WASHINGTON
LEGISLATIVE OFFICE

October 8, 2010

Honorable William K. Sessions, III
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Comments on Proposed Emergency Amendments to the Sentencing Guidelines.

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Dear Chief Judge Sessions:

With this letter the American Civil Liberties Union (ACLU) provides commentary on the proposed emergency amendments issued by the Commission in response to the Fair Sentencing Act of 2010 (the "Act" or the "FSA"). The American Civil Liberties Union is a nationwide, non-partisan organization with more than 500,000 members, dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. We welcome the opportunity to comment on the temporary, emergency amendment to the sentencing guidelines, policy statements, and commentary to decrease penalties for offenses involving "crack" cocaine proposed by the United States Sentencing Commission.

The Fair Sentencing Act is a long overdue law that will help to reform one of the most notorious and irrational aspects of our nation's criminal justice system — the staggering 100 to 1 sentencing disparity between crack cocaine and powder cocaine offenses. This Act represents the culmination of years of research and recommendations by the Commission and countless hours of advocacy by affected families, scientists, defense attorneys, criminologists, members of Congress and civil rights groups. The FSA takes significant steps toward reforming inequitable federal sentencing structures by reducing the disparity between crack and powder cocaine and repealing the five year mandatory minimum for simple possession of crack cocaine.

Importantly, in the FSA, Congress recognized a basic principle that sentencing advocates have espoused for years: drug quantity is a poor proxy for actual criminal culpability and harm. Although the original goal of federal drug sentencing laws was to focus on major traffickers and the violence created by the drug trade, data collected over the past three decades indicates that most federal drug defendants are low level, non-violent offenders serving the same amount of time as individuals convicted of violent offenses. The result of the Guidelines' over-reliance on drug

quantity is not only unfair sentences, but also the diversion of precious law enforcement resources away from the investigation, prosecution and incarceration of the leaders of violent drug cartels.

An important effect of the FSA is to reduce reliance on quantity of drugs as a proxy for culpability and harm. This effect is reflected in the FSA directive to the Commission to "review" the Guidelines to "ensure" that certain acts of violence and certain acts evincing higher levels of criminal planning and involvement receive additional penalties. These "additional" penalties, however, are not meant to create cumulative or double-counted enhancements. Rather, the plain language of the FSA provides a roadmap for the Commission, directing it to analyze the existing guidelines and amend them where they do not already incorporate the aggravating factors set forth in the FSA. Thus, for example, in Section 5 of the FSA, Congress directs the Commission to make sure that the Guidelines provide at least a 2 level penalty for the violent conduct specified in the Act, or amend the Guidelines if it is necessary to do so. The ACLU has analyzed the current Guidelines and makes recommendations for pertinent amendments consistent with Section 5 below. Similarly, Section 6 requires that the Commission "review" the guidelines to "ensure" that the guidelines provide an additional increase of least 2 offense levels if the defendant (1) bribed a law enforcement officer; (2) maintained an establishment for manufacture or distribution; or (3) is subject to an aggravating role adjustment and the offense involved 1 or more of the enumerated "super-aggravating factors." As in Section 5, the Commission must review the Guidelines in order to make sure that they provide a 2 level enhancement for the three types of behavior listed in Section 6 of the Act. If the Guidelines do not already provide the necessary enhancements for the listed conduct then the Commission must amend the Guidelines. The ACLU has also analyzed the directives of Section 6 in relation to the existing guidelines and makes recommendations to amend them accordingly in the following sections.

In passing the FSA, Congress has taken a significant step away from quantity-based drug sentencing, and refocused the Guidelines on the culpability and harm caused by a defendant. Congress, however, evinced no intent in the Act to undermine the basic "parsimony principle" of federal criminal sentencing. This principle requires that sentences are sufficient but not greater than necessary to fulfill the purposes of 18 U.S.C. § 3553(a)(2), which include just punishment; deterrence; public safety; and rehabilitation. Sentencing under § 3553(a) requires the sentencing court to start with the minimum sentence permissible and add only so much additional punishment, if any, as is necessary to comply with the purposes of § 3553(a). The "parsimony principle" must also be reflected in the Guidelines themselves in order to comply with the purposes of § 3553(a). Therefore, the Commission should ensure that the amended provisions created in the Guidelines under the FSA do not duplicate existing provisions, resulting in unjust stacking of enhancements based on identical behavior. Both the "parsimony principle" and the move towards reduced drug-sentencing reflected in the FSA and the work of the Commission over the last thirty years should guide the Commission to adopt no more than a 2 level enhancement for the FSA's aggravated factors. Below, the ACLU has carefully parsed the guidelines and suggested language that prevents double-counting based on level 2 enhancements.

