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July 31, 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: Comment on Victims Advisory Group

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders, Families Against Mandatory Minimums and the National Association of Criminal Defense Lawyers in response to the Commission's request for public comment on a victims advisory group.

I. While Creating a Victims Advisory Group in Response to the Judicial Conference's Request, the Commission Should Support the Judicial Conference's Legislative Proposal to Add a Federal Public Defender *Ex Officio* Non-Voting Member to the Commission.

We appreciate the opportunity to provide comment on the proposal to create a victims advisory group. We believe that the ideal of a victims advisory group can be advanced only by a truly balanced and representative body. To that end, we offer detailed suggestions below. While the public comment process on a victims advisory group plays out, we request the Commission's support of legislation proposed by the Judicial Conference that would address a longstanding and ongoing imbalance in the Commission's deliberative processes.

The Judicial Conference has proposed legislation that would authorize it to appoint a Federal Defender to serve as an *ex officio*, non-voting member of the Commission. *See* Criminal Judicial Procedure, Administration, and Technical Amendments Act of 2007, Section 12. The Conference first resolved to seek such legislation in March 2004. *See* Report of the Proceedings of the Judicial Conference of the United States at 11, March 16, 2004. While we understand the Commission has, at least initially, decided to take no position on the proposal, we believe it is worthy of your support.

As the Judicial Conference explained, including a Defender *Ex Officio* on the Commission would mirror the “tripartite nature of the sentencing process: a neutral and impartial district court judge hears advocacy from the two parties in the adversarial process, the prosecutor and the defender, and thereafter determines the appropriate sentence. Prosecutors have been ably represented in the Commission’s proceedings by the *ex officio* non-voting position assigned to the Attorney General or his designee. Assigning a counterpart *ex officio* non-voting position to Federal Public Defenders would increase expertise in Commission deliberations and assist in ensuring balanced consideration of issues.” *See* Criminal Judicial Procedure, Administration and Technical Amendments Act of 2007, Explanation, Section 12.

The Federal Public Defenders are sentencing experts by training and experience. Due to their longstanding absence on the Commission (while the government has had two *ex officio* representatives), the Commission has been deprived of full and balanced input at the relevant time, *i.e.*, during non-public sessions, and the appearance of neutrality and fairness has suffered. A Defender *Ex Officio* would ensure that all relevant issues are raised and receive fully informed and balanced consideration at the relevant time, much as the adversary system functions, and would thereby improve the quality of, and public confidence in, the Commission’s work.

The National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums strongly support the proposed legislation. We would greatly appreciate the Commission’s support.

II. The Commission Should Constitute the Victims Advisory Group to Ensure That It Represents a Range of Groups Affected by Federal Crimes and Sentences and Should Provide Sufficient Guidance and Notice to Potentially Affected Groups and Candidates.

A. Membership

The victims advisory group should include representatives of the Native American community, the restorative justice community, formerly incarcerated persons, and family members of currently incarcerated persons.

Native Americans. As a consequence of the Major Crimes Act, which substitutes federal law in Indian country where state criminal law would otherwise operate, Native Americans are the single largest group with members who are victims of federal crimes. *See* 18 U.S.C. §§ 1151-1153.

Under the Major Crimes Act, an “Indian” who commits one of a list of felonies in “Indian country” is subject to prosecution and sentencing exclusively under federal law. Indians are thus unique in federal law, both as perpetrators and as victims of violent crime. Federal power reaches into what would be the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land and substitutes the United State as the sovereign with the role of vindicating the interest of the United States and the interests of the victims of crimes.

Among the crimes subject to this federal power are murder, manslaughter, kidnaping, maiming, incest, sexual abuse, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a person under the age of 16, felony child abuse or neglect, arson, burglary, robbery, and theft. *See* 18 U.S.C. § 1153. All of these crimes involve victims.

