



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

August 18, 2009

Re: 2010 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, including a report on the operation of the “Safety Valve”; (2) expand the Safety Valve to other than drug offenses; (3) correct the guidelines for all substance-based offenses consistent with the 2007 guideline adjustment for crack cocaine; (4) reform the relevant conduct standard to prohibit the consideration during sentencing of conduct of which the offender was acquitted; and (5) use statutory authority to amend sentencing guidelines that result in unduly long sentences.

(1) Update the “Mandatory Minimum Penalties” Report to Congress

We endorse your intention to study and perhaps report to Congress on statutory mandatory minimum penalties, including a “safety valve” review. We once again urge you to update the 1991 Report, “Mandatory Minimum Penalties in the Criminal Justice System.” In the eighteen years since the report, the number of mandatory minimums has increased to 171 and the prison population has grown dramatically. More than two decades 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 are very timely reasons for you to revisit the report. The Department of Justice is looking at mandatory minimum sentencing in its review of federal sentencing and corrections policy. Attorney General Eric Holder has pointed to that review in public speeches, and stated his opinion recently that “[t]he desire to have an almost mechanical system of sentencing has led us away from individualized, fact-based determinations that I believe, within reason, should be

our goal.”¹ Two bills in Congress address the issue, including H.R. 3327, the Ramos-Compean Justice Act of 2009, named after the former border agents subjected to ten-year mandatory minimum sentences under 18 U.S.C. § 924(c). H.R. 3327 would permit the judge to waive the mandatory minimum in cases where that sentence does not comply with 18 U.S.C. § 3553(a). Meanwhile, the blue ribbon commission proposed by Sen. Jim Webb in S. 714, the National Criminal Justice Commission Act of 2009, would be well served by a comprehensive, updated Commission report on mandatory minimums.

It is an appropriate time to build on the information you presented in your July 14, 2009 submission to the Subcommittee on Crime, Terrorism, and Homeland Security, “Overview of Statutory Mandatory Minimum Sentencing,” revisit and update the conclusions of the first and only report to date on mandatory minimums from 1991, and test how and to what extent your concerns about mandatory minimums expressed in that report remain relevant.

In 2010 the Commission should also produce a 15th anniversary report on the statutory “safety valve,” 18 U.S.C. § 3553(f), and its guideline counterpart, USSG § 5C1.2. This year, the Commission investigated the interplay of safety valve eligibility and criminal history in its report entitled “Impact of Prior Minor Offenses on Eligibility for the Safety Valve.” However, the Commission has never issued a comprehensive report on the application of safety valves. The 15th anniversary of their creation is a fitting time to review their impact on federal sentencing.

The report could include, *inter alia*, statistical and data analysis of how often courts have applied the safety valves over the last 15 years, including a breakdown of that data for each district and circuit; the average lengths of sentence reductions (both below the calculated guidelines range and below the mandatory minimum) resulting from application of the safety valves; how safety valve application has, if at all, created bed space or cost savings in the federal prison system; and judicial, prosecutor, and defense community attitudes toward the safety valves. The Commission should also identify any shortcomings of the current safety valves and provide suggestions for improving or expanding them. For example, the current safety valves – both in the U.S. Code and in the guidelines – are limited to certain drug offenses and do not apply to those sentenced under other mandatory minimum statutes or guidelines provisions.

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,

¹ Attorney General Holder, Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium, Rethinking Federal Sentencing Policy: 25th Anniversary of the Sentencing Reform Act,” (June 24, 2009), available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-0906242.html>.

Terrorism and Homeland Security on June 26, 2007, the Commission urged Congress to expand the statutory 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.

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 16,600 defendants, not subject to mandatory minimums, who received the benefit of a two-level guideline reduction. Fully 13.9 percent of all drug defendants, 3,329 defendants, in 2008 had their sentences lowered. This reduction has made a genuine difference, lessening sentences for the least culpable, least serious offenders.

