

# FAMMMGram

*Sentences that fit. Justice that works.*

## THE ROAD AHEAD

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**AFTER MANY YEARS** of stalling on crack cocaine sentencing reform, Congress is finally moving legislation that would provide some relief. On March 17, the U.S. Senate unanimously

approved a bill to reduce the disparity between crack and powder cocaine sentences. It also eliminates the five-year mandatory prison sentence for simple possession of crack. Now the House of Representatives must vote on the bill and the President must sign it before it is law.

The overwhelming, bipartisan vote in the Senate was welcomed by some longtime sentencing reform advocates who have encountered stiff resistance in their lengthy and arduous journey to fix the crack disparity. After all, Families Against Mandatory Minimums (FAMM) joined the fight a full 19 years ago.

The bill doesn't go far enough – it doesn't help those currently serving crack sentences – but it is a start. The specifics of the legislation are important: approximately 3,000 individuals (and their families) would benefit from shorter and more rational sentences every year if the bill becomes law.

*What progress on crack reform means for broader sentencing changes*

Yet the magnitude of an ultimate victory in this battle could be far greater than simply a change in crack penalties. Indeed, the factors leading to this bill suggest bigger sentencing wins could be on the horizon.

### What changed?

First, reason and science prevailed over emotion and politics. Scientists and other experts have testified consistently that crack cocaine is essentially the same drug as powder cocaine. It took a while, but this message finally got through to members of the U.S. Senate. Whatever misconceptions and fears existed about crack 24 years ago, when the disparity was created, were erased over time by research and an insurmountable body of evidence. It might take time, but the facts can prevail.

Second, FAMM supporters never let their senators forget how important crack cocaine reform is. Thousands of FAMM members tirelessly wrote their federal senators and representatives. Some FAMM members traveled across the

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**NEVER UNDERESTIMATE THE MEMBERSHIP OF FAMM.** That's what I told myself recently before sending an email to our national membership list about the sentence handed down to a woman in Nevada named Michele Taylor. Her offense was making a 13-year-old boy touch her breast over her clothing and asking him to have sex with her. No sex occurred but this conduct is a crime in every state, as well it should be. Why did I write to our membership? Because the sentence Ms. Taylor received was outrageous. Nevada law imposes a mandatory minimum sentence of life in prison (with parole eligibility after 10 years) for lewdness with a minor under age 14. Because the prosecutor offered no plea and the jury found her guilty, Michele was sentenced to spend the rest of her life in prison.

We haven't talked much about sex crimes at FAMM, at least not publicly. So it was risky sending that email to you. We all have sons, daughters, nieces or nephews and we recoil at the thought of aiding someone who harms a child. But FAMM has never aided any of the offenders whose cases we learn about. FAMM's job is to ensure that those who cross the legal line are punished fairly – that is, with a penalty or sentence sufficient but not greater than necessary to do justice. Unfortunately, that rarely happens in cases that carry mandatory penalties. And it is not what happened here.

What is a just sentence? This question has been the subject of social science studies and scholarly inquiry since civil society made the decision to punish wrongdoing. I don't know the answer but I do know this: we know injustice when we see it. I didn't need to look at regression models and law review articles to know deep in my bones that Michelle Taylor's punishment was wrong. Apparently, you didn't either.

The responses I got to the email about Michelle's case were, to a person, supportive. "How can I help?"

"Thank you, FAMM, for highlighting the plight of unfair sentences for different crimes"; "Keep up the good fight"; "I had given up on all organizations until I saw the new approach you have taken, I believe you're on the right track now."

I think we're on the right track too. It doesn't matter if you are rich or poor, black or white, or if your offense is selling crack or laundering money or asking a 13-year old to touch your breast. The punishment must fit the crime and the offender. And when it doesn't, we all know it. It violates our common sense. And that's what I love about FAMM members – your internal compass for injustice is strong and true. Thank you for following it to wherever sentencing injustice occurs.

My best,



*Julie Stewart*



Since 1991

Mission: FAMM is the national voice for fair and proportionate sentencing laws. We shine a light on the human face of sentencing, advocate for state and federal sentencing reform, and mobilize thousands of individuals and families whose lives are adversely affected by unjust sentences.

The *FAMM*Gram is published three times a year.

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## FAMM in the news

### The Star-Ledger

January 21, 2010

#### New state law reduces drug penalties in school zones

“Mandatory minimums in New Jersey have filled our prisons with drug addicts instead of drug kingpins, caused the erosion of faith in the fairness of the criminal justice system because of severe racial disparities, and wasted millions without protecting public safety.”

—Deborah Fleischaker,  
FAMM’s director of state legislative affairs

### The Boston Globe

January 1, 2010

#### Editorial: Allow parole for drug offenders

Mandatory minimum sentences for drug offenses didn’t turn out as advertised in the 1970s and 1980s when many states, including Massachusetts, adopted them. Substance abuse continues to spread, prisons are crammed, and recidivism rates remain high, especially among offenders who complete their sentences with no post-release supervision. Surely state lawmakers can protect the public while saving the public’s money through shorter sentences and better treatment options for nonviolent drug offenders. Senate President Therese Murray provided steady leadership on the issue. But supporters of the bill, including Families Against Mandatory Minimums, are still waiting to see if House leaders will do their part.

### The New York Times

March 11, 2010

#### A vote to change some cocaine sentences

Julie Stewart, the president of Families Against Mandatory Minimums, said there was no scientific basis for the discrepancy in sentences under either the original law or the Senate legislation. She added, however, “If this imperfect bill becomes law, it will provide some long-overdue relief to thousands of defendants sentenced each year.”

### The Washington Post

March 13, 2010

#### Senate bill would reduce sentencing disparities in crack, powder cocaine cases

Julie Stewart, president of Families Against Mandatory Minimums, said she had advocated for 19 years for the elimination of the disparity and was “disappointed” with the Senate action. Still, Stewart said, about 3,000 people could benefit from the measure as it is written.

### San Francisco Chronicle

March 21, 2010

#### Crack and powder should not be black and white

Families Against Mandatory Minimums began fighting the bill 19 years ago. Stewart has seen seven Congresses, 10 congressional hearings, three Sentencing Commission reports, and 75,000 defendants sentenced. Lawmakers from both parties have recognized the fundamental unfairness of the law. Yet it has taken decades to win a floor vote to address the disparity, and then only part way.

