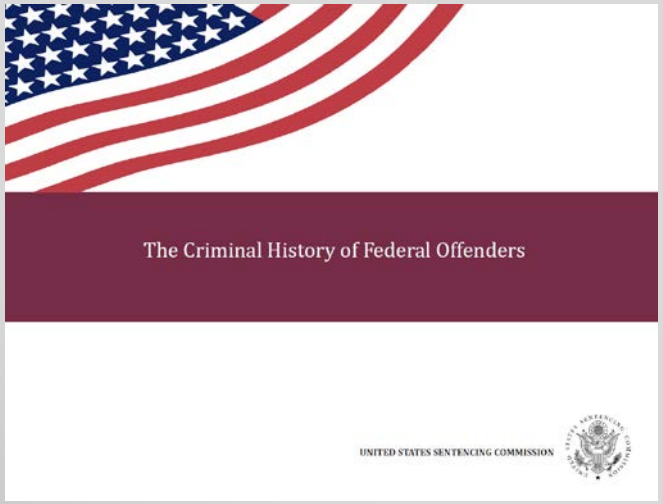
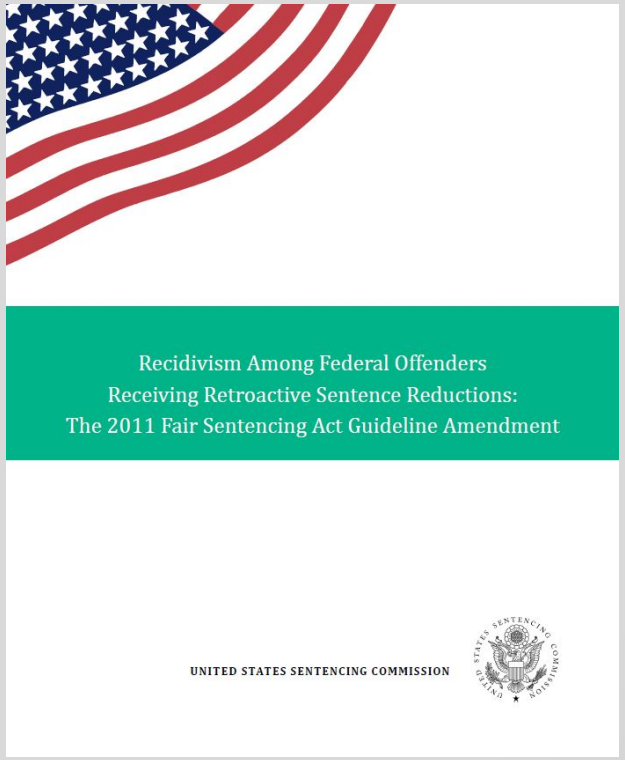
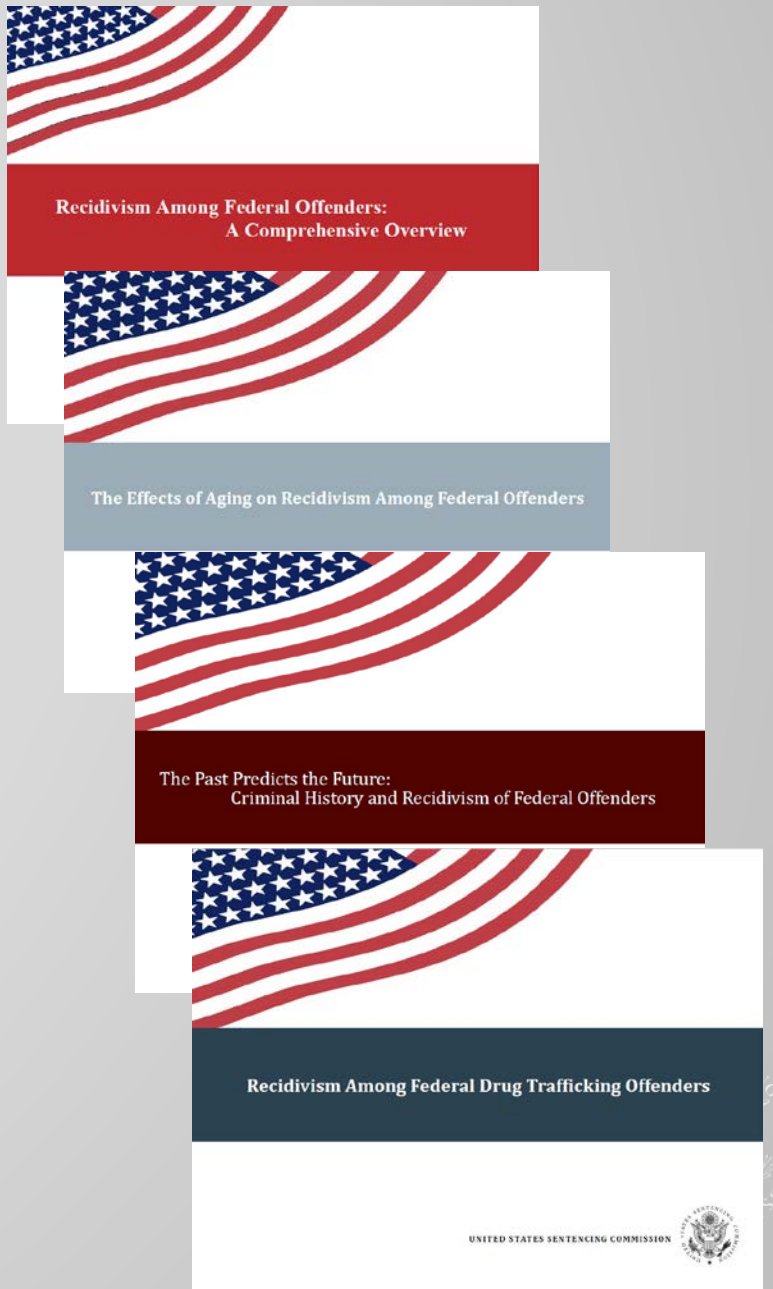
UNITED STATES SENTENCING COMMISSION
DATA REPORTS
2017-2018

Data Reports 2017-2018







Mandatory Minimum Penalties in the Federal Criminal Justice System

MANDATORY MINIMUM PUBLICATIONS

KEY FINDINGS

Key Findings are identified in each publication and relate to:

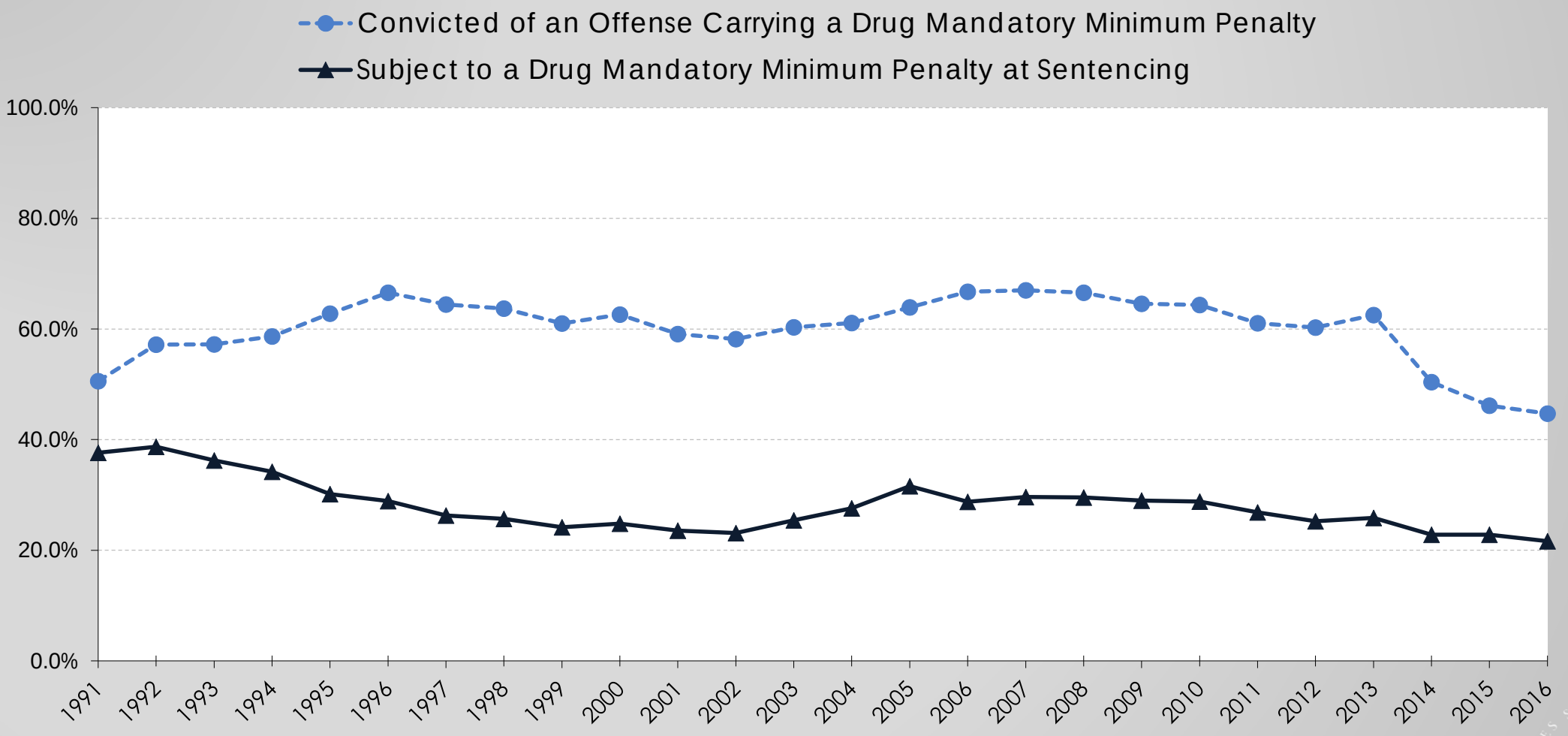
Prevalence of Mandatory Minimums in the Federal System

