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Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Notice of Proposed Priorities for Cycle Ending May 1, 2008

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders in response to the Commission's notice of proposed priorities for the amendment cycle ending May 1, 2008. We welcome this opportunity to further engage on the issues we believe the Commission should address. Our letter of July 9, 2007, which is attached hereto, sets forth many of our concerns, and this letter serves as a brief supplement.

1) Cocaine Sentencing Policy

This issue is addressed in Part IV of our July 9, 2007 letter at p. 16. We have nothing to add at this time. On or before October 1, 2007, we will submit further comments on why the crack amendments should be made retroactive.

2) Updating the Guideline Manual

We addressed this issue in Part II of our July 9, 2007 letter at pp. 4-5. In addition, the Commission should ensure that the Manual reflects the principles to be announced in the Supreme Court's decisions in *Gall v. United States*, No. 06-7949, and *Kimbrough v. United States*, No. 06-6330. Cases that are outdated or questionable, such as *United States v. Watts*, 519 U.S. 148 (1997) and *Witte v. United States*, 515 U.S. 389 (1995), should be removed from the commentary to USSG § 6A1.3. The Commission should also remove from the commentary the statement that the preponderance standard satisfies due process and the encouragement of the use of hearsay, and remove the "probable accuracy" standard from the policy statement itself. These provisions do not ensure the "thorough adversary testing" required for a sentence to be reasonable, *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007), and invite fact-finding that violates the Due Process Clause. *Burns v. United States*, 501 U.S. 129, 137-38 (1991) (interpreting Rule 32 to require notice of

departures in order to avoid constitutional doubt, where Due Process Clause requires notice, full adversarial hearing, confrontation of witnesses and evidence). The extent of minimal constitutional requirements should be decided by the courts and not set by the Commission. *See Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989).

We would be happy to provide detailed proposals for updating the manual as the cycle moves forward.

3) Immigration Offenses

We addressed § 2L1.2 in Part V of our July 9, 2007 letter at p. 19. In view of the published priorities, we note that the Commission just raised sentences under § 2L1.1 in 2006. Sentences under this guideline certainly do not need to be raised again. If anything, they should be lowered.

4) Criminal History

We addressed criminal history issues in Part III of our July 9, 2007 letter at pp. 7-16, and have nothing to add at this time. On or before October 1, 2007, we intend to submit comments on why the amendments to the criminal history rules that are beneficial to defendants should be made retroactive.

5) Relevant Conduct

At this time last year, the Commission announced that it would reconsider relevant conduct. That topic, however, does not appear on the priorities list. It should, whether under the heading of simplification, responding to recent Supreme Court caselaw, or the Commission's duties to provide fairness, promote respect for law, and avoid unwarranted sentencing disparities among defendants "who have been found guilty" of similar conduct. Uncharged and acquitted conduct have been a blight on the federal sentencing system from the Guidelines' inception, and should be abolished.

In addition to the serious constitutional and policy problems described in Part I, pp. 1-4, of our July 9, 2007 letter, and in previous letters, we add here that, to the extent Congress envisioned "real offense" sentencing, it contemplated differences in sentences based on the circumstances of the offense of conviction, not sentencing for uncharged and acquitted other offenses. Congress directed the Commission to establish categories of offenses for use in the guidelines based on "the circumstances under which the offense was committed," and the "nature and degree of the harm caused by the offense." 28 U.S.C. § 994(c)(2), (3) (emphasis supplied). The Senate Judiciary Committee expected "that there will be numerous guideline ranges, each describing a somewhat different combination of . . . offense circumstances." S. Rep. No. 98-225, at 168 (1983) (emphasis supplied). The House Judiciary Committee explicitly rejected the form of "real offense" sentencing contained in USSG § 1B1.3: "The legislation does not authorize, nor does the Committee approve of, the use of sentencing guidelines based on allegations not proved at trial. To permit 'real offense'

sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties." H.R. Rep. No. 98-1017, at 98 (1984).

We again urge the Commission to (1) abolish the use of acquitted conduct, (2) strike out subsection § 1B1.3(a)(2), (3) abolish cross-references to greater crimes, and (4) clarify the definition in § 1B1.3(a)(1)(B) to ensure that the courts do not include conduct of others that was merely "reasonably foreseeable" but not within the scope of the defendant's agreement, as they continue to do.

6) Circuit Conflicts

In Part III(E) of our July 9, 2007 letter at pp. 13-14, we identified a circuit split in need of resolution as to whether sentences that are completely stayed should nonetheless be counted under USSG § 4A1.2(a)(3).

7) Research Topics

As we suggested in Part III of our July 9, 2007 letter, we believe that the Commission should (a) complete and publish a study on minor offenses, and (b) conduct and publish a study on which offenses are empirically violent, as demonstrated by data showing either that the offense actually results in injury in a significant number of cases, or that it actually involves the use of force against the person of another in a significant number of cases[1].

The Commission should also update its 1991 report on mandatory minimum sentencing for the reasons stated at page 10 of the Letter from the Practitioners Advisory Group dated July 10, 2007.

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[1] In *United States v. James*, 127 S. Ct. 1586, 1596 (2007), the Supreme Court stated that the Commission reviewed empirical data reflecting that attempt crimes often pose a similar risk of injury as completed offenses. We are not aware of any such empirical data being collected or studied, and no such data is mentioned in the reason for the amendment that added attempts to the career offender guideline. *See* USSG App. C, amend. 268 (effective Nov. 1, 1989). The Commission should carry out this responsibility with respect to offenses it has classified as "crimes of violence," both because the Supreme Court believes that it does and because the courts "need data." *See also United States v. Chambers*, 473 F.3d 724, 727 (7th Cir. 2007) ("The Sentencing Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report and return. . . . It is apparent that more research will be needed to establish whether failures to report or return have been properly categorized by this and most other courts as crimes of violence. . . . [W]e judges need data.").

The Commission should conduct a study on unwarranted disparity created by the relevant conduct guideline. Sources of disparity that warrant attention include, for example, the unreliability of the information used to find relevant conduct, e.g., snitch testimony, estimates and extrapolation, different procedural standards used by different judges and probation officers; different prosecutors, probation officers and judges finding or not finding relevant conduct based on the same or similar information for any reason or no apparent reason; different understandings of vague or complex rules leading to different outcomes; prosecutorial control over whether any given defendant is sentenced for alleged uncharged offenses.

We look forward to working with the Commission on these issues in the coming months.

Sincerely,

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