### OCALA.COM

April 25, 2010

#### Given Fla.’s budget, some look to ease sentencing laws

“We’ve identified Florida as being particularly problematic because of the length of the drug mandatory minimums. We also think some really good stuff is happening in Florida,” said Deborah Fleischaker of the Washington, D.C.-based group Families Against Mandatory Minimums, which has spearheaded a lobbying effort in Florida. “People are starting to pay attention because the budget is a mess.” **FG**

# A CLOSER LOOK AT THE SENATE CRACK REFORM LEGISLATION, S. 1789

## What is the status of S. 1789, the Fair Sentencing Act of 2010?

S. 1789, the Fair Sentencing Act of 2010, introduced by Rep. Richard Durbin (D-Ill.), passed the Senate on March 17. *The bill is not yet law.* All bills must pass BOTH the House and the Senate before being sent to the President for his consideration. S. 1789 is awaiting consideration in the House.

## Would S. 1789 benefit people who are already in prison?

No. None of the provisions in S. 1789 would apply to people who are already in prison (in other words, the reforms are not “retroactive”).

## Why does FAMM support S. 1789 if it does not eliminate the crack disparity or help people in prison?

Before the bill was voted out of the Senate, it became clear to us that nothing short of the Senate compromise bill, S. 1789, would move forward. FAMM believes that the only just solution is complete elimination of all mandatory minimums. But we were confronted with a choice: support the only bill to lower crack penalties that the Senate would pass – a bill that will help over 2,900 people each year – or work against the bill and help no one.

Knowing the hardships so many members of FAMM and their families have endured because of the 100:1 disparity, we felt compelled to support the compromise and work to prevent others from the same suffering.



LAW	Five-Year mandatory minimum	10-Year mandatory minimum	Simple possession of five grams of crack
Current law	Five grams crack 500 grams cocaine (100:1 ratio)	50 grams crack 5,000 grams cocaine (100:1 ratio)	Five-year mandatory minimum sentence
S. 1789	28 grams crack 500 grams cocaine (18:1 ratio)	280 grams crack 5,000 grams cocaine (18:1 ratio)	No mandatory minimum

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country to meet their elected representatives in person at lobby days on Capitol Hill. Whenever FAMM asked, our supporters responded quickly and ably.

As so often happens with real reform, this bill is a compromise. To ensure Senate approval, the crack and powder cocaine “ratio” was changed from 1:1 to 18:1. Without this compromise, crack reform would be dead again, since nothing else would pass the Senate.

Finally, this bill demonstrated the power of our members’ personal stories. Dick Durbin (D-Ill.) was the lead sponsor of the crack reform bill. He believed in fixing the disparity. But it is hard to deny that Sen. Durbin grew from an advocate into a tireless champion after hearing the heart-felt testimony of Cedric Parker, FAMM

member and brother of federal prisoner Eugenia Jennings at a Senate hearing in 2009. For years, countless FAMM members have shared their stories of heartbreak and perseverance that enable FAMM to make a more compelling argument for reform.

## What does progress on the crack bill tell us about prospects for further reforms?

As Bob Dylan sang, “You don’t need a weatherman to know which way the wind blows.” Everyone involved in the fight for sentencing reform senses that the winds of change are blowing strong – from New York and Rhode Island where lawmakers voted to repeal their drug mandatory minimum laws, to Washington, D.C., where members of Congress from both parties are working together to move crack reform

closer to reality. When the Senate passed the crack reform bill, they put policy ahead of politics, science and evidence ahead of rhetoric, and people ahead of partisanship.

FAMM is committed to seeing the crack reform bill through until it is the law of the land. We have more work to do. But when we are done, we plan to build on our momentum to push broader sentencing reforms. We believe that if members of Congress take this step now, on this issue, they will be more willing to take the next step and address other sentencing reforms for those in prison and those yet to enter the system. Advocates must seize this moment to eliminate all unjust sentencing laws. For now, at least, it appears we are on the road to broader sentencing reforms. **FG**

# Faces of FAMM

These stories from FAMM members serving excessive sentences for crack cocaine illustrate why FAMM will not stop working for reform for those in prison as well as those facing long sentences. Don't give up!

FAMM will work with Congress and the Sentencing Commission to make lower penalties retroactive so people in prison can benefit from them.

## How would S. 1789 change the current 100:1 crack-powder ratio?

Under current law, five grams of crack cocaine and 500 grams of powder cocaine trigger the same five-year sentence. Fifty grams of crack cocaine and five kilograms of powder cocaine trigger the same 10-year sentence. This creates what is commonly referred to as the 100:1 ratio between crack and powder cocaine. S. 1789 would replace the 100:1 ratio with an 18:1 ratio. Under the 18:1 ratio, 28 grams of crack cocaine would trigger a five-year sentence and 280 grams of crack would trigger a 10-year sentence. Powder cocaine sentences would not change. S. 1789 would also eliminate the current five-year mandatory minimum for simple possession (without intent to distribute) of crack cocaine.

## Who would NOT benefit from S. 1789?

If S. 1789 becomes law, it would not help

- **People who are already sentenced and currently in federal prison.**
- **People convicted in state courts for state crimes.** The reforms only apply to people convicted in federal courts.
- **People whose drug offenses do not involve crack cocaine.** The new law only changes crack mandatory minimum sentences, not mandatory minimums for any other type of drug (e.g., methamphetamine, marijuana, heroin, etc.).
- **People facing a mandatory minimum sentence whose crack cocaine offense occurred before the new law becomes effective,** even if they are convicted and sentenced after it becomes effective.

S. 1789 also would not change other mandatory minimum laws or certain guidelines that have their own rules, such as:

The career offender guideline, § 4B1.1 of the U.S. Sentencing Guidelines, even if the offense involved crack cocaine. Sentences under the career offender guideline are based on the statutory maximum punishment for a drug offense. S. 1789 would not change these statutory maximums – it would only change the statutory mandatory minimums for crack offenses. Gun offenses carrying mandatory minimums (e.g., 18 U.S.C. § 924(c) or § 924(e) (ACCA)).

