

September 8, 2008

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2009 Priorities

Dear Judge Hinojosa:

Families Against Mandatory Minimums (FAMM) writes in response to the Commission's request for comment on its proposed priorities for the amendment cycle ending May 1, 2009.

Study of Statutory Mandatory Minimum Penalties

FAMM commends the Commission for considering revisiting the 1991 Report, "Mandatory Minimum Penalties in the Criminal Justice System," as a priority for 2009. An updated and revised report would meet growing congressional interest in addressing both mandatory minimums for certain crimes, like crack cocaine, and also serve as a resource as Congress evaluates wider issues of incarceration, including mandatory minimums.

In the seventeen years since the report, the number of mandatory minimums has increased and the prison population has grown dramatically. Years of practice under the mandatory minimums have produced a wealth of data that the Commission can draw on for evaluation, analysis, and answers to the most pressing questions about mandatory minimums in the federal criminal justice system. At the same time, the environment in which mandatory minimums exist has changed and opposition to these flawed sentencing rules has grown. The Commission has been at the forefront of those critical about mandatory minimums but is by no means alone in its opposition.

There is a very timely reason for you to revisit the report now. In January 2009, a new administration and new Congress will begin work. The Commission is heard by members of Congress. The 2007 cocaine sentencing report and the sentencing reductions implemented by the Commission for crack cocaine undoubtedly spurred members of Congress to take a fresh look at the issue. Members introduced no fewer than seven bills addressing the crack cocaine sentencing structure in the 110th Congress. You accepted invitations to testify at hearings considering crack cocaine reform legislation in the Senate and the House.

There are signs that members of Congress are looking beyond crack cocaine to the wider issues of incarceration, including mandatory minimums. For example, Sen. Jim Webb (D-Va) chaired Joint Economic Committee hearings in October 2007 and June 2008 on over-incarceration. Both hearings highlighted, among other issues, the failure of disproportionate sentences and mandatory minimums to reduce the crime rate.

It is an appropriate time to build on the information you presented in your June 26, 2007 testimony to the Subcommittee on Crime, Terrorism, and Homeland Security, revisit the conclusions of the first and only report to date on mandatory minimums, and test how and to what extent your concerns about mandatory minimums expressed in that report remain relevant. We encourage you to do so also so that you can identify trends in and concerns about mandatory minimums that have emerged since that report was published.

An updated report would allow Congress to truly rely on the Commission, presenting a valuable contribution containing updated information about the state of mandatory minimum sentencing and its impact on federal sentencing.

Consideration of Alternatives to Incarceration

FAMM applauds the Commission for its leadership in engaging Congress, practitioners, and experts from the criminal justice and academic communities in a discussion on alternatives to incarceration. The Symposium on Alternatives to Incarceration hosted by the Commission on July 14-15, 2008 in Washington D.C. was a tremendous contribution to the discussion about how to reduce imprisonment and focus resources on preventing crime and imprisonment.

With federal prisoners currently numbering more than 200,000 individuals and the federal Bureau of Prisons operating at 37 percent above capacity at the end of 2006,¹ there are practical reasons to re-examine and reform the model that currently provides for prison sentences for the vast majority of people sentenced in the federal system. Despite the admonition in the Sentencing Reform Act that the guidelines provide alternatives to incarceration for non-violent, first-time offenders,² the use of prison rose by twenty percent to 86 percent of all offenders and among drug offenders fully 95 percent serve a sentence of incarceration.³

Support for alternatives to sentences for some offenders is longstanding. For example, the judiciary has long advocated alternatives and judges responding to a survey circulated by the Commission in 2002 underscored that support. According to the Commission: "The majority of district judges urged greater availability of probation with confinement conditions, particularly for drug trafficking offenders (64 percent), and the majority of Circuit judges requested that such

¹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Prisoners in 2006* at 5 (December 2007).

² 28 U.S.C. § 994(j) (2008).

³ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 43, 52 (Nov. 2004) (*Fifteen Years of Guideline Sentencing*).

sentencing options be made either more available or not reduced from their current availability.”⁴ While work to develop effective policy alternatives at the federal level is still in the exploration stages, we encourage the Commission to enact one long-recommended measure to increase the potential for non-prison sentences where appropriate: We ask that the Commission amend Zones A and B of the Sentencing Table, making more low-level offenders eligible for shorter or non-prison sentences. Expansion of the zones both reflects the nuanced flexibility of the Federal Sentencing Guidelines to reflect the nature of the offense and the details that qualify or exacerbate an offender’s conduct and is consistent with the Commission’s duty to provide alternatives to incarceration for non-violent, first-time offenders.

