

August 25, 2008

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

Dear Judge Hinojosa,

I am writing to you on behalf of The Sentencing Project to offer recommendations in regard to the Commission's priorities for the 2009 amendment cycle. We appreciate this opportunity to submit comments for the Commission's consideration.

Over the past year, the Commission has demonstrated strong leadership in enacting reforms for sentencing in crack cocaine cases. The Guideline adjustments have been among the most significant changes in sentencing policy in recent years and serve as a model for responsible policymaking. We hope that the Commission will continue to play a constructive role in this area, as well as others, as Congress considers a range of reform proposals to the statutory penalties.

With a new administration and Congress taking office in 2009, now is an important moment for consideration and review of federal sentencing policy. In that regard, we offer recommendations that we believe would enlighten the policy discussion regarding federal sentencing and contribute to an evidence-based and fair system. The proposals are as follows:

Study the Impact of Mandatory Minimum Sentencing

Although mandatory sentencing provisions have historically been a part of American criminal sentencing, the past three decades have witnessed an exponential increase in their use. Beginning with the Anti-Drug Abuse Act of 1986, mandatory minimums have become a high profile legislative tool at the federal level, most often targeting narcotics, firearms, and gang offenses. During this period, mandatory minimums have become an increasingly polarizing topic, receiving an unparalleled level of political and media attention. Supporters of mandatory sentencing laws, such as the Department of Justice, argue they increase public safety by "deter[ring] certain types of criminal behavior . . . incapacitat[ing] dangerous offenders for long periods of time," and "provid[ing] an indispensable tool for prosecutors" to compel defendants to cooperate in ongoing criminal investigations. Opponents argue that mandatory sentencing has had a questionable impact on crime, while resulting in disproportionately severe penalties, exacerbating racial disparities, and jeopardizing fair sentencing outcomes. United States

Supreme Court Justice Anthony M. Kennedy observed, “[I] can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”

These positions are emblematic of a profound divergence of opinion as to the efficacy of mandatory minimum sentencing. Unfortunately, despite sparking widespread disagreement during this period, the actual impact of federal mandatory minimum sentencing has not been subject to sustained analysis. Since the Commission issued its report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, in 1991, there have been a number of developments that warrant an update of that work.

- In 1991, mandatory sentencing was still a relatively new phenomenon in the federal system. We now have more than two decades worth of data to consider, which can provide a much more comprehensive understanding of how mandatory minimums have affected federal sentencing.
- The introduction of the “safety valve” in 1994 changed how mandatory minimums apply to low-level offenses. The effectiveness of this policy at re-calibrating mandatory sentences to apply to more serious offenses should be analyzed.
- Members of Congress continue to introduce new mandatory sentencing legislation every year and a host of such policies have become law since 1991.

Considering the wide use of mandatory minimums, it is critical that the Commission undertake a comprehensive review of how these policies have influenced the federal justice system. A review is particularly important as Congress considers policy on crack cocaine and other sentencing issues. In urging the Commission to address this informational void, we note four specific questions deserving of attention.

What effect do mandatory minimum sentences have on reducing crime?

- There is widespread disagreement as to the efficacy of mandatory sentencing in reducing crime. Some state-level analyses raise doubts about the utility of mandatory sentencing, but Department of Justice officials argue in support of them as a critical instrument in reducing crime. The Commission can provide valuable guidance in this debate by analyzing more than two decades of federal sentencing patterns to ascertain what impact, if any, mandatory sentencing has had on crime.

How have mandatory minimums affected criminal court case processing dynamics?

- While proponents of mandatory sentences view them as a valuable tool in obtaining cooperation from defendants as well as eliciting favorable plea agreements, opponents question whether their use has unfairly concentrated discretion in the office of the prosecutor at the expense of the defendant.

How do mandatory minimums interact with the Guidelines?

- Longer mandatory minimum sentences have resulted in the inflation of Guideline ranges to maintain consistency, leading to concern about how this adjustment influences the statutory goals of the Guidelines such as proportionality in punishment and the elimination of disparity in sentencing.

To what degree have mandatory minimums had a racially disparate impact?

- The Commission's report, *Fifteen Years of Guidelines Sentencing*, noted that mandatory sentences, such as those associated with powder and crack cocaine offenses, are likely responsible for some degree of racially disparate outcomes in federal sentences. The issue of mandatory sentencing was beyond the purview of the 1991 report, but a focused analysis on this critical issue would be invaluable to policymakers.

