

Memorandum

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Regarding: Estimate of Sentencing Impact of the Smarter Sentencing Act of 2013

Date: September 16, 2013; revised October 8, 2013

The proposed “Smarter Sentencing Act of 2013” would, among other changes, 1) expand the current statutory “safety valve,” which waives the mandatory statutory minimum for certain non-violent, low-level drug offenders, to include defendants with up to 3 criminal history points, and 2) reduce the mandatory minimum terms of imprisonment required by 21 U.S.C. §841(b) for various types of drugs and quantities, and for certain repeat offenders. The act also directs the U. S. Sentencing Commission to review and amend its guidelines and policy statements, as appropriate, consistent with these statutory changes. The first of these changes is likely to result in lower sentences for between **479 and 2,250 defendants**, depending on how the Commission responds. The impact of the second change depends even more on the Commission’s response, with **about 2,359 defendants** likely to benefit from the statutory change alone, **and over 25,000 defendants** potentially benefitting from changes to the Drug Quantity Table in the sentencing guidelines, which the Commission has historically linked to the statutory mandatory minimums.

To estimate the number of defendants likely to benefit in various ways from the proposed legislation, the Sentencing Commission’s Monitoring Datafile was queried to determine how many offenders in FY2012 were subject to the statutes and guidelines that would be revised by the act. To ensure comparability with analyses of other proposed legislation and policy changes, only the 85.5 percent of cases in which the Commission received full documentation were included in the analysis. Based on the available data, very few defendants excluded due to incomplete data were convicted of offenses carrying drug mandatory minimums, and fewer yet of these would have qualified for the proposed expansion of the safety valve.

1) Safety Valve Expansion; Effect on Statutory Penalties. In FY2012, 15,519 offenders were convicted of drug offenses carrying a mandatory minimum penalty. Most of these received some form of relief from the minimum, either from the current safety valve or from a government motion under 18 U.S.C. § 3553(e) for waiver of the statutory minimum due to the defendant’s substantial assistance in the investigation or prosecution of another person. (These motions are usually, though not always, accompanied by a motion under USSG §5K1.1 for a departure below the guideline range for the same reason. The datafile records §5K1.1 departures, not § 3553(e) motions directly.) Of the 6,504 offenders who remained subject to a statutory penalty, 1,149 had two or three criminal history points and might benefit from the proposed expansion of the safety valve, provided they meet the other safety valve criteria. A drug trafficking guideline was the primary sentencing guideline for 1,124 of these offenders. (Money laundering or some other guideline was primary for the other defendants, because it resulted in a higher guideline sentence. These 25 defendants are excluded from the following analyses.)

The other safety valve criteria, and the data available to determine whether a defendant might be excluded by them, are as follows:

- The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

232 of the 1,124 defendants received either an adjustment under 2D1.1(b)(1) or 2D1.11(b)(1), or a statutory enhancement under 18 U.S.C. § 924(c), for possession of a weapon; 2 defendants also received the guideline adjustment under § 2D1.1(b)(2) for use of violence or threats of violence.

- The offense did not result in death or serious bodily injury to any person;

One defendant had a base offense level of 43 due to USSG § 2D1.1(a)(1), indicating that death or serious bodily injury resulted in the case. Whether death resulted in other cases could not be determined, because § 2D1.1(a)(2) and (3) do not result in unique base offense levels.

- The defendant is not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

117 defendants qualified for an aggravating role adjustment under § 3B1.1. It was not possible to identify defendants whose conduct met the criteria for a continuing criminal enterprise, but this is unlikely to be a large number of defendants.

- The defendant truthfully provides information about the offense to the government prior to sentencing.

106 defendants did not receive the adjustment for acceptance of responsibility under § 3E1.1, which is a rough proxy for failure to meet this criterion. However, among defendants in Criminal History Category I who did not receive this adjustment (and who appear to meet the other criteria), 30 percent still received the safety valve. Applying this percentage to these 106 defendants suggests that about 74 defendants would be disqualified by this criterion.

