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August 22, 2007

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: Proposed 2008 Priorities

Dear Judge Hinojosa:

I write on behalf of the American Bar Association ("ABA") regarding the Commission's priorities for the 2008 amendment cycle and the tentative priorities for that cycle identified by the Commission in its most recent request for comment.

We reiterate the suggested priorities regarding the development of additional alternatives to incarceration, expansion of diversion and deferred adjudication options, and the expansion of the "safety-valve" to non-drug cases as set forth in our previous priorities letter dated July 9, 2007. We note that several proposals regarding alternatives to incarceration are related to the Commission's ongoing work on criminal history, such as the creation of a criminal history category "0" to permit greater flexibility in the sentencing of first offenders. We hope that the Commission will consider this and similar proposals within the criminal history priority tentatively identified by the Commission in its most recent request for comment.

In connection with our suggested priority regarding alternatives to incarceration and in response to the Commission's request for comment on potential research topics, we suggest one such topic would be the effectiveness of alternatives to incarceration in the prevention of recidivism. Do individuals sentenced to home detention or community confinement centers recidivate at higher or lower rates than similarly situated offenders sentenced to imprisonment? Social scientists have observed that "high rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender deep resentment toward the legal system." Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, 19

FED. SEN. REP. 221, 223 (2007). *See also* Christopher Loewencamp & Edward Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, Topics in Community Corrections, NIC Annual Issue (2004). Given the wealth of available data, the Commission is ideally suited to study the effectiveness of alternatives to incarceration.

We also strongly support the Commission's tentatively identified priority regarding cocaine sentencing policy. We commend the Commission's proposed amendment on this issue now pending before the Congress. Assuming, as we expect, that this amendment will take effect November 1, 2007, we urge the Commission to make that amendment retroactive.

The Commission has set forth its policy statement regarding retroactive application of amendments in Section 1B1.10 of the Guidelines and has specifically identified twenty-four amendments that may be applied retroactively. *See* U.S.S.G. § 1B1.10(c). The Commission has explained that in selecting these particular amendments, the Commission considered, among other factors, "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)." *See id.* cmt. background.

Over the years, the Commission has amended the drug guideline with the effect of lowering sentences in particular drug cases, and in each instance, has made the amendment retroactive by including it in the list of amendments eligible for reduction under Section 3582(c)(2). For example, in November 1993, the Commission revised the method of calculating the weight of LSD for purposes of determining the guidelines offense level, instructing courts to calculate the amount of LSD by using a constructive weight of .4 milligrams per dose rather than weighing the carrier medium. U.S.S.G., app. C., Vol. I, Amend. 488. The Commission designated the revised Guideline as retroactive. *See* U.S.S.G. § 1B1.10(c).

In November 1, 1995, the Commission changed the weight calculation applicable to marijuana plants in cases involving more than 50 plants from 1,000 grams per plant to 100 grams per plant for purposes of determining the guidelines offense level. U.S.S.G. app. C, Vol. I, Amend. 516. This amendment was also made retroactive. *See* U.S.S.G. § 1B1.10(c). The Commission explained that studies indicated that a marijuana plant does not actually yield 1 kilogram of usable marijuana, and that not every plant will produce any usable marijuana. *See* U.S.S.G. app. C, Vol. I, Amend. 516. To "enhance fairness and consistency," the Commission adopted the lower equivalency for all cases involving marijuana plants.

And in November 2003, the Commission modified the way in which the drug oxycodone is measured for purposes of calculating the guidelines offense level. *See* U.S.S.G. app. C, Vol. II, Amend. 657. As a result of the amendment, sentencing courts are directed to use the actual weight of the oxycodone contained within the tablet in calculating the drug quantity. The Commission explained that the amendment "responds to proportionality issues in the sentencing of oxycodone trafficking offenses." *See id.*, Reason for Amend. The amendment had the effect of lowering sentences for the drug Percocet. Because tablets sold as prescription pain relievers

contain varying amounts of oxycodone, tablets of the same weight may contain vastly varying amounts of oxycodone. With amendment 657, the Commission remedied the proportionality issue, and made the amendment retroactive *See* U.S.S.G. § 1B1.10(c)(2).

The Commission's current proposed amendment to Section 2D1.1 -- that would modestly reduce offense levels across the board for crack cocaine -- is intended as an interim measure to alleviate the "urgent and compelling" problems associated with the 100-to-1 crack-to-powder ratio. At the very least, principles of fairness, consistency, and proportionality should likewise lead the Commission to include this amendment in the list of amendments eligible for reduction under Section 3582(c)(2). The relevant factors weigh in favor of making the amendment retroactive:

Since 1995, the Sentencing Commission has consistently taken the position that the 100:1 ratio was unwarranted from its inception, and has a racially disparate impact. The Reason for the May 11, 2007 Amendment notes that the Commission set drug quantity thresholds to produce base offense levels corresponding to guideline ranges above the statutory mandatory minimum penalties.

The amendments to the drug guidelines related to LSD, marijuana, and oxycodone and made retroactive have generally benefited caucasian defendants. Given the racially disparate impact of the 100:1 ratio and the public perception that our drug laws are racially discriminatory, making this amendment retroactive is the only fair and principled course.

Even if practical concerns about the courts' ability to respond to a retroactive amendment could overcome the need to right a longstanding wrong, such concerns are unfounded. Because the sentencing court has already determined drug quantity, no additional fact-finding would be necessary. This stands in contrast to, for example, the amendment to the money laundering guideline, which would have required additional fact-finding had it been made retroactive. Indeed, the defendant need not be present for a proceeding involving the correction or reduction of sentence under 18 U.S.C. § 3582(c). *See* Fed. R. Crim. P. 43(b)(4).

If the amendment is not made retroactive, the courts will likely be inundated with a large number of *pro se* filings using various vehicles, such as 28 U.S.C. §§ 2241, 2255, once the amendment goes into effect. The same number of motions filed under Section 3582(c) would be a far more orderly and effective manner of managing the inevitable requests for relief, creating "cleaner" and more uniform decisions. Indeed, 18 U.S.C. § 3582(c)(2) provides that the court may reduce the term of imprisonment "on its own motion." Under this provision, a court could enter a blanket order reducing all sentences imposed under the former guideline. Moreover, post-*Booker* practice demonstrates that the federal criminal justice system is fully capable of revisiting many thousands of sentences when justice so requires.

We appreciate the Commission's consideration of the ABA's perspective on these important

issues and are happy to provide any additional information or input that you might require.

Sincerely,

Denise A. Cardman

cc: Hon. Ruben Castillo
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