Sentence Lengths and Impact on the BOP Population

Relief from Mandatory Minimums

Demographic Impacts

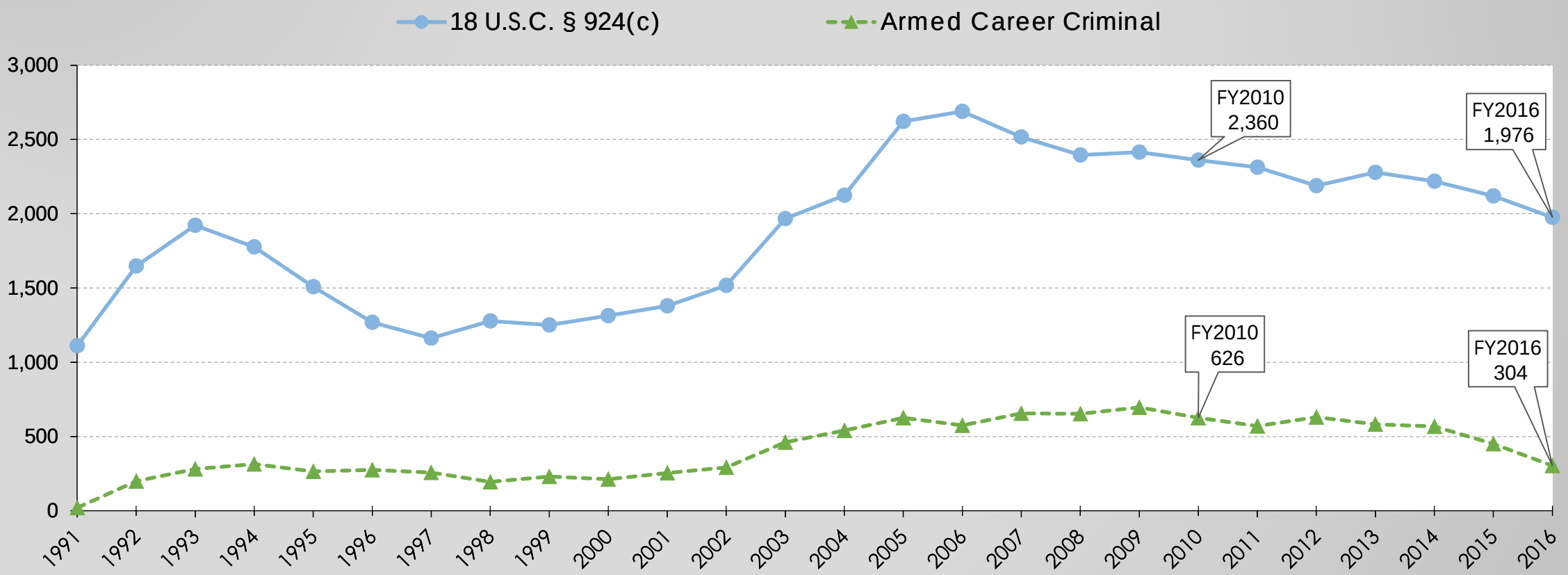
Mandatory Minimum Penalties Decreased Between 2010 and 2016



SOURCE: U.S. Sentencing Commission 1991 through 2016 Datafiles, USSCFY1991-USSCFY2016.

Offenders Convicted Under 18 U.S.C. § 924(c) and Armed Career Criminal Act

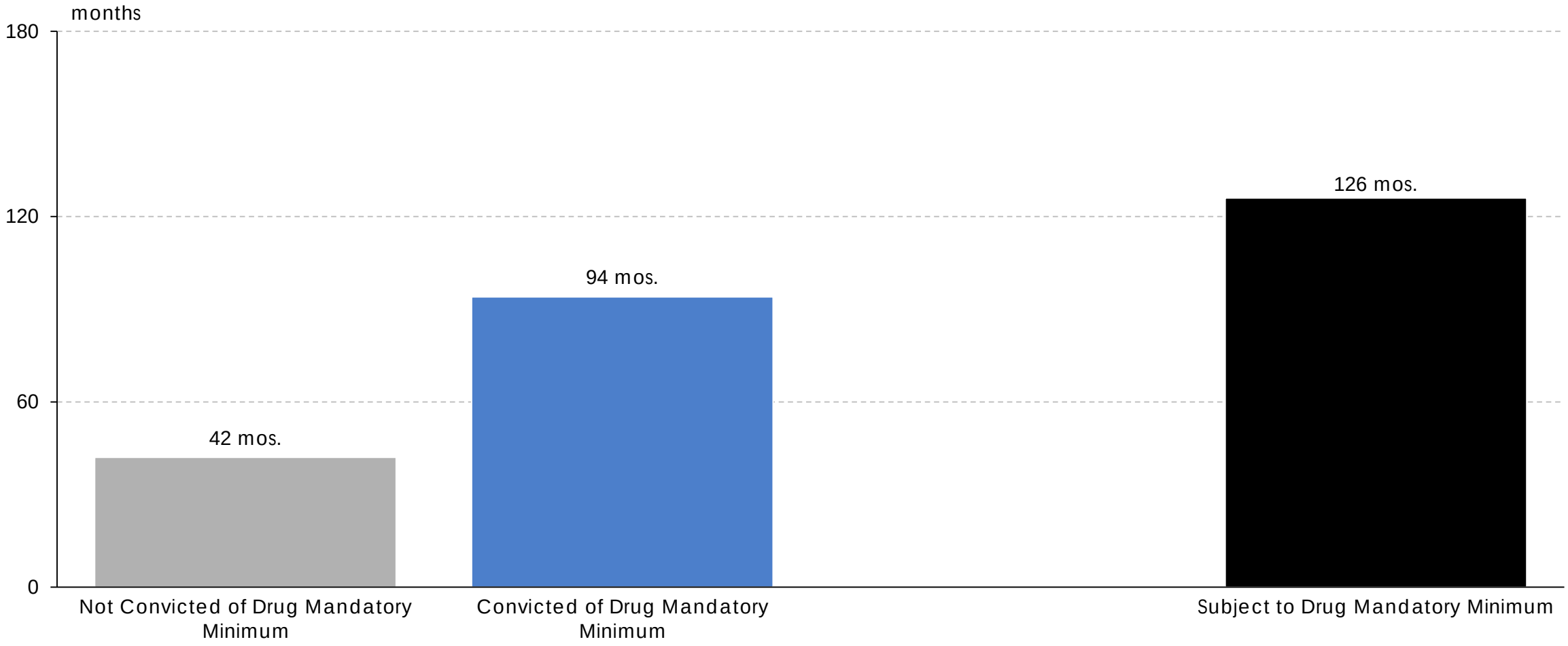
Fiscal Years 1991 - 2016



SOURCE: U.S. Sentencing Commission, 1991 through 2016 Datafiles, USSCFY91 – USSCFY16.