Continuation of Work on Crack Cocaine Sentencing Policy and an Invitation to Amend the Drug Table

FAMM unconditionally supported the Commission’s just decision to amend and then make retroactive the guideline for crack offenses to reduce the sentencing range by two levels and commends the Commission for its continued efforts to address disparity in the crack cocaine sentencing policy as set forth in the Commission’s 2002 and 2007 reports to Congress.

In addition to continued work to redress the lengthy and unjust sentences being served by crack cocaine offenders, we urge the Commission to apply the same two-level adjustment to all drug offenses anchored by the mandatory minimums. In the 2004 report, *Fifteen Years of Guidelines Sentencing*, the Commission acknowledged that “finding the correct quantity ratios among different drugs and the correct thresholds for each penalty level has proven problematic.”⁵ While in that Report, the Commission urges Congress to revise the mandatory minimum penalty statutes, the Commission itself has the mandate to apply the same sound policy to drug offense guidelines.

The Commission’s own history explains why this adjustment is sound policy. The passage of the Anti-Drug Abuse Act of 1986, introducing mandatory minimum sentencing, interrupted the Commission’s development of drug offense guidelines.⁶ The Commission necessarily responded to the “dilemma” posed by Congress’s new legislation.⁷ Striving to keep the guidelines and their more nuanced considerations effective, the Commission correlated the guideline range to the new mandatory minimums, but in all cases indexing the applicable range above the applicable mandatory minimum, thus providing for longer guideline sentences than called for even by the applicable mandatory minimums.⁸ This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug

⁴ *Fifteen Years of Guideline Sentencing*, at 44-45 (Nov. 2004).

⁵ *Id.* at vii (November 2004).

⁶ *Id.* at 47.

⁷ *Id.* at 48 and 53.

⁸ *Id.* at 49.

offenders,⁹ characterized by the Kennedy Commission as “far beyond historical norms.”¹⁰ Because of this grim reality, the Commission has urged Congress to revise mandatory minimums and the guidelines, without avail.¹¹

The problem of disproportionate drug sentencing plagues many drug offenses.¹² The “dramatic increase in time served by federal drug offenders” includes all drug offenders and the Commission admits that “relative harmfulness” of different drugs was not necessarily reflected by the guideline sentences.¹³ The Commission was able to correct two decades of disproportionate sentencing with the crack amendment—it is time to apply the same good judgment to amend the drug offense guidelines that have suffered under the same twenty-year-old rush to policy-setting. Such a move would represent an important first step in what should be a complete overhaul of the drug sentencing guidelines which are a patchwork in need of repair.

There is no sound reason to maintain the guidelines at levels above those required by the drug mandatory minimums. Reducing them would have an immediate and salutary effect on the length of sentences for drug trafficking which have, in the Commission’s words “in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”¹⁴

Safety Valve and Relevant Conduct

In addition to the priorities identified by the Commission and the suggestions outlined above, we encourage the Commission to expand the safety valve provided for in 18 USC § 3553 (f) and reform the relevant conduct standard to prohibit the consideration during sentencing of conduct of which the offender was acquitted.

First, we urge the Commission to expand the safety valve adjustment to *all* offenders who satisfy the five criteria, not just drug defendants, through an amendment to the guidelines. The proposed safety valve expansion would replicate the two-level reduction and go further, encouraging courts to consider lower sentences in cases where true first offenders might benefit from a second chance that includes punishment but does not include incarceration.

⁹ *Id.* at 49, 55 (Figure 2.7), and iv (where the Commission acknowledges that, under the guidelines, sentences have been made “more severe” and lengths of imprisonment have “climbed dramatically”).

¹⁰ Report by the American Bar Assoc.’s Justice Kennedy Comm. 38 (Aug. 2004). The report also shows, by a comparison to states’ guideline systems, that the federal guidelines are unique in accomplishing an *increase* in the severity of sentencing. Thus, the over-incarceration under the federal guidelines is a problem with the administration of the guidelines, not the guidelines as a system. As the states’ guidelines and the 2007 crack adjustment illustrate, this is also a problem that can be fixed. *Id.* at 35.

