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May 8, 2008

Mr. Charles R. Fulbruge III
Clerk, U. S. Court of Appeals
For the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: *United States v. Gomez-Gomez*, No. 05-41461

Dear Mr. Fulbruge:

On April 30, 2008, this Court requested two-page letter briefs discussing the affect the U.S. Sentencing Commissions' proposed amendment to USSG § 2L1.2 would have on this case. The proposed amendment only affects this case indirectly as it clarifies the Sentencing Commission's intent regarding the full scope of the enumerated offense of "forcible sex offense," and as such, provides extremely useful and pertinent guidance on how this Court should resolve the issue of defining "forcible sex offenses" under the current and preceding editions of USSG § 2L1.2.

As this Court noted, the Sentencing Commission has proposed to change the term "forcible sex offense" in Section 2L1.2 to read: "forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.)" Importantly, the Sentencing Commission provided significant and telling commentary with regard to this amendment.

> "First, **the amendment clarifies** the scope of the term "forcible sex offense" as that term is used in the definition of "crime of violence" in §2L1.2, Application Note 1(B)(iii). The amendment provides that the term "forcible sex offense" includes crimes "where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced." **The amendment makes clear** that forcible sex offenses, like all offenses enumerated in Application Note 1(B)(iii), "are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another." USSC, Guideline Manual, Supplement to Appendix C, Amendment 658.

See www.ussc.gov/2008guid/finalamend08.pdf, p.30 ("Reason for Amendment")(emphasis added). The Commission added that one of the specific purposes of this amendment was to clarify that a "forcible sex offense" includes prior convictions where the statute of conviction might permit a sex

offense conviction involving "assent in fact" that does not legally qualify as "valid consent." The Commission noted that the amendment's application would result in outcomes contrary to cases such as *United States v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007), *United States v. Luciano-Rodriguez*, 442 F.3d 320 (5th Cir. 2006), and *United States v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004).

The commentary language demonstrates that this amendment is clarifying as opposed to a substantive change. Thus, an appellate court could apply it. *See United States v. Huff*, 370 F.3d 454, 465-66 (5th Cir. 2004) (court may consider amendment on appeal where Sentencing Commission states amendment is clarification). However, the amendment currently remains only a proposed clarification until Congress ratifies it. Moreover, even if Congress ratifies the proposed amendment, it would not become effective until November 1, 2008. Were Gomez to be resentenced upon remand after the amendment's effective date, the amended guideline would not apply to him under 18 U.S.C. § 3553(a)(4)(A)(ii) and 18 U.S.C. § 3742(g)(1); Gomez would still be sentenced under the Guideline version in effect at the time of his 2005 sentencing – i.e. the 2004 edition of the Guidelines. Based upon prior cases, it is unclear how courts would apply the clarifying amendment to prior versions of the Guidelines.[1] Thus, regardless of the outcome of the 2008 proposed clarifying amendment, the question in this and other pending cases remains regarding how "forcible sex offenses" should be defined in Guideline editions preceding the application of the proposed amendment.

Nevertheless, the proposed amendment is useful to this Court's analysis of the case-at-bar. In essence, the Sentencing Commission has validated the concern that *Sarmiento-Funes* is not consistent with the intended meaning of "forcible sex offenses." Therefore, all subsequent cases, including the panel holding in the instant case, relying upon *Sarmiento-Funes* were likewise contrary to the true intended meaning of "forcible sex offenses." Notably, the amendment is entirely consistent with the Third and Tenth Circuits' current case law defining "forcible sex offenses." *United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007); *United States v. Remoi*, 404 F.3d 789 (3rd Cir. 2005). In order to maintain uniformity in sentencing, this Court should define "forcible sex offenses" to include sex offenses committed against the will of the victim.

Respectfully submitted,

TONY R. ROBERTS
Assistant United States Attorney

cc: AFPD Margaret Ling (via mail and email).

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[1] The proposed amendment would not, even if ratified, eliminate the need for this en banc proceeding as members of this Court have been divided on whether they were bound by *Sarmiento-Funes* construing an earlier version of § 2L1.2, despite an intervening amendment. *See Luciano-Rodriguez*, 442 F.3d at 324 (Jolly, J., concurring) (applying *Sarmiento-Funes* notwithstanding amendment to § 2L1.2) and *id.* at 324, 328-30 (Owen, J., dissenting) (noting the majority applied *Sarmiento-Funes* even though the Sentencing Commission had issued a clarifying amendment regarding the intended scope of the term "forcible sex offenses" under § 2L1.2). Thus, an en banc decision consistent with the Third and Tenth Circuits is necessary to establish a consistent definition for prior, current, and future versions of this provision.