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*December 2018 Commission Meeting
Danny Reeves, Charles Breyer,
Rachel Barkow, William H. Pryor Jr. (l-r)*



Featured:

2018-2019 Proposed Amendments

US Sentencing Commission Seeks Public Comment

The United States Sentencing Commission voted December 13, 2018 to publish for comment proposed amendments to the federal sentencing guidelines, including a proposal concerning how sentencing courts determine if a prior conviction is a “crime of violence” under the guidelines.

At a public meeting, Circuit Judge William H. Pryor Jr., the Acting Chair of the Commission remarked, “The ‘crime of violence’ definition continues to cause extensive litigation with inconsistent sentencing outcomes, often resulting in offenders whose conduct is obviously violent in nature failing to qualify for sentencing enhancements. These results are particularly troublesome given the risk to public safety posed by violent offenders.”

The sentencing guidelines provide increased penalties for offenders with a prior conviction that is a “crime of violence” or “controlled substance offense” (for example, the career offender guideline). Under the guidelines, the court must determine whether a prior conviction falls into either of those categories. Circuit caselaw currently limits the sentencing court’s analysis of the prior conviction to the elements of the statute of conviction (referred to as the “categorical approach”), without any consideration of the defendant’s actual conduct in the offense. The proposed amendment would enable sentencing courts to consider the conduct that formed the basis of the offense of conviction as well as the elements of the statute of conviction. The

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IDENTITY THEFT OFFENSES

The major findings of the Commission’s Report on Mandatory Minimum Penalties for Identity Theft Offenses.....Pg. 3

National Seminar in New Orleans

Tuesday through Friday, May 28th to May 31st

Mark your calendars! The Commission will hold its Annual National Seminar on Federal Sentencing in May 2019 at the Marriott New Orleans. New for this year, we’ll start with an introduction to relevant conduct and criminal history on Tuesday afternoon.

On the first full day of the seminar, we will focus on relevant conduct in our guidelines foundations courses. This series is appropriate for all levels of experience, from those new to federal sentencing, to seasoned veterans. We’ll focus on how relevant conduct works in some of the most frequently applied guidelines, including drugs and firearms, economic crimes, sex offenses, and violent crimes. In other sessions, we’ll cover recent caselaw, the grouping of multiple counts, emerging technologies in federal crime, synthetic drugs, and, for the first time, we will work through sentencing scenarios to explore practices related to the presentence report and to departures and variances.



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!

Defendant has pleaded guilty to distribution of fentanyl. A victim died as a result of using the fentanyl. The parties, in the plea agreement, agree that a person died as a result of the fentanyl. However, the plea agreement states that "this is not a stipulation under §1B1.2." The parties also agree that the drug weight should be used to determine the Base Offense Level (BOL), and that there will be an upward departure for the death of the victim. Can the USPO use the increased BOL for an offense involving the death of a victim.

No. It would be incorrect for the USPO to apply the increased BOL based on the death of the victim. First, the increased BOL at §2D1.1 requires that the offense of conviction establish that death occurred. In this case, the offense of conviction does not. A mere statement in the plea agreement is not sufficient. In addition, the plea agreement specifically addressed §1B1.2 and noted that an upward departure, likely under §5K2.1, is the appropriate means to increase the defendant's guideline range or sentence.

The defendant plead guilty to a drug conspiracy. During the drug conspiracy, the defendant kidnapped an individual who had not paid their drug debt to the defendant. Would it be proper to do a pseudo count for the kidnapping conduct?

In order to apply a pseudo count, there must be a stipulation pursuant to §1B1.2 for additional criminal conduct or in the case of §1B1.2(a), a stipulation that the defendant committed a more serious offense than the offense of conviction. In other words, both parties must specifically agree that the factual statement or stipulation is a stipulation for guideline purposes.