## Can the U.S. Sentencing Commission, President Obama or Attorney General Holder make a lower mandatory minimum retroactive?

No. The Commission can only make changes to the U.S. sentencing guidelines retroactive. The proposed legislation would change only mandatory minimum laws, *not* guidelines. Only Congress can make the changes to mandatory minimums retroactive.



## Tammi Bloom

**19 years, 7 months**

A licensed nurse and mother of two, Tammi was held accountable for her husband's drug business.



## DeJarion Echols

**20 years**

DeJarion sold crack for six months to pay for college; a decision that would cost him 20 years of his life.



## Eugenia Jennings

**21 years, 10 months**

Eugenia is serving more than two decades in federal prison for 13.9 grams of crack: less than half the weight of a candy bar.



## Stephanie Nodd

**30 years**

Stephanie has been incarcerated since 1990 because of her involvement in a six-month crack conspiracy as a 20-year old.



## Lamont Garrison

**19 years, six months**

Just before their college graduation, Lamont and his brother were implicated in a drug conspiracy by a well-known dealer whose sentence was greatly reduced by implicating others.



## Telisha Watkins

**20 years**

After an old neighbor contacted her looking to buy drugs, Telisha introduced him to a friend who sold powder and crack cocaine. Unbeknownst to Telisha, her former neighbor was a confidential informant.

### LEGAL DISCLAIMER:

FAMM cannot provide legal advice, representation, referrals, research, or guidance to those who need legal help. Nothing in this article is intended to be legal advice or should be relied on as legal advice. If you or your loved one feel that you need legal advice, you should speak with an attorney.

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## Webb bill to establish National Criminal Justice Commission Act marches forward

**THE NATIONAL CRIMINAL JUSTICE ACT** is making progress in Congress. The brainchild of Sen. Jim Webb (D-Va.), the act would create a blue-ribbon commission to conduct a top-to-bottom review of the entire criminal justice system and offer concrete recommendations for reforming it within 18 months.



Julie Stewart, Rep. Marcia Fudge (D-Ohio) and Rep. Tom Rooney (R-Fla.) at a press conference introducing the NCJA bill in the House.

Slowly but surely, bipartisan support for the idea is building in both houses of Congress and FAMM is in the thick of things, working to ensure the legislation succeeds.

On January 21, the U.S. Senate Judiciary Committee passed S. 714, the Senate version of the bill. It received widespread bipartisan support and has 37 cosponsors, including Sen. Patrick Leahy (D-Vt.), Chairman of the Senate Judiciary Committee, Sen. Arlen Specter

(D-Penn.), Chairman of the Subcommittee on Crime and Drugs, Sen. Lindsey Graham (R-S.C.), Ranking Member of the Subcommittee on Crime and Drugs, and Sen. Orrin G Hatch (R-Utah).

On April 27, H.R. 5143, the House version of the bill, was introduced by U.S. Reps. Bill Delahunt (D-Mass.), Darrel Issa (R-Calif.), Marcia Fudge (D-Ohio), Tom Rooney (R-Fla.), and Robert C. “Bobby” Scott (D-Va.), Chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. FAMM president Julie Stewart and representatives of civil rights, law enforcement and reentry organizations stood with the lawmakers at a press conference on Capitol Hill to show support for the bill.

Jennifer Seltzer Stitt, FAMM’s federal legislative affairs director, commended Senate and House leaders for the bills. “The National Criminal Justice Commission Act comes at a time when support for mandatory minimum sentencing reform is high. FAMM believes arbitrary mandatory minimums, which ignore individual circumstances, undermine faith in the criminal justice system,” said Seltzer Stitt.

FAMM is working with members of Congress to ensure that the Commission conducts a thorough evaluation of sentencing policies, including mandatory minimums. “We are eager to see these issues explored by the independent, objective, and bipartisan Commission envisioned by this legislation,” said Seltzer Stitt.

## Sentencing concerns heating up on Capitol Hill

**CALLS FOR REFORM** are reverberating all over Capitol Hill! FAMM representatives, administration officials, other advocates and even members of Congress are all urging a change in policies that contribute to overincarceration, including relief from harsh mandatory minimum sentences. Here are some highlights:

**The Senate Judiciary Committee, Subcommittee on Human Rights and the Law** held a hearing on racial disparity in the U.S. criminal justice system on December 1. In written testimony submitted to the Committee, FAMM Vice President Mary Price

argued mandatory minimum sentences result in race-based disparity in sentencing and pushed for Congress to end the destructive and failed policy.

**The House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies** reviewed President Obama’s fiscal 2011 budget request for the Bureau of Prisons (BOP) in March. In his testimony, BOP Director Harley Lappin testified that “it is imperative we reduce overcrowding” and “to do so we must reduce the length of time some inmates spend in prison and/or expand prison capacity.”

**The U.S. House Oversight and Government Reform Subcommittee on Domestic Policy** heard from Office of National Drug Control Policy Director Gil Kerlikowski in March. The drug czar repeated the message that the Obama Administration would place renewed emphasis on the role of prevention and treatment, as well as more traditional law enforcement mechanisms, in the fight against illicit drug use and abuse. The Chair of the Committee, Rep. Dennis Kucinich, academics, and activists called for a departure from the previous Administration’s policy.

# Sentencing Commission recommends alternatives to incarceration, judicial discretion

**THE UNITED STATES** Sentencing Commission completed its 2010 amendment cycle and submitted proposed changes to federal sentencing guidelines to Congress on May 1. Lawmakers have six months to consider and reject (with a majority vote in both houses) any or all of the amendments. If Congress does not reject the amendments, they become a permanent part of the guidelines on November 1.

FAMM weighed in on several of the proposed amendments, including:

## ► Alternatives to Incarceration: Drug treatment

**COMMISSION'S PROPOSAL:** The Commission proposed allowing courts to sentence a very small number of drug offenders to treatment instead of prison. Only those who committed their offense while addicted, met all five parts of the "safety valve," and had a relatively low guideline sentence could benefit. The Commission asked whether the drug treatment program should be residential and whether alternatives should be available based on a defendant's mental or emotional condition.

