



Families Against Mandatory Minimums

F O U N D A T I O N

Statement of
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Before the
United States Sentencing Commission

Public hearing on
Proposed Guideline Amendments
March 18, 1997

Mr. Chairman and Distinguished Members of the Commission:

Thank you for the opportunity to address the Commission on this year's proposed guideline amendments. FAMM hopes that the Commission will continue to foster annual progress in the development of the Guidelines and resist proposals to decrease the frequency of the amendment process.

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.

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 Columbia 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.

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.