Offenders Convicted of Drug Mandatory Minimum Penalties

Fiscal Year 2016

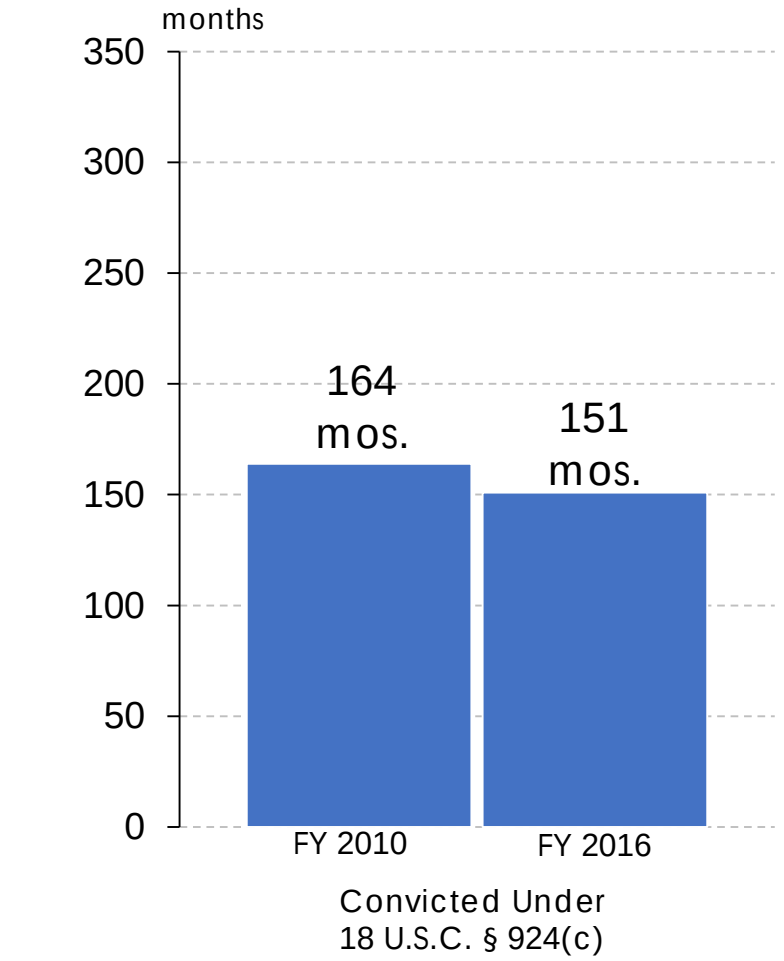


SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Offenders Convicted Under 18 U.S.C. § 924(c)

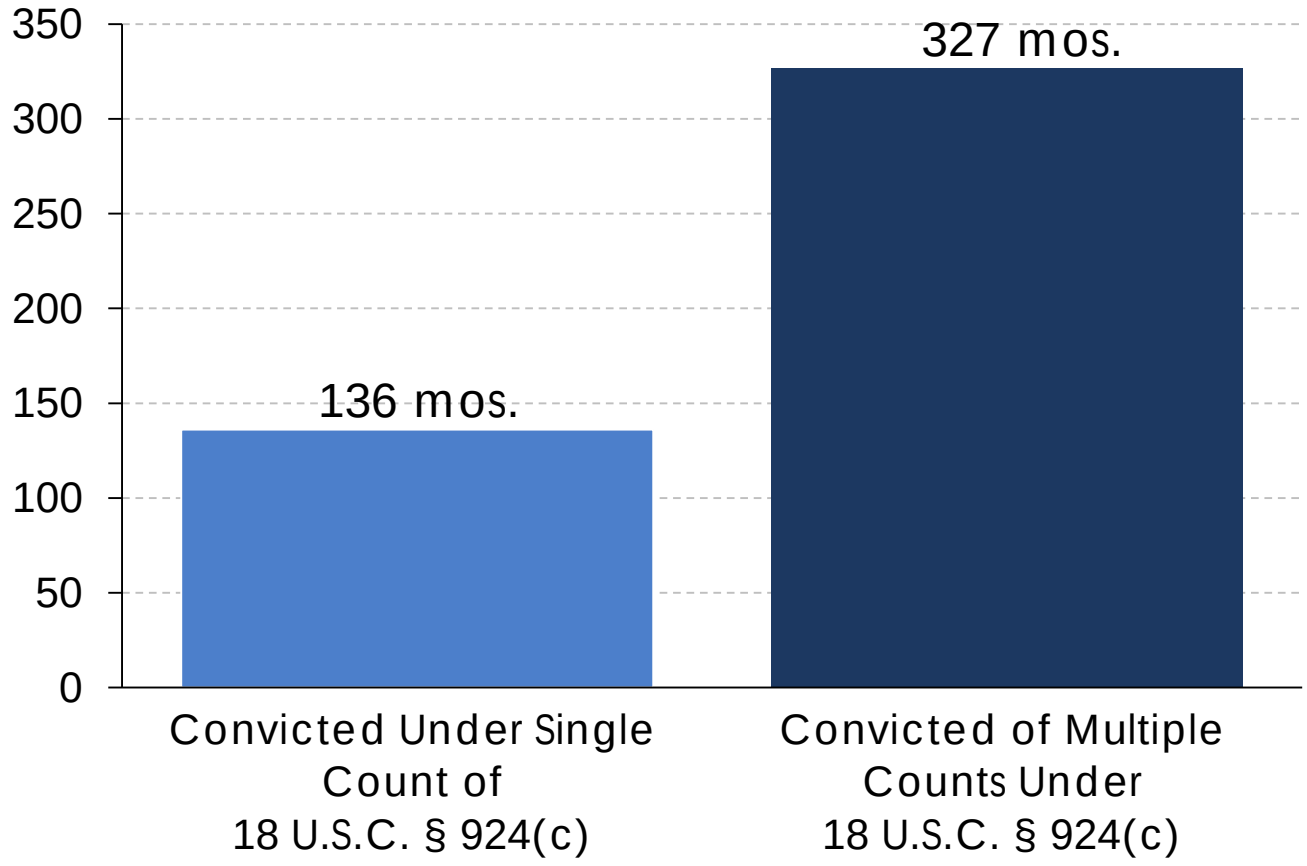
Fiscal Year 2016

Average Sentence Length for Offenders Convicted Under 18 U.S.C. § 924(c)
Fiscal Years 2010 & 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

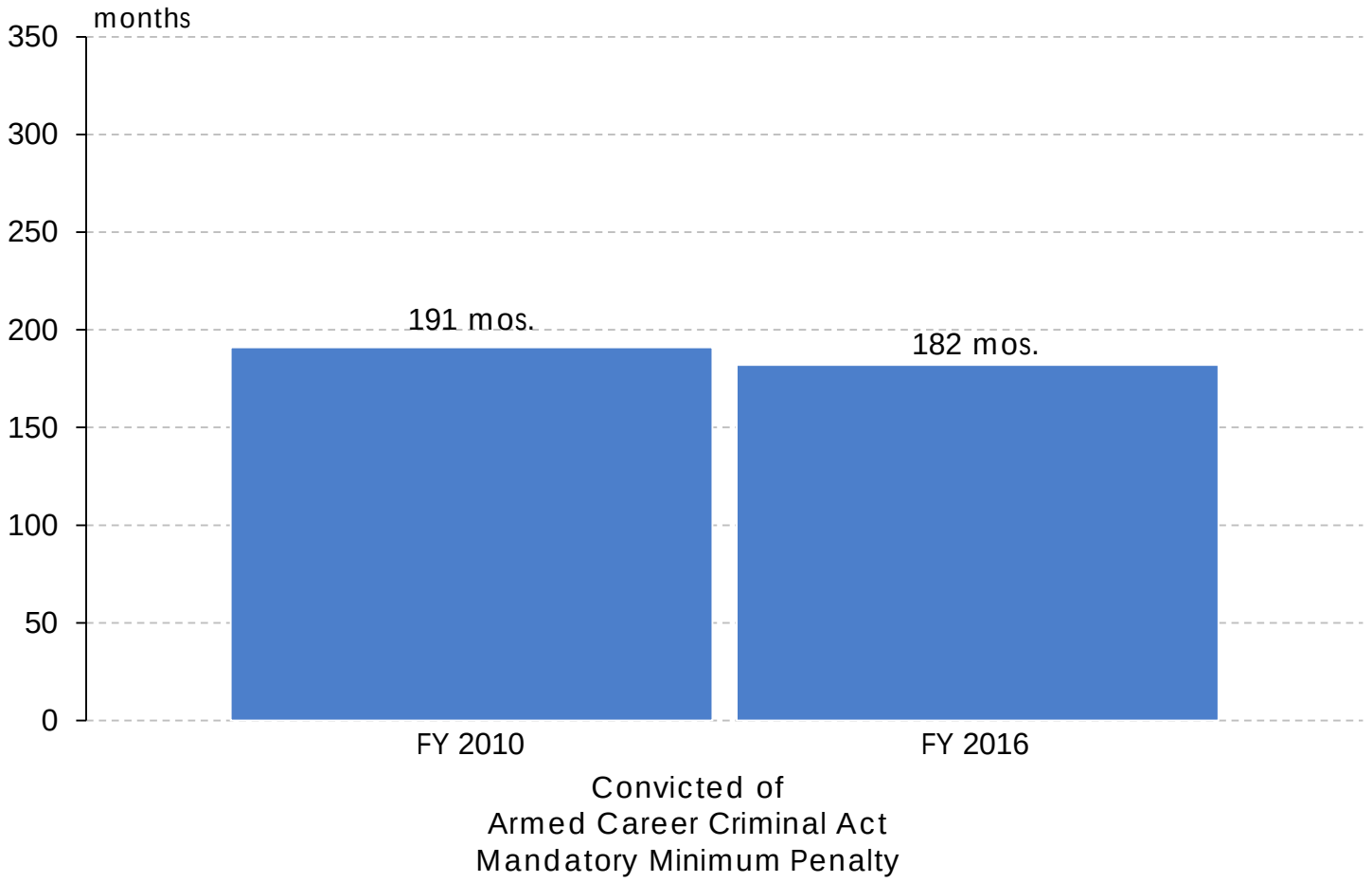
Average Sentence Length for Offenders Convicted of Multiple Counts Under 18 U.S.C. § 924(c)
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

