Summary of 2018 Amendments to the Sentencing Guidelines
National Sentencing Resource Counsel Project
Federal Public & Community Defenders
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On April 12, 2018, The Sentencing Commission voted to promulgate amendments to the guidelines. These amendments will be submitted to Congress by May 1, 2018. Barring congressional action, they will take effect November 1, 2018. This memorandum contains a summary of the most relevant changes. Please be sure to read the actual language of the amendments available on the Commission's website.[1]

Amendments that help defendants may be useful now, even before the November 1, 2018 effective date, to support downward variances. For amendments that hurt defendants, they are not effective until November 1, 2018, and even after that, remember *ex post facto* limitations apply and the Guidelines Manual in effect on the date of the offense of conviction should apply if beneficial.

Amendment Topics:

1. Synthetic Drugs

The Commission made significant changes to the drug guidelines for synthetic drugs, namely cathinones, cannabinoids, and fentanyl analogues. It took a new class-based approach, set equivalency ratios (converted drug weight)[2] for each class

[1] A reader-friendly version of the amendments is available here: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180412_prelim_rf_final.pdf. The Commission made several technical and miscellaneous amendments in addition to the amendments discussed here.

[2] The Commission this year decided to stop using "Marihuana Equivalency" as a conversion value and replaced it with the term "Converted Drug Weight."

of substance, and added specific offense characteristics and departure provisions. The amendments also set a minimum base offense level of 12 for synthetic cathinones and cannabinoids. The amended ratios are as follows:

> Synthetic Cathinones (except a Schedule III, IV, or V substance) 1 gram = 380 grams Marihuana;
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> Synthetic Cannbinoids (except a Schedule III, IV, or V substance) 1 gram = 167 grams Marihuana; and
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> Fentanyl Analogues 1 gram = 10 kilograms Marihuana.

A. Synthetic Cathinones (Flakka, Khat, Bath Salts, etc.)

The Commission adopted a class-based approach to synthetic cathinones, setting a marihuana equivalency (or converted drug weight) for all synthetic cathinones (except Schedule III, IV or V substances) of 1 gram of synthetic cathinone = 380 grams of marihuana. Methcathinone – previously listed separately in the equivalency table – is included in the new class. For this class of synthetic drugs, the Commission also established a minimum base offense level of 12.

Importantly, the amendment includes a departure provision based on potency that specifically recognizes "there may be 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." The Commission identifies methylone as an example of a substance that may warrant a downward departure because a greater quantity must be consumed "to produce an effect on the central nervous system similar to" that produced by typical synthetic cathinones. Conversely, MDPV is identified as an example of a substance that may warrant an upward departure for having higher than typical potency. The application note specifically identifies methcathinone and alpha-PVP as examples of typical synthetic cathinones.

B. Synthetic Cannabinoids (Spice, K-2, Synthetic Marijuana, etc.)

The Commission also adopted a class-based approach to synthetic cannabinoids, setting a marihuana equivalency (converted drug weight) for all synthetic cannabinoids (except Schedule III, IV, or V substances) of 1 gram of synthetic cannabinoid = 167 grams of marihuana. It defined synthetic cannabinoid as "any synthetic substance (other than synthetic tetrahydrocannabinoil) that binds to and

activates type 1 cannabinoid receptors (CB_1 receptors)." And, as with synthetic cathinones, the Commission established a minimum base offense level of 12.

The Commission provided two important departure provisions based on concentration and potency. The first recognizes that the concentration of synthetic cannabinoid in a substance may vary. Accordingly, the Commission provides an invited upward departure in cases involving pure synthetic cannabinoids "not combined with any other substance," and an invited downward departure in cases involving "a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material." The second, inviting only a downward departure, recognizes the potency of some synthetic cannabinoids is lower than the "typical synthetic cannabinoid in the class." The Commission specifically identified JWH-018 and AM-2201 as examples of typical synthetic cannabinoids. The application note invites a downward departure where a "substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class."

C. Fentanyl and Fentanyl Analogues

Despite recognizing that "most fentanyl analogues are typically about as potent as fentanyl itself," the Commission sets an equivalency ratio (converted drug weight) for all fentanyl analogues of 1 gram = 10 kilograms of marihuana. This is higher than the ratio for fentanyl, which is set at 1 gram = 2.5 kg of marihuana.[3] The Commission defined fentanyl analogue to include "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-piperidnyl] propanamide)."

In addition, the Commission added a specific offense characteristic to §2D1.1, providing a four-level enhancement "[i]f the defendant *knowingly* misrepresented *knowingly* marketed as another substance any mixture or substance containing fentanyl . . . or a fentanyl analogue." (emphasis added.)

Practice tip for Synthetic Drugs: For challenges to these new guidelines, including why the new ratios are wrong, the class definitions are inappropriate, and more,

[3] Two fentanyl analogues previously specifically listed in the drug guideline at the same ratio the Commission set for all fentanyl analogues, Alpha-Methyfentanyl and 3-Methylfentanyl, have been deleted as those are now encompassed within the general class of fentanyl analogues.

please see Defender comments on the proposed amendments.[4] Also note that even with the new class based approach, there is room to litigate that the specific synthetic drug at issue in a particular case should be punished less severely than others in the class. The invited departure provisions may be helpful in that regard. For synthetic cathinones and cannabinoids, the departure provisions list specific substances that can be used as comparisons. And for fentanyl analogues, pointing to the departure provisions for synthetic cathinones and cannabinoids may help support a variance based on potency or concentration of the fentanyl analogue as compared to the weight of the mixture with other substances. Finally, when applying the new specific offense characteristic for fentanyl, it is important to note its application is limited to situations in which the *defendant*, and not someone else involved in the offense, *knowingly* misrepresented or marketed fentanyl or fentanyl analogues.