Applying all the exclusionary criteria at once suggests that of the 1,124 drug defendants with two or three criminal history points who remained subject to a mandatory minimum drug penalty, 675 additional defendants would have received relief from the statutory penalty if the proposed expansion of the safety valve had been in effect in FY2012. (In addition, over 400 offenders who already received a government motion under § 5K1.1 would appear to also qualify for relief from the mandatory minimum by the proposed expansion of the safety valve.) Of the 675 defendants newly qualifying for relief, **381 defendants** had statutory minimums that exceeded the minimum of their current guideline range, and nearly 100 of these had statutory minimums above the *top* of their guideline range; most of these defendants would almost certainly benefit once the statutory floor no longer “trumped” or “truncated” the otherwise applicable guideline range. In addition, 161 defendants with statutory minimums below their guideline range received a departure or variance below the range; **98 of these defendants** were sentenced at the statutory minimum and may have received a lower sentence if the statutory minimum had not limited the judges’ discretion.

Safety Valve Expansion; Effect on Guideline Range. In addition to the statutory safety valve that waives any applicable drug mandatory minimum, a guideline safety valve (codified at USSG §2D1.1(b)(16) and §2D1.11(b)(6)) reduces many drug defendants' offense level by two levels if they meet the statutory criteria, regardless of whether they are charged with a statutory mandatory minimum. A 2-point reduction generally reduces the minimum months of imprisonment recommended by the guidelines by about 19 percent. The proposed legislation directs the Commission to review and amend, if appropriate, its guidelines and policy statements to ensure that they are consistent with the amended statutory safety valve.

Historically, the Commission has reduced offense levels by two points for most defendants who meet the statutory criteria. (USSG §5C1.2(b) requires an offense level of at least 17 for defendants who would otherwise be subject to a five year statutory minimum.) If the Commission continues this practice, this change will have a wider impact than the waiver of the statutory minimum discussed above, because it applies to *all* drug defendants whose offense level is determined by the Drug Quantity Tables at USSG §2D1.1 and 2D1.11.

The Commission recently estimated that if the safety valve criteria had included offenders with up to 3 criminal history points, **2,180 offenders** who were disqualified by the current criminal history limitation would have benefitted from the guideline safety valve in FY2012. *See* Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission, For the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences" Before the Committee on the Judiciary United States Senate at 10, Sept. 19, 2013. The Commission noted that expansion of the safety valve "would likely have little effect on the demographic differences observed in the application of mandatory minimum penalties" because black offenders would be under-represented among the newly-eligible offenders, just as they are among the currently eligible.

The Commission's estimate closely tracks my own analysis of how many offenders would benefit if the Commission amends the guideline safety valve in line with its historic practice. However, the additional considerations in section 5 of the act, and other reductions to the statutory penalties proposed by section 4 of the act, make it difficult to predict the Commission's responses with certainty.

2) Reduction of Penalties at 21 U.S.C. § 841: Effect of Removal of Statutory Overrides.

Section 4 of the act reduces the minimum terms of imprisonment required by 21 U.S.C. §841(b) for various types of drugs and quantities, and for certain repeat offenders. In general, mandatory prison terms are reduced to two years for offenders currently subject to five year terms, and reduced to five years for offenders currently subject to ten year terms. Section 5 directs the Commission to "review and amend, if appropriate" its guidelines and policy statements, in light of the changes made by the act and additional considerations: 1) the need to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"; 2) the findings and conclusions of the Commission's October 2011 report to Congress on mandatory penalties; 3) fiscal implications; 4) public safety concerns; 5) the intent of Congress that penalties for violent and serious drug traffickers who present public safety risks remain appropriately severe; and 6) the need to reduce and prevent racial disparities in Federal sentencing.