**FAMM COMMENTED:** FAMM urged the Commission to abandon its overly restrictive eligibility requirements and give courts discretion to choose a drug treatment alternative. We also encouraged the Commission to provide alternative sentencing options for defendants with emotional and mental conditions and to allow courts to grant downward departures for drug or alcohol dependence.

**FINAL VERSION:** The Commission decided to amend the guidelines to permit a downward departure from Zone C sentences (where at least half of the sentence must be served in confinement) to Zone B sentences (which allow intermittent confinement, community confinement, or home detention) so that some drug offenders could receive treatment. To qualify, the defendant "must be an abuser" of drugs or alcohol or suffer from a "significant mental illness," and the crime must be "related to" the substance abuse or mental illness. Before departing from a sentence, courts must consider public safety and the effectiveness of diversion.

## ► Alternatives to Incarceration: Expansion of the zones

**COMMISSION'S PROPOSAL:** The Commission proposed to expand the zones in the sentencing table to give judges more flexibility to sentence some lower level defendants to alternatives to incarceration. The Commission asked for public comment on whether the expansion should

exclude certain defendants (including white collar offenders).

**FAMM COMMENTED:** We encouraged the Commission to expand the zones even more than proposed and not to exclude certain classes of offenders from the benefit of expanded zones.

**FINAL VERSION:** The Commission adopted the zone expansion and did not exclude any types of offenders from benefitting from it.

## ► Specific Offense Characteristics

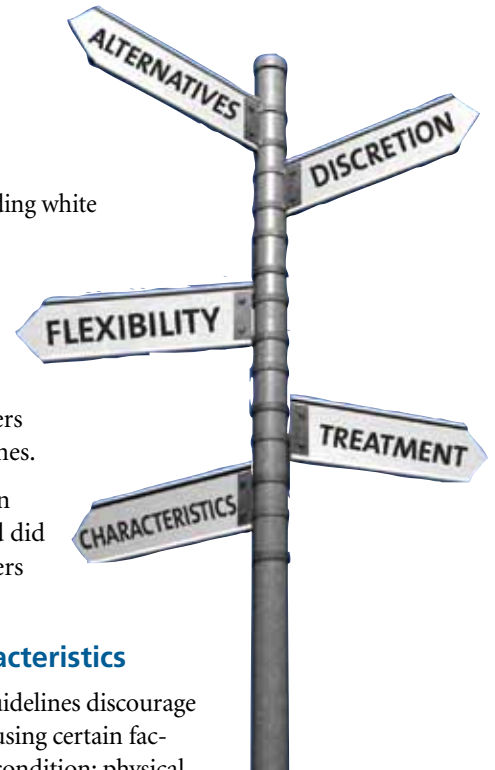
**COMMISSION'S PROPOSAL:** The guidelines discourage and sometimes ban courts from using certain factors (age; mental and emotional condition; physical condition including drug dependence; military, civic, charitable, or public service; and lack of guidance as a youth) to justify a departure from a guideline sentence. The Commission asked for comments on whether judges should be allowed to use some of these factors to depart.

**FAMM COMMENTED:** The guidelines should allow judges to consider the defendant's age, mental and emotional condition, physical condition (including drug dependence), lack of guidance as a youth, and military, civic, charitable, or public service as permissible grounds for departure.

**FINAL VERSION:** The Commission voted to allow courts to consider the defendant's age (including youth); mental and emotional conditions; physical condition or appearance, including physique; and military service at sentencing, but only if the condition is present to an unusual degree and distinguishes the case. The Commission also scaled back its ban on using drug or alcohol dependence as grounds to depart, saying that such a dependency is "ordinarily" not a reason to depart. This brings the guideline departure provisions in line with the proposed drug treatment guideline.

Complete text of the proposed amendments is available at the U.S. Sentencing Commission website: [www.ussc.gov/2010guid/20100121\\_Reader\\_Friendly\\_Proposed\\_Amendments.pdf](http://www.ussc.gov/2010guid/20100121_Reader_Friendly_Proposed_Amendments.pdf).

You can also read FAMM's letter to the Commission and comments from other groups on the Commission's website: [www.ussc.gov/pubcom\\_201003/PC201003.htm](http://www.ussc.gov/pubcom_201003/PC201003.htm) **FG**



## Commission to FAMM: Tell us what you think

The United States Sentencing Commission invited FAMM's Julie Stewart to testify at a hearing in Washington, D.C. on mandatory minimums on May 27. The hearing brought a variety of witnesses together to share their views on mandatory sentencing and help the Commission complete work on a report on mandatory minimums due to Congress no later than October 2010. The last and only report from the Commission on mandatory minimums was published in 1991, the same year FAMM was founded.

FAMM has been asking the Commission for just such a report for a number of years. We urged the Commission to update its first report which found that mandatory minimums result in unwarranted sentencing disparity and unwarranted sentencing uniformity; frustrate transparency of proceedings because prosecutors manipulate charging to secure plea agreements; undermine certainty of application and punishment, and result in racial disparity.

In the 20 years since that first report, a number of things have changed that affect mandatory minimums. For example, many mandatory minimums have been added to the federal criminal code. With FAMM's help, the safety valve was adopted, directing judges to waive the mandatory minimum sentence for qualified defendants. And in 2005, the Supreme Court handed down the *Booker* decision, transforming the sentencing guidelines from mandatory to advisory.

In her testimony, Julie told the Commission to continue its steadfast opposition to mandatory minimums, and provided stories of our members serving mandatory minimum sentences that show how much damage one-size-fits-all sentencing can do.

A report on the hearing and Julie's testimony are on our website, [www.famm.org](http://www.famm.org).

## Understanding federal mandatory minimums and sentencing guidelines

**FEDERAL MANDATORY MINIMUMS** and sentencing guidelines are as different as apples and oranges, but much harder to tell apart. To help you understand the two federal sentencing systems, FAMM put together the following guide.

### Mandatory minimum sentencing laws

If an offense carries a mandatory minimum, in most cases judges may not impose a sentence shorter than the number of years chosen by Congress. With two narrow exceptions, federal mandatory minimum sentencing laws prevent judges from considering other relevant factors, such as the defendant's role in the offense or likelihood of committing a future offense.

