UNITED STATES SENTENCING COMMISSION

PUBLIC MEETING

THURSDAY
AUGUST 23, 2018

The United States Sentencing Commission met in Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 11:00 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

*Present via teleconference
C-O-N-T-E-N-T-S

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(11:00 a.m.)

ACTING CHAIR PRYOR: Okay, this meeting is called to order. 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's website. As always, we welcome and encourage the significant public interest and federal sentencing issues and the work of the Commission.

I'd like to start by introducing the other members of the Commission. First, to my immediate left is Commissioner Rachel Barkow, who 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 joins us by phone today. Judge Breyer, can you hear us?
COMMISSIONER BREYER: Yes, I can.

ACTING CHAIR PRYOR: Thank you. 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 far left at the end of the table is Judge Danny Reeves. Commissioner Reeves is a District Judge for the Eastern District of Kentucky and has served in that position since 2001.

Finally, David Rybicki is here with us as the new Ex Officio Commissioner from the Department of Justice. Commissioner Rybicki was appointed Deputy Assistant Attorney General for the Department of Justice’s Criminal Division in 2017. He previously served as counselor to the Attorney General and as an Assistant United States Attorney in the District of Columbia. Welcome to the Commission.

Commissioner Patricia Cushwa, who will be representing the Parole Commission, is not able to attend the meeting today. She was
nominated to the United States Parole Commission and confirmed to that position in 2004. She currently serves as Acting Chair of the Commission. Commissioner Cushwa has a long tenure of public service including 12 years on the Maryland Parole Commission, seven of those years as Chair. We look forward to working with her in the future.

Finally, a word about some departures. Commissioner Patricia Smoot is no longer with the Parole Commission, and Commissioner Zach Bolitho, who previously served as the DOJ's Ex Officio, has returned to teaching. We thank them both for their contributions to the Commission. We will miss them both and enjoyed working with them both.

The first order of business is a vote to adopt the April 12, 2018, public meeting minutes. Is there a motion to do so?

COMMISSIONER BARKOW: So moved.

COMMISSIONER REEVES: Second.

ACTING CHAIR PRYOR: And there's a
second. Is there any discussion of the motion?

Vote on the motion by saying aye.

(unanimous ayes)

ACTING CHAIR PRYOR: Any nays? The motion is adopted by a voice vote. The next item of business is the 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.

The Commission has the unique statutory responsibility to act at the intersection of all three branches of government as a clearinghouse of federal sentencing data. Since we last met in April, the Commission has published three new publications. In May, the Commission published a report titled "The Criminal History of Federal Offenders." This publication, for the first time, provides complete information on the number of convictions and the types of offenses and the criminal histories of federal offenders sentenced in a fiscal year.
One of our key findings from this publication is that 72 percent of federal offenders sentenced in fiscal year 2016 had been convicted of a prior offense.

In June, the Commission published its Fiscal Year 2017 Overview of Federal Criminal Cases. Over 66,000 original cases were reported to the Commission in fiscal year 2017, representing a 1.3 percent decrease from the previous year. The Commission also found that the total number of drug cases fell for the fifth consecutive year, while firearm cases increased by 10 percent from fiscal year 2016.

Finally, in July, the Commission published its report entitled, "Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders." This report examines the use and impact of increased penalties for drug offenders who have a prior felony drug conviction. This publication is the fourth in a series of reports on mandatory minimum penalties, which builds on the
Commission's 2011 report to Congress.

I'd like to briefly highlight two of our findings. The Commission found that § 851 enhancements were applied inconsistently, with wide geographic variation in filing, withdrawal, and ultimate application of the enhancement among eligible offenders. For instance, in five judicial districts, the government filed § 851 enhancements against more than 50 percent of eligible offenders. While in 19 districts, the government chose not to file any § 851 enhancements against eligible offenders.

Also, the decision to file an § 851 enhancement significantly impacted an offender's average sentence. When the government chose to file an § 851 enhancement, offenders received an average sentence over five years longer than when an § 851 enhancement was not filed against an eligible offender.

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 period. I will now turn to the Commission's General Counsel, Kathleen Grilli, as we start the discussion of the final priorities pending for our consideration and approval today.

MS. GRILLI: Thank you, Judge Pryor. A notice of possible policy priorities for the amendment cycle ending May 21, 2019, was published in the federal register on June 28, 2018. The Commission has received and reviewed public comment pursuant to that notice. A motion to adopt and publish in the federal register the final notice of policy priorities for the Commission's 2018/2019 amendment cycle would be in order at this time.

