

# ESP INSIDER EXPRESS



*Circuit Judge William H. Pryor, Jr.  
Acting Chairperson of the  
US Sentencing Commission*

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## Circuit Judge William H. Pryor, Jr. Acting Chair of the U.S. Sentencing Commission

On January 3, 2017, Judge William H. Pryor, Jr. became Acting Chair of the United States Sentencing Commission. At a recent meeting of Chief Judges in Washington, D.C., Judge Pryor recapped significant achievements during the six-year term of the outgoing Chair, Chief Judge Patti B. Saris. Those include the complete rewriting of the illegal reentry guideline, the retroactive application of the Fair Sentencing Act, and the reduction of the BOP prison population by 31,000. Judge Pryor then discussed the Commission's work going forward:

The Sentencing Reform Act calls for seven voting commissioners, no more than four of whom can be from the same political party, and three of whom must be federal

judges. But with the expiration of the terms of Chair Patti Saris, Judge Charles Breyer, and Dabney Friedrich at the end of the last Congress, we started the year with five vacancies and lacked the four voting members required to promulgate amendments. The good news is that on March 21st, the Senate voted to confirm the nominations of Judge Breyer for a second term, and Judge Danny Reeves of Kentucky for a first term to the Commission.

During Judge Saris's last amendment cycle as Chair, the Commission continued work on several policy priorities, and in December we voted to publish proposed amendments for comment. Among the more

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## Criminal History and Recidivism of Federal Offenders

The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders examines a group of 25,431 federal offenders who were released from prison or placed on probation in calendar year

**The Commission measured recidivism in multiple ways, including rearrest, reconviction, and/or reincarceration of the offender.**

2005. Information about the components of Chapter Four of the Guidelines Manual—including total criminal history score, criminal history category, and point assignments for types of past convictions—and their association with recidivism are contained in the report. The findings included in the report build on those in the Commission's 2016 Recidivism Overview report. (Published March 9, 2017). Find the full report online at our website at <http://www.ussc.gov/research/research-reports/criminal-history-and-recidivism-federal-offenders>.



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

Helpline: (202) 502-4545

### QUESTIONS OF THE QUARTER

Have a look at how we address 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!

In May 2016, the defendant rammed his vehicle into a gun store, broke in, and stole several firearms. In June 2016, he did the same thing. He was charged with two counts of violating 18 U.S.C. § 922(u) (theft of firearm from firearms dealer) and pled guilty to both counts. Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

Yes. They group under 3D1.2(d). The same guideline is applied to both counts, and when that occurs, you don't get to choose, you simply follow the rule.

They will not group - §2B3.1 is on the excluded list at 3D1.2(d). You assign units.

...



In December 2016, the defendant is convicted of possession with intent to distribute meth (§2D1.1) and false statements (§2B1.1) based on the following conduct. The defendant negotiated several sales of meth with a confidential informant. After arrest, the defendant provided to the DEA names of co-defendants who were not, in fact, involved in the drug trafficking. Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

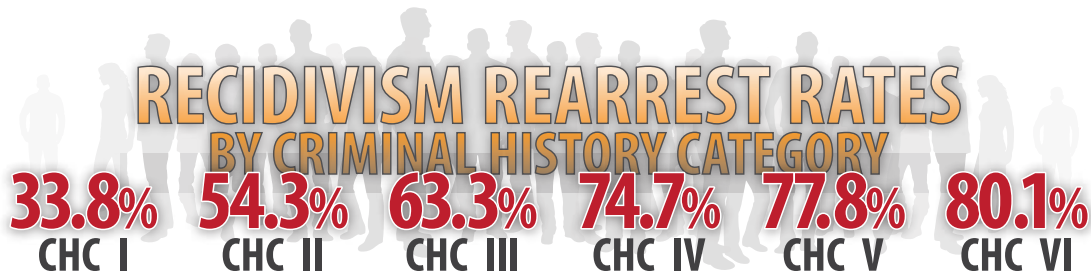
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In August 2016, the defendant pled guilty to two counts of robbery (§2B3.1). Count one describes the robbery of the First National Bank on March 11, 2016. The second count describes the robbery of the same bank on June 20, 2016. Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

The counts group under 3D1.2(c) because the Chapter Three adjustment for Obstruction of Justice – (3C1.1) applies to the drug trafficking offense.

## Criminal History Category Recidivism Rates

Consistent with its previous work in this area, the Commission found that recidivism rates are closely correlated with total criminal history points and resulting Criminal History Category classification, as offenders with lower criminal history scores have lower recidivism rates than offenders with higher criminal history scores.



## SCOTUS UPDATE

**Dean v. U.S.**, 137 S.Ct. 1170 (2017) - In a unanimous opinion, the Court held that a sentencing judge may take into account a lengthy, consecutive mandatory minimum sentence in determining the sentence on another count of conviction. Dean was charged with a violation of 18 U.S.C. § 924(c), which in his case subjected him to a 30-year sentence to run consecutive to his robbery and conspiracy convictions. The Court reversed the Eighth Circuit, noting that “[s]entencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence,” and that “[n]othing in §924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count.”

**Beckles v. U.S.**, 137 S.Ct. 886 (2017) Beckles was charged with felon in possession of a firearm. The offense involved a sawed-off shotgun, which is a crime of violence under the guidelines’ definition at §4B1.2. Beckles was sentenced as a career offender. He challenged the guidelines’ definition of crime of violence as vague because it contained the same residual clause that the Court found vague in *Johnson*. Resolving a circuit conflict, the Court sided with the Eleventh Circuit, holding that the advisory guidelines are not subject to vagueness challenges. As a result, career offenders who sought to challenge the use of the guidelines’ crime of violence definition are not entitled to relief under *Johnson*. The Court left open the possibility of other challenges to the guidelines, such as Ex Post Facto and due process challenges other than vagueness. The Court also left open the question whether defendants sentenced before *Booker* may challenge the guidelines on vagueness grounds.