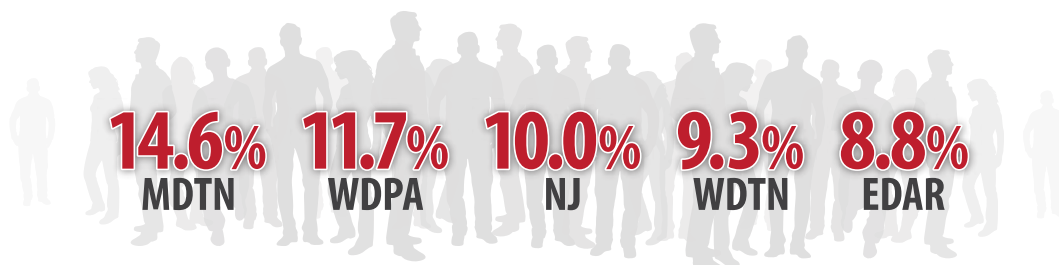
The defendant was convicted at trial of one count of Production of Child Pornography - involving one victim (§2G2.1). However, there were actually six different victims, and multiple instances of harm involving the defendant producing child pornography. Specifically, the defendant took many pictures of other neighborhood children on days different from the date noted in the offense of conviction. One of the parties believes the USPO should use §1B1.2(c) to account for other victims in pseudo counts. Is that correct?

In a trial there is no stipulation pursuant to §1B1.2 and certainly no agreement as to the number of victims. Based upon the offense of conviction involving one victim, you only have one victim for guideline purposes. In addition, because §2G2.1 is listed as an excluded offense at §3D1.2, you cannot use expanded relevant conduct to account for the additional victims. For additional guidance, listen to the Podcast on stipulations (Episode 12) found at: <https://www.ussc.gov/education/training-resources/sentencing-practice-talk>

Career Offenders

Districts with Highest Proportion of Overall Caseload

Career Offenders are persons who commit a crime of violence or drug trafficking crime after two prior felony convictions for those crimes. See USSG §4B1.1. In 2017, 10.7% of career offenders received a sentence of less than 5 years; 28.6% a sentence between 5 and 10 years; 47.3% a sentence between 10 and 20 years; and in 13.4% of cases, a sentence that exceeded 20 years.



CASE LAW UPDATE

United States v. Stitt, No. 17-765, 2018 WL 6439818 (2018). In a unanimous decision, the Supreme Court held that generic burglary, as described in the Armed Career Criminal Act (ACCA), includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight habitation. These include mobile homes, recreational vehicles, trailers, and camping tents.

The Court reiterated the principle that the definition of a generic offense under the ACCA should match the definition of the offense as it was understood at the time of the ACCA's enactment. At that time, most states had adopted definitions of burglary that included vehicles and non-dwelling structures adapted or customarily used for habitation. The Court also noted that the risk of violent confrontation between intruder and occupant, which is the danger inherent in burglary, is present in the entry of an inhabited vehicle or structure just as it is present in the entry of a residential home.

Legislative Action: **In Paroline v. United States**, 134 S. Ct. 1710 (2014) the Supreme Court held that mandatory restitution for offenses that involve the sexual exploitation of children and child pornography, pursuant to 18 U.S.C. § 2259, is proper only to the extent that the defendant proximately caused the victim's losses. Rather than establish a list of harms for which defendants would be held accountable, the Supreme Court listed a number of factors for courts to consider in determining restitution in such cases.

On December 7, 2018, the President signed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018. The Act modifies procedures for determining the amount of mandatory restitution in child pornography cases. Under the new law, full restitution to the victims includes medical services relating to physical, psychiatric, or psychological care, physical and occupational therapy or rehabilitation, necessary transportation, temporary housing, and child care expenses, lost income, reasonable attorneys' fees, as well as other costs incurred, and any other relevant losses incurred by the victim. The court must impose a minimum of \$3,000 in restitution for each victim, however once the victim recovers restitution in full, defendants ordered to pay restitution to that victim are relieved of that obligation. The new law makes other funds available to victims, and includes a special monetary assessment courts may impose on defendants.

The law does not apply retroactively, so defendants who committed the offense before December 7, 2018 will not be subject to it. For more information and to review the new law, see: <https://www.congress.gov/bill/115th-congress/senate-bill/2152/text>

DID YOU KNOW?

The average sentence length for all § 922(g) offenders was 64 months.

The average sentence length for offenders convicted of violating only § 922(g) and who were sentenced under the Armed Career Criminal Act was 188 months.

The average age of these offenders at sentencing was 34 years.

About one-quarter (24.9%) of offenders convicted under section § 922(g) were assigned to the highest Criminal History Category (Category VI).



NEW: the Commission released an updated Sentence and Prison Impact Analysis of the #FirstStepAct.
ussc.gov/sites/default/ ...

