

March 10, 2000

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

Re: Amendment #4: Commission Response to the Methamphetamine Trafficking
Penalty Enhancement Act of 1998

Dear Judge Murphy and Commissioners:

We are writing on behalf of Families Against Mandatory Minimums Foundation (FAMM) to comment on proposed Amendment Number 4, which concerns the penalties for methamphetamine offenses. FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy, and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not advocate the legalization of drugs nor does it minimize the serious impact of drug trafficking or other crimes. All we ask is that the punishment fit the offense and the offender. As an alternative to mandatory sentences, FAMM supports sentencing guideline systems that are more sensitive to differences in culpability.

Unfortunately, the benefits of guidelines over mandatory sentencing have never been fully realized in the federal system. This is because statutory mandatory minimums directly and indirectly impede the guidelines' capacity to distinguish between offenders. Amendment Number 4, which contains two options for responding to the Methamphetamine Trafficking Penalty Enhancement Act of 1998, further diminishes the Guidelines' value as an accurate measure of culpability.

The 1998 Act lowers the quantities of methamphetamine necessary to trigger the 5- and 10-year mandatory minimum sentences to the controversial triggering quantities applicable to crack cocaine. As noted in the Methamphetamine Policy Team's report, the subject legislation issued no directives to the Commission. In sum, FAMM submits that amending the methamphetamine guidelines to reflect politically inspired mandatory minimums, rather than Commission expertise, will result in individuals spending more time in prison than is justified by the fundamental purposes of sentencing and will undermine the Guidelines' goal of disparity reduction.

As possible bases for the first two proposed amendments, the methamphetamine report submits three considerations: (1) the drug's current popularity, (2) consistency with past practice, and (3) political concerns. Because guideline amendment is not mandated, however, the Commission should only act if it determines that higher guideline sentences -- many exceeding the mandatory minimums -- are necessary to promote the purposes of sentencing: punishment, deterrence, incapacitation and rehabilitation. See 18 U.S.C. § 3553(a)(2), 28 U.S.C. §§ 991(b), 994(m).

There is no evidence that methamphetamine offenses are under punished.

Under the first amendment option, the Commission's report predicts that average methamphetamine sentences, second in severity only to crack, will increase 20% -- from 97 to 116 months. The crack cocaine regime provides a useful point of comparison. The overall severity of the crack cocaine guidelines (apart from the issue of race) underlies much of the criticism lodged against federal drug sentencing. Fulfilling its duty under the Sentencing Reform Act of 1984 to consider community views in developing the Guidelines, the Commission surveyed public attitudes toward federal sentences in 1993 and 1994. This survey revealed that respondents preferred punishments below the guideline ranges for crack offenders and also for higher-quantity drug traffickers. Peter H. Rossi & Richard A. Berk, U.S. Sentencing Comm'n, *A National Sample Survey, Public Opinion on Sentencing Federal Crimes* 80, 84 (1995). This suggests that the proposed amendments would widen the gap between actual sentencing policy and just punishment in the public's eyes.

A few examples of first-time offenders illustrate the severity of methamphetamine penalties (even prior to 1998 law) and the comparative increases under the proposed guideline amendments:

- Joyce Nelson is an addict whose abusive relationship with a methamphetamine cooker cost her more than seven years in prison. Even with a four-level reduction for her minimal role and a three-level reduction for acceptance of responsibility, she received an 87-month guideline sentence. She was finally released, but would still be incarcerated under the first proposed option, which would prescribe at least 108 months imprisonment. (No. CR92-00026M-002, W.D. Wash.).
- Linda Bear became involved in a methamphetamine conspiracy as a result of her own addiction, permitting a childhood friend to manufacture at her residence in exchange for personal-use quantities of the product. Her drug abuse was apparently connected to certain mental disorders and tragic events, like the deaths of her prematurely born child and her husband. Although her 46-month sentence pales in comparison to some federal drug sentences, her guideline range under the second proposed option would be 87-108 months. (No. 97-CR-171-016-C, N.D. Okla.).

- Loretta Fish received a 235-month sentence for her short-term, minor role in her boyfriend's methamphetamine business. Her involvement in the conspiracy lasted about six months, during which time she allowed the co-conspirators to use her car and her trailer home, acted as a lookout and relayed messages concerning drugs. Her offense level was 38, based on more than 15 kilograms of methamphetamine, a two-level reduction for minor role and a two-level obstruction of justice enhancement based on perjury. Since Loretta Fish's base offense level is 38 (which caps the Drug Quantity Table), her sentence would not change if based on the proposed amendments. (No. 93-00158-03, E.D. Pa.).

In light of the fact that more than 50% of federal methamphetamine defendants have little or no criminal history (U.S. Sentencing Comm'n, *1998 Sourcebook of Federal Sentencing Statistics* 72), the proposed amendments would yield an increased supply of anecdotes to illustrate the unnecessary severity of the drug trafficking guidelines. See, e.g., *Prisoners of Love* (Court TV television broadcast, Feb. 14, 2000); *The Early Show with Bryant Gumbel* (CBS television broadcast, Feb. 22, 2000) (including detailed accounts of harsh drug guideline sentences meted out on several first-time offenders; tapes on file with FAMM).

Sentencers' use of ameliorative provisions and meth-mixture offense levels supports the conclusion that increased punishment is unwarranted.

