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April 4, 2001

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

I write to supplement the statement of the Federal Public and Community Defenders concerning proposed amendment 9. Proposed amendment 9 would, in part, amend the safety-valve provision of § 5C1.2 by adding a new subsection to § 5C1.2 that provides that a defendant who meets the safety-valve criteria, and who is subject to a mandatory minimum of at least five years, cannot have an offense level from chapters two and three of the *Guidelines Manual* that is less than level 17. We oppose this part of proposed amendment 9 and urge that it not be promulgated.

The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, contained two mandates. First, section 80001(a) of that Act amended 18 U.S.C. § 3553 to direct federal courts to impose sentence "pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 [of the United States Code] without regard to any statutory minimum sentence" if the defendant meets five criteria. Second, section 80001(b) of the Act gave directions to the Sentencing Commission. Section 80001(b)(1)(A) directed the Commission to amend the guidelines to carry out the purposes of section 80001. Section 80001(b)(1)(B) provided that "in the case of a defendant for whom the statutorily required minimum sentence is 5 years, such guidelines and amendments issued under subparagraph (A) shall call for a guideline range in which the lowest term of imprisonment is at least 24 months." Section 80002(b)(2) of the Act gave the Commission the authority to promulgate a temporary amendment to carry out the purposes of section 80001.

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In response to the Act, the Commission promulgated amendment 509. Amendment 509 added § 5C1.2, which provides that "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence" if the defendant meets five criteria. The five criteria are taken from the legislation almost verbatim. Under § 5C1.2 as promulgated by amendment 509, a defendant subject to a five-year mandatory minimum who met the criteria of § 5C1.2 could have received a guideline sentence of 30 months. (Offense level of 26 for quantity, less 4 levels for minimal role, less 3 levels for acceptance of responsibility, resulting in a final offense level of 19. The applicable range for offense level 19, criminal history category I is 30-37 months.)

Amendment 509 was promulgated under the temporary-amendment authority of section 80001(b)(2) of the Violent Crime Control and Law Enforcement Act of 1994. The temporary-amendment authority provided that any changes made by the temporary amendment would remain in effect only until the end of the next amendment cycle in which any guideline amendments were promulgated.

During the next amendment cycle, the Commission promulgated and sent to Congress amendment 515. Amendment 515 repromulgated § 5C1.2 with minor editorial changes and added subsection (b)(6) to § 2D1.1(b) § 2D1.1. Section 2D1.1(b)(6) authorizes a two-level reduction for a defendant who meets the five criteria of § 5C1.2. As a consequence, a defendant subject to a five-year mandatory minimum who meets the criteria of § 5C1.2 can receive a guideline sentence of 24 months. (Offense level of 26 for quantity, less 2 levels under subsection (b)(6), less 4 levels for minimal role, less 3 levels for acceptance of responsibility, resulting in a final offense level of 17. The applicable range for offense level 17, criminal history category I is 24-30 months.)

It is true that under § 5C1.2 a safety-valve defendant can have a guideline range with a minimum of less than 24 months. The Commission recognized that fact when it originally promulgated § 5C1.2. Indeed, the Commission included an example of how that could occur in the statement of reasons for amendment 509, the amendment that originally promulgated § 5C1.2. *See* 59 Fed. Register 52210, 52211 (1994) The Commission also indicated that it expected that such sentences would occur infrequently. *Id.* The Commission, however, did not willfully ignore section 80001(b)(1)(B) of the Violent Crime Control and Law Enforcement Act of 1994. The Commission gave a thoughtful rationale for promulgating a guideline that could result in a guideline sentence of less than 24 months.

The Commission believes that it has the authority to authorize such minor variations from the literal language of the Congressional instruction to ensure consistency with the guidelines as a whole. In the Conference Report accompanying this legislation [i.e., the Violent Crime Control and Law Enforcement Act of 1994], the Congress expressly noted

that the Commission "shall assure reasonable consistency with other guidelines" and "take into account any mitigating circumstances which might justify exceptions." H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 388 (title IX) (1994); see also *id.*, sec. 280003 at 312 (directing the Commission to carry out a specific instruction regarding sentencing enhancements for hate crimes in a manner to ensure reasonable consistency with other guidelines). The Commission similarly believes its interpretation of section 80001(b)(1)(B), within the overall context of a clearly ameliorative sentencing provision for qualified defendants, is consistent with past Congressional directives to the Commission and Congress's rationale for employing such directives as a more flexible means of effecting sentencing policy in particular situations. . . . in this case, the Commission has sought to implement the Congressional instruction in section 80001(b)(1)(B) in a manner that best "assure[s] reasonable consistency with other guidelines * * * and take[s] into account * * * mitigating circumstances which might justify exceptions." H.R. Conf. Rep. No. 711, *supra*.

Id. at 52211-12.

We agree with the Commission's analysis. Had the Commission's analysis been incorrect, we would have expected an effort in Congress to reject or modify amendment 515. To our knowledge, there was no attempt to do so when amendment 515 was sent to Congress, and there has been no attempt to do so since then.

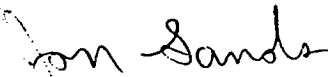
We do not question the authority of the Commission to amend § 5C1.2 to impose a floor of 17, but we do question the wisdom of such a floor. The Commission, until now, has recognized that defendants with the same offense level and criminal history category should be subject to the same guideline range. Indeed, that approach would seem to be mandated by the statutory statement in 18 U.S.C. § 3553(a)(6) that one of the purposes of sentencing is "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

To abandon that approach now would be to introduce unwarranted disparity into the guidelines and encourage downward departures. Congress placed no limitation on the sentencing court's authority to sentence a defendant eligible for safety-valve treatment. As application note 9 to § 5C1.2 states, "A defendant who meets the criteria under this section [i.e., § 5C1.2] is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release." Thus, the sentencing court is free to sentence such a defendant to a term of less than 24 months. A floor of offense level 17 under § 5C1.2 will always overstate the seriousness of the offense if the defendant's actual offense level would otherwise be 14, for example. A safety-valve defendant in criminal history category I with an actual offense level of 14 should be treated the same as a nonsafety-valve defendant with an offense-level of 14. When sentencing the safety-valve defendant, therefore, the sentencing court will have a basis to depart downward to a sentence within the guideline range of 15-21 months.

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Section 5C1.2 as presently written has worked well ever since originally promulgated. We see no need to change it now.

Sincerely,

A handwritten signature in cursive script that reads "Jon Sands".

Jon Sands, Chair

Handwritten initials "LMM" in cursive script.

Federal Defenders' Sentencing Guidelines Committee

cc: Vice Chair Castillo
Vice Chair Sessions
Vice Chair Steer
Commissioner Johnson
Commissioner Kendall
Commissioner O'Neill
Commissioner (ex officio) Gaines
Commissioner (ex officio) Horowitz
Charles Tetzlaff, General Counsel