The most frequently applied federal mandatory minimums were enacted by Congress in the 1986 and 1988 anti-drug bills. Mandatory minimum drug sentences start at five and 10 years, and are based on the weight of the drug.

### Federal sentencing guidelines

Congress authorized the creation of the United States Sentencing Commission in 1984 and instructed it to write sentencing "guidelines" for all federal crimes to provide proportional sentences and limit unwarranted sentencing disparity among similar defendants. Originally, sentencing guidelines were also mandatory, meaning judges had strictly limited discretion to use other factors not taken into account in the guidelines to lower the sentence. In 2005, the Supreme Court decision in *Booker v. United States* transformed the once mandatory guidelines to advisory guidelines, giving courts the ability to sentence within, above, or below the calculated guideline range.

The guidelines direct the sentencing judge to consider various facts about the crime and the defendant. This results in a "guideline range" sentence (for example, 18 to 24 months). While judges generally impose a sentence within the guideline range, the Supreme Court told courts they must also

choose a sentence that is sufficient but no greater than necessary to achieve the purposes of punishment. Judges exercise their discretion by calculating the guideline sentence and then considering other relevant facts to come up with a sentence. Most sentences are within the guidelines but judges also sentence below and must less frequently above them when the facts warrant.

Unfortunately, mandatory sentencing laws supersede or "trump" the sentencing guidelines. For example, in drug cases, if the defendant was convicted of a quantity of drugs that triggers a mandatory minimum penalty the judge must impose the mandatory sentence, regardless of the sentencing guidelines. Information about federal sentencing guidelines can be found at the U.S. Sentencing Commission's website, [www.ussc.gov](http://www.ussc.gov).

### Can you avoid mandatory minimums?

There are only two ways to avoid receiving a mandatory minimum sentence. First, the defendant may provide "substantial assistance" by turning in others. If the government is satisfied with the cooperation, it can ask the court to impose a sentence lower than the mandatory minimum. Second, some defendants qualify for the "safety valve," a law Congress passed in 1994 (at FAMM's urging) to provide relief from mandatory minimums. If the judge finds that the defendant is a low-level, nonviolent, first-time offender who did not use violence or possess a gun, and tells the government all about their crime, the defendant qualifies for the safety valve and must be sentenced without the mandatory minimum. The safety valve provides relief for nearly 23 percent of all drug defendants exposed to mandatory minimums. Although the safety valve is a step in the right direction, its eligibility criteria are narrow and thousands of nonviolent drug defendants cannot benefit from it.

For more information, visit [www.famm.org](http://www.famm.org) and click on federal sentencing. **FG**





Photo credit: Urszula Masny-Latos

Barbara Dougan (r) demonstrates the small, sugar packet-sized amounts that trigger Massachusetts' mandatory sentences.

## MASSACHUSETTS

### House bill doesn't include sentencing reforms.

#### Next step: conference committee.

After months of waiting, the Massachusetts House Ways & Means Committee issued its criminal justice bill in late May. Unfortunately, the bill mainly addressed CORI (criminal records) reform. It did not include any of the sentencing reforms that were passed by the state Senate in 2009. The House of Representatives voted to pass the bill on May 26.

The House did not vote against sentencing reform. Instead, they didn't vote on the issue at all. The House leadership stated that they wanted to get a CORI bill passed this session, so they decided to release a House bill that focused mainly on that issue.

While the House bill was disappointing, we also know that there are always setbacks on the road to justice. So we will now focus on the next opportunity for success, the conference committee process. Three senators and three representatives have been appointed to work out a compromise version of a criminal justice bill. FAMM will be working hard to get sentencing reforms put back into the conference committee's bill. The compromise version will then be sent back to the Senate and House for approval. This must happen by July 31, the end of the legislature's formal session until January 2011, when the whole process begins anew.

In the months leading up to the House vote, FAMM worked hard to educate the House of Representatives on the need for change. Massachusetts project director Barb Dougan spoke to House members, explaining the state's current drug sentencing laws and the re-

forms in the Senate bill. FAMM drafted recommendations for the House leadership as well as a rebuttal to a position paper from the state's prosecutors.

In addition, hundreds of FAMM's Massachusetts members called or wrote to their representatives and the Speaker of the House, voicing support for a bill that includes work release and greater parole eligibility for drug offenders. Four members had letters to the editor published in their local newspapers. Such a strong showing by voters will be a great help as we begin the conference committee process.

Finally, FAMM continues to use the media to educate the public. Barb Dougan wrote articles for the influential political blog, Blue Mass Group, and the newsletter of the National Lawyers Guild, as well as an op-ed for the Springfield Republican newspaper.

### New fact sheet on women and mandatory minimums

FAMM's Massachusetts Project issued a new fact sheet, "Adding insult to injury: Mandatory minimum sentencing laws & their impact on women." While mandatory drug sentences are often unfair, they can have a particularly harsh effect on women. For a copy of the fact sheet, plus much more information on our Massachusetts campaign, please visit our expanded webpage at [www.famm.org/statesentencing/massachusetts.aspx](http://www.famm.org/statesentencing/massachusetts.aspx).

## NEW JERSEY

### NJ FAMM's drug-free school reform bill is signed into law

In one of his final acts in office, Governor Jon Corzine signed the drug-free school zone reform bill, S-1866, into law on January 12. S-1866 was sponsored by Sen. Raymond Lesniak (D-Union) and Sen. Sandra Cunningham (D-Jersey City) and was the companion legislation to A-2762, championed by Rep. Bonnie Watson Coleman (D-Mercer).

The signing was sweet victory for FAMM members and other sentencing advocacy groups, who worked for years to convince the legislature that reform was warranted. Prior to the new law, the drug-free school zone law imposed a mandatory three-to-five year sentence for distributing, dispensing or possessing with



Gov. Jon Corzine

intent to distribute a controlled dangerous substance within 1,000 feet of a school. Courts were required to impose lengthy and costly mandatory minimum terms without considering any mitigating factors.

