



March 17, 1997

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We are writing on behalf of Families Against Mandatory Minimums to comment on the 1997 proposed guideline amendments. The three amendment proposals which FAMM considers to be of the highest priority, acquitted conduct (Proposed Amendment 9), the cliff between offense levels 42 and 43 (Proposed Amendment 13), and mitigating role (Proposed Amendment 22), have been addressed in FAMM's previously submitted written testimony. For your convenience, this letter also includes the text of that submission. Seven additional amendment proposals of importance to FAMM are addressed herein: controlled substance transactions separated by more than one year (Amendment Proposal 8), aggravating role in the offense (Amendment Proposal 21), acceptance of responsibility (Amendment Proposals 24, 25 and 26), aberrant behavior (Amendment Proposal 28), and the effect of the safety valve on supervised release terms (Proposed Amendment 30).

Controlled Substance Transactions Separated by More than One Year
(Amendment Proposal 8)

As recognized by some courts, "careful practice [in assessing drug quantities] is essential where a defendant's sentence depends in such large measure on the amount of drugs deemed attributable to his conduct." *United States v. Shonubi*, 998 F.2d 84, 89-90 (2d Cir. 1993). Application of U.S.S.G. §1B1.3 (relevant conduct) is among the guideline issues most frequently appealed and results in the greatest number of reversals. United States Sentencing Commission, 1995 Annual Report 132, 142-43. The example derived from *United States v. Hill*, 79 F.3d 1477 (6th Cir. 1996), may avert the erroneous counting of temporally remote and unrelated drug transactions. Therefore, FAMM does not oppose this amendment.

However, additional language may be required to avoid the inference that two drug deals eleven months apart are, *ipso facto*, part of the "same course of conduct." If the Commission goes forward with this amendment, the commentary should also state that even when shorter time intervals are involved (i.e., one year or less), transactions are not necessarily part of the "same course of conduct" simply because they involved the same controlled substance.

Acquitted Conduct as Relevant Conduct
(Proposed Amendment 9)

Public participation -- through the jury system -- is vital to our system of law. A sentencing guideline which nullifies the effect of jury verdicts is offensive to our participatory democracy. FAMM supports Proposed Amendment 9, Option 1B, excluding acquitted conduct from relevant conduct.

The rationale used to support the current approach to acquitted conduct, based upon pre-Guidelines cases such as *Williams v. New York*, 337 U.S. 241 (1949), is that sentencing judges have always been free to consider all relevant and reliable evidence. *Williams* held that judges in sentencing *may*, if they choose, take account of nonconviction behavior; the Guidelines, on the other hand, mandate pre-determined sentence increases for such conduct. In addition, it has been suggested that 18 U.S.C. § 3661 prohibits erecting a bar to the required use of acquitted conduct. If this were true, many other guidelines that cabin judicial discretion at sentencing would constitute impermissible limitations under 18 U.S.C. § 3661. *See, e.g.*, U.S.S.G. §5H1.12 ("Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range.").

It is often noted that people first exposed to the Sentencing Guidelines find it troubling that they require judges to calculate sentences based upon conduct that was the subject of charges resulting in acquittal. Michael Tonry, *Sentencing Matters* 94 (1996). This particular criminal process does not satisfy the appearance of justice. With surprising hubris, Senators Abraham and Hatch, in their letter to Commissioner Goldsmith, write that they would "be most surprised and also would be deeply concerned if an expert body, such as the Sentencing Commission, succumbed to the *untutored* reactions of such persons by modifying the Guidelines to limit the use of conduct underlying an acquittal." Criticism of the sort appearing in a recent Washington Post series is a poignant reminder that the Commission must be *seen* to do justice, even by the "untutored." Mary Pat Flaherty and Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Washington Post, October 6, 1996, at A1, A21.

The "Cliff" Between Level 42 and Level 43
(Proposed Amendment 13)

FAMM believes that life sentences without parole are totally inappropriate for drug offenses. This country's most severe punishment, save execution, should be reserved for our most dangerous offenders, for whom permanent incapacitation is the only way to ensure public safety. Through a combination of enhancements under the current Guidelines, non-violent offenders are easily ensnared by the natural life sentence mandated by offense level 43.

Submitted for the Commission's consideration is the case of Sharvonne McKinnon, who at age 27 began serving her life sentence for a crack cocaine conspiracy. (*See United States v. McKinnon*, 102 F.3d 1120 (11th Cir. 1997)). Ms. McKinnon was romantically involved with a

crack kingpin, who was also the father of her toddler son. For three years prior to her arrest, she had been employed as a bus driver. Although not reflected in her sentence, she was apparently not a sufficient threat to the community to warrant detention pending trial. Ms. McKinnon was held accountable for the total amount of crack involved in the entire conspiracy, although her alleged participation primarily consisted of counting rocks of cocaine, counting money, and acting as a lookout. With a 2-level enhancement for possession of a firearm, Ms. McKinnon's adjusted offense level was 44. She received no upward adjustment for aggravating role in the offense.