Though Native Americans comprise approximately 1 percent of the population, they comprise the largest percentage of federal offenders and victims by race for murder, manslaughter, sexual abuse, assault, and burglary/breaking and entering. The Native American Advisory Group reported to the Commission in 2003 that over 80 percent of federal manslaughter cases, over 60 percent of sexual abuse cases and nearly 50 percent of all murders and assaults arise in Indian country. *See* Report of the Native American Advisory Group at 1-2, 21, n. 37 (Nov. 4, 2003). Most non-Indians who commit similar offenses do so under circumstances in which there is no federal jurisdiction, and therefore are subject to prosecution and sentencing only in state court.

In 2003, the Native American Advisory Group encouraged the Commission to consult with affected tribal communities when contemplating changes to the Sentencing Guidelines for Major Crimes Act cases. This advice, rendered in light of concerns about sentencing disparity borne by Native Americans, carries equal force with respect to the concerns of Native American victims of crimes covered by the Major Crimes Act. Given that and given the disproportionate number of Native Americans who are victims of federal violent crime, it is essential that the Commission's victims advisory group include representatives from Indian Country

Restorative Justice Representation. Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior, rather than simply punishing an offender. A system based on restorative justice seeks to repair harm and prevent further crime through collaborative, community-based, interactive processes that include all the relevant stakeholders: offender, victim, the family, community members, and government representatives. Restorative justice processes include victim-offender mediation, conferencing, providing victims and offenders with services to assist them in recovering from the crime, and restitution and community service in lieu of imprisonment. *See* Introduction, Restorative Justice Online, *available at* <http://www.restorativejustice.org/intro> (viewed July 27, 2007). "Conferencing," for example, is an innovative victim-sensitive approach to addressing wrongdoing in various settings geared to providing healing, interactive solutions to the human and social impact of crime. Groups such as Real Justice, which originated to find appropriate responses to juvenile crime, use family group conferences, restorative justice conferences and community accountability conferences to bring offenders and victims together. *See* http://www.realjustice.org/Pages/what_is.html (viewed July 30, 2007).

Restorative justice finds its roots in ancient methods of community sanctioning, grounded in both Judeo-Christian ideas of forgiveness and redemption, *see generally*, Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L. REV. 1 (1998), and

practices developed and used by native peoples for hundreds of years in communities around the world. See Mariane O. Nielsen, *A Comparison of Development Ideologies: Navajo Nation Peacemaker Courts and Canadian Native Justice Committees*, and Curt Taylor Griffiths & Ron Hamilton, *Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* (Burt Galway & Joe Hudson, eds., 1994).

Restorative justice represents a different approach from retributive models to responding to crime because it emphasizes relationships, forgiveness, and community responsibility to both victim and offender, and it gives all those impacted a voice in the harm-repairing process. See generally Ellen Waldman, *Healing Hurts or Writing Wrongs?: A Meditation on the Goals of "Restorative Justice,"* 25 *HAMLIN J. OF PUB. L. & POLICY* 355 (2004). Studies show that offenders participating in victim and community reconciliation programs were more likely than incarcerated offenders to make restitution to victims and generally have significantly lower recidivism rates. See James Bonta et al., *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Report No. 1998-05, Solicitor General of Canada (Oct. 1998), available at http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf.

Restorative justice is increasingly finding a place in the mainstream. For example, the Minnesota Department of Corrections employs a Restorative Justice Planner; Vermont uses "reparative probation," directly involving the community in the sentencing and monitoring functions of the state criminal justice system; and a number of states use restorative justice paradigms to fashion more effective responses to youth crime. See generally <http://www.restorativejustice.org/resources/world/nothamcar/govt> (viewed July 30, 2007), for resources discussing governments that use restorative justice models. See also Nancy Lucas, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 *Hofstra L. Rev.* 1365 (2001) (citing numerous studies examining effectiveness of restorative justice in criminal context).