The FSA is an important step in the movement towards much-needed federal sentencing reforms. It is the ACLU's position that retroactive application of the guideline provisions of the FSA is necessary to achieve a just application of the Act, but it is understood that the

Commission is likely to address retroactive application at a later date an in accordance with its established process, rather than in the context of an emergency amendment. Once the Commission addresses the guideline provisions of the FSA through its regular amendment cycle, the ACLU will urge the Commission to adopt full retroactivity of the Act.

The ACLU's specific recommendations and responses to the Commission's "Issues for Comment" are laid out below:

Issue for Comment A

Should the Sentencing Commission set the base offense levels for crack cocaine so that when using the new drug quantities established by the Act the statutory minimum penalties correspond to levels 24 and 30 or to levels 26 and 32?

The Sentencing Commission, through its extensive empirical and general research, has recognized that the crack cocaine sentencing disparity was unjust many years before Congress arrived at that conclusion. The Commission is to be commended for its advocacy on this issue as well as the concrete steps that it has taken to rectify the injustice inherent in the sentencing disparity.

In its 2007 report to Congress, the Commission outlined the following four problems with quantity-based penalties:

1) The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine,
2) The current quantity-based penalties sweep too broadly and apply most often to lower level offenders,
3) The current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and
4) The current severity of crack cocaine penalties mostly impacts minorities.

See Report to the Congress, Cocaine and Federal Sentencing Policy, at 7 (May 2007), *at* http://www.ussc.gov/r_congress/cocaine2007.pdf.

The Commission repeatedly noted in its reports that the low quantity of cocaine base needed to trigger mandatory minimums resulted in too many low-level offenders being prosecuted in federal court. Prosecuting low level offenders rather then the leaders of criminal enterprises is not only unfair; it also wastes valuable prosecutorial and federal correctional resources that could be better utilized on more culpable criminals. Setting the base offense levels at 24, the lowest level available under Congress' directive, will help ensure that valuable resources are expended productively.

In enacting the FSA, which both increased the quantity thresholds necessary to trigger mandatory minimums and directed the Commission to amend the Guidelines to focus on an offender's action and role in the offense instead of mere drug quantity possessed, Congress recognized that drug sentences should be more closely tied to an individual's roles and the harms

he or she causes and not simply the amount of drugs involved. In amending the Guidelines, the Commission should follow Congress's lead by minimizing the role of drug quantity as the driving factor in sentencing. In 2007, the Commission lowered the base level offense to 24 in recognition of the tendency of high base offense levels tied to drug quantity to sweep in low level offenders, such as drug couriers, rather than more pertinent criminal actors. The FSA has affirmed the Commission's practice in this regard. Therefore, in order to maintain a more just and resource-efficient sentencing structure the ACLU recommends that the base offense levels continue to be set at the 24, 30 levels.

The only potential justification for setting the base offense level at 26 is that level 26 more closely adheres to an 18:1 ratio between base and powder cocaine. This rationale is not responsive to the FSA which is framed only in terms of the quantity necessary to invoke a mandatory minimum, not in terms of a ratio. As Congress did not prescribe a particular ratio, there is no reason to set a offense levels to adhere to a particular ratio. Further, the Commission reduced the base offense *from* level 26 just three years ago in order to lessen the disparity. It would be irrational to *increase* the existing offense level in response to an Act designed to lower penalties.

Issue for Comment C-1

Should the Commission provide a single level of enhancement for any conduct covered by the violence enhancement or should the Commission distinguish among the different categories of conduct by assigning different levels of enhancement to each?

The proposed emergency amendment to the Sentencing Guidelines should provide for a 2-level enhancement for any (not each) of the three forms of violence listed by Congress in the Fair Sentencing Act of 2010, Section 5. The FSA requires the Commission to "review and amend the Federal Sentencing Guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence or directed the use of violence during a drug trafficking offense." Congress listed all three forms of violent conduct in a single directive to the Commission and instructed the Commission to set an enhancement for the specified conduct. The combined listing of the three types of conduct suggests that Congress did not intend that the Commission should separate each form of violent conduct and give each a different offense level increase; rather the combination suggests that Congress intended a single enhancement to apply if any of the specified conduct occurred.

Moreover, providing a blanket rule ranking the three categories of conduct from most to least serious would be difficult because each of the categories is so general and encompasses so many different situations. There are multiple scenarios in which directing another to use violence would result in more egregious behavior then the personal use of violence. Likewise, a credible threat to use a gun or a knife could be more culpable behavior then minor acts of physical violence.