ACTING CHAIR PRYOR: Is there a motion to adopt and publish in the federal register, the final notice of policy priorities for the Commission's 2018/2019 amendment cycle as suggested by the General Counsel?

COMMISSIONER REEVES: So moved.
ACTING CHAIR PRYOR: Is there a second? Is there a second? Judge Breyer, are you still with us? We may have lost Judge Breyer. Hold on.

COMMISSIONER BREYER: Hello?

ACTING CHAIR PRYOR: Judge Breyer.

COMMISSIONER BREYER: Sorry. Suddenly I was disconnected.

ACTING CHAIR PRYOR: Well that is fine. The General Counsel has suggested that we move to adopt and publish in the federal register, the final notice of policy priorities for the 2018/2019 amendment cycle. And I asked if there was a motion. Commissioner Reeves so moved. And then I asked then is there a second.

COMMISSIONER BREYER: I will second.

ACTING CHAIR PRYOR: Is there any discussion?

COMMISSIONER BARKOW: I'd like to raise a few. So, I am voting for most of the priorities this term for us. But I'm voting “no” on Priority 3(A). And I wanted to offer some
comments as to why that is. I do not think we should consider allowing courts to consider the actual conduct of the defendant that's the quote of the priority, instead of the elements the offense of conviction in determining whether something is a crime of violence or controlled substance offense. And there's several reasons for that.

First, I think it's inconsistent with the Supreme Court's jurisprudence mandating the categorical approach. And it raises Sixth Amendment issues. Second and relatedly, I think the statutory language in 28 U.S.C. § 994(h) is comparable to the statutory language that was at issue in Taylor, which is the Supreme Court case where the court concluded the categorical rule was appropriate. And there the court said Congress in the statute there, used the phrase “convicted of a felony,” not “committed a felony” in a significant way to indicate that it was the language of conviction that mattered, suggesting an elements inquiry.
Third, when the Supreme Court in Taylor announced the categorical approach, it noted the practical difficulties and potential unfairness of a factual approach is daunting in this context. How exactly is a court going to figure out what the "actual conduct" of the defendant is in prior cases when that conduct may have occurred long ago, particularly where the defendant pleaded guilty. There will be no trial record. No jury finding.

And as the Supreme Court noted in Descamps, statements of fact in plea colloquies or arrest records might be, in the Court's words, "downright wrong." Because a defendant has little incentive to contest facts that are not elements of the charged offense. And may have good reason not to do that. At trial, extraneous facts and arguments may confuse a jury. During plea hearings, the defendant may not want to wish to irk the prosecutor or court by squabbling about superfluous factual allegations, the Court said.
I do not believe we should allow unreliable documents to be used to support a lengthy career offender enhancement. Now I think the initial Sentencing Commission went astray when it approached relevant conduct, precisely because it allows a free for all inquiry into what “really happened,” as opposed to what a defendant was actually charged with. And state commissions have rejected this approach for good reason in my view. But that would be far worse if this priority were to result in any actual changes. Because we wouldn't just be engaged in that kind of inquiry for the present offense and conduct, we would be using it for things that happened long ago and in other jurisdictions.

Now reconsidering the categorical approach isn't necessary in my view to raise the significant concerns raised by the Department of Justice. Because we can address those concerns by modifying definitions of enumerated crimes, which is why I support 3(B).

Now you might think there's no harm in
just considering this as a priority because it's not a vote to actually do it. But the Commission's time is limited and adding something as a priority means other things cannot be considered. This cycle for example, my colleagues decided it wasn't worth it for us to extend resources considering the use of family ties and responsibilities at sentencing. Or to study BOP's use of compassionate release. We have dropped those issues from the final priorities, even though they were initially listed. And even though we received voluminous supportive comment to do so. And that at least one Commissioner and possibly two, is interested in looking at them further.

Now I think deleting those issues from the priorities was a mistake. I think the Commission is well-situated to study family ties and responsibilities and how they relate to sentencing. Both to understand what judges are actually doing with their departures and their variances because we know they're considering it,
and to report to Congress about whether Congress's initial decision to say family ties are not ordinarily relevant was in fact correct or needs to be modified or should be considered to be modified given the consequences of incarceration on children.

