

ESP INSIDER EXPRESS

Chief Judge Patti B. Saris
*Former Chairperson of the
US Sentencing Commission*



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Featured:

Chief Judge Patti B. Saris *Former Chair of the U.S. Sentencing Commission*

During the United States Sentencing Commission meeting on December 9, 2016, Chief Judge Patti B. Saris recapped her illustrious six-year term as Chair of the Commission, while noting that 2017 will mark the thirtieth anniversary of the Commission's first publication of the sentencing guidelines:

Over the last six years the proposed amendments to the guidelines have been developed and adopted in the same tradition of bipartisanship that has shaped the Commission the last three decades. The efforts have resulted in significant policy decisions that we believe have contributed to a decrease in the federal prison population, which peaked in 2013 at 219,298 and now has declined to its

current level of 190,303. That's a reduction of more than 28,995 offenders, or 13.2 percent over three years.

I have become a big fan of our standing advisory groups: the practitioners advisory group, the probation officers advisory group, and the victims advisory group. I would also like to thank the Federal Defenders Guidelines Committee, Commission Liaison Subcommittee for their assistance. I am enthusiastic about the future contribution of our tribal issues advisory group, newly announced with the members identified on our website. These groups regularly meet with the Commission and help us in the formation of sentencing policy.

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TIAG – Tribal Issues Advisory Group *Newly Created in 2015*

The Commission established the TIAG as an ad hoc advisory group to the Commission beginning in May 2015. The TIAG produced the Report of the Tribal Issues Advisory Group on May 16, 2016, which can be found on the Commission's website. TIAG made several recommendations to the Commission for amendments to the Sentencing Guidelines, including a recommendation that the Commission consult tribes as part of its amendment process. They also recommended adding an application note and commentary to USSG §4A1.3 to guide when tribal court convictions may be considered for a possible upward departure in the defendant's criminal history category, as well as including in USSG §1B1.1 a definition of a "court protection order." Amending USSG §5H1.1's policy statement regarding age is a current focus, as is adding a departure concerning juvenile and youthful offenders.

Over 40 percent of Native American offenders (43.6%) had little or no prior criminal history

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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!

The caller has a defendant charged with two counts of production of child pornography involving the same victim on two different dates. The defendant is also charged with multiple counts of production of child pornography involving the same victim, but on different dates. Can you use other counts for relevant conduct purposes?

No. Pursuant to §3D1.2, production of child pornography is on the excluded list, which means you can't use expanded relevant conduct. You are not permitted to use the same course of conduct or common scheme or plan analysis. You are relegated to the offenses of conviction and not other counts of production of child pornography or any relevant conduct or specific offense characteristics from those additional counts of child pornography production.

BOL 6. It is a two-part analysis. First Appendix A directs you to go to §2X1.1. The second question is whether the offense of conviction has a statutory maximum of 20 years or more – and in this case the statutory maximum is only 5 years.



The caller has a defendant convicted of 18 U.S.C. § 1956 (Money Laundering) which carries a 20 year stat max. The applicable guideline is §2S1.1. Defendant was involved in a wire fraud scheme and was laundering proceeds from the wire fraud scheme. §2S1.1(a)(1) directs the use of the offense level for the underlying offense from which the laundered funds were derived. Which base offense level applies at §2B1.1(a)?