The proposed guideline 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 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 2010 amendment cycle.

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 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.² The Commission necessarily responded to the "dilemma" posed by Congress's new legislation.³ Striving to keep the

² U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING 47 (Nov. 2004).

³ *Id.* at 48 and 53.

guidelines and their more nuanced considerations effective, the Commission correlated the guideline range to the new mandatory minimums, but in all cases indexed the applicable range above the applicable mandatory minimum, thus providing for longer guideline sentences than called for even by the applicable mandatory minimums.⁴ This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug offenders,⁵ characterized by the Kennedy Commission as “far beyond historical norms.”⁶ Because of this grim reality, the Commission has urged Congress to revise mandatory minimums and the guidelines, without avail.⁷

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.”⁸ The Commission correlated the guideline to encompass the mandatory minimum at its high end, instead of its low end—an enormously beneficial change.

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.⁹ 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.¹⁰ 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

⁴ *Id.* at 49.

⁵ *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”).

⁶ 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.

⁷ FIFTEEN YEARS OF GUIDELINE SENTENCING at vii.

⁸ UNITED STATES SENTENCING COMMISSION, COCAINE AND FEDERAL SENTENCING POLICY 9 (May 2007).

⁹ FIFTEEN YEARS OF GUIDELINE SENTENCING at vii.

¹⁰ *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.”¹¹

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.¹² 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.¹³ 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.¹⁴

We strongly encourage the Commission to reform the rule such that use of acquitted and uncharged 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.

Use Statutory Authority to Amend the Sentencing Guidelines

The guidelines are considered by many to be too complex, they are laden with directives, frequently result in unduly long sentences, and lack internal coherence. They forbid or

¹¹ FIFTEEN YEARS OF GUIDELINE SENTENCING at 49.

¹² U. S. SENTENCING COMMISSION, GUIDELINES MANUAL, § 1B1.3 (Nov. 2008).

¹³ *Mandatory Minimum Sentencing Laws: The Issues*, Hearing before the House Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary, 110th Cong. 155 (June 26, 2007), available at <http://judiciary.house.gov/hearings/printers/110th/36343.PDF>.

¹⁴ FIFTEEN YEARS OF GUIDELINE SENTENCING at 50-51.

discourage consideration of factors that § 3553(a) mandates, and require the consideration of acquitted and discharged conduct.

The Sentencing Commission could do a great deal to fix some of its guidelines, particularly those that are criticized for unnecessary harshness and those that routinely result in sentences that are too long. The Sentencing Commission would not need to go to Congress for yet another directive or legislation. Rather, it could look to the SRA for immediate authority. There are several directives embedded in the criminal code by the SRA that have lain dormant or been underutilized. These directives could arm the Sentencing Commission with enough authority to address some of the worst problems with guideline sentences.

For example, 28 U.S.C. § 994(g) would provide support to reduce sentences. This law tells the Sentencing Commission to consider penal and correctional facility populations when drafting or amending guidelines. In particular, it commands that “the sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.”¹⁵ The federal prison population is currently 37 percent over capacity,¹⁶ and the Federal Bureau of Prisons struggles to maintain safety for prisoners and guards in such adverse conditions.

Taken together with another unrealized directive from the SRA found at 28 U.S.C. § 994(j), the Commission could begin now to reduce or eliminate recommended prison sentences for the least culpable offenders. It provides that “[t]he Commission shall insure that the guidelines reflect the appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” Under the guideline regime, however, “the percentage of offenders receiving simple probation has been cut in half under the guidelines.”¹⁷ Of the 75,657 people sentenced in federal court in 2008, nearly 90 percent were sentenced to imprisonment (86.4 percent to prison time only).¹⁸

¹⁵ 28 U.S.C. § 994(g) (2008).