Although Sharvonne McKinnon may now be eligible for less than a life sentence pursuant to Guidelines Amendment 505 (capping the Drug Quantity Table at offense level 38), the Commission's staff has identified approximately 30-40 other individuals who received life sentences in cases not involving death of a person or treason. FAMM supports the proposed amendment to abolish "mandatory" natural life sentences in these cases.

Aggravating Role in the Offense (Amendment Proposal 21)

Part A of this proposal would add the following to the introductory commentary concerning role in the offense: "the fact that the conduct of one participant warrants an upward adjustment for aggravating role, or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for mitigating role." For the sake of parity, the commentary should explain that the converse is also true; that is, a *mitigating* role adjustment for one participant does not require that another participant receive an *aggravating* role adjustment. Aside from this flaw, FAMM does not oppose the amendments to the introductory commentary proposed in Part A.

Because Options One and Two of Part B threaten to increase the number of aggravating role adjustments in controlled substance cases, FAMM opposes these amendments. These proposals would reduce the number of participants necessary for a four-level upward adjustment. Some observers and Commission staff have noted that the number of participants is not a reliable indicator of role because this factor varies depending upon the offense type. As illustrated in one staff discussion paper, five-person drug conspiracies are relatively common but a five-person robbery is unusually large. Reducing the number of participants required will only enhance the disproportionate application of aggravating role adjustments to controlled substance offenses.

Furthermore, while weight often overstates culpability in drug cases, calling for liberal application of mitigating role adjustments, the converse is not true with respect to aggravating role adjustments. The Guidelines' excessive reliance upon weight negates any concern that guideline sentences, combined with mandatory minimums, will fail to adequately punish higher ranking drug offenders. Therefore, aggravating role adjustments should be infrequent.

Both Options One and Two contain an application note entitled "Illustrations of

Circumstances That May Warrant an Upward Departure.” Here again, this amendment lacks symmetry with the proposed mitigating role guideline. The analogous departure provision set forth in the mitigating role amendment states that “[s]uch a departure should not result, without more, in a lower sentence than would result if the defendant had received a mitigating role adjustment under this section.” Upward departures for aggravating role in the offense should be limited in the same way.

Option Three adopts a flexible approach to aggravating role in the offense similar to the proposed amendment of the mitigating role guideline. FAMM does not oppose this option.

Mitigating Role in the Offense
(Proposed Amendments 21 and 22)

FAMM applauds the Commission for reducing emphasis on drug weight through a more flexible mitigating role guideline. The Guidelines often require judges to impose severe sentences on “mules” and other minimally involved participants. In such cases, drug quantity already overstates culpability and should not also preclude mitigating role reductions. Assessment of role should not, as suggested by the commentary in application note 2, be affected by drug amount. FAMM supports the elimination of this commentary.

Nonetheless, Proposed Amendment 22 remains unduly restrictive in other respects. The proposed definition, requiring that the defendant be “a *substantially* less culpable participant,” inexplicably raises the current standard for the two-level reduction; that is, a minor role reduction is now authorized under the Guidelines for a participant who is simply “less culpable than most other participants.” The commentary regarding burden of persuasion may also undermine the flexibility aimed for by the Commission. That is, the proposed amendment instructs, “As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment is warranted.” The chilling effect of this commentary may be particularly pronounced in jurisdictions where the current practice is to deny reductions for mitigating role if the defendant’s post-arrest statements are the only evidence thereof. *See* Tony Garoppolo, *Treatment of Narcotics Couriers in the Eastern District of New York*, 5 Fed. Sent. R. 317 (1993). This provision does not appear elsewhere in the Guidelines and is equally unnecessary in the mitigating role guideline.

FAMM also objects to the elimination of the three-level reduction. By eliminating an adjustment deemed appropriate in 298 cases in a recent year, this proposal reduces sought-after flexibility. United States Sentencing Commission, 1995 Annual Report 73. Secondly, the intermediate adjustment may facilitate plea negotiations, allowing the parties to resolve differences of opinion as to mitigating role.