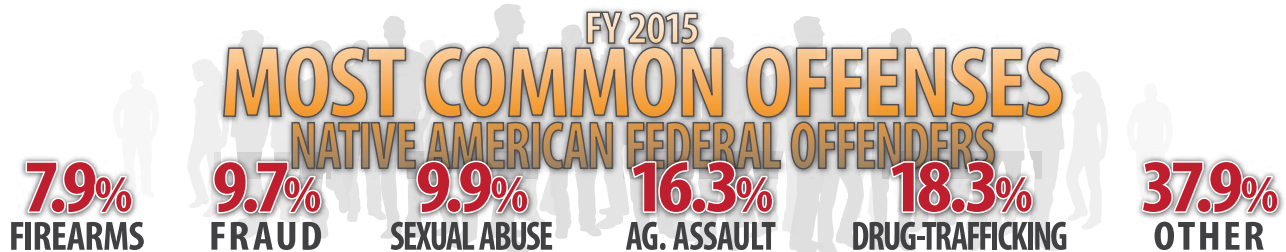
BOL 6. Again, it is a two-part analysis. Appendix A directs you to go to §2S1.1, not §2B1.1, for 18 U.S.C. §1956, therefore the answer is as noted. The second part of the analysis is whether the offense of conviction has a statutory maximum of 20 years or more – and in this case the statutory maximum is 20 years, but because it does not meet both criteria, it is a BOL of 6.

The caller has a defendant who was convicted of 18 U.S.C. § 371 (Conspiracy) to commit a violation of 18 U.S.C. § 1343 (Wire Fraud). Per Appendix A, the applicable guideline for § 371 is §2X1.1 which references to §2B1.1. The statutory maximum for § 371 is 5 years; the stat max for § 1343 is 20 years. Which base offense level (BOL) applies at §2B1.1(a)?

Federal Convictions

Within the Native American Population

Native American offenders account for a small portion of federal offenders. The number of Native American offenders has decreased by 10.8 percent over the last three years. Section 1151 of Title 18 defines "Indian Country" and provides the geographic basis of federal criminal jurisdiction in Indian Country. The Major Crimes Act, 18 U.S.C § 1153, lists and defines most of the crimes over which the federal government has jurisdiction in Indian country.



SCOTUS UPDATE

Welch v. United States, 136 S. Ct. 1257 (2016) - *Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review.

Mathis v. U.S., --S.Ct.--, 2016 WL 3434400 (2016) - “A prior conviction does not qualify as the generic form of a predicate violent felony offense listed in the ACCA if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element.”

Molina-Martinez v. U.S., 136 S. Ct. 1338 (2016) - Where there is an unpreserved error in calculating a Sentencing Guidelines range, a defendant is not required to provide additional evidence to show the error affected his or her substantial rights. “The Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious. A district court that ‘improperly calculat[es]’ a defendant’s Guidelines range, for example, has committed a ‘significant procedural error.’”

U.S. v. Beckles v. U.S., 616 F. App’x 415 (11th Cir. 2015), cert granted by 2016 WL 1029080 15-8544 (S. Ct. 2016) – argued November 28, 2016. **Issues:** (1) Whether *Johnson v. United States*’ void-for-vagueness holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2); (2) Whether *Johnson*’s holding applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2) and (3) whether possession of a sawed-off shotgun remains a “crime of violence” after *Johnson*.

DID YOU KNOW?

There were 71,003 cases reported to the United States Sentencing Commission in fiscal year 2015.

In 2015, 9.8% of all defendants received probation or probation and community confinement.

As to fraud cases, court ordered fines and restitution totaled \$8,902,145,042 in 2015. That’s almost \$9 billion.

Methamphetamine continues to be the most common drug in drug convictions, at 31.5% of all drug offenses.



Did you know USSC now broadcasts all of its public hearings & meetings? You can find an archive of these events at: <http://bit.ly/2icT2EW>

— SentencingCommission (@TheUSSCgov)
January 19, 2017

Guidelines Issue of the Quarter

RECIDIVISM AMONG FEDERAL OFFENDERS: A Comprehensive Overview

Key findings of the Commission’s study. Released March 2016.

