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2018 Amendments

One Columbus Circle, NE
Suite 2-500, Washington,
DC, 20002

Ph: (202) 502-4500
Helpline: (202) 502-4545
Em: training@ussc.gov
Twitter: @theUSSCgov

Recently Adopted Amendments

Effective November 1, 2018

At a public meeting held on April 12, 2018, the Commission unanimously voted on a slate of new amendments to the *Guidelines Manual*. Among other actions, the Commissioners voted to update the federal sentencing guidelines to address evolving challenges related to the distribution of synthetic drugs. The amendments reflect a collaborative, detailed, and data-driven approach to federal sentencing policy.

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Synthetic Drugs Amendment New Drug Ratios & Synthetic Drug Definitions

At the meeting, the Commissioners approved a multi-part synthetic drugs amendment. The amendment draws upon public comment, expert testimony, and data analysis gathered during a multi-year study of synthetic drugs. Many new synthetic drugs commonly called bath salts, flakka K2, Spice, and Scooby Snax, among others, were not referenced in the federal sentencing guidelines. As a result, courts have faced expensive and resource-intensive hearings. Following a multi-year study and series of public hearings with experts, the Commission determined that synthetic cathinones possess a common chemical structure that is sufficiently similar to treat as a single class of synthetic drugs. Also, while synthetic cannabinoids differ in chemical structure, the drugs induce similar biological responses and share similar pharmacological effects.

In proposing these new drug ratios, the Commission considered among other factors, the severity of the medical harms to the user, the current ratios applied in similar cases,

known trafficking behaviors, and concerns for public safety. The Commission’s actions reflect the evolving nature of these new drugs and will simplify and promote uniformity in sentencing these offenders by providing a marijuana equivalency for synthetic cathinones and synthetic cannabinoids, with departures for further guidance in certain kinds of cases.

A new definition of “fentanyl analogue” raises the guideline penalties for fentanyl analogues to a level more consistent with the current statutory penalty structure. To address the severe dangers posed by fentanyl, the Commissioners also voted to adopt a four-level sentencing enhancement for knowingly misrepresenting or knowingly marketing fentanyl or fentanyl analogues as another substance (which equates to an approximate 50 percent increase in sentence). While most fentanyl analogues are typically as potent as fentanyl itself, some analogues, such as sufentanil and carfentanil, are reported to be many times more potent than fentanyl.



* (except any Schedule III, IV, and V substances) | ** A minimum base offense level of 12 applies



NEW LANGUAGE

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.** . . .

Acceptance of Responsibility Clarification on Relevant Conduct Challenges

In response to concerns that some courts have interpreted the commentary to §3E1.1 as automatically precluding the reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct, the Commission amended the commentary. Some commenters had said that courts sometimes deny acceptance of responsibility when the defendant unsuccessfully challenges relevant conduct in the presentence report, and that this has a “chilling effect” on defendants. The new language clarifies that the unsuccessful nature of a challenge to relevant conduct does not necessarily establish that the challenge was either a false denial or frivolous.

Alternatives to Incarceration Application Note for Nonviolent First Offenders

A new application note in §5C1.1 provides that judges should consider alternative sentencing options for nonviolent first offenders whose applicable guideline range falls within Zones A or B. Eligible defendants must not have any prior convictions and must not have used violence, credible threats of violence, or possessed a firearm or other dangerous weapon in the offense. The amendment also frees up courts from imposing electronic monitoring as part of home detention, in favor any means of surveillance that is equally effective. (See §5F1.2 (Home Detention))

Judges should consider alternative sentences for certain nonviolent first offenders.

This new application note is consistent with 28 U.S.C. § 994(j), which addresses the “general appropriateness of imposing a sentence other than imprisonment” for certain first-time, nonviolent offenders. It also is consistent with the Commission’s study of recidivism and criminal history, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate.

e-Learning Course

Look for an e-Learning course on applying the Illegal Reentry guideline soon at the Education section of the Commission website.

Illegal Reentry Amendment New Conviction Language

The Commission passed a comprehensive amendment to the illegal reentry guideline in 2016, basing illegal reentry sentences on three main factors: the defendant’s history of returning illegally, criminal conduct committed before the defendant was first ordered deported, and criminal conduct committed after the defendant was first ordered deported. This amendment addresses two discrete

if the defendant “engaged in criminal conduct that at any time resulted in a conviction. . .” This means that a defendant who was ordered deported before his or her conviction, still receives an increase based on the criminal conduct that occurred before the deportation order.