Concerning the additional issues for comment, FAMM urges the Commission to expressly sanction minimal role adjustments for mules. Although these participants have no role other than delivery, wide disparity exists in the application of the mitigating role guideline to

mules. See Tony Garoppolo, *Treatment of Narcotics Couriers in the Eastern District of New York*, 5 Fed. Sent. R. 317 (1993) (reporting that the Eastern District of New York routinely affords four-level reductions for mules, while other port cities only occasionally afford two-level reductions for such defendants). Consider the case of Donaldo Munoz-Vallejo, a mule who was arrested on a vessel in Houston, Texas, carrying cocaine-packed sardine cans. (*United States v. Munoz-Vallejo*, No. H-95-00220-01 (S.D. Tex.) (on file with FAMM)). Mr. Munoz admitted responsibility and immediately cooperated with the Customs agents, but the other participants in the offense were never apprehended or formally identified. Mr. Munoz, who had been lawfully employed on merchant ships in Colombia for several years, explained that he was approached by a man who asked him to deliver the sardine cans. As with all mules, Mr. Munoz was promised a flat fee and had no proprietary interest in the cocaine. While the probation officer and the sentencing court apparently accepted Mr. Munoz's explanation of his part in the offense, he did not receive a downward adjustment for his mitigating role. Consequently, Mr. Munoz was sentenced to 87 months imprisonment. FAMM contends that a flexible mitigating role guideline, combined with commentary explicitly identifying mules as minimal participants, would result in more appropriate sentences for individuals like Mr. Munoz.

Acceptance of Responsibility (Amendment Proposal 24)

Based upon the Commission's 1995 Annual Report, it appears that approximately six percent of all defendants who plead guilty are denied an adjustment for acceptance of responsibility. United States Sentencing Commission, 1995 Annual Report 53, 74. A bright line rule that all defendants who plead guilty receive the acceptance of responsibility adjustment would reduce litigation and reward individuals who do not put the government to the considerable expense and burdens of trials and appeals.

Instead, Amendment Proposal 24 further complicates the operation of this guideline. For the two-level reduction, the amendment imposes a timeliness requirement and, for the extra one-level reduction, the amendment requires that the defendant demonstrate "extraordinary" acceptance of responsibility. Both of these provisions are far too restrictive and are likely to result in fewer adjustments. Another flaw is the suggestion that the defendant must provide accurate "information regarding the defendant's juvenile and adult criminal record." The connection between a defendant's accurate account of his criminal history and acceptance of responsibility for the present offense is tenuous in many cases. Moreover, this provision is simply unnecessary in light of the fact that probation officers uniformly rely upon other, generally more accurate, sources for criminal history information. For these reasons, FAMM opposes this amendment proposal.

Acceptance of Responsibility (Amendment Proposal 25)

FAMM opposes this amendment which would effectively bar a reduction for acceptance

of responsibility based upon the commission of a new offense while pending trial or sentencing for the offense of conviction. Like the preceding amendment, this proposal would divert the sentencing judge's focus from the defendant's guilty plea. The commission of a new offense does not necessarily negate the defendant's genuine contrition for the offense of conviction. While new offenses may suggest a likelihood on the part of the defendant to recidivate, this factor may be adequately considered by the judge in determining the proper sentence within the guideline range.

Acceptance of Responsibility
(Amendment Proposal 26)

FAMM supports this amendment proposal, which eliminates the offense level threshold for the additional one-level reduction. Simply stated, low level offenders should not be denied a reduction available to higher level offenders. Inasmuch as a lower offense level indicates involvement in a small scale offense, a defendant with an offense level less than 16 is perhaps less likely to benefit from a mitigating role adjustment or a substantial assistance departure.

Issue for Comment: Aberrant Behavior
(Amendment Proposal 28)

Part Thirteen of Amendment Proposal 28 invites comment on "[w]hether multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting departure." In its proposed amendments, FAMM recommended that §5K2 include a new section to read as follows:

If the defendant's conduct constitutes a single episode of aberrant behavior, a downward departure may be warranted. Departure from the guidelines may be justified even where the conduct is the result of some planning and preparation.

This proposal would resolve two closely-related conflicts regarding aberrant behavior departures: (1) Whether aberrant behavior must be spontaneous and unplanned, and (2) whether aberrant behavior may involve multiple acts. The current reference in the Guidelines to aberrant behavior has been interpreted too narrowly by some courts. In resolving the circuit conflict, the Commission should encourage departures in a broader category of cases where the criminal conduct involves multiple acts and/or some preparation but nonetheless is completely out of character for the defendant.

Safety Valve and Supervised Release
(Proposed Amendment 30)

FAMM supports this proposed amendment and commends the Commission for clarifying application of the safety valve.

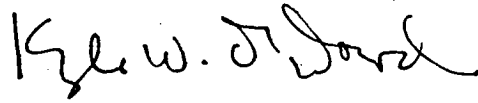
Conclusion

FAMM appreciates this annual opportunity to propose amendments to the Guidelines and to comment on published proposals. To safeguard the value of this process, we urge the Commission to voice its opposition to mandatory minimums and other legislative measures that diminish the role of the Commission and the Guidelines.

Sincerely yours,



Julie Stewart
President



Kyle W. O'Dowd
General Counsel