We also know there remains a tremendous problem with compassionate release decision-making at BOP. Even after we were promised that there would be changes when we made our amendments to the sentencing guidelines. So, we should, in my view, prioritize oversight of what's happening there.

So, despite my disagreement with the deletion of these issues and the inclusion of 3(A), I will support publishing the remaining priorities. And I wanted for the record to indicate why I come out the way I do on these issues. Thank you.

ACTING CHAIR PRYOR: Thank you. Any further discussion?

COMMISSIONER BREYER: Yes.
ACTING CHAIR PRYOR: Commissioner Breyer, Judge Breyer?

COMMISSIONER BREYER: Yes. First, I would like to associate myself with Commissioner Barkow's remarks on the merits concerning the categorical approach. I do not think at the present time that for the reasons that Commissioner Barkow has stated, that it would be wise to change the categorical approach that we've already examined on numerous occasions. Nevertheless, I am voting in favor of including 3(A) because this is the process in which we simply determine whether it should be studied. And in the context of 3(B), I think it does make sense to include an examination of that issue.

An examination of that issue may confirm that my views are correct, at least in my mind and require no change. On the other hand, an examination of an issue may result in the fact that I think it ought to be changed -- my mind ought to be changed on the subject. And if that's the case, I think it would be my
responsibility to consider whatever the report is and the information from the Sentencing Commission and the public and make some determination. So, I am in favor of listing it as a priority with the reservations that I've indicated.

Now as to the argument that we ought to take a look at family ties and compassionate release, I do not think that by prioritizing the matters that we are prioritizing, we are in any way detracting from the significance of looking at the issue of §5H1.6, family ties and responsibilities. It is my view that, that's a very significant departure but that the Commission has adequately addressed that departure in the application note that accompanies the departure language.

So, I think it's a matter that is highly individualized. It ought to be highly individualized. And I have found that -- What I have done and what I know my colleagues have done, that the departure language is adequate to
address that subject. Nevertheless, I am concerned that the Bureau of Prisons report publicly or at least to the Commission as to the status of their compassionate release program because I think that, that is required by Congress. And that it is necessary for the Commission to monitor that situation.

So, I do want to assure my fellow Commissioners and in particular, Commissioner Barkow that as far as my agenda is concerned, I will make sure that the Bureau of Prisons is asked the appropriate questions as to their implementation of that program.

ACTING CHAIR PRYOR: Thank you. Any further discussion?

COMMISSIONER REEVES: Just one brief comment. We have two priorities that deal with continuing to work with Congress to implement certain recommendations that are made in two reports that have been previously published; the 2016 report on career offender sentencing enhancements and also the 2011 Report on
Mandatory Minimum Penalties in the Federal Criminal Justice System.

While I plan to vote in favor of all of the priorities that are listed, I do want to indicate that while I agree with some of the recommendations made in those two reports, I don't agree with all the recommendations. And specifically don't agree with those that are listed in our priorities and would not be in favor of adopting those. But I do believe that it's important to give this Commission as much flexibility as possible to discuss these in the future, including with perhaps some new Commissioners that may be joining us. And so, I will be voting in favor, but again don't necessarily agree with the recommendations.

ACTING CHAIR PRYOR: Okay. Hearing no further discussion, will the General Counsel please call the roll?

MS. GRILLI: Yes. Commissioner Barkow?

COMMISSIONER BARKOW: I vote in favor
of all the priorities except 3(A).

MS. GRILLI: Judge Breyer?

COMMISSIONER BREYER: I vote in favor of all the priorities.

MS. GRILLI: Judge Reeves?

COMMISSIONER REEVES: I vote in favor of all the priorities.

MS. GRILLI: Judge Pryor?

ACTING CHAIR PRYOR: I vote in favor of all the priorities.

ACTING CHAIR PRYOR: Let the record reflect that at least three Commissioners voted to publish and adopt the final notice of priorities for the 2018/2019 amendment cycle.

I would like to take a moment to discuss briefly some of the priorities that involve multi-year projects examining sentencing practices and their outcomes within the federal system.

The first is a top priority. The Commission will continue its ongoing 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. The Commission will research the differences and sentencing practices that have emerged across districts, within districts, and in some cases, within courthouses under the advisory guidelines system.

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.