Offenders and their families. Additionally, the victims advisory group should include former prisoners and family members of current prisoners. Including these members of the community would add diversity to the victims advisory group and would more adequately represent all of the key stakeholders in the criminal justice system, including the people most directly and personally impacted by the sentencing guidelines. They include the offender and especially his or her family members, who must cope not only with the offender's drug abuse but also with the loss of the offender to the prison system for what is often a lengthy period of time. For example, family members of a young father incarcerated for a number of years for a non-violent drug offense include children deprived of the emotional and financial support of their parent. They will grow up separated for years from their parent, or perhaps seeing him only occasionally and under the stressful circumstances of a prison visiting room. They are vulnerable emotionally, intellectually and economically. Such youngsters and the people left behind to care for them, e.g., grandparents, mothers or even foster families, can have much to say to the Commission about being the victims of drug crimes.

Former prisoners similarly can bring their unique perspective to the Commission, particularly prisoners who have served lengthy sentences for what are considered victimless crimes, such as drug trafficking. Former prisoners (and the loved ones of current prisoners) are in a unique position to provide guidance on whether the sentencing guidelines are applied in a fair and uniform manner, whether the guidelines are perceived as just, whether the guidelines adequately address the purposes of punishment, and the direct and collateral effects of a guidelines sentence on the offender and his or her family. The Commission would greatly benefit from including these community members in the victims advisory group.

Given that the single largest proportion of people sentenced under the sentencing guidelines are sentenced for the victimless crime of drug trafficking – in 2006, 25,086 or nearly 35 percent of the 72,518 people sentenced in federal court – the impact of their crimes and incarceration on themselves and those close to them, is profound. Their perspectives should be included.

B. Procedures for Determining Membership and Governance

The notice for comment states that the Commission anticipates that the group will consist of 9 members, each of whom will serve not more than two consecutive 3-year terms, and that a charter governing the group's activities will be established. Rule 5.4 states that "[u]pon creating an advisory group, the Commission may prescribe such policies regarding the conduct of meetings and operation of the group as the Commission deems necessary." In drawing up a charter, it would be appropriate for the Commission to take into consideration the unique nature of a victims advisory group, and in particular the comparative difficulty of determining appropriate members. Unlike PAG, which is comprised of practitioners, or POAG, which is comprised of probation officers, victim representatives are not members of a profession specializing in federal criminal law and sentencing, or any particular profession. There is no unitary victim community but a variety of groups with different philosophies and agendas. Many such groups are concerned with state crimes and issues which have little or no relevance to the Commission's work.

C. Extension of Deadline/Clarify Instructions on How to Apply

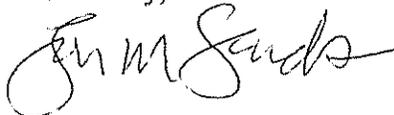
The undersigned groups are attempting to get the word out widely to the Native American and other communities that may not follow the Commission's notices, but who have a keen interest in victims' concerns. None of the organizations we have contacted, outside our own, were aware of the request for candidates. We believe such groups would be in the best position to find and put forward candidates for the slots. Our outreach has generated a great deal of interest, but we cannot provide the groups and individuals guidance on, for example, the application procedure, what documents and references might be needed, what commitment agreeing to be an advisory group member will entail, and when and how the Commission will make decisions about membership. We urge the Commission to extend the deadline for nominations and applications because we believe the Commission would benefit from a deep pool of potential advisory group members. This

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will also give the Commission the opportunity to re-publish the notice with clearer instructions on how to apply.

Thank you for considering our views.

Sincerely,



JON M. SANDS

Chair

Federal Defender Sentencing Guidelines Committee

MARY PRICE

Vice President and General Counsel

Families Against Mandatory Minimums

CARMEN D. HERNANDEZ

President-Elect

National Association of Criminal Defense Lawyers

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner John R. Steer, Vice Chair
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
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Commissioner *Ex Officio* Edward F. Reilly, Jr.
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