### DID YOU KNOW?

There were 67,742 cases reported to the United States Sentencing Commission in fiscal year 2016.

Overall, 79.2 percent of all sentences imposed in FY 2016 were either within the applicable guideline range, above the range, or below the range at the request of the government.

In 2016, the most common questions on the HelpLine were about §2B1.1 (Fraud), §2K2.1 (Firearms), and §3D1.2 (Multiple Counts).

In 2016, the most common statutes addressed on HelpLine calls were 18 U.S.C. §924(c) and 18 U.S.C. §924(j) (Firearms) and 18 U.S.C. §1001 (False Statements).



The USSC has collected, analyzed, & reported data on 2+ million sentences since the 1st set of guidelines. [ussc.gov/research/sourcebook/archive](http://ussc.gov/research/sourcebook/archive) ... #USSC30th

— SentencingCommission (@TheUSSCgov)  
April 26, 2017

## Guidelines Issue of the Quarter

### REPORT TO CONGRESS: Career Offender Sentencing Enhancements

- Drug trafficking only career offenders were most likely to receive a sentence below the guideline range (often at the request of the government), receiving an average sentence (134 months) that is nearly identical to the average guideline minimum (131 months) that would have applied to those offenders through the normal operation of the guidelines.
- Career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future.

- Career offenders are primarily convicted of drug trafficking offenses – nearly three-quarters (74.1%) of career offenders in fiscal year 2014 were convicted of a drug trafficking offense and would have been sentenced pursuant to §2D1.1 (Drug trafficking).
- Career offenders are sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months).
- As a result of these lengthy sentences, career offenders now account for more than 11 percent of the total BOP population.





UPCOMING PROGRAMS

2017 National Seminar

May 31 - June 2  
Hilton Baltimore

2017 Annual Judges Seminar

June 22 & 23  
Westin San Diego

2017 National Seminar

September 6 - 8  
Grand Hyatt Denver

RECENT PROGRAMS

Probation Officers

Tucson, Arizona  
New Orleans, Louisiana

New Probation Officers

FLETC, Charleston,  
South Carolina

AUSAs

National Advocacy  
Center Violent Crime

Seminar

Court Family

Oklahoma City, OK

Dayton, Ohio

# Circuit Judge Pryor

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significant is a proposed amendment that would add a downward adjustment for some first offenders, combine Zones B and C on the sentencing table, and add commentary encouraging the use of alternatives for some categories of offenders. Another would implement recommendations by our Tribal Issues Advisory Group and provide new guidance for when tribal convictions may be used as an appropriate basis for an upward departure. Another proposed amendment would respond to the advisory group's recommendations and evolving scientific research on brain development by excluding juvenile sentences from the calculation of the defendant's criminal history score.

The Commission received a great deal of thoughtful public comment on these and other amendments, and ordinarily we would have received testimony about them at the public hearing in March. But it seemed premature to hold a public hearing on proposed amendments with only two voting commissioners -- Commissioner Rachel Barkow and myself -- so we deferred scheduling one until a reconstituted Commission was formed. While we are very pleased to have our voting quorum restored, because of the three months we operated without one there simply was not enough time for us to schedule a public hearing, digest the public comment, deliberate, and hold a public vote, all before the statutory deadline of May 1 for submitting promulgated amendments to Congress for its 180-day review period. However, the data analysis,

legal research, and public comment on these proposed amendments should provide us a sound basis for considering guideline amendments as early as possible during the next amendment cycle.

We also continue to monitor other developments that may impact our work, particularly case law developments. One significant development is the recent opinion in *United States v. Beckles*, in which the Supreme Court ruled that the Federal Sentencing Guidelines, including the residual clause in the former definition of crimes of violence, are not subject to vagueness challenges under the

**One significant development is the recent opinion in *United States v. Beckles*, in which the Supreme Court ruled that the Federal Sentencing Guidelines, including the residual clause in the former definition of crimes of violence, are not subject to vagueness challenges under the Due Process Clause**

— Judge Pryor

Due Process Clause. In reaching this holding, the majority opinion concluded that, unlike the Armed Career Criminal Act, the advisory Guidelines do not fix the permissible range of sentences, but instead guide the exercise of judicial discretion in choosing an appropriate sentence within the statutory range. I highlight this opinion for its significance not only to the Commission, but to the Judiciary as a whole. *Beckles* was also significant for the Commission's work. A finding that the vagueness doctrine applies to the Guidelines would have undoubtedly led to challenges to other parts of the guidelines, leading to circuit conflicts and additional appeals to the Supreme Court.

It's been a pleasure to update you on the work of the Commission during our time of transition, and as always, we welcome your feedback.

## ESP TRAINING HIGHLIGHTS



- Please be sure to check out the Commission's website at [www.ussc.gov/education/2017-national-seminar-series](http://www.ussc.gov/education/2017-national-seminar-series) for information about the upcoming National Seminars in Baltimore, Maryland and Denver, Colorado. You can also review materials from previous National Seminars including the agenda, PowerPoint Presentations, as well as the Teachers Edition Workbook (including answers) from the 2016 National Seminar in Minneapolis, Minnesota.



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.