The new law authorizes the court to waive or reduce the minimum sentence required before parole eligibility, or to place a school zone offender on probation after considering the following factors:

- The extent of the person’s prior criminal record and the seriousness of the offense;
- Where the offense was committed in relation to the school property, including distance from the school or bus and the reasonable likelihood of exposing children to drug-related activities there;
- Whether school was in session at the time of the offense; and
- Whether children were present at or in the immediate vicinity of the offense.

Under no circumstances may the court or judge waive the minimum term of parole ineligibility or place the defendant on probation if the offense occurred on school property or a school bus or the defendant used or threatened violence, possessed a firearm, or resisted arrest or eluded a police officer while committing the offense.

Any person who was sentenced to a mandatory minimum sentence under the old drug-free school zone law and has not been paroled, discharged, or had the sentence suspended, may ask the court to review his or her sentence. If the court finds that the sentence does not serve the interests of justice, the court may re-sentence the prisoner.

These statutory changes should help reduce corrections costs, lessen racial disparity, and help mitigate the state’s alarming incarceration rate for drug offenders.

## FLORIDA

### FAMM gains important allies in Florida campaign

Florida’s mandatory minimum sentences are among the harshest in the country, particularly those for “trafficking” illegal prescription opiates like Vicodin and Oxycodone. For example, being convicted of possessing over 28 grams of illegal prescription drugs (approximately the weight of half of a candy bar) requires a minimum sentence of 25 years in prison, regardless of extenuating circumstances.

Due to our hard work, FAMM is gaining allies in its effort to reform Florida’s mandatory minimum drug laws. In February, the Collins Center for Public Policy, working with the state’s business community, issued “Smart Justice,” a report with findings and recommendations for fixing Florida’s bloated and unfair criminal justice system. The recommendations included implementing cost-saving reforms, including revisiting mandatory minimums, diverting nonviolent offenders from prison, and revising penalties for low-level drug offenders.

In March, Florida TaxWatch issued a report on how the Florida government can save money. Included in its recommendations are a host of criminal justice reforms which would expand alternatives to incarceration, protect public safety, and save the state millions of dollars.

FAMM’s work in Florida and ongoing state sentencing reform efforts were also featured in a two-part series on Ocala.com, a news website that serves newspapers across Florida. The Tallahassee Democrat also published a commentary by Deborah Fleischaker, FAMM’s state legislative affairs director, and Lester Abberger, a prison reform advocate and FAMM’s lobbyist.



## SOUTH CAROLINA

### South Carolina enacts sweeping sentencing reform

A sweeping sentencing reform law was signed by Governor Mark Sanford on June 2, much to the delight of FAMM. FAMM had an office in Columbia in 1996 and 1997 and was an early advocate of the changes that are finally taking root in the state.

The new law eliminates mandatory minimum sentences for first-time drug possession, makes certain repeat drug offenders eligible for a suspended sentence and other sentence reducing programs, and removes the 10-year mandatory minimum sentence for violations of its drug-free school zone law.

“South Carolina did it the right way. Republicans, Democrats, and Independents came together to eliminate mandatory jail time for first-time, nonviolent offenders and make sure prison space is available for real threats to public safety,” said Deborah Fleischaker, FAMM’s Director of State Legislative Affairs.

“Sentencing reform is not liberal or conservative. It’s just smart. That’s why historically conservative states like Texas and South Carolina are joining typically liberal states like New York and Rhode Island in passing reforms that protect public safety at less cost to state taxpayers,” said Fleischaker.

In addition to specific reforms, the law attempts to re-focus the South Carolina criminal justice system toward education and supervision and away from incarceration for low-level offenders. In addition, the law eliminates sentencing disparities for crack and powder cocaine possession.

Besides being sound criminal justice policy, there is an added bonus. The new law is projected to save the state \$409 million over the next five years.

## NEVADA

### FAMM condemns mandatory life sentence for NV woman

Last November, a jury in Elko County, Nevada found Michelle Lyn Taylor, 34, guilty of lewdness with a minor for making a 14-year old boy touch her breast through her clothing and asking him for sex. She was sentenced to a mandatory life sentence with parole eligibility after 10 years.

“Based on what we’ve learned so far, we believe the life sentence handed to Ms. Taylor is a total travesty of justice,” said Julie Stewart, FAMM founder and president.

“FAMM does not condone criminal behavior, especially where a minor is the victim, but no reasonable person can believe that the punishment fits the crime in this case. Life sentences should be reserved for murderers and repeat violent offenders.”

The harshness and high expense of mandatory sentences, like the one meted out to Ms. Taylor, are two reasons why other states are reforming mandatory minimums. Over a dozen cash-crunched states, including New Jersey, Rhode Island and Michigan have enacted significant sentencing reforms in the last decade, saving millions of dollars and reducing pressure on overcrowded prisons.

“FAMM opposes mandatory minimum sentencing laws that carry disproportionate one-size-fits-all sentences and enormously expensive penalties. Keeping Ms. Taylor in jail for the rest of her life could cost Nevada taxpayers well over \$1 million. This seems like a terrible waste of a life, and limited taxpayer resources,” concluded Stewart. **FG**



Michelle Taylor

## Your toolkit for legislative change.

Request FAMM’s “Advocating for Change” guide to influencing lawmakers and learn more about the legislative process. For a free copy, visit [www.famm.org](http://www.famm.org) or email [famm@famm.org](mailto:famm@famm.org).



# Supreme Court scaling new heights in sentencing

FAMM PARTICIPATES in U.S. Supreme Court cases to push the law in the right direction. This spring, the Court heard federal gun statute and “good time” cases that are reaching new heights in the world of sentencing law. FAMM took part with *amicus* (or “friend of the court”) briefs in the following cases.

## HIGH COURT SIDES WITH BOP IN GOOD TIME CALCULATION

ON JUNE 7 in a 6-3 decision, the U.S. Supreme Court sided with the government in *Barber v. Thomas*, 560 U.S. \_\_\_\_ (2010), a case that challenged the amount of time the Bureau of Prisons (BOP) shaves from a prisoner’s sentence for good behavior.

FAMM filed a brief urging the court to invalidate the BOP’s method of calculating good time credit. In FAMM’s view, the law dictates that prisoners should earn time off by pegging the number of “good time” credits to the length of the sentence imposed. Instead, the Court held that the BOP’s calculation – conditioning credits based on the sentence actually served, which results in less time off – was more in line with “the most natural reading of the [good time] statute.”