“The amendment makes clear that the prior criminal conduct enhancement should apply regardless of when an illegal reentry offender’s conviction is finalized.”

application issues that have arisen in litigation since then. The amendment makes clear that the prior criminal conduct enhancement should apply regardless of when that conviction is finalized. The graduated enhancements at 2L1.2 (b)(2) now apply

In addition, the sentence length, which determines whether the defendant receives a 10, 8, 6, or 4-level enhancement, includes any revocation sentence imposed on that offense, regardless of whether that revocation sentence was imposed before or after the defendant was ordered deported. This part of the amendment responds to opinions from the Fifth and Ninth Circuit Courts of Appeals, which had reached a different result.

Tribal Issues

Departures for Tribal Convictions

The Commission also voted to adopt the recommendations made by the Tribal Issues Advisory Group (TIAG) in May 2016. In recent years there have been important changes in tribal criminal jurisdiction. In 2010, Congress enacted the Tribal Law and Order Act of 2010 (TLOA) to address high rates of violent crime in Indian Country by improving criminal justice funding and infrastructure in tribal government, and expanding the sentencing authority of tribal court systems. In 2013, The Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization) also increased criminal jurisdiction for tribal courts, and also required more robust court procedures and provided more procedural protections for defendants. While the TIAG did not support assigning criminal history points to tribal convictions, they did recommend providing guidance to courts on when to depart based on a defendant's tribal court convictions.

The amendment related to tribal court sentences provides a non-exhaustive list of factors that courts may consider in determining whether a prior tribal court conviction warrants an upward departure from the recommended sentencing range. The six factors outlined in the amendment provide a framework for courts to use when determining whether an upward departure is appropriate to account for tribal convictions. Collectively, these factors balance the rights of defendants and the unique and important status of tribal courts.

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) 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.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

The amendment also provides a definition for the term “court protection order,” which incorporates the statutory definition of “protection order.” By adopting a clear definition, the guidelines will ensure that court protection orders issued by tribal courts receive treatment consistent with that of other jurisdictions.

Definition: “Court protection order” means “protection order” as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). See §1B1.1 (Application Instructions)



PLUS (+)4

If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl . . . or a fentanyl analogue.

Drug Amendment Continued And Other Amendments

In response to legislation and public comment by the Social Security Administration and others, the Commission added a 4-level enhancement and a minimum offense level of 12 to §2B1.1 for specified persons who commit fraud under certain Social Security programs. The legislation increased the statutory maximum for those offenders from five to ten years. The offenders who would receive this increase are already deemed to have abused a position of trust by violating specific statutes, so the four level adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply to these offenders.

The Commission changed the term “Marijuana equivalency” to “Converted drug weight” to avoid confusion. In drug trafficking cases with multiple drugs, the marijuana equivalency was used to convert all the drugs to one universal substance in order to come up with a single drug quantity. Some commenters said that the reference to marijuana was misleading, especially to those less familiar with the Guidelines. The amendment doesn’t change the math, it only changes the terminology to avoid confusion.

“We worked together to develop solutions that improve the federal sentencing guidelines.”

— Circuit Judge William H. Pryor Jr., Acting Chair

DEPARTURE PROVISION

For 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. Methcathinone is an example of a typical synthetic cathinone, whereas MDPV is more potent, and methylone is less potent, than methcathinone.

DEPARTURE PROVISIONS

For synthetic cannabinoids – upward for cannabinoids in pure, crystalline form, downward when mixed with plant material, and downward for less potent forms of the drug.

Definitions

Fentanyl Analogue: “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-piperidinyl] propanamide).”

Synthetic Cannabinoids: are human-made, mind-altering chemicals developed to mimic the effects of tetrahydrocannabinol (THC), the main psychoactive chemical found in the marijuana plant.

Synthetic Cathinones: are human-made drugs chemically related to cathinone, a stimulant found in the khat plant

*The full set of amendments, including various technical and miscellaneous amendments, will be transmitted to Congress by May 1, 2018. If Congress does not act to disapprove the amendments, they will go into effect on November 1, 2018. More information about this process and the proposed amendments can be found at:

<https://www.uscc.gov/about/news/press-releases/april-12-2018>

ESP HIGHLIGHTS



- There are two new introductory-level e-Learning courses available on our website. Learn the foundational principles of the guidelines through these interactive courses on relevant conduct and calculating the defendant’s criminal history score. These courses are in addition to the e-Learning course on the treatment of multiple prior sentences (the single sentence rule). All three of the programs can be found at: <https://www.uscc.gov/education>.

- Look for an e-Learning course on applying the Illegal Reentry guideline soon at: <https://www.uscc.gov/education>.

