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March 27, 2009

Honorable Richard H. Hinojosa  
Acting Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 2002-8002

**Re: Comments on Proposed Miscellaneous Amendments**

Dear Judge Hinojosa,

Thank you for the opportunity to provide comments from the Federal Public and Community Defenders on the Commission's proposed miscellaneous amendments to the guidelines. At the public hearing on March 17, 2009, we submitted written testimony on these matters, which is attached and incorporated as part of this public comment. We briefly summarize our recommendations below.

1. On Part A's proposed amendments related to the Housing and Recovery Act of 2008, we question the need to take any action at this time given that the listed statutes do not appear to have ever resulted in a criminal conviction and are unlikely to do so in the future. If the Commission feels that it should nonetheless act now, we recommend that new 12 U.S.C. § 4636b and old 12 U.S.C. § 1818(j), which punish the failure to comply with an administrative agency order, be referred, if at all, to §2J1.1, and that the remaining statutes listed in the proposal – all of which are Class A misdemeanors – be referred, if at all, to §2X5.2.
2. On Part E's proposed amendments related to the Child Soldiers Accountability Act of 2008, we recommend that the Commission:
  - refer convictions under 18 U.S.C. § 2442 to §2H4.1;
  - amend the definition of "involuntary servitude" in Application Note 1 to include convictions under 18 U.S.C. § 2442 where the defendant used or threatened physical restraint or physical injury, or used or threatened coercion through law or the legal process, in order to recruit, enlist, or conscript a person under the age of 15 to serve in an armed force or group, or to use such a person to participate actively in hostilities; and

- add an Application Note to §2H4.1 to clarify that the upward adjustment under §3A1.1 should not apply to convictions under § 2442 in order to avoid double punishment.

We also recommend that the Commission review its data on cases sentenced under §2H4.1 to determine why courts are finding that it over-punishes in such a high percentage of cases and amend the guidelines to reflect the results of that review.

3. On Part F's proposed amendments related to the Judicial Administration and Technical Amendments Act of 2008, we recommend that the Commission adopt all of the proposed changes as published. We also recommend that it consider further changes, including bringing Application Note 2 to §5F1.1 in line with 18 U.S.C. § 3624(c)(1) by making community confinement available for the last 12 months of a sentence, and generally increasing the availability of all types of alternative sanctions under the guidelines.
4. On Part H's proposed amendments related to the Effective Child Pornography Prosecution Act of 2007 and the Protect Our Children Act of 2008, we recognize and appreciate that the proposal tracks the changes made by those Acts to the child pornography statutes. Nonetheless, given the absence of a congressional directive to respond to the statutory amendments, as well as the widespread criticisms that the child pornography guidelines regularly over-punish defendants, we urge the Commission to take no action that would further increase sentences under §§2G2.1 and 2G2.2 unless and until it finds the action empirically necessary to satisfy the purposes of punishment.
5. On Part I's proposal to amend the definition of "another felony offense" and "another offense" in Application Note 14(C) to §2K2.1, and to clarify that Amendment 691 was not intended to have a substantive effect on those terms, we recommend that the Commission adopt the proposed changes as published. We also recommend that the Commission give retroactive effect to the amendment in order to avoid unwarranted disparities between defendants who are sentenced after the proposed amendment goes into effect (or whose sentences are still on direct appeal at the time) and those whose sentences have already been finalized.
6. With regard to the Commission's request for public comment on offenses involving the production, distribution and possession of "morphed images" under new 18 U.S.C. § 2252A(a)(7), it is important to recognize that Congress chose to impose a much lower penalty structure for these offenses than for any other child pornography offense except straight possession. This makes policy sense because such images do not depict the actual sexual abuse of a minor, and thus they involve less serious conduct than other types of child pornography offenses. We recommend that because "morphed images" offenses do not have any mandatory minimum sentence, and have a statutory maximum of only 15 years, they should be referred to §2G2.2(a)(1), which is the same guideline to which all other child pornography offenses with similar penalty structures are referred.

Honorable Ricardo H. Hinojosa  
United States Sentencing Commission  
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As always, we very much appreciate the opportunity to submit comments on these and all of the Commission's proposed amendments. We look forward to continue working with the Commission on all matters related to federal sentencing policy.

Very truly yours,

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Federal Public Defender  
Chair, Federal Defender Sentencing Guidelines  
Committee

cc: Hon. Ruben Castillo, Vice Chair  
Hon. William K. Sessions III, Vice Chair  
Commissioner William B. Carr, Jr.  
Commissioner Dabney Friedrich  
Commissioner Beryl A. Howell  
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