¹¹ *Fifteen Years of Guideline Sentencing* at vii.

¹² *Id.*

¹³ *Id.*

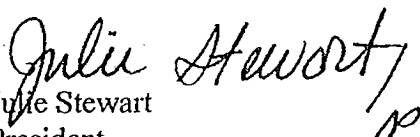
¹⁴ *Id.* at 49.

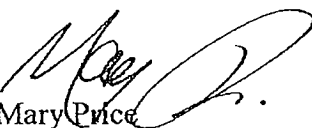
In testimony before the Subcommittee on Crime, Terrorism and Homeland Security on June 26, 2007, the Commission urged Congress to expand the safety valve to benefit more than the drug defendants currently eligible for its relief. This reflected a concern previously expressed by the Commission that first-time, low-level, non-violent defendants suffer unnecessarily harsh sentences. We agree that the safety valve has proven a valuable way to better individualize sentences for first time, non-violent drug defendants by directing courts to use the more nuanced guidelines. We applauded your call for its expansion and we added that message to ours in our own work in Congress. Now, more than a year has passed and it is time to consider prioritizing this expansion as an amendment to the guidelines.

Second, we ask that you consider abolishing consideration of acquitted conduct and reform or eliminate the use of uncharged and dismissed conduct during sentencing, now permitted under the relevant conduct rule. If dismissed conduct is retained, we encourage the Commission to require that it be tested by the beyond a reasonable doubt standard (and if found, weighted differently for sentencing purposes than that conduct that forms the offense of conviction) , and notice of intent to use all relevant conduct is given prior to entry of a guilty plea.

Thank you for considering our comments. We stand ready to assist the Commission in any way we can in these very important matters.

Sincerely,


Julie Stewart
President


Mary Price
Vice President and General Counsel

Cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner Dabney Friedrich
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Kelli H. Ferry
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel



Families Against Mandatory Minimums

F O U N D A T I O N

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

July 25, 2008

Re: 2009 Priorities

Dear Judge Hinojosa:

We write to you on behalf of Families Against Mandatory Minimums (FAMM) to make five recommendations to the Commission for your consideration during the 2009 amendment cycle. We urge you to (1) update your 1991 report to Congress on mandatory minimum sentencing; (2) expand the safety valve provided for in 18 USC § 3553 (f); (3) reform the relevant conduct standard to prohibit the consideration during sentencing of conduct of which the offender was acquitted; (4) expand the Sentencing Table Zones to make more lower-level offenders eligible for shorter sentences; and, (5) apply the 2007 guideline adjustment for crack cocaine to all substance-based offenses.

Update the Mandatory Minimums report

We urge you to update the 1991 Report, "Mandatory Minimum Penalties in the Criminal Justice System." In the seventeen years since the report, the number of mandatory minimums has increased and the prison population has grown dramatically. Seventeen years of practice under the mandatory minimums have produced a wealth of data that the Commission can draw on for evaluation, analysis, and answers to the most pressing questions about mandatory minimums in the federal criminal justice system. At the same time, the environment in which mandatory minimums exist has changed and opposition to these flawed sentencing rules has grown. The Commission has been at the forefront of those critical about mandatory minimums but is by no means alone in its opposition.

There is a very timely reason for you to revisit the report. In January 2009, a new administration and new Congress will return to Washington. The Commission is heard by members of Congress. The 2007 cocaine sentencing report and the sentencing reductions implemented by the Commission for crack cocaine undoubtedly spurred members of Congress to take a fresh look at the issue. Members introduced no fewer than seven bills addressing the crack cocaine sentencing structure in the 110th Congress. You were invited to testify at hearings considering crack cocaine reform legislation in the Senate and the House.

There are signs that members of Congress are looking beyond crack cocaine to the wider issues of incarceration, including mandatory minimums. For example, Sen. Jim Webb (D-Va) chaired Joint Economic Committee hearings in October 2007 and June 2008 on over-

incarceration. Both hearings highlighted, among other issues, the failure of disproportionate sentences and mandatory minimums to reduce the crime rate.

It is an appropriate time to build on the information you presented in your June 26, 2007 testimony to the Subcommittee on Crime, Terrorism, and Homeland Security, revisit the conclusions of the first and only report to date on mandatory minimums, and test how and to what extent your concerns about mandatory minimums expressed in that report remain relevant.