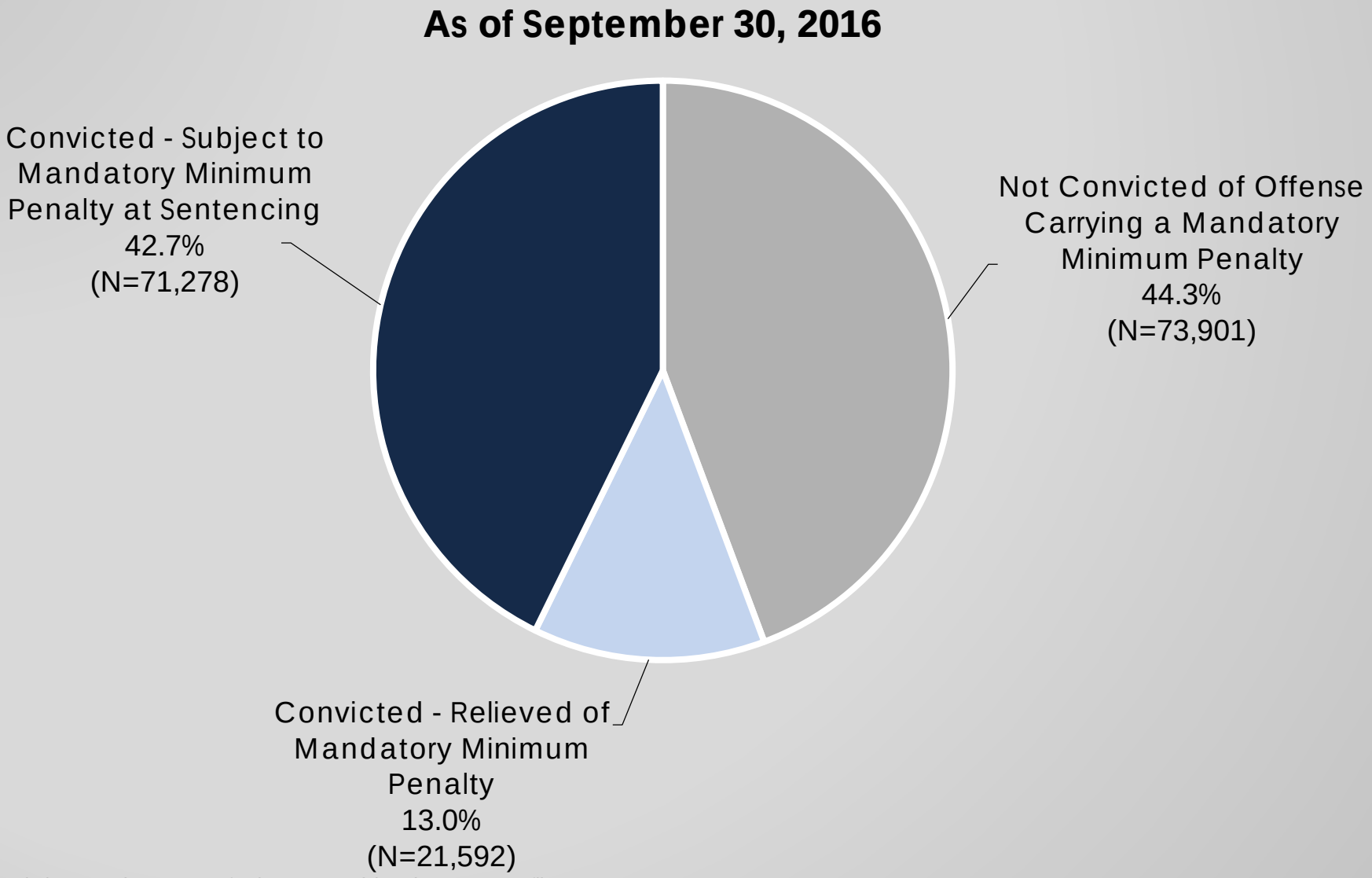
Armed Career Criminals
Fiscal Year 2016

Average Sentence Length for Offenders Convicted of an Offense Carrying the Armed Career Criminal Act Mandatory Minimum Penalty
Fiscal Years 2010 & 2016



SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Impact of Mandatory Minimum Penalties on the Federal Prison Population



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP.

Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment

UNITED STATES SENTENCING COMMISSION

Recidivism of FSA Retroactivity Group and Comparison Group

	Comparison	FSA Retroactivity
Percent	37.9%	37.9%
Most **Serious Post-Release** Event (Percent)	Supervision Violations 30.8%	Supervision Violations 32.9%
Median Age at Release	35	35
Median Time to Recidivism	14.4 Months	14.5 Months

SOURCE: U.S. Sentencing Commission FSA Recidivism Datafile: FSARECID_2018_01_16.

The Criminal History of Federal Offenders

UNITED STATES SENTENCING COMMISSION

CRIMINAL HISTORY PUBLICATION

KEY FINDINGS

Almost three-quarters (72.8%) of federal offenders sentence in FY 2016 had a prior conviction. The average number of priors was 6.1 among offenders with a criminal history.

Public Order was the most common prior offense, as 43.7 percent of offenders with a criminal history had at least one public order offense.

More Publications On the Way

- Additional Mandatory Minimum Penalties in the Federal Criminal Justice System

- Additional Reports Regarding Recidivism

Commissioner Remarks at USSC National Seminar

May 30, 2018

San Antonio, TX

Judge Pryor

Good morning, and welcome to San Antonio for this year's national seminar on federal sentencing hosted by the United States Sentencing Commission. I'm Bill Pryor, Acting Chair of the Commission and a Judge on the Eleventh Circuit Court of Appeals. I'd like to introduce my fellow Commissioners: To my immediate [right] [left] is Rachel Barkow, who is Vice Dean and Segal Family Professor of Regulatory Law and Policy at the New York University School of Law. Commissioner Barkow also serves as the faculty director of the school's Center on the Administration of Criminal Law. To her [right][left] is Danny Reeves, United States District Judge for the Eastern District of Kentucky. Judge Reeves has served as a United States District Judge since 2001. Next to Judge Reeves is Judge Charles Breyer, Senior United States District Judge for the Northern District of California. Judge Breyer has served as a United States District

Judge since 1998. We also have two *ex officio* non-voting members of the Commission, who are not on the panel today: Patricia Smoot is Chairwoman of the United States Parole Commission, and Zachary Bolitho, who represents the Attorney General of the United States, is Deputy Chief of Staff and Associate Deputy Attorney General to the Deputy Attorney General. This morning, after a review of the Commission's activities over the last year, we'll have some time for questions and answers before the start of the next session.

As many of you know, 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. For more than a year, however, we have had three vacancies on the Commission, so we've been operating with only four voting members. The lack of a full slate of Commissioners presents a significant challenge, because, by statute, we need an affirmative vote of at least four Commissioners to approve any amendments to the Sentencing Guidelines. I am pleased to report that, despite this challenge, due in large part to the spirit of collaboration and compromise shown by my fellow Commissioners, we had great success in pursuing the ambitious research and policy agenda that we established for this past amendment cycle.

On the research side of the agenda, the Commission released nine reports during the amendment cycle. Commissioner Barkow will discuss several of these publications in more detail, but first I'll give you a brief overview of all of them.

We issued three reports in our ongoing series on mandatory minimum penalties: The first, released in June 2017, provides general data on the use and impact of mandatory minimum penalties since 2010. The second report, released in October 2017, analyzes offenses carrying mandatory drug minimums. And the third report, released in March 2018, analyzes offenses carrying a firearms mandatory minimum penalty.

The Commission also issued two reports in our ongoing series on recidivism: The first, released in December 2017, analyzes the impact of the aging process on federal offender recidivism. The second publication, released in March 2018, analyzes recidivism among crack cocaine offenders who were released immediately before and after implementation of the 2011 Fair Sentencing Guideline Amendment.