“We are heartbroken for the prisoners and their families who have been fighting this battle in the courts for so long,” said Mary Price, FAMM vice president and general counsel. “Spending even a day, much less weeks and months behind bars that Congress did not authorize is profoundly unjust.”

The good time statute, 18 U.S.C. § 3624(b), provides that most federal prisoners may receive credit of up to 54 days at the end of each year of the term of impris-

onment for good conduct. Prisoners and their advocates, including FAMM, have argued that the phrase “term of imprisonment” means only the sentence imposed and that any credit should be calculated to shorten the imposed sentence. Accordingly, a 10-year sentence should generate 540 days of good time credit to be deducted from the 10-year sentence.

In contrast, the BOP has interpreted “term of imprisonment” to mean “time served” and has refused to apply the credit to the sentence beyond the time served. The BOP’s calculation results in 47 days of credit for every year of the imposed sentence, or only 470 days of credit on a 10-year sentence. The difference between the two calculations for a 10-year sentence is 70 days.

The majority opinion was met with a strong and eloquent dissent, written by Justice Anthony Kennedy and joined by Justices Stevens and Ginsburg. Justice Kennedy wrote in his opinion, “. . . And if the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court’s interpretation comes at a cost to the taxpayers of untold millions of dollars. The interpretation the Court adopts, moreover, will be devastating to the prisoners who have behaved the best and will undermine the purposes of the statute.”

Justice Kennedy closed his dissent with equal force, writing, “To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake.”

FAMM thanks the prisoners, lawyers, and advocates who kept the faith on this issue over the years, including Oregon Deputy Federal Public Defender Steve Sady, who reached the Supreme Court on this issue, and FAMM’s *amicus* team for Barber from Sidley & Austin, Jeffrey T. Green and Peter Pfaffenroth.

**Team Barber**  
(l to r): Lynn Deffebach, (represented Mr. Barber), Mary Price, Steve Sady (argued Barber), Peter Goldberger, Peter C. Pfaffenroth, Matthew Krueger, Elliott Morrison.



## SUPREME COURT RULES 30-YEAR MANDATORY MINIMUM CANNOT APPLY WITHOUT JURY SAY SO

**IN A VICTORY** for defendants and advocates, on May 24 the U.S. Supreme Court ruled in *United States v. O'Brien*, et al. (No 08-1569) that a punitive 30-year mandatory minimum sentence for offenses involving a machine gun may not be imposed unless the defendant is indicted and found guilty beyond a reasonable doubt by a jury of using a machine gun.

A unanimous court rejected the government's position that the machine gun provision is merely a "sentencing factor." Sentencing factors direct judges to increase sentences for things the defendant was not charged.

The justices were – yet again – grappling with 18 U.S.C. §924(c), the poorly drafted and complicated gun statute. It sets a mandatory minimum of five years for the crime of possessing or using a gun in connection with a crime of violence or drug trafficking crime. It also provides for additional mandatory minimums for the type of gun and how it is used, including a 30-year mandatory minimum if it is a machine gun.

"The Court got it right," said FAMM's Mary Price. "The government admitted it could not prove Mr. O'Brien had a machine gun. The court has ruled that the government may not try to sneak the fact in at sentencing and force the judge to sentence the defendant to three decades for a crime the prosecutor could not prove."

Price also noted that Justices Thomas and Stevens took the opportunity to point out that all facts that trigger mandatory minimums should be treated as offense elements that must be proven beyond a reasonable doubt to a jury. They took issue in separate concurrences today with the ruling in *Harris v. United States*, a 2004 case in which FAMM participated. In *Harris*, a slim majority of the court found that while several

mandatory minimums in the gun statute depend on mere sentencing factors, they still must be imposed even though the jury need not find the facts that trigger them. "FAMM agrees with Justices Thomas and Stevens that mandatory minimums can never be imposed on a defendant unless he has the constitutional safeguards of notice and jury findings."

Together with the National Association of Criminal Defense Lawyers, FAMM filed an amicus brief that further explains why the machine gun provision cannot constitutionally be considered other than an offense element. Price also attended oral arguments in the *O'Brien* case. More information is available at FAMM's website.

Stay tuned! This challenging statute will be in the Supreme Court spotlight once again in a pair of cases: *Abbott v. U.S.* and *Gould v. U.S.* FAMM is planning to weigh in on those cases with an amicus brief. The Supreme Court will hear the argument sometime after September 2010.

FAMM is grateful to Aaron Katz of Ropes & Gray LLP and Samuel Buffone (formerly of Ropes & Gray and now with Buckley Sandler LLP) who worked with Peter Goldberger and Margy Love of FAMM's Amicus Advisory Committee to craft our amicus brief.



## FAMM Hails Court Ruling to Limit Reach of ACCA

In a victory for rational sentencing, the U.S. Supreme Court on March 2 limited the reach of one of the most punitive mandatory minimum sentencing enhancements in federal law. A seven-justice majority ruled that crimes will not be considered "violent" under the Armed Career Criminal Act (ACCA), a condition that triggers a minimum 15-year sentence enhancement, unless the accused uses physical force against another person. The case is *Johnson v. United States*, No. 08-6925.

"We are pleased the Supreme Court has taken this small, but significant step for rational sentencing. FAMM has long opposed the 15-year mandatory minimum in ACCA, because it punishes too many people who don't deserve the label 'armed career criminal,'" said Mary Price, vice president and general counsel of FAMM.

Price attended oral arguments in the *Johnson* case. Her more detailed account of the case and the Court's decision can be found on FAMM's website, [www.famm.org](http://www.famm.org).

## is justice being served?

The following cases represent FAMM's "profiles of injustice." Are you or a loved one serving a mandatory sentence in federal or state prison? If so, we need you to help to show the human face of sentencing injustice. Please request a profile form from FAMM, c/o Profile Researcher, 1612 K St., N.W., Suite 700, Washington, DC, 20006.