Expand Alternatives to Incarceration in Federal Guidelines

The Sentencing Project strongly supports the Commission's consideration of alternatives to incarceration during its upcoming amendment cycle. As highlighted at the Commission's July 2008 symposium, *Crime and Punishment in the United States: Alternatives to Incarceration*, states are taking bold steps to reduce prison populations by expanding the use of alternative sentences that divert offenders from incarceration. We urge the Commission to follow suit and expand the federal sentencing guideline ranges for nonviolent offenses to include non-imprisonment sentencing options in a broader range of cases.

Over 200,000 people are incarcerated under the jurisdiction of the Federal Bureau of Prisons, making it the largest prison system in the country. The population doubled in the period 1995-2005, largely due to a jump in incarcerations for drug and public order offenses. Violent offenses were responsible for less than 10% of the increase in the prison population over this period. These high rates of incarceration for nonviolent offenses, and the significant cost associated with imprisonment, highlight the need to reduce the federal prison population by diverting individuals serving sentences for these low-level offenses from prison.

The public supports such action. In 2002, a poll conducted by Peter D. Hart Research Associates for the Open Society Institute, entitled *Changing Public Attitudes toward the Criminal Justice System*, found strong support for alternatives to incarceration. Over 70% of respondents favored a policy that would mandate drug treatment and community service rather than prison for people found guilty of selling small amounts of drugs. More broadly, three-quarters of all adults favored sentencing nonviolent offenders to supervised community service or probation instead of imprisonment, including 41% who strongly favored this proposal.

As the body responsible for setting the federal sentencing guidelines to advise judges on the appropriate sentencing range for all federal offenses, the Commission's consideration and efforts to expand alternative sentencing options would have a significant impact on the ballooning federal prison population. To accomplish this objective, the Commission may consider creating a new criminal history score that denotes the lowest level defendants, who are likely to be the most appropriate candidates for diversion from incarceration. The Commission should also consider shifting the sentencing grid to allow for alternative sentences for the lowest-level offenses.

Explore the option of producing racial impact statements for proposed guideline changes

Concerns about unwarranted racial disparity in the criminal justice system have been widespread, as evidenced most notably in the policy debate regarding sentencing for crack cocaine offenses. While there has been broad discussion about the racial dynamics of crack cocaine policy in recent years, there was little analysis about these issues when the laws were adopted in the 1980s. Responses could have been developed that would not have exacerbated unwarranted racial disparities if policymakers had examined available data and anticipated the likely effect of these changes in the law.

There are now mechanisms in place in several states that can serve as models for federal policy in this area. In 2008, three states adopted or implemented processes by which policymakers can assess the racial and ethnic impact of proposed law changes prior to adoption. These states are:

- *Minnesota* – The Minnesota Sentencing Guidelines Commission adopted an internal policy to conduct racial impact analyses of proposed sentencing changes, and to assess the degree of change in sentence length for racial and ethnic groups. The Commission notes that “[t]he agency does not intend to comment on whether or not a particular bill should be enacted. Rather, it is setting out facts that may be useful to the Legislature, whose members frequently express concerns about the disparity between the number of minorities in our population and the number in our prisons.”
- *Iowa* -- In April, Governor Culver signed legislation that will require that the legislature receive a racial and ethnic impact statement, along with a fiscal and population assessment, for proposed sentencing changes.
- *Connecticut* – In June, Governor Rell approved a law that will grant committee chairs the option of requesting a racial impact statement prior to consideration of sentencing policy changes by a full committee.

In addition to these newly-enacted policies, the concept of racial impact statements has received significant support from the legal community. In 2004, the American Bar Association's Justice Kennedy Commission recommended that legislative bodies “conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of existing

statutes and proposed legislation.” In 2007, as part of its revision to the Model Penal Code, the American Law Institute (ALI) called for sentencing commissions to prepare projections to quantify “demographic patterns,” along with correctional resource projections. The ALI noted that “[t]he provision treats numerical disparities in punishment as an important societal cost that must be considered along with other factors when the existing sentencing structure is assessed, or when changes within the system are contemplated.”

In order to aid policymakers in considering the racial and ethnic impact of proposed sentencing changes, the Commission should review existing mechanisms in the states and assess the feasibility and utility of incorporating such analyses into the federal system. Such an assessment would include a review of available data by race and ethnicity, the range of circumstances under which a racial/ethnic impact statement might be beneficial, the process by which such statements could be produced, and the ability of existing software to produce such analyses. A Commission review could then make a recommendation regarding whether such analyses would be a useful tool in federal policymaking and if so, the means by which this could be accomplished.

Thank you for the opportunity to provide these recommendations for your consideration. We would be pleased to elaborate on any of these issues if helpful.

Sincerely,



Marc Maurer

cc: Hon. Ruben Castillo, Vice Chair
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Commissioner Michael E. Horowitz
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