— SentencingCommission (@TheUSSCgov)
December 19, 2018

Look for FAQs on the new law, coming soon, at www.ussc.gov/education.

Guidelines Issue of the Quarter

Mandatory Minimum Penalties for Identity Theft Offenses

Key findings of the Commission's study. Released September 2018.

- In fiscal year 2016, the average sentence length for offenders convicted of at least one count under section 1028A was more than double the average sentence length for offenders convicted of an identity theft offense not carrying a mandatory minimum penalty (51 months compared to 22 months).
- Black offenders were convicted under section 1028A at a higher rate than any other racial group. In fiscal year 2016, Black offenders represented 49.8 percent of all identity theft offenders, yet accounted for 58.7 percent of offenders convicted under section 1028A.
- Of the cases involving identity theft offenses, slightly more than half (53.4%) were convicted under section 1028A, while 46.6 percent were convicted of an identity theft offense that did not carry a mandatory minimum penalty.
- For those offenders convicted of multiple counts under section 1028A, the court exercised its discretion to impose sentences for additional 1028A counts concurrently in the overwhelming majority of cases (89.6%).
- In fiscal year 2016, 89.2 percent (n=872) of offenders convicted under section 1028A were convicted of a single count, and 10.8 percent (n=106) were convicted of multiple counts under the statute.
- Section 1028A offenses accounted for 7.2 percent of offenses carrying a mandatory minimum penalty in fiscal year 2016.



UPCOMING
PROGRAMS

New Probation
Officers,

FLETC, Charleston,
South Carolina

Court Family,
Richmond, Virginia

Court Family,
Salt Lake City, Utah

RECENT
PROGRAMS

Circuit Staff
Attorneys,
Atlanta, Georgia

Defense Attorneys,
Montgomery, Alabama

Court Family,
Lubbock & Dallas,
Texas

Proposed Amendments

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Commission is requesting input on this proposal as well as on the appropriate sources of information the courts might use to ensure that clear and reliable evidence of prior violent conduct is accounted for at sentencing.

The Commission also published a proposal to clarify the definition of robbery, and to provide clearer guidance on how to treat inchoate offenses (including conspiracies, attempts, and solicitation to commit crimes) in determining whether an offense is a crime of violence. The proposed amendment addresses specific application issues and general concerns raised by the Department of Justice in their August 2018 letter to the Commission.

In a continuation of its ongoing study of recidivism among federal offenders, the Commission is finalizing a study of recidivism among violent offenders. Our analysis revealed that violent federal offenders recidivate much more often, more quickly, and commit more serious offenses than non-violent federal offenders. We expect to publish the findings, as well as a report on the impact of revocations on federal sentences, in early 2019 (view related studies).

At the December public meeting, Acting Chair Pryor also provided an update

on the Commission's top priority this amendment cycle—examining the current federal sentencing system and operation of the sentencing guidelines. Organized in 1985, one of the Commission's core responsibilities was 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. On January 8th, the Commission released a report comparing federal judges' sentencing practices within 30 major metropolitan U.S. cities.

"The results are particularly troublesome given the risk to public safety posed by violent offenders."

"These findings raise important questions about the advisory guidelines system. We need to study and consider new approaches that more adequately achieve the goals of the Sentencing Reform Act—including the goal of avoiding unwarranted sentencing disparity—within the constitutional parameters set forth by the Supreme Court in *Booker*," stated Acting Chair Pryor.

Other proposed amendments respond to circuit conflicts and recently enacted legislation. All of the proposed amendments can be found at the following link. The Commission is accepting initial public comment on the proposed amendments through February 19, 2019. Please send your comments to PubAffairs@ussc.gov.

https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181213_prelim-rf-proposed.pdf

ESP HIGHLIGHTS



- We've added a new eLearning course on the 2018 Illegal Reentry Amendment. We've also added more topics to the Case Law Concierge, and have released nine new podcasts. All of the new products can be found at: <https://www.ussc.gov/education>

- In early 2019, we will be announcing openings for the Probation Officers Advisory Group (POAG). We will be seeking representatives for the 7th and 9th Circuits to serve 5-year terms. Check with your Chief for additional information. You can also review the POAG Charter, as well as recent written submis-

sion and meeting minutes at the following link: <https://www.ussc.gov/about/who-we-are/advisory-groups>