¹⁶ *Hearing on Federal Bureau of Prisons Oversight, Before the Subcomm. on Crime, Terrorism and Homeland Security of the U.S. Comm. On the Judiciary*, 111th Cong. (July 21, 2009) (statement of Harley G. Lappin, Director, Federal Bureau of Prisons 2), available at <http://judiciary.house.gov/hearings/pdf/Lappin090721.pdf>.

¹⁷ FIFTEEN YEARS OF GUIDELINE SENTENCING at 42.

¹⁸ U.S. SENTENCING COMMISSION, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 28, Table 12.

Of all offenders sentenced in 2008, 28,158 had little or no criminal history.¹⁹ In 2008, of the 24,321 drug offenders, 52 percent were in Criminal History Category I.²⁰ Of those 24,321 offenders, 82.8 percent had no weapons involvement in their offense,²¹ and only 5.7 percent had an aggravating role adjustment.²²

These numbers tell us that over half of all drug offenders are first-time offenders, and very few drug offenders used or had weapons. Using one subset of drug cases, those for crack and powder cocaine, the Sentencing Commission has demonstrated that the overwhelming majority of defendants sentenced in 2005 were couriers, street level dealers, and loaders: 53.1 percent of powder cases, and 61.5 percent of crack cases.²³ Nonetheless, the vast majority of crack and powder cocaine defendants are subject to sentences of imprisonment beginning at five years and concentrate at the five and ten year levels.²⁴

While there might be principled disagreement about the definition of “serious” in the directive at 28 U.S.C. § 994(j), the Commission has made clear that, at least for crack cocaine offenses, the crack guideline overstates the relative seriousness of the offense.²⁵ The same is undoubtedly true for other guideline sentences as well, both for drugs as well as for a host of non-violent offenses, including many white collar offenses.

There is no provision for alternative sentencing in the guidelines, despite the statutory directive. The Sentencing Commission could help determine which defendants might be considered “first offenders who have not been convicted for a crime of violence or otherwise serious offense” so that the Commission can follow the directive in § 994(j) to “insure that the guidelines reflect the appropriateness of imposing a sentence other than imprisonment” in those cases.

¹⁹ *Id.* at 30, Table 14.

²⁰ *Id.* at 104, Table 37.

²¹ *Id.* at 106, Table 39.

²² *Id.* at 197, Table 40.

²³ U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY 20-21, Figures 2-5 and 2-6 (May 2007).

²⁴ *Id.* at 42, Figure 2-10.

²⁵ *Id.* at 8.

In the near term, the Commission could 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, keeping faith with 18 U.S.C. § 994(j). 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

Another underutilized directive the Commission can resort to is 28 U.S.C. § 994(o), which provides in part that “[T]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provision of this section.” The guidelines have been amended more than 725 times, but only a scant handful of those amendments have lowered guideline sentences.²⁶ Complaints about judicial departures or variances from the calculated guidelines – particularly variances that address guideline sentences that are considered unduly long in light of the considerations and mandate of § 3553(a) – miss the point. As the opinion in *Rita v. United States*, 551 U.S. 338 (2007), pointed out, the sentencing guidelines were to be treated as a kind of feedback system. Instead, for many years, the Department and some in Congress sought to hamper this exercise of judicial opinion, claiming that judges were engaging in exercises of undue leniency by abusing their departure authority. Instead, these policy setting bodies – and the Commission itself – should view frequent or widespread guideline departures and variances as indicators that the guideline sentences themselves might be inappropriate and in need of reform.

Feedback from the courts can inform Congress and the Commission when a particular guideline results in sentences that are too severe for too many defendants who are subject to it. Were the Commission to respond to this feedback by using it to identify, investigate and adjust problematic guidelines, it is likely that compliance with the guidelines would increase.

We appreciate your consideration of these recommendations.

²⁶ See Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker: Why and How the Guidelines Do Not Comply with 3553(a)*, 30 CHAMPION 32, n. 39 (Sept./Oct. 2006).

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Sincerely,



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