Therefore, since Congress has implied that the three types of violence listed are to be grouped together and as it is impractical to stagger offense level enhancements of the forms of

violence so as to ensure that more culpable behavior is punished more harshly then less culpable behavior, the ACLU recommends that the new violence enhancement provide a single penalty increase of 2 offense levels if a defendant engages in any of the listed forms of violence.

<u>Issue for Comment</u>
Should the Commission apply the new enhancement for violence and the enhancement for weapon possession cumulatively?

The ACLU believes that double counting identical conduct in separate enhancement provisions is unjust and unwarranted. Rather than inserting the violence enhancement provision at (b)(2), this provision should be included with the weapon possession provision at (b)(1), thereby eliminating the threat of cumulative application of the two enhancements as well as ensuring that violent behavior (including weapon possession) results in a 2 level increase. Subsection (b)(1) should be amended as follows:

> "If a dangerous weapon (including a firearm) is possessed, or if defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense, increase by 2 levels."

<u>Issue for Comment C-3</u>
Should the Commission define violence and if so how should violence be defined?

It is unnecessary for the Commission to define the term "violence" for the purposes of the new violence enhancement. As noted by the Commission, the term "violence" is not defined in the Sentencing Guidelines even though it is used in numerous provisions. Supplying such an important definition could have potentially far reaching consequences for the entire Guidelines Manual. Such a monumental task should be undertaken during the regular amendment process. As Congress did not direct the Commission to define the term "violence," the Commission should not depart from past practice and supply such an important definition in an emergency amendment.

If the Commission feels that the term should be defined for the purposes of this subsection, then the following definition will ensure that this provision is not unfairly overextended:

> For the purposes of this provision the term "violence" means the use of physical force intended to cause serious bodily injury to another person. However, violence does not include physical force used in self defense.
>
> The term "credible threat to use violence" means the intent to use physical force to cause serious bodily injury to another person, expressed so as to put a reasonable person in imminent fear of bodily injury

<u>Issue for Comment C-4</u>
Should the new bribery enhancement be applied cumulatively with 3C1.1?

A defendant's identical conduct should not be double counted in separate enhancements. If a defendant commits separate acts each of which independently qualifies for an enhancement, then both enhancement provisions would apply – for example, a defendant who commits both bribery and perjury would have his offense level enhanced under both provisions. However, the conduct of bribery should not be counted twice, once for each enhancement provision. The ACLU recommends that the following language be inserted in the new bribery enhancement at subsection (b)(11) or in a corresponding Application Note:

> "If defendant's act of bribery has subjected him/her to an enhancement under 3C1.1 or other provision within these guidelines then subsection (b)(11) does not apply."

Adding the language above to (b)(11) will ensure that a defendant is not subject to unwarranted enhancements, while also ensuring that a defendant's act of bribery, if not covered by 3C1.1, is subject to a 2 level enhancement as required by the FSA.

Issue for Comment C-5

Should the new "maintaining an establishment" enhancement apply if a defendant merely committed an offense described in 21 USC 856 and how should the new enhancement interact with provision 2D1.8 (renting or managing a drug establishment)?

The proposed establishment enhancement should not be interpreted to apply to every defendant that has committed an offense described in 21 U.S.C. § 856, because the proposed enhancement and § 856 are aimed at different (if overlapping) types of conduct. The proposed establishment enhancement applies to a defendant who "maintained an establishment for the manufacture or distribution of a controlled substance as described in 21 U.S.C. § 856." Section 856 is broader then the new proposed enhancement, as it covers defendants who "open, lease, rent, use .... any place, whether permanently or temporarily." Someone may "open" or "use" a place without "maintain[ing]" it. Congress directed an enhancement to apply to defendants who "maintain an establishment" not simply any defendant convicted under 21 U.S.C. § 856. In order to better effectuate the intent of Congress language should be added to section (b)(5) so that it reads as follows:

> If the defendant is convicted under 21 U.S.C 856 or has maintained an establishment for the manufacture or distribution of a controlled substance as described in 21 U.S.C. 856, increase by 2 levels.

The alternative base offense level in §2D1.8 should not be affected by new establishment enhancement. The establishment enhancement and §2D1.8 are separate provisions. The establishment enhancement is an enhancement for "maintaining a drug establishment," whereas §2D1.8 is a provision intended to reduce the offense level for a defendant who had "no participation in the underlying controlled substance offense." It is very possible that a defendant could qualify for the establishment enhancement without qualifying for the §2D1.8 reduction, i.e. the defendant "maintained an establishment" *and* was also involved in the controlled substance offense. Likewise, it is possible that a defendant could qualify for a §2D1.8 reduction without qualifying for the establishment enhancement, e.g., a defendant who was merely the landlord and did not "maintain" the establishment or "participat[e]" in the underlying offense. As the two

provisions are independent of each other, they should be considered and applied on a case by case basis.