- Over an eight year follow-up period, almost one-half of federal offenders released in 2005 (49.3%) were rearrested for a new crime or rearrested for a violation of supervision conditions.
- Almost one-third (31.7%) of the offenders were also reconvicted, and one-quarter (24.6%) of the offenders were reincarcerated over the same study period.
- Offenders released from incarceration in 2005 had a rearrest rate of 52.5 percent, while offenders released directly to a probationary sentence had a rearrest rate of 35.1 percent.
- A federal offender’s criminal history was closely correlated with recidivism rates. Rearrest rates range from 30.2 percent for offenders with zero total criminal history points to 80.1 percent of offenders in the highest Criminal History Category.
- Each additional criminal history point was generally associated with a greater likelihood of recidivism.
- Recidivism rates are largely unaffected by the length of the sentence imposed, with the exception of 0-6 month sentences.



UPCOMING PROGRAMS

2017 Annual
National Seminar
May 31 - June 2
Hilton Baltimore

2017 Annual
Judges Seminar
June 22 & 23
Westin San Diego

2017 Annual
National Seminar
September 6 - 8
Grand Hyatt Denver

RECENT PROGRAMS

Probation Officers
Auburn, Alabama

New Probation Officers
FLETC, Charleston,
South Carolina

FJC Phase I for Judges
Redondo Beach,
California

11th Circuit
Staff Attorneys
Atlanta, Georgia

Chief Judge Saris

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In 2011, my first year on the Commission, the Commission implemented new lower crack cocaine penalties from the 2010 Fair Sentencing Act and voted to apply these changes retroactively to benefit currently incarcerated crack cocaine offenders. In arriving at these decisions, the Commission found that the crack cocaine penalties were not proportionate to the harms on society, and that the impact of the unduly severe penalties were borne most by minorities. That decision resulted in 7,748 offenders receiving an average reduction in their sentences of 19.9 percent – from 153 to 123 months.

In 2014, the Commission voted to reduce the Drug Quantity Table for all drug trafficking offenses – not just crack cocaine – by 2 levels – which reduced drug penalties going forward by about 17 percent. The Commission then voted to make those reductions retroactive and to date 28,544 drug offenders have received an average sentence reduction of 17 percent, or 25 months from 143 months to 118 months. It's important for the public to know before sentence reductions were granted as a result of the 2011 and 2014 amendments, each individual case was reviewed by a federal judge to ensure that the offender did not pose a public safety risk. Simply put – none of these reductions are automatic.

The Commission also had several other important amendments that became effective this year. In response to the Supreme

Court's decision in *Johnson v. United States* the Commission eliminated the analogous residual clause from the Sentencing Guidelines definition of crime of violence. In addition, this year the Commission published a report to Congress analyzing career offenders in the federal system and the statutory definition of crime of violence. In our report, the

Commission recommended that Congress establish one definition of "crime of violence" for all criminal law purposes, and we encourage Congress to adopt the Commission's definition of "crime of violence" as that single,

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— Chief Judge Saris

uniform definition.

Whether I'm addressing a room full of federal judges or a group of law students, I have always emphasized that the Commission's decisions are evidence-based and data-driven. Our detailed synthesis of sentencing data has culminated in 60 publications ranging from significant research reports to more tailored Quick Facts. The Commission's reports have a continued impact on educating policymakers and the public.

It has been a real honor for me to serve in this role. I am pleased with the contributions that we've accomplished together to strengthen and improve the federal sentencing guidelines. While my time is ending, the work goes on and I urge each of you to remain as focused and dedicated as ever to a system of guidelines that is fair, effective and just. Thank you all.

ESP TRAINING HIGHLIGHTS



- Please be sure to check out the Commission's website at www.uscc.gov to find our latest eLearning installment. 'Federal Sentencing: The Basics' offers a refreshed take on the primer of the same name published in 2015 and is packed with interactivity and quizzes to test your knowledge. Be sure to check this course out for a general overview on federal sentencing!

- The U.S. Sentencing Commission, a bipartisan, independent agency located in the judicial branch of government, was created by Congress in 1984 to reduce sentencing disparities and promote transparency and proportionality in sentencing.

- The Commission collects, analyzes, and distributes a broad array of information on federal sentencing practices, continuously establishing and amending sentencing guidelines for the judicial branch and assisting the other branches in developing effective and efficient crime policy.