The Commission also released four reports on other sentencing issues: In August 2017, we released a report analyzing the sentencing commutations issued under the Department of Justice's 2014 Clemency Initiative. In September 2017, we released a review of emerging alternative-to-incarceration programs operated by the federal courts. In November 2017, we released a report updating its earlier analyses of the relationships between demographic factors, such as race and gender, and sentencing outcomes. Most recently, this month we published a review of the criminal history of federal offenders sentenced during the previous fiscal year that uses new data collection

methods to provide, for the first time, complete information on both the number of prior convictions and the types of offenses involved in those convictions.

The Commission also had substantial success on the policy side of our agenda. In April, we unanimously adopted nine amendments to the Sentencing Guidelines. These amendments have been submitted to Congress, and they will become effective on November 1 of this year unless Congress passes legislation providing otherwise. I'll review the highlights of the amendments, and later Judge Reeves and Judge Breyer will discuss a few of them in greater detail.

Before I discuss the substance of the amendments, I'd like to say a word about our process. These amendments were the product of many months of careful data and policy analysis, which included substantial public input. The Commission sought public comment eight times during this amendment cycle: We first sought public comment on our proposed priorities last summer. We then had both original and reply comment periods on an initial set of proposed amendments that we published in August, and original and reply comment periods on a second set of proposed amendments that we published in January. We also issued three requests for comment specific to our study of synthetic drugs. In addition, the Commission held four public hearings: two specific to the synthetic drug study, and two more general hearings on the proposed amendments. This extensive public input is a critical part of our effort to refine the

sentencing guidelines in a way that balances fairness, justice, fiscal responsibility, and public safety.

Turning to the substance of the amendments, one of the more significant is a multipart amendment addressing synthetic drugs. This amendment creates a class-based approach to synthetic cathinones and synthetic cannabinoids, which should reduce the expensive and resource-intensive hearings that have previously been required to deal with offenses involving these substances. The synthetic drug amendment also clarifies the guidelines definitions of fentanyl and fentanyl analogue, effectively raising the penalties for fentanyl analogues to a level more consistent with the current statutory penalty structure. Finally, this amendment creates a four-level sentencing enhancement for a defendant who knowingly misrepresents or knowingly markets as another substance a mixture containing fentanyl or a fentanyl analogue.

Another very significant amendment addresses alternatives to incarceration, particularly for nonviolent first offenders. This amendment adopts a new application note providing that judges should consider imposing a sentence other than imprisonment for a nonviolent first offender whose applicable guideline range is in Zone A or B of the Sentencing Table. This amendment also removes language in the Commentary to the guideline on Home Detention instructing that home detention generally should include electronic monitoring.

Another important amendment addresses the guideline that reduces a defendant's offense level for acceptance of responsibility. Some commenters have expressed concern that some courts have read the commentary to this guideline as automatically precluding an offense-level reduction where the defendant makes an unsuccessful but good faith, non-frivolous challenge to relevant conduct. The amendment clarifies that the fact that a challenge is unsuccessful does not necessarily preclude a reduction.

The Commission also adopted several other important substantive amendments, as well as some more technical changes. One important substantive amendment implements recommendations made by the Commission's Tribal Issues Advisory Group in its 2016 report. Another revises the guidelines to reflect enactment of Bipartisan Budget Act of 2015. And a third amendment clarifies issues that have arisen in applying the illegal reentry guideline, which we substantially revised in 2016.

This last amendment illustrates how the Commission continually reviews and, where appropriate, revises the guidelines in response to case law. Litigation has arisen concerning how the enhancements for prior convictions in the new illegal reentry guideline treat revocations of probation, parole, or supervised release. In response to this litigation, the amendment makes clear that the illegal reentry guideline treats revocations the same way that the criminal history provisions in Chapter 4 of the guidelines treat revocations. Under the illegal reentry guidelines' enhancements for

prior convictions, the length of the sentence imposed includes any additional term of imprisonment imposed upon revocation of probation, suspended sentence, or supervised release, regardless of when the revocation occurred.

That completes my overview of the Commission's actions during the past amendment cycle. Commissioner Barkow will now discuss the Commission's recent research and publications in more detail, after which Judge Reeves will review the synthetic drug amendment, and Judge Breyer will review the amendments involving nonviolent first offenders and acceptance of responsibility. Commissioner Barkow…

Commissioner Barkow

Thank you, Commissioner Pryor. Good Morning, and welcome to the Commission's National Seminar. As Judge Pryor indicated, my fellow Commissioners will speak to you this morning regarding some of the recent amendments we have promulgated this year. Therefore, it falls to me to tell you about some of the other significant work the Commission has also done over the course of the past year.

For those of you who follow the Commission's work, you already know that we have been very busy releasing publications on numerous topics, including mandatory minimums and recidivism of federal offenders, to name a few. I am going to touch on just a couple of the findings in these publications today, but I hope you will read them for yourself as there is a great deal of additional information that I don't have time to discuss this morning.

First, I will address the Commission's continuing study of mandatory minimum penalties. So far, the Commission has released three publications, and we plan to release an additional three in the coming months. In July 2017, the Commission published *An Overview of Mandatory Minimum Penalties*, which highlighted recent developments regarding the charging of offenses carrying a mandatory minimum penalty, and provided updated sentencing data regarding the use and impact of mandatory minimum penalties. Since then, the Commission has published two additional detailed reports: in October 2017 on Drug Offenses, and in March 2018 on Firearms Offenses.

For each publication, the Commission analyzed data relating to the application and impact of mandatory minimum penalties, and provided key findings focusing on a number of topics. One of the initial things we found is that the frequency of both drug and firearms mandatory minimum penalties did decrease from 2010 to 2016.

The sizable dip in the percentage of offenders convicted of an offense carrying a drug mandatory minimum penalty is clear. Less than half, or 44.7 percent, of all drug offenders sentenced in fiscal year 2016 were convicted of an offense carrying a mandatory minimum penalty, which was a significant decrease from fiscal year 2010 when approximately two-thirds of drug offenders were convicted of such an offense.

Similarly, we can see a decrease in both of the primary firearms mandatory minimum penalties, which are 924(c)s and the Armed Career Criminal Act. We also saw, however, that mandatory minimum penalties continued to result in very long sentences. There is a great deal of analysis on this point in the publication, but let me give you just a few points.

Being convicted of a drug mandatory minimum resulted in average sentences that were more than double the average sentence (42 months) for drug offenders not convicted of an offense carrying a mandatory minimum penalty. The penalty was even longer at 126 months when the offender did not receive relief and therefore remained subject to the mandatory minimum at sentencing.

Firearms offenders also received long sentences, although they did decrease some from 2010. On the left, you see that 924(c) offenders in fiscal year 2016 received an average sentence of over 12 years (151 months) of imprisonment. On the right, you will see, however, that being offenders convicted of multiple 924(c) counts received particularly long sentences that exceeded 27 years of imprisonment (327 months). That is nearly two-and-a-half times the average sentence for offenders convicted of a single count under section 924(c) (136 months).

We see here that offenders convicted of an offense carrying the mandatory minimum penalty under the Armed Career Criminal Act received an average sentence of over 15 years (182 months) of imprisonment.

Because of these long sentences, Mandatory minimum penalties continue to have a significant impact on the size and composition of the federal prison population. We see here, that more than half (55.7%; N=92,870) of federal inmates in custody at the end of FY 2016 were convicted of an offense carrying a mandatory minimum penalty.

I next want to touch on the Fair Sentencing Act Recidivism report. This report studied the effect upon recidivism of the retroactive application of the Fair Sentencing Act Guideline Amendment. This amendment reduced the penalties for crack cocaine offenses. In order to determine whether the retroactive reduction in penalties affected recidivism, the Commission studied two groups of offenders. The first group was comprised of offenders who received a reduced sentence through retroactive

application of the FSA Guideline Amendment. The Commission compared their recidivism rates with a group of similar crack cocaine offenders who had served their full sentences before the FSA guideline reduction retroactively took effect.

As we can see, the recidivism rates were virtually identical 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. Additionally, among offenders who did recidivate, the times to recidivism for both groups were nearly identical. The median time to recidivism for offenders who recidivated in both groups was approximately 14½ months.

Finally, I'd like to address our most recent publication, which utilized recent technological improvements to expand the scope of information the Commission collects on an offender's criminal history and allows us to provide a more complete assessment of the criminal history of federal offenders. This new, automated data collection method will be incredibly useful for future publications, as it means more robust data will be readily available.

Historically, the Commission has regularly collected data only on the points assigned to previous offenses under the federal sentencing guidelines. This is the first report that provides complete criminal history information for federal offenders, including the types of offenses in offenders' criminal histories. It also provides information on previous convictions that did not receive points.

There is more work on the horizon. In the near future, the Commission plans to release the fourth in its series on Mandatory Minimum penalties, this time dealing with statutory enhancements under 18 U.S.C. § 851. This report will provide comparisons between all offenders who appeared eligible for an 851 enhancement, offenders for whom a notice was filed, offenders for whom a notice was filed and later withdrawn, and offenders who remained subject to the enhancement at sentencing. Additionally, the Commission has plans for future reports on the topic of recidivism.

