

ESP INSIDER EXPRESS

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2018 Public Meeting
David Rybicki, William H. Pryor, Rachel Barkow,
& Danny Reeves. (l-r) Not pictured is
Charles Breyer who attended by phone.



Featured:

2019 FINAL PRIORITIES
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The major findings
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HELPLINE CALLS
Have a look at recent
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2018-2019 Final Policy Priorities What Work Lies Ahead?

On August 24, 2018, the United States Sentencing Commission approved a list of policy priorities for the coming year, including expansion of several multi-year projects examining sentencing practices and their outcomes within the federal system.

As its top priority, the Commission announced that it will continue its multi-year examination of the current federal sentencing structure. Circuit Judge William H. Pryor Jr., Acting Chair of the Commission remarked, “This amendment year, the Commission will research the differences in sentencing practices that have emerged across districts, within

districts, and, in some cases, within courthouses under the advisory guidelines system.” Since 2014, the Commission has explored avenues to simplify and strengthen the guidelines and bring greater certainty to sentencing.

For the third consecutive year, the Commission also set as a priority the adoption of a uniform definition of “crime of violence.” In 2016, the Commission revised the guideline definition of a “crime of violence” and published several key findings and statutory recommendations in its Report to Congress on Career Offender Sentencing Enhancements.

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Primer on RICO

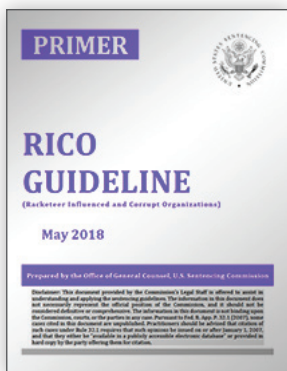
Useful Information at Your Fingertips

This primer provides a general overview of the statutes, sentencing guidelines, and relevant case law regarding the Racketeer Influenced and Corrupt Organizations Act, commonly referred to as the “RICO Act” or simply “RICO.”

The primer addresses relevant conduct and determining the offense level for a RICO offense as well as more complicated issues including career offender determinations and other counts of conviction.

https://www.ussc.gov/sites/default/files/pdf/training/primers/2018_Primer_RICO.pdf

Primers on various types of cases are available here:
<https://www.ussc.gov/guidelines/primers>



HELPLINE! Who's Calling & What's the Buzz?

Helpline: (202) 502-4545

QUESTIONS OF THE QUARTER

Have a look at how we addressed recent questions. Be sure to give our HelpLine a call, we're here for you! And who knows, your call may be featured right here in our quarterly Newsletter!

The defendant was arrested for illegal reentry in 2018. In 2000, defendant was sentenced for a conviction under 8 USC § 1326. He was released in 2002. In 1996, defendant was sentenced for burglary. He was released in 1998. Pursuant to §2L1.2, App. Note 3, only those convictions that receive criminal history points can count under §2L1.2(b)(1), (b)(2), and (b)(3). Since these priors are too old to count, they won't count under §2L1.2, correct?

Correct, however, be cautious because the date the defendant was arrested for illegal reentry is not always the earliest date of relevant conduct. If the court finds, by a preponderance standard, that the defendant entered the US illegally at an earlier time and remained in the US until his arrest in 2018, the earliest date relevant conduct will be the earlier of the two dates. As a result, the time frame for counting prior convictions for criminal history may be significantly different. For example, if the defendant was arrested and convicted of DUI in March, 2009 and the defendant continued to reside illegally in the US until his arrest on the instant offense in 2018, the earliest date of relevant conduct will likely be in March, 2009.

The defendant pled guilty to two counts of bank robbery involving two banks on separate days. However, based upon a preponderance of evidence standard, it appears the defendant robbed another bank, using the same gun and in a similar fashion. Can the government or USPO include the third bank robbery as relevant conduct?

No. Pursuant to §3D1.2, the bank robbery guideline §2B3.1 is found on the excluded list. As a result, when determining relevant conduct, you cannot look at offenses in the same course of conduct, or part of a common scheme or plan. You are left with a relevant conduct analysis that only looks to the offenses of conviction

The defendant is being sentenced for one count of burglary and one count of larceny (stealing a car). Both counts of conviction go to §2B1.1. Two additional counts of larceny have been dismissed. Can the USPO look at the conduct involved in the dismissed counts to apply 2B1.1?

Yes. Pursuant to §3D1.2, the fraud guideline §2B1.1 is found on the included list. As a result, when determining relevant conduct, you can look at offenses in the same course of conduct, or part of a common scheme or plan - §1B1.3(a)(2). See also §5K2.21.

2017 Federal Sentencing Statistics

Average Sentence Length by Primary Offense Category.

The Commission received documentation on 66,873 federal felony and Class A misdemeanor cases in fiscal year 2017. We then coded information from the sentencing documents in these cases, adding them to our comprehensive, computerized data collection system.



SCOTUS LAW UPDATE

The Court has announced that it will hear these three cases of interest this term.

Stokeling v. United States, 684 F. App'x 870 (11th Cir. 2017), cert. granted, 138 S. Ct. 1438 (2018). Whether a state robbery offense that includes the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the Armed Career Criminal Act when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

United States v. Stitt, 860 F.3d 854 (6th Cir. 2017), cert. granted, 138 S. Ct. 1592 (2018) and **United States v. Sims**, 842 F.3d 1037 (8th Cir. 2017), cert. granted, 138 S. Ct. 1592 (2018). Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act.

