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Mr. Charles R. Fulbruge III, Clerk  
United States Court of Appeals  
for the Fifth Circuit  
600 S. Maestri Place  
New Orleans, Louisiana 70130

Re: United States v. Jorge Gomez-Gomez, Fifth Cir. No. 05-41461

Dear Mr. Fulbruge:

Pursuant to the Court's request, Appellant Jorge Gomez-Gomez submits this letter brief addressing the consequences on this case of the Sentencing Commission's recent amendment to USSG § 2L1.2, defining "forcible sex offenses."

A. The Amendment Effects a Substantive Change That Cannot Be Applied Retroactively.

This Court has granted en banc review to reconsider the meaning of "forcible sex offenses" under USSG § 2L1.2, and to decide whether Mr. Gomez-Gomez's 1991 California conviction for rape qualifies as a "forcible sex offense." The Sentencing Commission recently made a substantive change to § 2L1.2, adding a definition of "forcible sex offenses" in Application Note 1(B)(iii) to include offenses "where consent to the conduct is not given or is not legally valid, such as where consent to the conduct was involuntary, incompetent, or coerced." See "Amendments to the Sentencing Guidelines," at 29-30 (May 1, 2008) located at <http://www.ussc.gov/2008guid/finalamend08.pdf> (last visited May 2, 2008).

This definition of "forcible sex offenses" is a substantive amendment to the Guideline because it defines the term in a manner contrary to this Court's existing precedent and thus overrules prior constructions of this term by this Court. See United States v. Diaz, 245 F.3d 294, 303 (3d Cir. 2001); United States v. Capers, 61 F.3d 1100, 1108-12 (4th Cir. 1995); see also United States v. Huff, 370 F.3d 454, 466-67 (5th Cir. 2004) (recognizing that some circuits have held that amendments altering existing law in the circuit are substantive). Although the Commission stated that "the amendment clarifies the scope of the term "forcible sex offense[s]," this statement is not

conclusive. See Capers, 61 F.3d at 1110. It is clear from the “Reasons for Amendment” that the amendment constitutes a substantive change because the Commission explained that “[a]pplication of the amendment . . . would result in an outcome that is contrary to” 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). See Diaz, 245 F.3d at 302-03 (finding amendment substantive rather than clarifying because amendment was intended, in part, to overturn prior contrary case law).

B. The Amendment Nullifies Any Reason for En Banc Review in This Case

The amendment cannot be applied retroactively to Mr. Gomez-Gomez, because the court on remand is required to apply the Guidelines in effect on the date of the original sentencing. 18 U.S.C. § 3742(g)(1); see also United States v. Carrillo-Morales, 27 F.3d 1054, 1067 (5th Cir. 1994) (substantive amendments cannot be applied retroactively). However, the new definition will apply to offenses committed after November 1, 2008. By expressly providing a definition of “forcible sex offenses” that includes sexual conduct for which there was no consent or for which the consent was involuntary, incompetent, or coerced, the Commission has addressed the concerns expressed by the government and some members of the Court with this Court’s decision in Sarmiento-Funes.

In amending § 2L 1.2, the Sentencing Commission performed the function bestowed upon it by Congress, and there is no longer any reason for this Court to revisit Sarmiento-Funes. See generally Braxton v. United States, 500 U.S. 344, 348 (1991).

Moreover, any modifications to United States v. Calderon-Pena, 383 F.3d 254 (5th Cir. 2004) (en banc), to expand the meaning of the term “element” and the definition of “physical force” as used in § 2L1.2 would not affect the result in this case, and using this case to overrule or modify Calderon-Pena would be an improper advisory opinion in violation of Article III. There are no factual allegations regarding the offense in the relevant state court documents, and even if “causing physical injury” could be construed as requiring the “use of physical force,” this case, which involves rape “by duress,” has no element of either physical force or physical injury. The record contains no facts or controversy that can serve as a basis for deciding the issues that were contested in Calderon-Pena. This Court should therefore abide by principles of judicial restraint and refrain from deciding issues that are not raised by this case and that will not affect the rights of the litigants before the Court. C&H Nationwide, Inc. v. Norwest Bank of Texas, 208 F.3d 490, 493 (5th Cir. 2000).

Respectfully submitted,

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