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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 Amendments Regarding the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

Dear Judge Hinojosa,

Thank you for the opportunity to provide comments from the Federal Public and Community Defenders on the Commission's proposed amendments and issues for comments regarding the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (PL 110-457), which revised numerous laws relating to human trafficking, created two new offenses, and contained one directive to the Commission.

At the public hearing on March 17, 2009, we submitted testimony on these matters, in which we made the following suggestions:

1. The Commission should inform Congress that it has reviewed the guidelines for alien harboring offenses involving prostitution and a defendant in a leadership role, and has determined that no changes should be made to them because they already conform to – and at times exceed – the guidelines for promoting a commercial sex act.

2. New 18 U.S.C. §§ 1589(b) and 1593A, which prohibit benefiting financially from peonage, slavery, trafficking in persons, and forced labor, should be referred to §2X3.1, or to §2H4.1 with a downward departure provision for people who may have been reckless in not discovering that other people were committing crimes, but did not themselves intend that crimes be committed and did not actively assist the commission of crimes.

3. New 18 U.S.C. § 1351, which prohibits fraud in foreign labor contracting, should be referred to §2B1.1 because Congress intended § 1351 to function as a fraud offense, not a human rights violation.

4. The new obstruction offenses should be referred to §2J1.2 because they punish a wide range of conduct that is different from – and potentially far less culpable than – the substantive offenses. §2J1.2 provides for more appropriate guideline ranges for those defendants who unknowingly or unintentionally interfere with a statute's enforcement.

5. The new conspiracy offenses under 18 U.S.C. § 1594(b) should be referred to §2H4.1, with a downward departure provision for less culpable defendants, such as those who operated on the periphery of a conspiracy or were induced to participate because of some mitigating circumstance, such as an abusive relationship, addiction, extreme poverty, or some other circumstance that left them vulnerable. The new conspiracy offenses under 18 U.S.C. § 1594(c) should be referred to §2G1.1(a)(2) and §2G1.3(a)(4), because Congress clearly intended that conspiracies to violate § 1591 would not be subject to the mandatory minimum sentences required for substantive violations of § 1591.

6. The Commission should review its data on cases sentenced under §2H4.1 to determine to the best extent why courts are finding that §2H4.1 over-punishes in such a high percentage of cases, as indicated by Commission statistics showing that 59% of cases sentenced under §2H4.1 in 2008 received a below guideline sentence, as did 47.4% in 2007, and 63.6% in 2006.

A copy of our written testimony is attached and incorporated as part of this public comment. In addition, we write briefly to address a few of the issues that were raised at the public hearing.

1. The Directive Is Limited in Scope and the Response Should Be Similarly Limited.

We note at the outset that much of the testimony at the hearing focused on human trafficking offenses, yet those offenses were not the focus of the directive. Human trafficking offenses involve force, fraud, coercion or minors, and are all sentenced under §2G1.3. Alien harboring is a much less culpable offense, even under the circumstances outlined in the directive.

The directive itself is quite limited in scope. It does not require the Commission to raise penalties or to take any action other than to "review" the guidelines so as to ensure that the guidelines for alien harboring offenses are "in conformity with" the guidelines for commercial sex offenses.

They are. While there is a slight two-level difference between the base offense levels at §§2L1.1 and 2G1.1, we agree with the Department of Justice that the difference is "appropriate," both because "convictions for interstate transportation and importation for prostitution involve not just knowledge, but *specific, deliberate intent* to further prostitution, while alien harboring convictions require no such proof of specific deliberate intent," and because "interstate transportation and international importation tend to involve more extensive and elaborate criminal conduct than localized acts that could constitute alien harboring, such as conduct on the part of a landlord."[1]

Adding a cross reference to §§2G1.1 and 2G1.3, or adding even a two-level enhancement to §2L1.1, would remove this "appropriate" difference. In the rare case where the offense conduct fits the directive – and thus is more culpable and elaborate than the typical harboring case – sentences will be higher by operation of §3B1.1. In particularly egregious cases, where even that increase is not sufficient to satisfy the purposes of sentencing, courts can invoke §2L1.1's upward departure provision. Nothing more need be done. If, however, the Commission decides to read the directive as requiring some sort of amendment to the guidelines, we urge it to tailor any change to the precise language of the directive – that is, any change should be expressly limited to cases where the harboring was committed in furtherance of prostitution; and the defendant to be sentenced is an organizer, leader, manager, or supervisor of both the harboring and the prostitution. If the Commission chooses this route, it should also add an Application Note clarifying that §3B1.1 does not apply in such a case; otherwise, the defendant would receive cumulative punishment for the same offense characteristic.

2. The Commission Should Not Enhance Sentences for § 1351 Violations without Collecting More Data

Whether the Commission chooses to refer violations of 18 U.D.C. § 1351 to §§2B1.1, 2H1.1, 2H4.2, or some other guideline, it should not add any specific offense characteristics until it knows what these cases look like. Certainly there should not be any sentence enhancement for "fraud" given that fraud is an essential element of the offense.

The fraud guideline starts at 6 for offenses with a statutory maximum of five years like § 1351; whatever guideline the Commission chooses for § 1351 offenses should also start there. Nor should there be any specific offense characteristic for the number of victims, particularly since there is no data to show how to calibrate such an enhancement to ensure that it does not result in sentences that are greater than necessary to serve any purpose of sentencing. The guidelines are most useful when they are "the product of careful study, based on extensive empirical evidence." *See Gall v. United States*, 128

[1] *See* Testimony of Joseph Koehler, Assistant U.S. Attorney, Deputy Chief, Criminal Division, Office of the U.S. Attorney, District of Arizona, Presented to the U.S. Sentencing Commission Public Hearing on the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, at 3 (emphasis in original).

S.Ct. 586, 594 (2007). We urge the Commission to hold off on advising courts to increase sentences for this type of offense until it has a better sense of what these offenses look like and what courts are doing with them.

3. The Commission Should Either Refer Violations of 18 U.S.C. §§ 1589(b) and 1593A to §2X3.1, or Add a Downward Departure Provision to §2H4.1 to Ensure Appropriate Sentences for Less Culpable Defendants

We disagree with the suggestion presented at the hearing that convictions under new 18 U.S.C. §§ 1589(b) and 1593A for benefiting financially from a venture that commits certain Chapter 77 violations necessarily reflect the same level of culpability as the substantive violation. Sections 1589(b) and 1593A have a much lower standard of culpability – permitting conviction even where the defendant did not know or intend that the substantive crime be committed, and did not actively assist its commission. The guidelines should allow courts sufficient flexibility to take into account the lower level of culpability that these new offenses capture.

We recommend either that the Commission directly refer the new offenses to §2X3.1, which punishes defendants who "materially support" the commission of offenses that the defendants were not necessarily aware of or intend, or that it add a downward departure provision to §2H4.1 suggesting that courts be guided by §2X3.1's principle of sentencing such defendants in a way that reflects their lesser culpability. We believe that this approach will allow courts sufficient flexibility to determine the appropriate sentence in individual cases, the results of which can then be aggregated and studied by the Commission to develop empirical data on what these offenses actually look like, how frequently they appear, and the proper offense level for them.

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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Chair, Federal Defender Sentencing Guidelines Committee

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