

# ESP INSIDER EXPRESS

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**2017 Public Meeting**  
Charles Breyer, William H. Pryor,  
Rachel Barkow, and Danny Reeves (l-r)

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## US Sentencing Commission

### Coming Soon: 2017-2018 Policy Priorities

Washington, D.C. - On June 23, 2017, the United States Sentencing Commission published proposed priorities for the amendment cycle ending May 1, 2018. Following a public comment period that closed on July 31, the Commissioners will adopt final priorities for the 2017-2018 amendment cycle at a public hearing later this month. The proposed priorities include:

An in-depth study of the current advisory guidelines structure. For more than a decade, the Commission has studied the impact of the Supreme Court's decision in *United States v. Booker*, which rendered the federal sentencing guidelines advisory. Over the next year, the Commission has proposed to examine additional

ways to simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities, as well as appropriately account for the defendant's role, culpability, and relevant conduct;

A study of the offense levels associated with the illegal substances including MDMA/Ecstasy, THC, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Mephedrone, MDPV, and Mephedrone);

Implementing the recommendations the Commission made to Congress in its 2016 report, *Career Offender Sentencing Enhancements*;

*Cont. on Pg. 4*

## Probation Officers Advisory Group

**Chair – Richard Bohlken**

The Probation Officer's Advisory Group (POAG) is established by the Commission to help us carry out our responsibilities under the Sentencing Reform Act, and to represent U.S. Probation Officers in the area of sentencing. POAG members provide feedback and input

**POAG Authors Two Major Papers and Submits Additional Information when the Commission Asks for their Feedback on Specific Issues** regarding the sentencing guidelines, the proposed priorities, any proposed amendments, and other sentencing issues that may arise throughout the amendment cycle.

According to Mr. Bohlken, "the Commissioners always solicit POAG's feedback and are concerned about what's happening in the field. Input from POAG makes a real difference in helping the Commission decide on priorities and in figuring out how to make the guidelines clearer and easier to apply in the field."



## 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!

**Question 1:** In December 2016, the defendant pled guilty to Wire Fraud (§2B1.1). The defendant stole \$140,000 from one victim who claimed he suffered additional losses, including a promised 10% per year rate of return (over \$10,000), as well as interest and penalties for early withdrawal money from an IRA. The victim claimed his losses exceeded \$165,000. Is the \$165,000 the correct loss amount for guideline purposes?

and a stolen identity to attempt bank fraud. In the process, he also used several phishing e-mails to gather the fraudulent information, including on-line e-mail addresses and passwords, which then allowed him greater access to additional accounts with which he could continue to perpetrate his scheme. Should the defendant receive an enhancement for sophisticated means?



**Answer:** No. Pursuant to §2B1.1, App. Note 3(D)(i), interest of any kind, finance charges, late fees, penalties, amounts based upon an agreed-upon rate of return, or other similar costs are excluded from loss. The loss in this case would be \$140,000. However, keep in mind that the restitution order may include the additional amounts. Loss calculations measure culpability, but restitution orders should make the victim whole by including additional losses caused by the defendant. Those losses can include the kinds of losses the victim claims in this case, as well as other harms that are not part of the guidelines' loss amount.

...

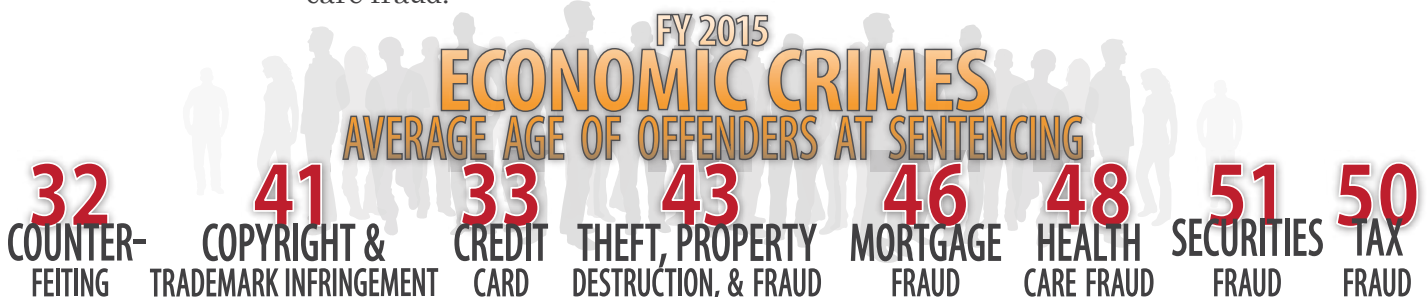
**Question 2:** Defendant was convicted of bank fraud under 18 U.S.C. § 1344. Defendant used forged checks

