

March 1, 2004

Advance copy by electronic mail
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Amendment 6 to the Sentencing Guidelines and Issue for Comment 10.

Dear Commissioners:

I write on behalf of Families Against Mandatory Minimums Foundation (FAMM) to urge that you leave undisturbed for now the mitigating role cap and the aberrant conduct departure. Both provide necessary relief for the very small number of people who qualify. Moreover, both the cap and changes to the aberrant conduct departure are so recent that it is too soon to tell if the concerns that motivated them have been addressed or how well they are presently working. Finally, built-in mechanisms ensure correct sentences when the operation of the guidelines fails to properly account for culpability: upward departure in the case of a capped sentence that is too low and either denial of the aberrant conduct departure or, in the case it is invoked, appellate review of the aberrant conduct departure if it is used inappropriately.

Proposed Amendment 6: Mitigating Role

The guidelines overemphasize drug quantity as a measure of blameworthiness and frequently cannot adequately account for role in the offense. FAMM's case files are filled with defendants serving unconscionably long sentences for drug offenses. Many are first-time, non-violent offenders. The relevant conduct rules and severe mandatory minimums drive these low-level participants' sentences well beyond those warranted. Many of their stories are truly disturbing. The mitigating role cap provides some limited relief to defendants like them. Below are a few examples of defendants who received mitigating role reductions. They are meant to illustrate the kinds of defendants this cap is designed to assist.¹

Lori Gibson's boyfriend, Larry Copeland, was a drug dealer. Ms. Gibson had heard that Mr. Copeland dealt drugs but had never discussed his business with him. He had never included her in his illegal activities and had never, to her knowledge, brought the drug trade home with him. He was also alcoholic and abusive. She was used to doing as she was told. Once, while out

¹ None of these defendants received the cap as it was instituted after they were sentenced and has not been made retroactive.

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of town, Mr. Copeland called Ms. Gibson and asked her to pick up something from a man named Eric McKinnon. Unaware of what she was picking up or why, Ms. Gibson did as she was asked. She met Mr. McKinnon, who she did not know, in a parking lot and received \$3,600 from him. She did not know that the money was intended to settle a debt from a sale by Larry Copeland of 113 grams of cocaine base. At Mr. McKinnon's direction, she called Mr. Copeland, told him she had the money, and gave the telephone to Mr. McKinnon. They arranged another drug deal, but in coded language that Ms. Gibson did not understand. Mr. McKinnon was an informant and Ms. Gibson was arrested within minutes of leaving her meeting with him.

Ms. Gibson went to trial and was found not guilty of conspiracy but guilty of one count of possession with intent to distribute cocaine base. She was originally sentenced at level 34 to 151 months (for the crack cocaine from the prior sale as well as that arranged while she was in the car) and did not receive a mitigating role adjustment despite counsel's arguments. Her case was affirmed but remanded for resentencing by the Eleventh Circuit Court of Appeals. In 1998, she was resentenced to 126 months, receiving a reduction of 2 levels in recognition of her minor role in the offense. Ms. Gibson has two children, now 11 and 18 years old. Their 66-year-old grandmother cares for them. Ms. Gibson will be released in early 2005.

Tammi Bloom's husband of 15 years distributed cocaine from an apartment that he shared with his mistress in Ocala, Florida. Ms. Bloom testified at her trial that she was unaware of her husband's affair or the sales in Ocala. A confidential informant said that she was present for other sales at her own home with Mr. Bloom in Miami and counted money for him.

After Ronald Bloom and his mistress were arrested, the police searched the home he shared with Ms. Bloom and discovered cocaine, cocaine base, 3 firearms and drug ledgers. Besides a small bag of cocaine on her husband's nightstand, she did not know about the other evidence as it was hidden, even from her, in a septic tank and in a part of the house used primarily by her husband.

The PSI identified Mr. Bloom as the most culpable defendant in the case because he exercised decision-making authority over his wife and others. Ms. Bloom was held accountable for drugs distributed from the home in Miami on three occasions for a total of 2.41 kilograms of cocaine and 510.05 grams of cocaine base. She received a two-level enhancement for the guns and a two-level obstruction of justice enhancement for testifying, allegedly falsely, to her innocence at trial. While she received a two-level reduction for minor participant, she still received the longest sentence of anyone convicted in the conspiracy: 235 months or 19 years and seven months. Her husband received 210 months, or 17.5 years, his mistress 78 months and another associate, 168 months.

Ms. Bloom has two children, 16 and 18, who are being raised by their maternal grandmother. Ms. Bloom's father died in 2002 and her mother is struggling to keep the family

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going without him.

Tammi Bloom will leave prison in late 2015.