An updated report would allow Congress to truly rely on the Commission, presenting a valuable contribution containing vastly updated information about the state of mandatory minimum sentencing and its impact on federal sentencing.

Apply the Safety Valve to All Offenders

We urge the Commission to expand the safety valve adjustment to *all* offenders who satisfy the five criteria, not just drug defendants. In testimony before the Subcommittee on Crime, Terrorism and Homeland Security on June 26, 2007, the Commission urged Congress to expand the safety valve to benefit more than the drug defendants currently eligible for its relief. This reflected a concern previously expressed by the Commission that first-time, low-level, non-violent defendants suffer unnecessarily harsh sentences. We agree that the safety valve has proven a valuable way to better individualize sentences for first time, non-violent drug defendants by directing courts to use the more nuanced guidelines. We applauded your call for its expansion and we added that message to ours in our own work in Congress. Now, more than a year has passed and it is time to consider prioritizing this expansion as an amendment to the guidelines.

The statutory safety valve obliges courts to impose a more flexible guideline sentence in place of a mandatory minimum upon a judicial finding that the conditions enunciated in 18 U.S.C. § 3553(f) are satisfied. The Commission amended U.S.S.G. § 2D1.1 (b) (6) in 1995 to include a two-level reduction for defendants who meet the criteria of § 3553(f), and in 2002 clarified that the reduction should be applied without respect to whether the defendant was subject to a mandatory minimum. Since 2002, the guideline safety valve has benefited over 13,300 defendants, not subject to mandatory minimums, who received the benefit of a two-level guideline reduction. Fully 13.9 percent of all drug defendants, 3,321 defendants, in 2007 had their sentences lowered. This reduction has made a genuine difference, lessening sentences for the least culpable, least serious offenders.

The proposed safety valve would replicate the two-level reduction and go further, encouraging courts to consider lower sentences in cases where true first offenders might benefit from a second chance that includes punishment but not include incarceration. Such a guideline is modeled in the 2008 letter from the Practitioners' Advisory Group at pages 5-6. We heartily endorse this proposal and encourage you to place it on the agenda for the 2009 amendment cycle.

Reform Relevant Conduct Considerations

Explaining to a family member that the relevant conduct rule has increased a loved one's sentence for uncharged, dismissed, or acquitted conduct is one of the most difficult things we do

at FAMM. People are incredulous that our system of justice permits this. It should not. The Commission should abolish consideration of acquitted conduct and reform the use of uncharged and dismissed conduct during sentencing, now permitted under the relevant conduct rule.¹ Under this practice, sentences are unfairly lengthened based on conduct that was thoughtfully considered and rejected at trial, never charged, or dismissed and thus not the subject of guilt phase advocacy. Such conduct is revived for consideration at sentencing under the less exacting and less reliable preponderance of the evidence standard. The consideration of acquitted conduct places a disproportionate amount of power in the hands of prosecutors.² In the drug guidelines, relevant conduct is responsible for increasing, sometimes very dramatically, the single most important sentencing factor, drug quantity, to the minimization of other, more accurate measures of culpability. The Commission has been critical of the role drug quantity plays in determining sentence length and identified concerns that quantity is a poor, incomplete measure of culpability.³

We strongly encourage the Commission to reform the rule such that use of acquitted and uncharted conduct is abolished, and dismissed conduct, if retained, is tested by the beyond a reasonable doubt standard (and if found, weighted differently for sentencing purposes than that conduct that forms the offense of conviction), and notice of intent to use all relevant conduct is given prior to entry of a guilty plea.

Expand the Zones to enhance alternatives to incarceration

We applaud the Commission for its initiative in holding the Alternatives to Incarceration symposium. It was a tremendous contribution to the discussion about how to reduce imprisonment and focus resources on preventing crime and recidivism. While the work to construct effective alternatives at the federal level is in the early stages, we encourage the Commission to implement one long-recommended and straightforward measure to increase the potential for non-prison sentences. Increasing the reach of Zones A and B of the Sentencing Table will make more low-level offenders eligible for shorter or non-prison sentences. Unlike the binary workings of mandatory minimum sentencing, the guidelines offer a more nuanced approach to every offender, responsive to the nature of the offense and the details that qualify or exacerbate that offender's conduct. A simple expansion of the zones is in keeping with this nuanced approach and with the Commission's duty to provide alternatives to incarceration for non-violent, first-time offenders.⁴ An expansion of the Zones would simply allow judge's access to options that they can use to impose more just and proportionate sentence for the many offenders whose conduct and personal characteristics militate for less incarceration.