**Answer:** Yes, probably for someone like this defendant. In this case, you have a data miner who was utilizing complex or especially intricate offense conduct that pertained to the execution or concealment of the offense. (§2B1.1, App. Note 9(B)) Ultimately, it depends on the facts of the case, but here the defendant's scheme included using the information from phishing (e-mail or account access computer tools) to obtain and make forged checks and ID's. The defendant was a data miner and was able to carry out his fraudulent activity using sophisticated means to obtain information to perpetrate the fraud. You need to look at the conduct as a whole, not necessarily the pieces, when determining if this SOC applies. Repetitive and coordinated conduct can amount to sophisticated means. Such conduct is often cited in case law to justify applying the SOC.

## Economic Crimes

### Average Age of Offenders at Sentencing

In fiscal year 2015, there were 7,724 defendants sentenced under §2B1.1: 28.3% were sentenced for embezzlement/theft, followed by 10% for financial Institution fraud, then 8.8% for government benefits fraud, 7 % for ID theft, and finally 6.2% for health-care fraud.



## CASE LAW UPDATE

*Sessions (Lynch) v. Dimaya* – The question presented before the Supreme Court was whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague. No decision was reached this term. On June 26, 2017, the Court ordered the parties to reargue the case in the fall.

### The following three cases highlight issues involving supervised release conditions for sex offenders

*U.S. v. Huor*, 852 F.3d 392 (5th Cir. 2017) Court incorrectly imposed condition limiting the defendant's right to possess and view sexually stimulating materials. The district court stated that defendant had "raped a four-year-old," but that took place 20 years prior when the defendant was 16 years old, and the court did not rely on any of the defendant's parole violations (which the court could examine on remand) in imposing the condition.

*U.S. v. Sherwood*, 850 F.3d 391 (8th Cir. 2017) Supervised release condition allowing probation officer access to any requested financial information and prohibiting defendant from incurring new credit charges without approval of probation officer was abuse of discretion when defendant was convicted of a sex offense. "The inclusion of vague and inappropriate language borrowed from the Guidelines out of context and by rote does not reflect the individualized inquiry we require."

*U.S. v. Shultz*, 845 F.3d 879 (8th Cir. 2017) After conviction for failure to register as a sex offender, condition restricting defendant's contact with minor children without written approval from probation officer was reasonable. Schultz was originally convicted of having a sexual relationship with a 14-year old girl when he was 23 years of age, and he had other convictions for violating no-contact orders with other minor females.

### DID YOU KNOW?

Embezzlement is the only primary offense type in which female offenders outnumber male offenders – 55.8% to 45.2%.

The median loss for tax offenses is \$214,093.

84.6% of tax offenses involved tax losses of \$1 million or less and 48.9% involved losses of \$200,000 or less.

The median sentence for fraud offenders is 14 months.



Learn how criminal history is factored into a federal sentence in this primer from USSC's Office of General Counsel: [bit.ly/2sQ7T1a](http://bit.ly/2sQ7T1a)

— SentencingCommission (@TheUSSCgov)  
June 21, 2017

## Youthful Offenders

Full Report: <https://www.ussc.gov/research/research-reports/youthful-offenders-federal-system>

Recent studies on brain development and age, coupled with recent Supreme Court decisions recognizing differences in offender culpability due to age, have led some policymakers to reconsider how youthful offenders (defined as those 25 or younger at the time of sentencing) should be punished. We recently published a paper studying those offenders.