Issue for Comment C-6

Should the Commission move the two new role related provisions, (b)14 and (b)15, into Chapter Three of the guidelines?

Subsections (b)(14) and (b)(15) should remain in 2D1.1. Both (b)(14) and (b)(15) are controlled substance provisions. The plain language of the FSA indicates that Congress intended these provisions to apply only to controlled substance offenses. Placing these provisions in the role adjustment portion of the Guidelines creates the risk of overextending these provisions to defendants whose sentences are not controlled by drug offenses and were not intended to be affected by the FSA.

Issue of Comment C-7

Should the Commission apply different enhancements levels to each of the aggregating factors of b(14)? If more then one aggravating factor is present, should that have a cumulative effect on the defendant's sentence?

The ACLU recommends that the Commission follow the clear direction of Congress and apply only a 2 level increase regardless of how many super-aggravating factors were involved in the offense. Section 6 of the FSA directs the Commission to increase a defendant's offense level by at least 2 if the defendant qualifies for an aggravating role enhancement under the Guidelines and if "the offense involved *1 or more* of the following super-aggravating factors." The Act's clearly indicates, by the use of the disjunctive "or," that a defendant's offense level should be increased by some increment regardless of whether his offense involved only "one," "or" (by contrast), "more" than one of the factors. Applying a separate enhancement for each factor involved in the defendants offense would contravene the "one or more" language in the Act.

Applying the same logic, each individual super-aggravating factor of this provision should not have its own independent staggered offense level enhancement. As noted above, the plain language of the Act directs that an enhancement apply if one or more of the super aggravating factors were involved in the offense. This implies that the super-aggravating factors were to be considered together, not individually at different levels. If different enhancements were associated with each factor, moreover, it would not be clear which enhancement would apply to a case involving more than one factor given, as noted above, the Act's language indicates that only one enhancement should apply.

Finally, staggering the enhancement levels of the individual factors would requires that the Commission decide which of the factors involve the more egregious acts. Is it more culpable to use a close relationship, to involve a minor, to distribute to a vulnerable person or to destroy evidence? If Congress had intended the Commission to make this difficult policy, it would have provided standards to do so or discussed each factor separately instead of in combination.

For the reasons stated, the ACLU recommends that a single, 2 level enhancement should be given to any defendant, meeting the role requirements, if one or more of the aggravating

factors were involved in the offense.

Issue for Comment C-10

Should the Commission duplicate the new enhancement provisions into the 2D1 sections that do not refer back to the specific offense characteristics in 2D1.1?

The new provisions should not be duplicated into the 2D1 sections that do not refer back to 2D1.1. The portions of Sections 2D1.2, 2D1.5 and 2D1.11 that do not refer back to 2D1.1 can continue to function as they were intended without addition of the new provisions. Section 2D1.2 requires that the sentencing court chose the greater of either the base offense level using a 2D1.1 calculation or a straight base level of 13 (or 26 if a minor was involved). If the new enhancements in 2D1.1 increase the 2D1.1 calculations beyond offense level 13, then the 2D1.1 calculation must be used. Similarly, 2D1.5 sets a mandatory base offense level of 38, but states that if a 2D1.1 calculation plus four offense levels is greater than 38, then the 2D1.1 calculation should be used. In both instances the new enhancement provisions will be taken into account when determining the necessary base offense level. Section 2D1.11, on the other hand, is a completely separate provision regarding chemical manufacturing and trafficking. Section 2D1.11 contains a completely different set of specific offense characteristics and a completely separate Chemical Quantity Table then 2D1.1. As Section 2D1.11 covers a subject separate and apart from the Schedule 1 controlled substances legislated by Congress in the FSA, the Commission should presume that the directive does not apply to these substances.

Conclusion

In conclusion, with the Fair Sentencing Act of 2010 the Commission has an opportunity to correct long-standing injustices in the sentencing structure. The Commission should take advantage of this important opportunity and amend the guidelines so as to reflect its dedication to justice and rational sentencing. The ACLU is grateful for this opportunity to provide comment on the proposed emergency amendments to the Sentencing Guidelines. We look forward to working with the Commission again in the near future.

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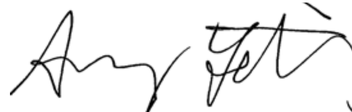

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