Apply the Crack Guideline Adjustment to All Substance-Based Offenses

On May 1, 2007, the Commission amended the guideline for crack offenses to reduce the sentencing range by two levels. This courageous move followed a thorough investigation of the

¹ United States Sentencing Commission, *Guidelines Manual*, § 1B1.3 (Nov. 2007).

² Rep. Artur Davis and Judge Hinojosa, Statements before House Judiciary Comm., Subcomm. on Crime Terrorism and Homeland Security, June 26, 2007.

³ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 50-51 (November 2004).

⁴ 28 U.S.C. § 994(j) (2008).

disparity between crack and powder cocaine sentencing. We encourage the Commission to apply the same adjustment to all drug offenses.

The Commission's own history explains why this adjustment is sound policy. The passage of the Anti-Drug Abuse Act of 1986, introducing mandatory minimum sentencing, interrupted the Commission's development of drug offense guidelines.⁵ The Commission necessarily responded to the "dilemma" posed by Congress's new legislation.⁶ Striving to keep the guidelines and their more nuanced considerations effective, the Commission correlated the guideline range to the new mandatory minimums, but in all cases indexing the applicable range above the applicable mandatory minimum, thus providing for longer guideline sentences than called for even by the applicable mandatory minimums.⁷ This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug offenders,⁸ characterized by the Kennedy Commission as "far beyond historical norms."⁹ Because of this grim reality, the Commission has urged Congress to revise mandatory minimums and the guidelines, without avail.¹⁰

Admirably, the Commission acted on its own to redress the lengthy and unjust sentences being served by crack offenders, calling the problem "urgent and compelling."¹¹ The Commission correlated the guideline to encompass the mandatory minimum at its high end, instead of its low end—an enormously beneficial change that affects 70 percent of crack cocaine cases sentenced in federal courts and reduces sentences by an average of 15 months.

However, the Commission has also acknowledged that the crack-powder disparity is not the only example of disproportionate drug sentencing—the problem plagues many drug offenses.¹² The "dramatic increase in time served by federal drug offenders" includes all drug offenders and the Commission admits that "relative harmfulness" of different drugs was not necessarily reflected by the guideline sentences.¹³ The Commission was able to correct two decades of disproportionate sentencing with the crack amendment—it is time to apply the same good judgment to amend the drug offense guidelines that have suffered under the same twenty-year-old rush to policy-setting.

There is no sound reason to maintain the guidelines at levels above those required by the drug mandatory minimums and reducing them would have an immediate and salutary effect on the length of sentences for drug trafficking which have, in the Commission's words "in

⁵ *Fifteen Years of Guideline Sentencing* at 47.

⁶ *Id.* at 48 and 53.

⁷ *Id.* at 49.

⁸ *Id.* at 49, 55 (Figure 2.7), and iv (where the Commission acknowledges that, under the guidelines, sentences have been made "more severe" and lengths of imprisonment have "climbed dramatically").

⁹ Report by the American Bar Assoc.'s Justice Kennedy Comm. 38 (Aug. 2004). The report also shows, by a comparison to states' guideline systems, that the federal guidelines are unique in accomplishing an *increase* in the severity of sentencing. Thus, the over-incarceration under the federal guidelines is a problem with the administration of the guidelines, not the guidelines as a system. As the states' guidelines and the 2007 crack adjustment illustrate, this is also a problem that can be fixed. *Id.* at 35.

¹⁰ *Fifteen Years of Guideline Sentencing* at vii.

¹¹ United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* at 9 (May 2007).

¹² *Fifteen Years of Guideline Sentencing* at vii.

¹³ *Id.*

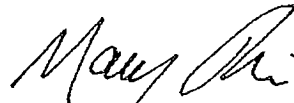
combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."¹⁴

We appreciate your consideration of these recommendations.

Sincerely,



Julie Stewart
President



Mary Price
Vice President and General Counsel

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner Dabney Friedrich
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Kelli H. Ferry
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel

¹⁴ *Fifteen Years of Guideline Sentencing* at 49.