In October 1990, **Daisy Diaz** accompanied her husband and others on a boat trip to several Caribbean islands. She believed the trip was for pleasure. After 41 kilograms of cocaine were discovered on an island the boat had just departed, the boat was searched by Bahamian police. The party was arrested and a gun found in a bag carried by Ms. Diaz. She and the boat's captain, Antonio Mateau, said he placed the gun there as he anticipated being arrested. (Mr. Mateau later provided an affidavit to that effect after he was finally captured, years later.) The party was released but later detained again. The vessel was searched and found to contain 176.1 kilograms of cocaine hidden near the fuel tank. Ms. Diaz denied knowledge of the drugs, which were so well hidden it took more than a day to locate them. She was considered, even by the prosecuting attorney, to be merely a decoy to make the trip appear not a drug smuggling run but a family vacation. She was charged with the amount of drugs found on the boat as well as the 41 kilograms found on the island. Ms. Diaz was convicted and sentenced to 235 months, a base offense level of 38, with an enhancement for Mr. Mateau's gun.

The two-level downward adjustment was warranted, according to the Probation Officer, who agreed with the AUSA that she was merely a decoy.

Ms. Diaz, who had no criminal history, received the longest sentence of the party -- with the exception of Mateau who died in prison -- including that of her husband, who received 12 years. She maintains her innocence to this day. She will not be released in September 2008.

The mitigating role cap is an effort to account for a defendant's minor or mitigating role by establishing a realistic base offense level. It is an explicit recognition that quantity alone is relied on to such an extent in the guideline drug calculations that the least culpable end up with sentences that well exceed the dangerousness or harm of their conduct. Some even exceed the sentences of the most culpable defendants, even after credit for mitigating role.

Senator Jeff Sessions (R-Al), speaking for himself and Senator Orrin Hatch (R-UT), recognized and attempted to fix the problem when he introduced S. 1874, the Drug Sentencing Reform Act of 2001. The bill was designed to more appropriately account for role by increasing sentences for certain kinds of conduct and reducing them for the least involved.

He remarked, when introducing the bill that "the primary focus of the mandatory minimums and the Sentencing Guidelines on quantity has resulted in a blunt instrument that data now shows is in need of refinement." 178 Cong. Rec. S13962 (daily ed. Dec. 20, 2001). First-time, non-violent offenders were least likely to be rearrested and the presence of violence or a dangerous weapon, he concluded, were better predictors of recidivism than drug quantity.

Sen. Sessions called for a cap on base offense levels of down to level 30 for those receiving minimal role adjustments:

This is very significant because couriers, who are often low-level participants in a drug organization, can have disproportionate sentences of 20 or 30 years simply because they are caught with a large amount of drugs in their possession. By capping the impact of drug quantity on the minimal role offenders, the bill allows a greater role for the criminality, or lack of criminality, of their conduct in determining their ultimate sentences.

For example, the bill provides a decrease for the super-mitigating factor of the girlfriend or child who plays a minimal role in the offense. These are often the most abused victims of the drug trade, and we should not punish them as harshly as the drug dealer who used them.

178 Cong. Rec. S13964 (daily ed. Dec. 20, 2001).

Defendants receive reductions for minor or minimal participation in fewer than 15 percent of drug distribution cases. In 2001 for example, only 2.3 percent of defendants received a minimal role reduction, 10 percent received a minor role reduction and .9 percent received one in between. No data is publicly available since the institution of the cap, but these numbers do not suggest an excess of leniency on the part of sentencing judges prior to its adoption.

It is particularly disturbing that the Commission chooses to revisit the cap, which it passed unanimously, so soon after it was instituted. There is simply no basis to judge whether and how it is affecting sentences, whether mitigating role adjustments are being invoked more or less frequently, and whether the government is appealing the adjustments. Furthermore, it is unclear how judges are handling cases where they believe a defendant warrants a mitigating role adjustment but may not warrant a reduction to level 30. Presumably, those sentences are subject to upward departure where the weight attached to the mitigating role adjustment is excessive. The better course would be to study how the cap is working before eliminating it or reducing its impact.

In light of the terrible outcomes that quantity-driven guideline sentencing guarantee, the recency of the amendment, and the few sentences it affects, we urge you to exercise restraint and neither eliminate nor adjust the role cap for the time being. Of course, if you choose to go forward with an amendment, we strongly encourage you to do so in a way that preserves as much flexibility in achieving sentencing relief for the less culpable who must suffer the brunt of quantity-driven sentences.

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Issue for Comment 10 Regarding Aberrant Behavior

FAMM urges that the Commission not eliminate or amend the ability of courts to depart on the basis of aberrant conduct at this time. Not only was the departure significantly amended and its use restricted recently, the Commission has not completed its study and recommendations concerning criminal history. It strikes us as at least premature to remove an entire ground for downward departure on limited information. The Commission can make a significant contribution to understanding the place that criminal history plays and should play at sentencing by staying its hand and studying the impact of the various changes to the departure made so far.

Departures from the guidelines were fashioned in part to provide feedback on the operation of the guidelines. That a departure is invoked teaches that judges feel the need to account for a factor or feature not provided for in the guidelines. That the departure is invoked, should never lead to the conclusion that it ought to be eliminated, even in this post-Feeney era.

We urge you to wait until you have complete information before you eliminate this important ground for departure.

Thank you for considering our views.

Sincerely,

Mary Price
General Counsel