- There were very few juvenile offenders (under 18) sentenced in the federal system – a total of 52 during the 5-year period from 2010 to 2015. During the same period there were 86,309 offenders (18.0% of the federal offender population) age 25 or younger sentenced in the federal system.
- Similar to the overall federal offender population (or non-youthful offenders group) the most common offenses committed by youthful offenders were drug trafficking (30.9%), immigration (28.6%), and firearms offenses (13.7%).
- The average sentence for youthful offenders was 34.9 mos.

- Almost 92% of offenses committed by youthful offenders were nonviolent offenses.
- Youthful offenders were more likely to be sentenced within the guidelines range than non-youthful offenders (56.1% compared to 50.1%). Youthful offenders recidivated at a much higher rate than their older counterparts — about 67% versus 41%





**UPCOMING  
PROGRAMS**

2017 National Seminar  
September 6 - 8  
Grand Hyatt Denver

Multi-Track Federal  
Criminal Defense Seminar,  
Philadelphia, Pennsylvania

US Probation,  
Dallas & Lubbock,  
Texas

Court Family,  
Puerto Rico

**RECENT  
PROGRAMS**

AUSAS,  
National Advocacy Center,  
Columbia, South Carolina

Court Family,  
Bowling Green &  
Louisville, Kentucky

US Probation,  
Southern Alabama

## 2017-2018 Policy Priorities

### Continued from Page 1

A series of publications on statutory mandatory minimum penalties, focusing on the Commission's recommendations regarding the severity and scope of mandatory minimums, expanding the safety valve, and eliminating the stacking of penalties under 18 U.S. C. § 924(c);

Continued study of recidivism, including the circumstances that are correlated with recidivism, recommendations to reduce costs of incarceration and overcapacity of prisons and promote effectiveness of reentry programs, and possible amendments to provide lower punishment ranges for first offenders and to increase the availability of alternatives to incarceration for those offenders.

Other possible priorities include the issues identified by the Commission's Tribal Advisory Group, and calculation of criminal history scores in Chapter Four of the Guidelines Manual, among others.

The Commission will vote to adopt final priorities at a public meeting later this month. Check the Commission's website for the meeting announcement and the link to watch the meeting from your desktop.

#### Synthetic Drugs

The Commission also requested public comment on MDMA/Ecstasy, and methylene. MDMA (also known as "ecstasy" or "molly") is a Sched-

ule I controlled substance (along with LSD, marijuana and heroin, among others). Users of MDMA experience pleasure, relaxation and self-confidence, but may also experience increased heart rate, blood pressure and inability to regulate body temperature. A popular "club drug," MDMA can be especially dangerous when the user is dancing in hot, crowded conditions. The Commission last established penalty levels for MDMA in 2001, and recently, some stakeholders have suggested that the penalties are no longer appropriate in light of new science.

As to Methylene, the Commission has not established penalties. The guidelines advise courts to determine the proper penalty by using those for the most closely related substance. Courts have often used MDMA as the most closely related substance.

In requesting comment on these drugs, the Commission expects to receive information on scientific developments, distribution patterns, addictiveness and abuse potential, and the general harms caused by these drugs. The Commission takes all of this information, and more, into account when setting drug penalties.

The full text of the issue for comment on MDMA and Methylene is available here: <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-issue-comment-synthetic-drugs>. Comment is due on August 7, 2017. We look forward to your feedback!

**The full text of the proposed  
priorities can be found here:**

<http://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2017-2018-priorities>.

## 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 Seminar in Denver, Colorado. You can also review the seminar materials, including the agenda, presentations, and case law updates.

- You can review the materials (including answers) from the 2016 National Seminar in Minneapolis by clicking on the Teacher's Edition of the workbook. A Teacher's Edition for the 2017 seminar series will be posted after the Denver seminar.

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.

