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COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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Honorable Maryanne Trump Barry
Chair

February 15, 1995

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

On behalf of the Criminal Law Committee of the Judicial Conference, I write to request that the Commission resolve, during this amendment cycle, the circuit split regarding whether the career offender guideline applies to drug conspiracy offenders. Failure to do so at this time would mean that the next date such resolution could be possible would be November 1, 1996.

We are taking this position because of the importance of this amendment in avoiding the significant disparity in sentences caused by the split, as well as continued, unnecessary litigation. Further, this is the kind of legal issue which the Supreme Court has suggested that the Commission handle. Braxton v. United States, 111 S.Ct. 1854 (1991). Certainly, this issue is one which the Commission is in a unique position to decide, and which can be decided very easily.

As you no doubt are aware, the courts of appeals are divided over whether the Commission properly exercised its statutory authority when it included drug conspiracy as a "controlled substance offense" for purposes of the career offender sentencing guidelines, sections 4B1.1 and 4B1.2. Three circuits have held that the career offender provision does not include drug conspiracies because the enabling statute section that the provision was based on (28 U.S.C. § 994(h)) does not include conspiracy. See, United States v. Price, 990 F.2d 1367, 1369-70 (D.C. Cir. 1993); United States v. Mendoza-Figueroa, 28 F.3d 766 (8th Cir. 1994); and United States v. Bellazerius, 24 F.3d 698, 701-2 (5th Cir. 1994). Four circuits

have gone the other way, holding that the Commission properly used its general authority under another section of the statute (§ 994(a)) to include conspiracy as a predicate offense for the career offender guidelines. See, United States v. Heim, 15 F.3d 830, 832 (9th Cir. 1994); United States v. Damerville, 27 F.3d 254, 257 (7th Cir. 1994); United States v. Hightower, 25 F.3d 182, 186-7 (3d Cir. 1994); and United States v. Allen, 24 F.3d 1180, 1186-7 (10th Cir. 1994).

This circuit split is uniquely of the kind that the Commission can easily eliminate by clarifying whether it intended to use its general authority pursuant to 18 U.S.C. § 944(a) as well as the specific authority pursuant to 18 U.S.C. § 994(h) when enacting the career offender (and other) guidelines.

This particular circuit split is unusually troublesome because of the large disparity in sentences for drug conspiracy offenders who are either sentenced as career offenders or not, depending upon which circuit they are in. This issue strikes at the core of one of the goals of the Sentencing Reform Act, which was to provide similar sentences for similar offenders and offenses. In addition to the disparate sentences currently being imposed due to the circuit split, that split is now generating post-conviction motions in the circuits where such offenders can no longer be sentenced as career offenders. If the split widens, there will be further sentence disparities and additional post-conviction motions, resulting not only in unnecessary disparity, but unnecessary litigation.

We know that the Department of Justice is in favor of the Commission resolving this circuit split, and the Department's annual report to the Commission, by letter dated November 14, 1994, specifically asked that the Commission do so.

We understand, as well, that the Commission's Probation Officers' Advisory Group has not only supported this amendment in the past, and asked that it be published again this year, but it has also specifically stated that it agrees with our special request for the resolution of the issue this amendment cycle.


Therefore, we urge the Commission to pay particular attention to this amendment this cycle, for the reasons stated above, and to resolve the circuit split by whatever procedure it decides is best. While perhaps the safest procedure would be to publish the issue in a second publication, the Commission may decide that publication is not necessary. Either way, we urge the Commission to resolve the issue this cycle.

In addition, we urge the Commission to make it a priority each year to consider those amendments which can eliminate needless litigation and resolve circuit splits, separately from all other amendments, and to perhaps distribute those which the staff propose in advance of the decision on what to publish. This procedure would more easily allow interested groups such as ours to consider and support those which would be most beneficial to the system.

Honorable Richard P. Conaboy
Page 3

As always, we appreciate the Commission's willingness to consider our views, and we look forward to meeting with you on March 13 to discuss the published proposed amendments and issues.

Sincerely,

A handwritten signature in cursive script that reads "Maryanne Trump Barry". The signature is written in black ink and is positioned above the printed name.

Maryanne Trump Barry
Chair, Committee on
Criminal Law