And with that, I would ask Commissioner Reeves to take over. He's going to address the Commission's recent work on synthetic drugs. Thank you.

Judge Reeves

Good morning and welcome to the Commission's Annual National Training Seminar. As Chair Pryor mentioned, I have been tasked with speaking about the Commission's work on synthetic drugs, including the amendment we recently submitted to Congress.

INTRODUCTION

For those of you who follow the Commission's work, you are already aware that studying offenses involving synthetic drugs and their proliferation has been one of the Commission's key priorities during the past several years. We took this issue up for several reasons, but principle among them is that the societal impact of these substances has been of growing concern as their prevalence and dangerousness have increased in the past several years.

Let me start by telling you a little bit about what we did leading up to the amendment. During the past two years, the Commission held four public hearings on synthetic drugs, published several issues for comment and carefully examined the comments of various parties, and conducted a detailed literature review. We studied the law, as well as the science relating to these substances, and performed extensive data analyses regarding how they are handled in the courts.

We also considered how the guidelines currently account for these substances. As you may know, when a controlled substance is not specifically referenced in the Drug guideline, courts are instructed to determine the base offense level "using the marihuana equivalency of the most closely related controlled substance related in this guideline." In determining the "most closely related controlled substance," courts must consider three factors related to the similarity of the **chemical structure**, whether the substance had a **stimulant, depressant or hallucinogenic effect**, and the potency of the substance – that is whether a **lesser or greater quantity** is needed to produce the same effect. For those of you who have had a case involving this process, you know it can be complex and time consuming, often requiring expert testimony.

SYNTHETIC CATHINONES & SYNTHETIC CANNABINOIDS

Against this backdrop, let me start with the Commission's work on synthetic cathinones, also known as "**bath salts**," and synthetic cannabinoids, including substances identified as a legal substitute for marijuana, such as "**K2**" or "**Spice**." Before the April amendments, the guidelines referenced one synthetic cathinone, **methcathinone**, which the courts often used to sentence such cases. However, the guidelines did not reference a true analogue for the synthetic cannabinoids. Given these facts, courts had to identify the most closely related controlled substance referenced in the drug guidelines and use that drug's marihuana equivalency anytime it had a case involving a synthetic cathinone or synthetic cannabinoid.

This task was particularly time consuming and burdensome given the ever-changing nature of these synthetic drugs and it often resulted in sentencing disparities.

CLASS-BASED APPROACH

Given the testimony and comments we received, the Commission decided it was impracticable to add equivalencies for individual synthetic drugs. Instead, the Commission determined that a "class-based approach" made sense. For **synthetic cathinones**, the testimony and comment consistently indicated they constitute a **well-defined class** that is not subject to debate. For **synthetic cannabinoids**, the scientific evidence indicated that they all share the **common pharmacological effect** of binding to and activating the brain's **CB_1 receptor**.

EQUIVALENCIES

Having decided on a class-based approach, the Commission turned to the testimony, comments, data, and scientific literature to decide the appropriate equivalencies for both classes. The Commission determined that for the **synthetic cathinone class** an equivalency of 1 gram of a synthetic cathinone equals **380 grams** of marihuana was appropriate.

BACKGROUND – CATHINONES RFA

[Judge: As background, here are the three reasons given in the reason for amendment the Commission adopted the 380-gram equivalency]

(1) Commission's data indicated that the 380-gram equivalency was both the median and approximate mean ratio utilized by the courts when sentencing synthetic cathinone cases pursuant to Application Note 6.

(2) The ratio is consistent with the existing methcathinone ratio and the Commission did not uncover any new scientific evidence undermining its rationale for setting the methcathinone ratio.

(3) The information about synthetic cathinones' established that the effects and potencies of synthetic cathinones range from "at least as dangerous as cocaine" to methamphetamine-like. With cocaine at a 1:200 ratio and methamphetamine at a 1:2,000 ratio, the Commission concluded that the ratio of 1:380 minimized the risk of frequent over-punishment for substances in this class while providing penalty levels sufficient to account for the specific harms caused by distribution of these substances.

For synthetic cannabinoids, an equivalency for the class of synthetic cannabinoids of 1 gram of a synthetic cannabinoid equals **167 grams** of marihuana.

BACKGROUND – CANNABINOIDS RFA

[Judge: As background, here are the reasons given in the reason for amendment the Commission adopted the 167-gram equivalency]

The marihuana equivalency selected for the class is identical to the existing marihuana equivalencies for both organic and synthetic tetrahydrocannabinol (THC).

Commission data for cases involving synthetic cannabinoids also indicates that the courts almost uniformly apply the marihuana equivalency for THC to such cases. Hence, the 1:167 ratio for the synthetic cannabinoid class reflects the courts' current sentencing practices.

DEPARTURE PROVISIONS FOR BOTH SUBSTANCES

In adopting a class-based approach for synthetic cathinones and synthetic cannabinoids, the Commission recognized, however, that some substances may be significantly more or less potent than the typical substances in the class that the equivalency is intended to reflect. Therefore, the Commission added departure provisions to address these concerns. These provisions allow a court to consider the relative potency of an individual synthetic drug to the class and determine whether an upward or downward departure is warranted.

FENTANYL & FENTANYL ANALOGUES

In addition to synthetic cathinones and synthetic cannabinoids, the Commission also analyzed penalties for fentanyl and fentanyl analogues. While fentanyl has long been a drug of abuse, there are several indications that its abuse has become both more prevalent and more dangerous in recent years. In fact, because of fentanyl's extreme potency, the risk of overdose death is great, particularly when the user is inexperienced or unaware of what substance he or she is using.

I see this in my courtroom on a regular basis. Let me take a moment to share a few observations. I am located in Lexington, Kentucky (within the Sixth Circuit). For the past several years, we have observed a steady and unsettling increase in the number of cases involving heroin (initially), followed by fentanyl (50 to 100 times more potent

than morphine). In many cases, fentanyl and related substances go unobserved due to the fact that state labs either cannot keep pace or it becomes just too expensive to perform the more extensive testing. Unfortunately, the number of related substances such as carfentanil (10,000 times more potent than morphine) is also increasing. With these increases, we have experienced a corresponding rise in the number of cases involving deaths and injuries from overdoses.

Initially, addicts were not seeking out fentanyl, but it was being added to the product sold by suppliers to make the product more potent than what was being sold by competitors. Over time, addicts started to ask for it. This seemed to be the result of its strength, increased tolerance of addicts to heroin, or by those who became "dope sick" from heroin use.

In the past, other drugs (such as methamphetamine and cocaine) were cut one or more times, which reduced the potency of the drug while increasing the profits to the dealers. Now, the opposite is occurring. The product being sold is still being cut, but with fentanyl as opposed to powder laxatives or other inert products. This results in greater potency and death to the end users. However, the profit margins are increasing for the dealers and distributors. And in a couple of recent cases, evidence has been presented indicating that local distributors are spraying fentanyl on marijuana. My observations in the courtroom have also been borne out generally in the case information the Commission receives from courts around the country.

As a result of our study, the Commission identified several areas of particular concern that ultimately resulted in changes to the guidelines. First, as I just mentioned, fentanyl and its analogues are often trafficked mixed with other controlled substances, including heroin and cocaine. Thus, some purchasers of these substances believe that they are purchasing heroin or pharmaceutically manufactured opioid pain relievers.

To address this concern, the amendment adds a new specific offense characteristic which will increase penalties if a defendant knowingly misrepresents or knowingly markets as another substance a mixture or substance containing fentanyl or a fentanyl analogue. The specific offense characteristic includes a mens rea requirement to ensure that only the most culpable offenders are subjected to these increased penalties.

DEFINITIONAL CHANGE

Next, a separate issue the amendment addresses involves the definition of "fentanyl" and "fentanyl analogue." In studying these cases, the Commission learned that the reference to "fentanyl analogue" in the Drug Quantity Table may interact in an unintended way with the definition of "analogue" provided in the guideline commentary and the U.S. Code.

In short, what we saw was that many courts sentence fentanyl analogue cases at the lower fentanyl ratio rather than the higher ratio applicable to fentanyl analogues in

the Drug Quantity Table. To address this problem, the Commission adopted a new definition of "fentanyl analogue." The Commission determined that adopting this definition will create a class of fentanyl analogues identical to that already created by statute, clarify the legal confusion that has resulted from the current definition of "analogue" in §2D1.1, and reaffirm that fentanyl analogues are treated differently than fentanyl under the guidelines as well as the statute.

It is our hope that these changes will provide added clarity and guidance when handling cases involving these substances.

Judge Breyer

As Judge Pryor noted in his opening remarks, in April, the Commission unanimously adopted nine amendments to the Sentencing Guidelines that will become effective on November 1 of this year unless Congress passes legislation providing otherwise. I will discuss two of these amendments—the Nonviolent First Offender amendment and the Acceptance of Responsibility amendment—in more detail.

