**PROPOSED TESTIMONY OF CHIEF JUDGE JAMES F. HOLDERMAN**

**TO THE UNITED STATES SENTENCING COMMISSION**

On behalf of all the judges of the Northern District of Illinois, I would like to welcome the members of the United States Sentencing Commission to Chicago and to the Everett McKinley Dirksen United States Courthouse. We appreciate the willingness of the Sentencing Commission to convene its set of public hearings throughout the country to provide a meaningful opportunity for members of the public across the country to give their views on the future of federal sentencing. I wish to emphasize that my views as Chief Judge of this district may not be fully reflective of all of the views of the judges with which I am privileged to serve here in Chicago. However, I believe that my views are shared by most of the judges of this district.

Most of the judges of the Northern District of Illinois continue to agree that the Sentencing Guidelines are an important starting point in sentencing even under an advisory system. For the most part, a great number of sentences in our district fall within the Advisory Sentencing Guideline range after extensive argument by counsel, sometimes both oral and written, about the appropriate length of a particular sentence to be imposed. Our federal criminal defense bar here in Chicago, like the defense bar in most big cities, is extremely active during sentencing advocacy. Extensive sentencing memorandums, with factual affidavits, are not unusual in this district.

In view of the strong advocacy efforts in this district, it is not surprising that our district also has a robust variance rate. Yet, I believe the Commission data will show that the sentences in our district have not dramatically dropped and we commend the Commission for providing accurate and timely data on actual sentences imposed. In the end, I suspect that many of our judges may on occasion vary downward in a modest fashion from the low end of the Guidelines.

I believe, though, that it will be important for the Sentencing Commission to continue to use its best efforts to improve the Sentencing Guidelines so they retain credibility with judges in the advisory system. We are well aware that the Commission has continually tried to provide better guidance to us judges through the Guidelines so as to reflect current thinking as to appropriate sentencing policy in society. In particular, we welcomed the reduction in the crack cocaine penalties that has restored greater credibility to drug sentencing. Certainly more work can be done in this area, and I am aware that the Commission continues to work with Congress in this area and that various pieces of legislation are pending to evaluate and relieve the tension regarding the still existing disparity between crack and powder cocaine penalties. We in the Northern District of Illinois were able to rule on over 400 sentencing reduction motions during the last year, and thanks to the leadership of the Commission, and our own Judge Ruben Castillo chairing our district committee, the retroactivity of the new crack cocaine penalties has been a relatively pain-free process which has resulted in great fairness to many former defendants in this district.

Most of the judges in our district, however, believe that the Commission should continue to take a hard look at lowering penalties for low-end, nonviolent drug offenders. In particular, the mandatory minimum penalties that apply to drug offenses have been a continuing concern for most of the judges in this district. In that regard, I would ask the Commission to consider updating its prior work in educating members of Congress on the appropriateness of eliminating mandatory minimum penalties for nonviolent, less serious offenses.

We appreciate the Commission's prior work on trying to refine the computation of relevant criminal history for defendants. We would encourage the Commission to continue its efforts to refine the use of criminal history and eliminate the counting of older, minor offenses which are poor predictors of recidivism.

I would like to also talk about two continuing sources of sentencing issues that plague our circuit in particular. The first is the use of of downward departures in sentencing. Our circuit has seen fit to deem departures obsolete under the Advisory Sentencing Guidelines system. I believe this is shortsighted and is case law that is not followed by other circuits. This has led to sentencing disparity and has encouraged judges to use variances rather than departures in reaching their decision as to a reasonable sentence. Perhaps the Commission can consider revising the Sentencing Guideline Manual to explain the continuing viability of downward departures. In that respect, the inclusion of fresher, pertinent examples in the application notes to the downward departure language could benefit the sentencing process. It is common knowledge that many judges throughout the country downwardly depart because of an overstatement of criminal history points. Perhaps some further examples pointing out when that should occur could lead to more transparency in sentencing.

Secondly, the relevant Sentencing Guideline Manual that should be used in sentencing is a source of frustration for many of our judges. The Seventh Circuit has decided in a case called *United States vs. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006) cert. denied, 127 S.Ct.3005 (2007), that there is no ex post facto violation in using a newer version of the Guidelines that was implemented after the offense was actually completed. Other circuits disagree with this approach. It is my belief that this has led to disparity within our circuit as judges are asked to use newer versions of Guidelines than they are ultimately uncomfortable with. Any clarifying language in the *Sentencing Manual* on this important issue would be helpful.

I would also recommend that the Commission take a close look at the career offender provisions of the Guidelines. It is the feeling of many of our judges that the use of certain drug offenses as sentencing enhancers is unnecessarily too broad and could benefit from further refinement by the Commission.

Finally, we here in Chicago appreciate the Commission's continuing work on alternatives to incarceration and reentry programs. Our district is currently working on a proposed structure for a formal reentry assistance program with the cooperation of the pertinent other governmental bodies, such as the United States Attorney's Office, the Federal Defender, and our court's Probation Department. Any general directives, training programs or guidance in this area by the Commission would be extremely helpful.

I am well aware that the Commission's upcoming list of priorities includes many of the areas that I suggested be evaluated. In that regard, please know that you have the full support of the judges of the Northern District of Illinois in continuing your important work.