to start by introducing the other members of the Commission. First, I will introduce Rachel Barkow. Commissioner 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.

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

Judge Danny Reeves is a District Court Judge for the Eastern District of Kentucky and has served in that position since 2001.

Finally, Zachary Bolitho is the *ex officio* Commissioner from the Department of Justice. Commissioner Bolitho serves as Deputy Chief of Staff and Associate Deputy Attorney General to the Deputy Attorney General of the United States.

Report of the Chair

Before we begin the hearing, I would like to briefly update the public on some of the Commission's most recent publications and actions.

Since we last met in March for the second public hearing on proposed amendments, the Commission released two new publications. One publication is related to mandatory minimum penalties for federal firearms offenses. I discussed this publication at our last meeting and encourage you to read the report's full findings that are now available on the Commission's website.

Another new publication is titled *Recidivism Among Federal Offenders Receiving Retroactive Sentencing Reductions: The 2011 Fair Sentencing Act Guideline Amendment*. This study analyzes the recidivism rates for offenders who received the retroactive benefit of the guideline amendment implementing the Fair Sentencing Act of 2010, which reduced the statutory mandatory minimum penalties for crack cocaine offenses.

While Congress did not make the statutory changes retroactive, the Commission did make the ensuing 2011 guideline amendment retroactive. The publication compares the recidivism rates for those offenders who received a retroactive reduction in their sentences with the rates for offenders who would have been eligible to seek a reduced sentence under the 2011 guidelines amendment, but who had served their full sentences before it went into effect. The Commission conducted a similar analysis of its retroactive 2007 "Crack Minus

Two” amendment. In the latest publication, the Commission found that recidivism rates were virtually identical, 37.9 percent, for offenders who were released early through retroactive application of the FSA Guideline Amendment and offenders who had served their full sentences before the FSA guideline reduction retroactively took effect.

Turning to the business of the day, the Commission would like to thank the numerous individuals and groups who submitted thoughtful comments and recommendations during our most recent public comment periods.

Tribal Issues Amendment

Let me start by thanking the members of the Tribal Issues Advisory Group for their recommendations in their 2016 report to the Commission and their expertise regarding this amendment. The six factors outlined in the amendment provide a framework for courts to use when determining whether an upward departure is appropriate to account for tribal convictions. Collectively, these factors balance the rights of defendants and the unique and important status of tribal courts. The amendment also provides a definition for the term “court protection order,” which incorporates the statutory definition of “protection order.” By adopting a clear definition, the guidelines will ensure that court protection orders issued by tribal courts receive treatment consistent with that of other jurisdictions.

Acceptance of Responsibility Amendment

The Commission has heard concerns that some courts have interpreted the current commentary to §3E1.1 as automatically precluding the reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct. This amendment clarifies that the unsuccessful nature of a challenge to relevant conduct does not necessarily establish that the challenge was either a false denial or frivolous.

Bipartisan Budget Act of 2015 Amendment

Before I comment on this amendment, I’d like to note the Commission’s appreciation for the constructive comment it received from the Senate Committee on Finance, the House Ways and Means Committee, the House Judiciary Committee as well as the Social Security Administration regarding the Bipartisan Budget Act of 2015. We value their past and current important work on this topic. This amendment ensures that the guidelines reflect the Bipartisan Budget Act’s increased penalties related to fraudulent claims under certain social security programs. The proposed sentencing enhancement, in particular, reflects the seriousness with which both Congress and the Commission view violations by defendants in positions of trust engaged in these sophisticated fraudulent schemes.

Illegal Reentry Guideline Enhancements Amendment

As many of you know, the Commission passed a comprehensive amendment to the illegal reentry guideline in 2016. This amendment clarifies certain discrete application issues that have arisen in litigation and that have been brought to our attention through the Department of Justice. The amendment makes clear that the prior criminal conduct

enhancement should apply regardless of when an illegal reentry offender's conviction is final. This amendment also makes clear that defendants who commit criminal conduct before their first order of removal, but who are not convicted until after that order is issued are subject to the relevant sentencing enhancements.

Synthetic Drugs Amendment

The Commission will now vote on a multi-part amendment regarding synthetic drugs—which includes, but is not limited to, synthetic cathinones (otherwise known as “bath salts”), synthetic cannabinoids (including, but not limited to, K2 or spice), fentanyl and fentanyl analogues. This amendment draws upon public comment, expert testimony, and data analysis gathered during a multi-year study of synthetic drugs. Currently, many new synthetic drugs are not referenced in the federal sentencing guidelines. As a result, courts have faced expensive and resource-intensive hearings. The amendment pending before the Commission today reflects the evolving nature of these new drugs. In addition, it will simplify and promote uniformity in federal sentencing.

This amendment will also create a new guideline definition of the term “fentanyl analogue.” The change effectively raises the guideline penalties for fentanyl analogues to a level more consistent with the current statutory penalty structure. To address the severe dangerousness of fentanyl, the amendment also creates a four-level sentencing enhancement for knowingly misrepresenting or knowingly marketing fentanyl or fentanyl analogues as another substance (which equates to an approximate fifty percent increase in sentence length).

The new amendment also establishes drug ratios and minimum offense levels for two new classes of synthetic drugs: synthetic cathinones and synthetic cannabinoids. Following a multi-year study and series of public hearings with experts, the Commission has determined that synthetic cathinones possess a common chemical structure that is sufficiently similar to treat as a single class of synthetic drugs. The Commission also found that, while synthetic cannabinoids differ in chemical structure, the drugs induce similar biological responses and share similar pharmacological effects. In proposing these new drug ratios, the Commission has considered among other factors, the severity of the medical harms to the user, the current ratios applied in similar cases, known trafficking behaviors, and concerns for public safety.

Alternatives to Incarceration for Nonviolent First Offenders Amendment

I'd like to discuss the Commission's reasons for considering this new application note. This new application note provides that judges should consider alternative sentencing options for “nonviolent first offenders” whose applicable guideline range falls within Zones A or B. Eligible defendants must not have any prior convictions and must not have used violence, credible threats of violence, or possessed a firearm or other dangerous weapon in the offense. This narrowly-tailored amendment is consistent with the directive to the Commission in 28 U.S.C. § 994(j).

Conclusion

I would like to acknowledge the unique challenge that the Commission faced during this current amendment cycle. The Sentencing Reform Act of 1984 contemplates that there will be seven voting members on the Commission, appointed by the President and confirmed by the Senate. While setting sentencing policy is always difficult—because it impacts the liberty of our fellow citizens—reaching consensus was particularly challenging and critical this amendment cycle. Under the statute, we need an affirmative vote of four Commissioners to approve any pending amendments.

Among the four of us here today, the unanimous agreement on this slate of amendments reflects even more collaboration and compromise than in a typical amendment cycle. I would like to thank my fellow Commissioners for their time and service. We worked together to develop solutions that improve the federal sentencing guidelines in a manner that balances fairness, justice, fiscal responsibility, and public safety. I look forward to working with my colleagues to strengthen and to simplify the guidelines. Working together, we can continue our efforts to ensure clear and effective guidance for federal courts across the country.

As one important part of that ongoing work, I would like to mention an upcoming event, the Commission's National Seminar on the Federal Sentencing Guidelines in San Antonio, Texas. The Seminar will take place from May 30th through June 1st. These annual trainings provide specialized instruction to probation officers, prosecutors, and defense attorneys on the guidelines. I look forward to seeing many of you there.