Nonviolent First Offender Amendment

The Nonviolent First Offender amendment was a result of both the Commission's ongoing consideration of alternatives to incarceration, as well as its recent recidivism study. In the past, the Commission's study of alternatives to incarceration demonstrated that courts were infrequently using alternative sentencing options though they were available under the guidelines. In response to this, in 2010, the Commission expanded Zones B and C of the Sentencing Table, increasing the pool of offenders eligible for certain types of alternative sentences. However, following this zone expansion, Commission data showed that use of alternative sentences, in fact, continued to decrease. Given the ongoing interest in alternatives to incarceration and debate about the size of the federal prison population, the use of alternative sentences continues to be an area of interest for the Commission.

More recent Commission data—the Commission's most recent recidivism study—demonstrated that first offenders have a lower recidivism rate than other

offenders. Specifically, the study found that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system had an even lower recidivism rate.

Confronted by these two data points, the Commission considered what it could do to increase the use of alternative sentences for a specific group of offenders. In particular, the Commission considered a provision in its organic statute, 28 U.S.C. § 994(j), regarding the "general appropriateness of imposing a sentence other than imprisonment" for "a first offender who has not been convicted of a crime of violence or an otherwise serious offense." The resulting amendment, the Nonviolent First Offender amendment, adopts a new application note, which provides that judges should consider imposing a sentence other than imprisonment for a "nonviolent first offender" whose applicable guideline range is in Zone A or B of the Sentencing Table.

The guidelines permit probationary sentences in some form for offenders in Zones A and B of the Sentencing Table. Zone A permits the full spectrum of sentencing options, including a probation-only sentence. Zone B, like Zone A, also authorizes non-prison sentences. However, Zone B sentencing options are more restrictive, authorizing probation only with conditions of confinement. The new application note is intended to serve as a reminder to courts to consider imposing non-

incarceration sentences for a defined class of "nonviolent first offenders" whose applicable guideline ranges fall within these zones.

The Commission, to be consistent with section 994(j) of its organic statute, had to consider how to define the class of offenders who are "first offenders" and were "not convicted of a crime of violence or other serious offense." The amendment defines a "nonviolent first offender" as a defendant who (1) has no prior convictions or other comparable judicial dispositions of any kind; and (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense.

With respect to the "first offender" component, "comparable judicial dispositions of any kind" includes "diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications." This definition ensures that the new application note defines "first offender" consistently with what was envisioned by Congress when it enacted section 994(j) and with ordinary usage.

With respect to the "nonviolent" requirement, the amendment adopts language from the statutory and guidelines "safety-valve" provisions to exclude offenders who "use[d] violence or credible threats of violence or possess[ed] a firearm or other dangerous weapon in connection with the offense." The Commission chose this real-offense definition in part to avoid the complicated application of the "categorical

approach." This definition, as opposed to a more limited "crime of violence" exclusion, also ensures that only nonviolent offenders are covered by the new application note.

Finally, the amendment also removes language in the Commentary to the guideline on Home Detention (§5F1.2) instructing that home detention generally should include electronic monitoring, and now instead instructs that electronic monitoring or any alternative means of surveillance may each be used, as "appropriate." The goal of this change, in conjunction with adding the application note I just discussed, is to increase the use of probation with home detention as an alternative to incarceration. The Commission received testimony indicating that location monitoring is resource-intensive and demanding on probation officers. Additionally, it heard testimony that imposing location monitoring by default is inconsistent with the evidence-based "risk-needs-responsivity" (RNR) model of supervision and may be counterproductive for certain lower-risk offenders. For many low-risk offenders, less intensive surveillance methods—for example, telephonic contact, video conference, unannounced home visits by probation officers—are sufficient to enforce home detention.

Responding to this testimony, the revised language allows probation officers and courts to exercise discretion to use surveillance methods that they deem appropriate and hopefully will allow for a greater number of offenders to serve non-incarceration sentences without overburdening probation officers.

Acceptance of Responsibility (§3E1.1)

Another important amendment addresses the guideline that reduces a defendant's offense level for acceptance of responsibility. The acceptance of responsibility guideline (§3E1.1) provides for an offense-level reduction for defendants who "clearly demonstrate acceptance of responsibility for their offense." Application Note 1 in the commentary provides a non-exhaustive list of factors for a sentencing court to consider when determining whether a defendant has demonstrated acceptance of responsibility. Among those factors is whether the defendant truthfully admitted the conduct comprising the offense(s) of conviction and truthfully admitted or did not falsely deny any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). The application note further provides that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."

It came to the Commission's attention that the language of this note was, in some cases, undermining the defendant's right to challenge relevant conduct. Commenters expressed concern that certain courts have interpreted this commentary to mean that a defendant who makes a good faith, non-frivolous challenge to relevant conduct is automatically precluded from receiving a reduction if that challenge is ultimately unsuccessful. This interpretation of the commentary is problematic because of the

chilling effect it creates. Additionally, though, the Commission heard that whether an unsuccessful but non-frivolous challenge to relevant conduct affected a defendant's receipt of acceptance of responsibility varied by circuit, district, and sometimes even by judge.

It was not the Commission's intent that an unsuccessful challenge to relevant conduct would, on its own, preclude a defendant from receiving a reduction for acceptance of responsibility. A defendant has a right to challenge relevant conduct, which is recognized in the Federal Rules (32(i)) and elsewhere in the guidelines (§§6A1.2, 6A1.3). Given the impact that relevant conduct can have on a defendant's sentence, and the fact that these sentencing decisions are made under a preponderance of the evidence standard, the defendant's ability to raise challenges is obviously an important one.

The amendment seeks to remedy this confusion by clarifying that an unsuccessful challenge to relevant conduct does not, by itself, bar a defendant from receiving a reduction for acceptance of responsibility. Specifically, the amendment adds to the end of Application Note 1(A), "but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous." The Commission intends through this amendment to ensure that defendants are not penalized for challenges that, while unsuccessful, are not frivolous, and to address what appeared to be diverging practices among judges.

I will now turn it back to Acting Chair Pryor who has some closing remarks…

Judge Pryor

Thank you Judge Breyer, Judge Reeves, and Commissioner Barkow for that insightful discussion of the Commission's activities during the past amendment cycle. In a couple of minutes, we will answer questions from the audience. But before we do that, I want to say a few words about what I anticipate the Commission may be working on during the upcoming amendment cycle.

The Commissioners will be meeting shortly to plan for the upcoming cycle. After that planning session, we'll be publishing tentative priorities for public comment. I don't want to short circuit that process by speculating too much on our likely priorities for the upcoming cycle. But I can say that I anticipate the Commission will continue its analysis of, and its publications on, mandatory minimum penalties as well as recidivism. I also anticipate that, as usual, we will examine issues on which the courts of appeals are divided, and other miscellaneous issues that have arisen in applying the guidelines, and we will respond to those issues as appropriate.

In addition, I hope that Commission will continue the study that we have been conducting of possible approaches to simplify the guidelines, promote proportionality and certainty, and reduce sentencing disparities—including demographic, geographic, and inter-judge disparities. This work is a personal priority of mine, and I believe it is

critical to ensure that the sentencing guidelines provide clear and effective guidance for federal courts across the county.

It has been a pleasure to update you on the work of the Commission, and I thank you for listening so attentively. Now I am going to open the floor for your questions, which you should feel free to address to any or all the Commissioners.…

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2018 Amendments

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Recently Adopted Amendments

Effective November 1, 2018

At a public meeting held on April 12, 2018, the Commission unanimously voted on a slate of new amendments to the *Guidelines Manual*. Among other actions, the Commissioners voted to update the federal sentencing guidelines to address evolving challenges related to the distribution of synthetic drugs. The amendments reflect a collaborative, detailed, and data-driven approach to federal sentencing policy.