### ERIK WEYANT (Florida)

**ERIK WAS THE** owner of a successful home renovation business when he began dating Amy\* in 2006. One night at a bar, a man approached them and began flirting with Amy. The same man would show up whenever Erik and Amy visited the bar. He made his interest in Amy clear and grew increasingly aggressive towards Erik.



Erik Weyant

One night, the man followed Amy in his car and begged her to go home with him. Frightened, Amy repeatedly declined and called Erik. Several days later, the man showed up at the bar and threatened Erik. It was late and Erik decided to go home to avoid any further trouble. He exited the bar alone and was walking to his truck when he was confronted by the man and a group of five others in the parking lot. Fearing a beating or worse, Erik jumped into his vehicle and tried leaving the parking lot, but the group blocked his exit. Erik frantically pulled a legally registered handgun from the console and fired shots into the air. The men dispersed and Erik drove away.

Incredibly, Erik was arrested and charged with aggravated assault with a firearm without intent to kill several months after the incident. He went to trial to prove he acted in self-defense. One of the men testified that Erik pointed the gun at him. The men admitted to drinking heavily all night.

#### ***What sentence do you think Erik should have received?***

Though no one was hurt in the incident and the handgun was legally registered, Erik was found guilty of aggravated assault with a firearm without intent to kill and sentenced under Florida's notorious 10-20-life law to 20 years. Intended to deter and punish habitual violent offenders, the law automatically requires a mandatory sentence of 20 years when a firearm is discharged during a crime. Without the 10-20-life mandatory minimum, Erik would have faced a maximum term of five years for his actions.

Judge Neil Roddenbery was ultimately forced to impose the 20-year term on Erik, a young first-time offender with no criminal record. At Erik's sentencing, he stated:

[U]nfortunately the legislature has mandated a particular sentence in this matter...the legislature has taken away any consideration by the Trial Court of the merits of a case...the history of a person...The only sentence I can impose in this matter is a 20-year prison sentence. It

does not matter whether I agree with that...I don't find that I have any room to deviate from what the legislature has said that the sentence has to be."

Erik has now been incarcerated for over three years. His imprisonment has been especially hard on his family who live seven hours away from the prison. Unless Florida's 10-20-life law is reformed, Erik will sit behind bars until 2027.

\* Name changed.

### EDWARD AMPARO (Massachusetts)

**EDWARD CAME TO** the U.S. in 1983 from the Dominican Republic. He was working as a cashier at a grocery store in 1994 when a police informant introduced Edward to undercover officers seeking to buy cocaine. Young and broke with two children and a wife to support, Edward sold them seven small bags of cocaine. In the following weeks, the officers made three more purchases of one ounce each and then arranged for a 10-ounce sale. Edward was arrested after the fourth sale and charged with drug trafficking within 1,000 feet of a school, even though the sales had taken place at his apartment. Moreover, the zoning map used to determine Edward's proximity to school property was from 1980, before the property was built, calling into question its accuracy.



Edward Amparo

Since his incarceration, Edward has completed extensive coursework in computer technology, GED classes, ESL and welding. Edward has three children who are now in their late teens. It is very difficult for his children to visit him because of travel expenses. Many of Edward's loved ones have passed away during his term of imprisonment. Upon his release, he will be deported.

#### ***What sentence do you think he should have received?***

Edward was sentenced to 15 years in prison for the sale of approximately 10 ounces of cocaine. He was sentenced to an additional two years because the sales took place within a "school zone." Due to the entrapment issues involved, the District Attorney did not prosecute Edward for the earliest sale.

"I lost far more than I ever gained selling drugs," Edward told FAMM. "I made a mistake that cost me 17 years of my life." **FG**

## Harvard hears from FAMM

The Harvard Law School chapters of the NAACP and the Federalist Society hosted a forum on the federalization of drug policy on April 6 and sought FAMM’s perspective. Jennifer Seltzer Stitt, FAMM’s federal legislative affairs director, spoke on a panel that also included Ronald Sullivan, a Harvard Professor; Tim Lynch, an expert from the Cato Institute; and Mark Osler, Baylor University. Jennifer also spoke at the International Community Corrections Association (ICCA) policy forum on March 23. **FG**

## Letters to the editor raise awareness in Massachusetts

As part of our campaign to change state mandatory sentencing laws in Massachusetts, FAMM members are writing letters to the editors and raising awareness in their community newspapers.



Many thanks to the FAMM members who took time to write and submit their letters and kudos to those whose letters were published, including Linda Sullivan, Jessica Rung, Thomasena Saunders and Jadeane Sica-Bernbaum.

CONTINUED FROM PAGE 5

The President does have the power to pardon or commute a person’s sentence. To learn more about the commutation process, please see FAMM’s website, [www.famm.org](http://www.famm.org).

### Would S. 1789 allow the Sentencing Commission to amend the crack guidelines?

Yes. S. 1789 would give the Commission “emergency authority” to change the crack guidelines within 90 days of the date the bill became a law. If S. 1789 becomes law, FAMM will asking the Commission to amend the crack guidelines quickly and accordingly.

### If S. 1789 becomes law and the Sentencing Commission amends the crack guidelines, will those guideline changes be made retroactive?

If the Sentencing Commission amends the guidelines so that crack guideline sentences are shorter, the Commission can vote to make those guideline changes retroactive. However, FAMM does not know if the Commission would do this. If or when that time comes, we will ask the Commission to make its guideline changes

retroactive. Remember: the Commission cannot make changes to mandatory minimum laws retroactive. Only Congress can lower mandatory minimums and make the changes retroactive.

### Should people serving a federal prison sentence for a crack offense begin looking for or hiring attorneys to help them get a sentence reduction?

First, **the bill has not yet passed**. Second, **the proposed legislation is not retroactive**. People should be extremely cautious about paying or hiring anyone who promises that the crack law will be made retroactive. Remember, the bill does not benefit people who are already in prison.

### Would passing S. 1789 save the federal government money?

Yes. The Congressional Budget Office (CBO) released a report that estimated that S. 1789 would lead to reduced spending for the federal prison system totaling \$42 million between 2011 and 2015. A copy of the CBO report is available online at [www.cbo.gov/ftpdocs/114xx/doc11413/s1789.pdf](http://www.cbo.gov/ftpdocs/114xx/doc11413/s1789.pdf). **FG**



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