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WESTERN DISTRICT OF TEXAS

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San Antonio
July 3, 1989

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Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue NW
Suite 1400
Washington, D.C. 20004

RE: Temporary Emergency
Amendments

Dear Judge Wilkins:

The Commission has solicited comment on certain proposed temporary emergency amendments to the Sentencing Guidelines and Commentary. I am pleased to respond on behalf of the Legislative Subcommittee of the Federal Defender Advisory Committee.

Emergency Guideline Promulgation Authority

The Commission has specifically invited comment on its authority under Section 21 of the Sentencing Act of 1987¹ to issue these proposed amendments. As a matter of policy, the Commission should resort to the emergency guideline authority sparingly, for both legal and practical reasons. The grant of authority in the 1987 Act was carefully circumscribed. The broader authority to promulgate an emergency amendment for any "urgent and compelling" reason has already expired, and the more limited authority which the Commission proposes to utilize will soon expire, with no apparent move to extend them. The legislative history argues for restrictive, rather than expansive use of this temporary authority:

It is expected that the Commission will use the authority to promulgate emergency guidelines only in truly emergency circumstances. If a guideline is invalidated, a new offense is created, or an existing offense is modified, an emergency guideline may be unnecessary because 18 U.S.C. 3553(b) may adequately address[] situations where there is no applicable guideline. In such circumstances, the

¹Pub.L. 100-182 § 21(a)(2), Dec. 7, 1988.

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Commission should submit a new or revised guideline to Congress in [the] manner called for in 28 U.S.C. 994(p).

133 Cong. Rec. H10014, H10019 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

In addition to the statutory procedure for no-guideline cases, cited above, the guidelines themselves provide a first step which will deal adequately with many, if not most, no-guideline situations. For a felony or misdemeanor for which no guideline has been promulgated, the court is to use the "most analogous" offense guideline; only if there is no "sufficiently analogous" guideline is the court to resort to the more subjective process set out in § 3553(b). Guideline §2X5.1. This underscores the Congressional expectation that the emergency guideline authority will be used only in "truly emergency circumstances."

Practical considerations as well argue against expansive use of the emergency authority. Because of the interplay between 18 U.S.C. § 3553(a)(4), which requires the court to use the guideline in effect on the date of sentencing, and the *ex post facto* clause (as interpreted in *Miller v. Florida*²), it is incumbent upon counsel to retain all superseded guidelines and to check carefully for amendments intervening between commission of the offense and sentencing. Regular amendments alone will be substantial in volume (witness the package of 237 numbered amendments submitted to the Congress in the 1989 amendment process); emergency amendments will only add to that burden.

The timing of these proposals argues against their propriety as emergency amendments. They are based upon new or amended statutes enacted by the Anti-Drug Abuse Act of 1988,³ which was signed into law over six months ago. It would appear that if emergency guidelines were necessary, they would have been promulgated and sent to Congress with the regular amendments on May 1, 1989. By just missing the 1989 regular amendment window, the Commission proposes to promulgate emergency guidelines which will remain in effect as such for well over a year, until November 1, 1990. This does not comport with the spirit of the emergency authority, even where it may meet the letter.

In sum, the Commission lacks authority to promulgate emergency guidelines beyond that granted in Section 21(a)(1) and (2) of the 1987 Sentencing Act, for an invalidated sentencing guide-

²107 S.Ct. 2446 (1987).

³Pub.L. 100-690 (Nov. 18, 1988).

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line or a new or amended statute. To the extent the Commission proposes to go beyond new or amended statutes, that would partake of a power which, by the express terms of Section 21(b), has already expired. To the extent the Commission proposes to promulgate certain emergency guidelines within its authority, there are compelling policy reasons why the Commission should refrain from doing so. The merits of individual amendments are discussed below.

Drug Amendments

The Federal Defenders oppose the adoption of proposed emergency amendment 1 to Guideline §2D2.1. As presently worded, the proposed new subsection (b) would require that, in a case involving a defendant who possessed five grams or more of cocaine base, the guideline applicable to the possession of that quantity of cocaine base with intent to distribute be applied. This guideline is objectionable because it does not take into account the fact that the maximum possible sentence for the simple possession charge is only 20 years while the statutory maximum for the possession with intent to distribute charge is 40 years and, in the case of quantities in excess of 50 grams, life imprisonment. In light of this difference in the statutory maxima, we submit that any new guideline which addresses the offense of simple possession of cocaine base should scale the increase in offense level for quantities greater than five grams on a less severe slope than that which applies to the possession with intent to distribute offense.

The Federal Defenders strongly oppose the Sentencing Commission's proposed emergency amendment number 3. We respectfully submit that the proposal is not supportable on the merits and, moreover, that the Commission lacks authority to promulgate this amendment as an emergency guideline.

Amendment 3 would modify the drug quantity table of Guideline §2D1.1 so as to increase by two levels the offense severity level for all offenses involving the distribution of cocaine base or possession of cocaine base quantities in excess of 125 milligrams with intent to distribute. In support of this proposed amendment, the Commission states that this increase in the offense level for cocaine base offenses is necessary to "more appropriately reflect the seriousness of offenses involving this substance as indicated by the enhanced penalties for possession of cocaine base contained in Section 6371 of the Anti-Drug Abuse Act of 1988."