In 2016, the Commission revised the guideline definition of crime of violence and published key findings and statutory recommendations in its 2016 Report to the Congress on Career Offender Enhancements. In its recent public comment, the Department of Justice raised a number of application issues that have arisen since the Commission's 2016 amendment,
including the meaning of robbery and extortion. In addition, the Department raised issues arising from the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance.

The Commission intends to address these concerns during the amendment cycle. In addition, and in response to additional concerns raised by the Department and the significant litigation brought about by the categorical approach, the Commission will also consider possible amendments to Section 4Bl.2 for the determination of whether an offense is a crime of violence or a controlled substance offense. The Commission will further study recidivism outcomes for federal offenders, as well as the use of mandatory minimums in the federal system. Over the last two years, the Commission released eight reports on both topics.

This amendment cycle, the Commission will release additional findings related to research on recidivism. In addition, the
Commission will report about the use of mandatory minimums relating to identity theft and sex offenses.

I'm pleased that the Commission's research and data regarding mandatory minimums continues to be useful to ongoing sentencing policy deliberations. The Commission remains prepared to work with Congress in this area. Implementation of federal legislation is always a priority for the Commission. The Commission is aware of several new laws that may require conforming changes to the guidelines including the creation of new federal criminal penalties.

The public will see that two items that were listed in our notice of tentative priorities, but not in our final priorities -- that were two that are not listed in our final priorities, but not because they are unimportant. The first relates to the compassionate release policy statement, which the Commission recently amended in 2016.

At this early juncture, we do not have
sufficient data and information to consider whether further revisions to the policy statement are appropriate. Therefore, we will continue to work with the Bureau of Prisons to obtain relevant data and monitor whether the amendment has had the intended effect, so this work can proceed without listing it as a priority at this time.

Second, the Commission has also chosen not to proceed with further study regarding the guidelines for family ties and responsibilities of a defendant. The Commission understands and appreciates the tremendous impact incarceration has on the families and children of defendants. While not ordinarily relevant, the Guidelines Manual does have a downward departure provision based on loss of caretaking and financial support when the defendant's sentence is within the applicable guideline range will cause a substantial direct and specific loss of essential caretaking or essential financial support to the defendant's family. The provision provides
further guidance to the court by providing a non-
exhaustive list of factors to consider in
determining whether a downward departure is
warranted. I believe that current policy
statement operates as intended.

As we conclude our business for today,
I would like to draw attention to the
Commission's Quick Facts data series, which has
now been updated to reflect 2017 data. These
short two-page fact sheets analyze a variety of
sentencing topics for the public in an accessible
format.

If you haven't done so already, we
invite you to explore the 2017 sentencing data
further by visiting our Interactive Sourcebook of
Federal Sentencing Statistics where you can
filter data and customize charts by time period
or jurisdiction.

Finally, the Commission would like to
thank everyone who attended our National Seminar
in San Antonio. Over 700 people attended the
seminar, including judges, Federal Defenders,
Assistant U.S. Attorneys, and probation officers. The Commission's next seminar will be next year in May in New Orleans.

Is there any further business before the Commission?

COMMISSIONER RYBICKI: Judge Pryor, if I could, I'd like to make a brief comment. On behalf of the Department of Justice, I'd like to thank the Commission for agreeing to reexamine the categorical approach and making that reexamination a top priority for the Commission in the upcoming amendment cycle. The categorical approach and the view of the Department has so strained application of what constitutes a crime of violence or a controlled substance offense, especially for recidivists and violent offenders that the guidelines provisions that deal with those offenders are not operating as intended.

Additionally, we're seeing criminal sentences that have become more disparate and inconsistent for criminal defendants depending on the circuit in which they were sentenced. So,
the Department applauds the Commission for making
the categorical approach a priority.

And on a final note, I would like to
thank you, Judge Pryor and my other fellow
Commissioners for welcoming me so warmly and
graciously to the Commission. I'd also like to
thank the Commission staff, specifically Ken
Cohen and Kathleen Grilli for welcoming me. And
I look forward to a productive amendment cycle.
Thank you.

ACTING CHAIR PRYOR: Thank you. And
as we look forward to one as well.

Hearing no further business, 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.

(Unanimous ayes)

ACTING CHAIR PRYOR: All in favor. So
is anyone -- no one's opposed. So the motion is adopted by a voice vote. And the meeting is adjourned. Thank you all for being with us today and have a good day.

(Whereupon, the meeting in the above-entitled matter was concluded at 11:27 a.m.)