United States, v. Gamble, 694 Fed Appx 750 (11th Cir. 2017), cert. granted, 138 S.Ct, 2707 (2018). Whether the Supreme Court should overrule the "separate sovereigns" exception to the double jeopardy clause of the Fifth Amendment.

DID YOU KNOW?

The number of methamphetamine offenders has increased by 33.0% since fiscal year 2013.

The number of heroin offenders has increased by 22.6% since fiscal year 2013.

The number of powder cocaine offenders has decreased by 27.0% since fiscal year 2013.

The number of crack cocaine offenders has decreased by 45.7% since fiscal year 2013.

The number of marijuana offenders has decreased by 43.2% since fiscal year 2013.



Have you checked out the Commission's interactive sentencing data? Customize and generate your own figures and tables using the latest fiscal year 2017 sentencing data here: isb.ussc.gov #USSCData

— SentencingCommission (@TheUSSCgov)
August 14, 2018

Guidelines Issue of the Quarter

Application and Impact of 21 U.S.C. § 851

Key findings of the Commission's study released July 2018.

Cases in which an 851 enhancement applied are rare.

► In fiscal year 2016, the government filed an 851 information against just 12.3% (N=757) of offenders eligible for an increased penalty under 21 U.S.C. § 851.

The 851 enhancements were applied inconsistently, with wide geographic variations in the filing, withdrawal, and ultimate application of the 851 enhancements for eligible drug trafficking offenders.

► In the majority of districts in fiscal year 2016, at least one-quarter of all drug trafficking offenders were eligible for an 851 enhancement.

The 851 enhancements resulted in longer sentences for the relatively few drug offenders to which they apply.

► In fiscal year 2016, offenders against whom an 851 information was filed received an average sentence

that was over five years longer (61 months) than eligible offenders against whom the information was not filed (147 months compared to 86 months).

While 851 enhancements had a significant impact on all racial groups, Black offenders were impacted most significantly.

► An 851 enhancement was filed against nearly 15 percent (14.9%) of Black offenders who were eligible to receive an 851 enhancement. This rate was higher than the rates for White offenders (11.4%), Other Race offenders (11.7%), and Hispanic Offenders (9.4%).



UPCOMING PROGRAMS

Court Family, Burlington, Vermont

New Judges, Lexington, Kentucky

Court Family, Dallas & Lubbock, Texas

RECENT PROGRAMS

New Probation Officers, FLETC, Charleston, South Carolina

Court Family, Nashville, Tennessee

Federal Defenders & CJA Attorneys, San Antonio, Texas

Final Policy Priorities Continued from Page 1

In its public comment, the Department of Justice raised several 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 this amendment cycle. In response to additional concerns raised by the Department and the significant litigation brought about by the "categorical approach," the Commission also will consider possible amendments to section 4B1.2 to allow courts to consider the actual conduct of the defendant in determining whether an offense is a crime of violence or a controlled substance offense.

The Commission will also continue to study recidivism outcomes among federal offenders as well as the use of mandatory minimum penalties in the federal system. Over the past two years, the Commission released eight reports on those topics. This amendment year, additional recidivism reports will be released, as well as reports on the use of mandatory minimums in identity theft and sex offenses.

Judge Pryor observed, "The Commission has a unique statutory responsibility to act

at the intersection of all three branches of government as a clearinghouse of federal sentencing data. We are pleased that the Commission's research and data has proven useful to ongoing sentencing policy deliberations, and we remain prepared to work with Congress to implement our recommendations should Congress decide to act."

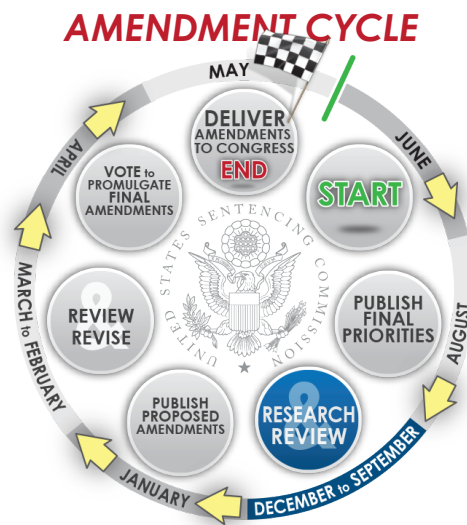
In light of the Supreme Court's decision in *Koons v. United States*, the Commission will also consider application issues related to the calculation of retroactive sentence reductions for certain offenders convicted of mandatory minimum penalties.

The Commission will also study revocations, such as those for technical violations, and their impact on criminal history. Finally, the Commission will determine how to incorporate recent legislation into the guidelines.

Annually, the Commission identifies policy priorities to review, analyze, and revise the federal sentencing guidelines in accordance with its statutory authority and responsibility. The Commission published tentative priorities and invited public comment in June.

A complete list of final priorities may be found in an upcoming edition of the Federal Register and on our website at:

<https://www.ussc.gov/policymaking/federal-register-notice/federal-register-notice-final-2018-2019-priorities>



ESP HIGHLIGHTS

• There are two new educational products available on our website. The Case Law Concierge is a summary of selected case law from the circuits on topics of interest to those involved in federal sentencing. We will continue to add topic areas, so check back often. Second, we've added short podcasts. Each podcast focuses on a specific guideline or guideline application issue and addresses correct guideline application. Look for more podcasts in the coming months. Take a look, give a listen, and e-mail us at training@ussc.gov if you have any suggestions for upcoming podcasts or products you'd like to see. See <https://www.ussc.gov/education> for more information.

• Save the Date! Next year's National Seminar will be held from May 29th through the 31st 2019 at the Marriott New Orleans.