Currently, in about a third of drug cases, the drug statutory minimums, which are based largely on drug type and quantity, exceed the minimum range of imprisonment recommended by the guidelines, which take into account some mitigating factors, such as acceptance of responsibility and mitigating role. In this circumstance, USSG §§5G1.1 and 2 direct that the statutory minimums override the otherwise applicable guideline range. Offenders can avoid the statutory penalty only by qualifying for the safety valve or by receiving a government motion under 18 U.S.C. § 3553(e) for substantial assistance. A reduction of the statutory drug penalties, even without additional changes to the guidelines, would end these overrides in most cases.

In FY2012, a statutory minimum drug penalty exceeded the *top* of the otherwise applicable guideline range for 6,204 offenders. Most of these offenders qualified for a waiver of the mandatory minimum, but 835 remained subject to the statutory minimum. Among these 835 offenders, **558 offenders** would no longer be subject to a statutory minimum exceeding the maximum prison term recommended by the guidelines if the statutory drug penalties were reduced as proposed by the act. (The offenders who continue to be subject to overriding statutory penalties were convicted largely of firearm offenses, such as 18 U.S.C. § 924(c), which are not reduced by the act.) It seems very likely that these offenders would have received lower sentences if the act had been in effect in FY2012, even if there were no additional changes to the guidelines.

An additional 2,319 offenders had statutory minimums that were within the recommended guideline range, but that exceeded the *bottom* of the range; 1,221 of these did not qualify for any currently available relief. Judges were prevented from sentencing at the bottom of the guideline range, or from granting a downward departure or variance to these offenders. If the statutory drug penalties were reduced as proposed by the act, **1,067 of these offenders** seem likely to have received a lower sentence, even if there were no additional changes to the guidelines.

Some offenders received downward departures or variances from the guideline range, but remained subject to mandatory statutory penalties that were below the range. Of these, **734 defendants** were sentenced at the statutory minimum, and may have received a lower sentence if the statutory minimum had been lower.

Adding together these three groups of defendants most likely to benefit from the proposed reduction of statutory penalties suggests that **about 2,359 defendants** would have received lower sentences in FY2012 if the proposed legislation had been in effect, even if the guidelines were not amended. Note that many of these offenders would also benefit from the proposed expansion of the safety valve discussed above; this number represents the impact of this statutory change alone, not an impact in addition to the safety valve expansion.

Reduction of Penalties at 21 U.S.C. § 841: Effect of Amendment of the Drug Quantity Table. By far the biggest potential impact could occur through the Commission's response to the act's directive to amend the guidelines. Historically, the Commission has linked the Drug Quantity Table at §2D1.1(c) to the quantity thresholds established by statute. If the Commission continues this practice in response to the directive in section 5 of the act, the guideline ranges of **over 25,000 defendants** subject to the quantity table in FY2012 would have been reduced. If the Commission continued its historic method of linkage, the ranges would be reduced by the equivalent of six to eight offense levels, which would cut terms of imprisonment recommended by the guidelines by approximately 50%.

Commission estimate of the savings from reduced statutory penalties. The Commission Chair's recent Statement to the Senate Judiciary Committee, cited above, estimates (p. 8) the savings resulting from a reduction in the statutory drug penalties proposed by the act. Assuming a reduction in the sentences of each offender subject to a statutory minimum proportionate to the reductions proposed by the act, the Commission estimated a savings of 45,312 prison bed years over time, from only offenders sentenced in the first year following the change. This translates into a cost savings of \$1 billion 194 million over time from the first year of new policies, with similar savings in subsequent years if other factors remain constant. It should be noted that this estimate appears to be based on a scenario in which only offenders convicted of statutes carrying mandatory penalties receive reduced sentences (p. 8, footnote 33); it does not assume any reductions for offenders subject to the drug trafficking guidelines but not convicted under mandatory minimum statutes. Given the historic linkage between the Drug Quantity Table and the statutes, and the anomalies and inequities that would result from reductions limited to this group, this scenario seems unlikely. The amount of savings will ultimately depend on how the Commission amends the Drug Quantity Table and other guidelines applicable to all 25,000 drug trafficking offenders.