2. Illegal Reentry

The Commission made two important changes to §2L1.2 for defendants who (A) engaged in criminal conduct before the first order of deportation/removal but are not convicted until after, and (B) are revoked after a first order of deportation/removal.

A. Engaged in Criminal Conduct Before First Order of Deportation/Removal, But Convicted After

Responding to complaints by the Department of Justice of a so-called "gap" in its Illegal Reentry guideline, the Commission amended §2L1.2(b)(2) to assign points when, before the defendant was ordered deported/removed for the first time, the defendant "engaged in criminal conduct that, at any time, resulted in" certain convictions set forth in §2L1.2(b)(2)(A)-(E). Previously, if a defendant engaged in the criminal conduct before the first order of deportation/removal, but was not convicted until after that order, no points were assigned under §2L1.2 for that prior conviction.

The Commission also added a note to the Commentary providing that in cases where criminal conduct underlying a prior conviction occurred both before and after the first deportation/removal order, the conviction should count *only* under subsection (b)(2).

[4] Defender comments are available here: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180306/FPD.pdf; or here https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/defender_recommendations/defender_puiblic_comment_2018_with_attachment.pdf.

B. Revoked After a First Order of Deportation

With this amendment, the Commission rejected decisions in the Fifth and Ninth Circuits that held revocation sentences imposed after the first order of deportation/removal should not be counted toward the length of sentence imposed for a conviction sustained before the deportation/removal order for purposes of §2L1.2(b)(2). Specifically, the Commission amended the definition of "sentence imposed" in the Commentary to provide that the "length of the sentence imposed "includes any term of imprisonment given upon revocation of probation, parole, or supervised release, *regardless of when the revocation occurred*."

Practice tip: To help with variance arguments in cases where revocations affect the length of sentence imposed, please see Defender comments on why revocations should not count.[5]

3. Acceptance of Responsibility (§3E1.1)

The Commission added language to the acceptance of responsibility Commentary to clarify that unsuccessful challenges to relevant conduct should not bar application of the acceptance reduction. Application Note 1(A) now reads: "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*."

The amendment addresses concerns that the Commentary encouraged "courts to deny a reduction in sentence when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report's assessment of relevant conduct." It attempts to cure the "chilling effect" on defendants who may have opted against making objections for fear of jeopardizing their eligibility for a reduction for acceptance of responsibility.

Practice tip: This amendment may be of particular use to those in circuits fighting against bad precedent that equated "frivolously contest" or "falsely deny" with any unsuccessful challenge to relevant conduct. In fighting against that precedent, it may be helpful to cite the new language in conjunction with the Commission's explanation in the synopsis regarding the concerns that precipitated the

[5] Defender comments are available here: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180306/FPD.pdf; or here https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/defender_recommendations/defender_puiblic_comment_2018_with_attachment.pdf.

amendment. In addition, the Commission characterizes this as a clarifying amendment, which may help arguments that it satisfies the various circuit standards to qualify as a "clarifying amendment," allowing it to be applied retroactively to those defendants still on direct appeal.

4. Alternatives to Incarceration (§5C1.1)

The amendment adds new Commentary directing that courts "should consider imposing a sentence other than" imprisonment for nonviolent first offenders falling in Zones A and B. The Commission defines a "nonviolent first offender" as a defendant with "no prior convictions or other comparable judicial dispositions of any kind," and "who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction." Diversionary dispositions and juvenile dispositions are considered prior convictions.

The Commission also amended the Commentary in §5F1.2 to provide that home detention need not include electronic monitoring. While electronic monitoring remains "an appropriate means of surveillance for home detention," the courts should consider whether it is appropriate given the facts and circumstances in each case.

Practice tip: The "nonviolent" requirement is tied to the defendant's actions, not the offense more generally, meaning defendants are not to be excluded on the basis of conduct by others, such as possession of a gun by a different participant in the offense. The Defender comments to the Commission may also help convince courts that alternatives to incarceration should be given in more cases and that juvenile adjudications should not preclude a person from getting a probationary sentence.[6]

5. Tribal Issues

A. Tribal Convictions

It is still the rule that tribal convictions do not count toward criminal history points. The Commission simply amended the Commentary in §4A1.3 to provide a non-exhaustive list of factors a court may consider in determining whether and to what extent to depart upward based on tribal court convictions. Specifically, a court "may consider relevant factors such as the following":

[6] Defender comments are available here: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/FPD.pdf.

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

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

(3) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111-211;

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

(5) 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; and

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

B. Court Protection Orders

The Commission amended the Commentary in §1B1.1 to provide that the term "'court protection order' means 'protection order' as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b)."

6. Bipartisan Budget Act

With this amendment, the Commission added the 20th specific offense characteristic to §2B1.1. It provides a 4-level enhancement, and a floor of 12 for defendants convicted of certain forms of social security fraud. It also amends the Commentary to provide that if this new enhancement applies, the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does *not* apply.

This is a narrow amendment, and will affect only those defendants who were both: (A) convicted under 42 U.S.C. § 408(a), § 1011(a) or § 1383a(a); and (B) fall into the subset of defendants for whom the statutory minimum of ten years' imprisonment applies.

7. Use of a Computer Enhancement (§2G1.3)

The amendment clarifies that Application Note 4 to §2G1.3 applies only to subsection (b)(3)(A) of the guideline. It addresses an application issue in which some courts determined the note was inconsistent with solicitation offenses. The two-level enhancement may apply whether using a computer to communicate directly with a minor or guardian or when used to solicit a third party.

8. Marihuana Equivalency/Converted Drug Weight

The Commission renamed "marihuana equivalency" as "converted drug weight" in the Drug Equivalency Tables.