The Commission's proffered justification fails to take into account the fact that although Congress has, in the case of simple possession of certain quantities of cocaine base, provided

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for a mandatory minimum penalty of five years, it has not chosen to amend either the minimum or the maximum penalties for the distribution of or possession with intent to distribute cocaine base. Rather, the penalties for those offenses remain the same and bear the same relationship to the penalties for the distribution of other drugs that they had prior to the enactment of the Anti-Drug Abuse Act. In this regard, it is noteworthy that in other portions of the Anti-Drug Abuse Act, Congress has taken action to impose enhanced statutory penalties (e.g., §§ 6462, 6468) or to direct the adoption of minimum guideline levels for specific offenses (e.g., §§ 6453, 6454, 6468). In light of Congress's failure to take such affirmative action with regard to the penalties to be applied to offenses involving the distribution of cocaine base and/or the possession of cocaine base with the intent to distribute, the Commission's justification for enhancing the offense severity levels for those crimes is not well founded. In fact, the Federal Defenders submit that the proposed amendment, by adjusting cocaine base offense levels to those provided for offenses involving other controlled substances such as cocaine and heroin inappropriately upsets the scale of penalties which Congress has provided in existing law.

For all these reasons, as well as the lack of authority discussed above, the Federal Defenders urge that the Commission withdraw its proposed emergency amendment number 3.

Obscenity Amendments

The Commission proposes to amend Guidelines §2G3.1 and §2G2.2 in light of Sections 7521 and 7526 of the Anti-Drug Abuse Act of 1988. At the outset it should be observed that the Commission has already dealt with these new offenses in the regular amendment process by amending the statutory coverage of Guideline §2G3.1.⁴ The proposal for comment does not address why the Commission now finds an emergency requiring different treatment.

The offenses previously governed by the Guideline §2G3.1, §§ 1461-1465 of Title 18, dealt with the importation, mailing, broadcasting, or interstate transportation of obscene matter. Each statute had a maximum penalty of five years, except for § 1464 (broadcasting obscene language) which was punishable by a maximum term of two years. The two new statutes enacted in the Anti-Drug Abuse Act of 1988 prohibit the sale or possession with intent to sell of a visual depiction either of obscenity or of a minor engaging in explicit sexual conduct (18 U.S.C. § 1460); and sale or possession with intent to distribute of obscene material

⁴Amendment No. 97, 54 FR 21365.

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by a person engaged in the business of selling obscene materials (18 U.S.C. § 1466). Both statutes require as an element of the offense distribution or an intent to distribute the prohibited material. The maximum penalties, however, differ. A dealer engaged in distributing pornography can be punished up to five years (§ 1466) whereas other distributors of obscene or child pornography materials can receive sentences only up to two years. This appears to reflect a decision by Congress to provide a relatively lighter sentence for persons who are not engaged in the business of pornography. Since the offenses set out in §§ 1461-1465 do not have as an element that the offender be engaged in the pornography business, those cases should be governed by a guideline similar to that provided for § 1460. Such a guideline would have offense levels in keeping with the maximum penalty of 24 months' imprisonment.

The proposed guideline has just the opposite effect. Instead of generally lowering the offense levels it has very substantially raised them. The Commission has rejected Congress's choice of the enhancing factor--being engaged in the obscenity business--for a much broader standard of its own creation, distribution for pecuniary gain. No explanation is offered for this variance from apparent legislative intent.

The proposed guideline also appears to produce a disparity in sentencing for offenses for which Congress has prescribed like terms. Mail fraud (18 U.S.C. § 1341), bank embezzlement (18 U.S.C. § 656), false statement to a government agency (18 U.S.C. § 1001), and passport offenses (18 U.S.C. §§ 1542-1544) are, like first offenses against 18 U.S.C. §§ 1461-1463 and 1465-1466, Class D felonies punishable by a maximum of five years. The base offense levels for these offenses are 6. Higher offense levels are reached depending on the value of the property taken. While the proposed guideline uses the same basic scheme, its base offense levels are two to three times higher than other Class D offenses. This disparity is based neither on Congressional intent nor on past sentencing practices. No reasons are given for the selection of these offense levels which seem disproportionately high to the grade of offense.

The disparity is even greater in comparing the proposed guideline's applicability to §§ 1460 and 1464 with the guidelines governing other Class E felonies that have a maximum term of two years. Acceptance of a gratuity (18 U.S.C. § 201(c)(1)), conflict of interest (18 U.S.C. § 208), and illegal entry into the United States (8 U.S.C. § 1326) have base offense levels respectively of 6, 7 and 8. Yet a person possessing an obscene magazine which he sells to another would have a base offense level between 12 and 16. His base offense level would be higher than a person convicted of involuntary manslaughter (10), at least as

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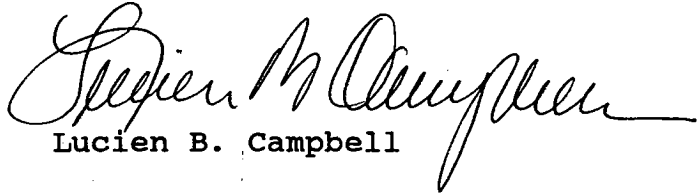
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high as a drug trafficker using a communication facility (12), a perjurer (12), or a commercial burglar (12), and perhaps higher than a person who has committed aggravated assault (15). Such a result offends not just the principles of uniformity and proportionality but common sense as well.

The Federal Defenders appreciate this opportunity to comment on the proposed emergency amendments. If the Commission believes it would be productive for a representative of the Defenders to meet with members of the Commission or staff on these issues, we will of course be pleased to do so.

Respectfully,

A handwritten signature in cursive script, appearing to read "Lucien B. Campbell", written in dark ink. The signature is fluid and extends across the width of the text block below it.

Lucien B. Campbell