Disproportionate reliance on ameliorative provisions may also reflect that methamphetamine offenses are currently over punished (but does not necessarily point to widespread guidelines circumvention). Although further research is needed, methamphetamine prosecutions may snare a higher proportion of low-level offenders who legitimately qualify for the safety valve and mitigating role adjustments. Similarly, the apparent over-reliance on the meth-mix penalties, as opposed to the harsher meth-actual penalties, may be due more to confusion than circumvention; if true, this commends clarification rather than stream-lining of the guideline at the expense of greater proportionality. On the other hand, if excessive reliance on the meth-mix penalties is due to dissatisfaction with current penalty levels, eliminating the meth-actual scheme may yield no more than better-camouflaged "disparity," while the sentence increases under both proposals will no doubt exacerbate the disparity. In this regard, it is useful to note the already high rate of substantial assistance departures -- often branded the "black box" of federal sentencing -- for methamphetamine offenses.

The deterrence rationale and other law enforcement considerations do not support increased sentences.

The Sentencing Reform Act suggests that the Commission consider "the current incidence of the offense," but only to the extent relevant. 28 U.S.C. § 994(c). Inasmuch as the

amendment proposals are inspired by epidemiological studies regarding methamphetamine, the Commission may see fit to focus on whether increased guideline sentences are likely "to afford [additional] deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Of course, most research suggests that severe sentences do not provide any additional deterrent effect over moderate sentences. Michael Tonry, *Sentencing Matters* 136-42 (1996).

Rather, there is reason to believe that adoption of lower triggering quantities will undermine effective federal law enforcement. The Attorney General, the Office of National Drug Control Strategy and the previous Sentencing Commission opposed the identical penalty scheme for crack cocaine as contrary to federal law enforcement priorities. U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 4-8 (1997). In like fashion, the penalty levels under consideration are apt to divert scarce federal law enforcement resources from large-scale trafficking to low-level offenders. According to the DEA, 5 grams of methamphetamine is worth a few hundred dollars at most (Drug Enforcement Administration et al., *The NNICC Report 1997: The Supply of Illicit Drugs to the United States* 68) -- hardly an amount indicating a serious trafficker -- yet agents and prosecutors will have the incentive to concentrate on these cases.

Past practice should not impede evolution of the guidelines.

The amendment proposals would merely compound the original Commission's imprudence in incorporating the statutory quantity thresholds and prescribing sentences in excess of the mandatory minimums. As many experts have observed, the Commission was not required to incorporate the drug quantity thresholds from the mandatory minimum statutes as anchors for drug sentencing calculations. See, e.g., Michael Tonry, *Sentencing Matters* 96-97 (1996) ("the commission's policies gratuitously raised sentences for drug offenders"); Stephen Schulhofer, *Excessive Uniformity -- And How to Fix It*, 5 Fed. Sent. R. 169 (1992) (Commission's decision to specify quantity-based sentences above the quantities triggering the 10-year mandatory minimum "goes beyond deference to congressional judgments."). In a report prompted by "anecdotal and empirical evidence suggesting that sentences for certain drug-trafficking defendants may be overly punitive," the Commission found that, among the states surveyed, the federal sentencing guidelines stand alone in their mandatory minimum-based approach to drug sentencing. U.S. Sentencing Comm'n, *Report of the Drugs/Role/Harmonization Working Group* 1, 50 (1992).

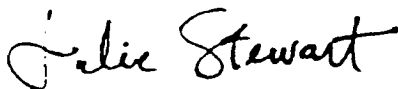
The methamphetamine report aptly frames the issue as follows: "Should no action be taken, the mandatory minimums established by Congress will trump the guidelines at sentencing but the impact of the Congressional increase will not be felt throughout the remainder of the Drug Quantity Table." The Commission, to its credit, has tolerated this trumping effect with respect to certain controlled substances (i.e. LSD and marijuana plants), and state sentencing commissions have adopted this approach. Michael Tonry, *Sentencing Matters* 96-97 (1996). In addition, this trumping effect occurs when the prosecutor files an information under 21 U.S.C. §

851, triggering an enhanced mandatory minimums for a drug offenders with one or more prior drug felonies. The Commission should also note that the safety valve diminishes the structural cliffs that the Commission sought to avoid by incorporating the mandatory minimums. In a recent year, the safety valve enabled 22% of drug defendants to receive guidelines-range sentences without regard to the mandatory minimum statutes. U.S. Sentencing Comm'n, 1998 *Sourcebook of Federal Sentencing Statistics* 79.

In conclusion, while congressional enactments and any underlying drug-use trends merit the Commission's attention, analysis of the statutory guideposts indicate that the proposed amendments will take the methamphetamine guidelines in the wrong direction. In contrast to other legislation, Congress did not direct that the Commission amend the sentencing guidelines to reflect the new quantity thresholds. See, e.g., Powder Cocaine Sentencing Act of 1999, S. Amdt. 2771 (to S. 625), 106th Cong. In the absence of specific statutory directives, guideline sentences should reflect the Commission's expert judgment, even if this entails some political risk. While the Commission does not operate in a political vacuum, "[i]f the commission refuses to take risks and simply reflects the views of the political agents to which it is ultimately responsible, it will accomplish nothing better than the legislature itself could in setting standards." Andrew von Hirsch & Judith Greene, *When Should Reformers Support Creation of Sentencing Guidelines?*, 28 Wake Forest L. Rev. 329, 337 (1993).

Thank you for considering our comments on this issue of great importance to the families of future methamphetamine prisoners.

Sincerely yours,



Julie Stewart
President



Kyle O'Dowd
General Counsel