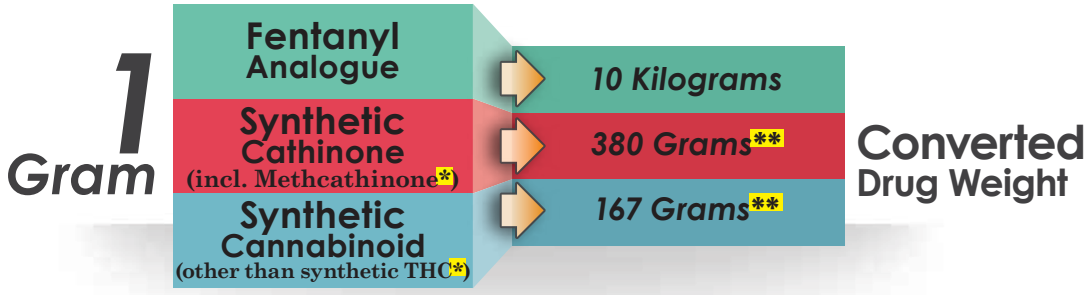
Synthetic Drugs Amendment

New Drug Ratios & Synthetic Drug Definitions

At the meeting, the Commissioners approved a multi-part synthetic drugs amendment. The amendment draws upon public comment, expert testimony, and data analysis gathered during a multi-year study of synthetic drugs. Many new synthetic drugs commonly called bath salts, flakka K2, Spice, and Scooby Snax, among others, were not referenced in the federal sentencing guidelines. As a result, courts have faced expensive and resource-intensive hearings. Following a multi-year study and series of public hearings with experts, the Commission determined that synthetic cathinones possess a common chemical structure that is sufficiently similar to treat as a single class of synthetic drugs. Also, 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 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. The Commission's actions reflect the evolving nature of these new drugs and will simplify and promote uniformity in sentencing these offenders by providing a marijuana equivalency for synthetic cathinones and synthetic cannabinoids, with departures for further guidance in certain kinds of cases.

A new definition of "fentanyl analogue" raises the guideline penalties for fentanyl analogues to a level more consistent with the current statutory penalty structure. To address the severe dangers posed by fentanyl, the Commissioners also voted to adopt a four-level sentencing enhancement for knowingly misrepresenting or knowingly marketing fentanyl or fentanyl analogues as another substance (which equates to an approximate 50 percent increase in sentence). While most fentanyl analogues are typically as potent as fentanyl itself, some analogues, such as sufentanil and carfentanil, are reported to be many times more potent than fentanyl.



*(except any Schedule III, IV, and V substances) | **A minimum base offense level of 12 applies

Featured:

NEW LANGUAGE
A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, *but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous* . . .

Acceptance of Responsibility

Clarification on Relevant Conduct Challenges

In response to concerns that some courts have interpreted the 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, the Commission amended the commentary. Some commenters had said that courts sometimes deny acceptance of responsibility when the defendant unsuccessfully challenges relevant conduct in the presentence report, and that this has a "chilling effect" on defendants. The new language 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.

Alternatives to Incarceration

Application Note for Nonviolent First Offenders

A new application note in §5C1.1 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. The amendment also frees up courts from imposing electronic monitoring as part of home detention, in favor any means of surveillance that is equally effective. (See §5F1.2 (Home Detention))

Judges should consider alternative sentences for certain nonviolent first offenders.

This new application note is consistent with 28 U.S.C. § 994(j), which addresses the "general appropriateness of imposing a sentence other than imprisonment" for certain first-time, nonviolent offenders. It also is consistent with the Commission's study of recidivism and criminal history, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate.

e-Learning Course
Look for an e-Learning course on applying the Illegal Reentry guideline soon at the Education section of the Commission website.

Illegal Reentry Amendment

New Conviction Language

The Commission passed a comprehensive amendment to the illegal reentry guideline in 2016, basing illegal reentry sentences on three main factors: the defendant's history of returning illegally, criminal conduct committed before the defendant was first ordered deported, and criminal conduct committed after the defendant was first ordered deported. This amendment addresses two discrete application issues that have arisen in litigation since then. The amendment makes clear that the prior criminal conduct enhancement should apply regardless of when that conviction is finalized. The graduated enhancements at 2L1.2 (b)(2) now apply if the defendant "engaged in criminal conduct that at any time resulted in a conviction. . ." This means that a defendant who was ordered deported before his or her conviction, still receives an increase based on the criminal conduct that occurred before the deportation order.

"The amendment makes clear that the prior criminal conduct enhancement should apply regardless of when an illegal reentry offender's conviction is finalized."

In addition, the sentence length, which determines whether the defendant receives a 10, 8, 6, or 4-level enhancement, includes any revocation sentence imposed on that offense, regardless of whether that revocation sentence was imposed before or after the defendant was ordered deported. This part of the amendment responds to opinions from the Fifth and Ninth Circuit Courts of Appeals, which had reached a different result.

Tribal Issues

Departures for Tribal Convictions

The Commission also voted to adopt the recommendations made by the Tribal Issues Advisory Group (TIAG) in May 2016. In recent years there have been important changes in tribal criminal jurisdiction. In 2010, Congress enacted the Tribal Law and Order Act of 2010 (TLOA) to address high rates of violent crime in Indian Country by improving criminal justice funding and infrastructure in tribal government, and expanding the sentencing authority of tribal court systems. In 2013, The Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization) also increased criminal jurisdiction for tribal courts, and also required more robust court procedures and provided more procedural protections for defendants. While the TIAG did not support assigning criminal history points to tribal convictions, they did recommend providing guidance to courts on when to depart based on a defendant's tribal court convictions.

The amendment related to tribal court sentences provides a non-exhaustive list of factors that courts may consider in determining whether a prior tribal court conviction warrants an upward departure from the recommended sentencing range. 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.

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

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.

Definition: "Court protection order" means "protection order" as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). See §1B1.1 (Application Instructions)

PLUS (+)4
If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl . . . or a fentanyl analogue.

DEPARTURE PROVISION
For cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class. Methcathinone is an example of a typical synthetic cathinone, whereas MDPV is more potent, and methylone is less potent, than methcathinone.

DEPARTURE PROVISIONS
For synthetic cannabinoids – upward for cannabinoids in pure, crystalline form, downward when mixed with plant material, and downward for less potent forms of the drug.

Drug Amendment Continued

And Other Amendments

In response to legislation and public comment by the Social Security Administration and others, the Commission added a 4-level enhancement and a minimum offense level of 12 to §2B1.1 for specified persons who commit fraud under certain Social Security programs. The legislation increased the statutory maximum for those offenders from five to ten years. The offenders who would receive this increase are already deemed to have abused a position of trust by violating specific statutes, so the four level adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply to these offenders.

> *"We worked together to develop solutions that improve the federal sentencing guidelines."*
> **— Circuit Judge William H. Pryor Jr., Acting Chair**

The Commission changed the term "Marijuana equivalency" to "Converted drug weight" to avoid confusion. In drug trafficking cases with multiple drugs, the marijuana equivalency was used to convert all the drugs to one universal substance in order to come up with a single drug quantity. Some commenters said that the reference to marihuana was misleading, especially to those less familiar with the Guidelines. The amendment doesn't change the math, it only changes the terminology to avoid confusion.

Definitions

Fentanyl Analogue: "any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)."

Synthetic Cannabinoids: are human-made, mind-altering chemicals developed to mimic the effects of tetrahydrocannabinol (THC), the main psychoactive chemical found in the marihuana plant.

Synthetic Cathinones: are human-made drugs chemically related to cathinone, a stimulant found in the khat plant

*The full set of amendments, including various technical and miscellaneous amendments, will be transmitted to Congress by May 1, 2018. If Congress does not act to disapprove the amendments, they will go into effect on November 1, 2018. More information about this process and the proposed amendments can be found at: **https://www.ussc.gov/about/news/press-releases/april-12-2018**

ESP HIGHLIGHTS

• There are two new introductory-level e-Learning courses available on our website. Learn the foundational principles of the guidelines through these interactive courses on relevant conduct and calculating the defendant's criminal history score. These courses are in addition to the e-Learning course on the treatment of multiple prior sentences (the single sentence rule). All three of the programs can be found at: **https://www.ussc.gov/education**.

• Look for an e-Learning course on applying the Illegal Reentry guideline soon at: **https://www.ussc.gov/education**.

2018 National Seminar

Guidelines App

2018 Annual National Seminar

The USSC is pleased to announce the launch of our web app containing a mobile-friendly version of the current *Guidelines Manual*. The web app features new tools to assist in understanding and applying the federal sentencing guidelines.

The Guidelines App is an interactive web-based application that provides easy access to the full content of the Guidelines Manual and its appendices with enhanced features and improved navigation. The app is accessible through any internet browser on mobile devices, desktop, or laptop computers.

Guidelines App users can instantly:

- Search for the applicable Chapter Two guideline in a case by typing in or selecting the statute of conviction;
- Determine the guideline range in the Sentencing Table, base offense level using the Drug Quantity Table, or marihuana equivalencies for substances referenced in the Drug Equivalency Tables by using the app calculators; or,
- Research a guideline amendment by typing in the amendment number or effective date.

Other helpful features of the app include:

- Quick-search by guideline or keyword;
- Swipe-gesture browsing;
- Bookmarking, text highlighting, and personal note-taking; and,
- Easy sharing of any part of the *Guidelines Manual* via email, text, or social media.

USSC Staff will be on-hand to assist you with downloading and navigating the app. Go to the Live Demo ongoing in the foyer for more information!

To receive updates on future events and other Commission activities, visit us on Twitter @TheUSSCgov, or subscribe to e-mail updates through our website at www.ussc.gov. For guidelines questions, call our Helpline at 202.502.4545, and to request training, email us at training@ussc.gov.

The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.