



Families Against Mandatory Minimums

Hon. William K. Sessions, III, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

July 2, 2010

Re: 2011 Priorities

Dear Judge Sessions:

We write to you on behalf of Families Against Mandatory Minimums (FAMM) to make recommendations to the Commission for your consideration during the 2011 amendment cycle. We once again urge you to (1) correct the guidelines for all substance-based offenses consistent with the 2007 guideline adjustment for crack cocaine; (2) expand the guideline Safety Valve to other than drug offenses; (3) reform the relevant conduct standard to, among other things, prohibit the consideration during sentencing of conduct of which the offender was acquitted; and (4) use statutory authority to amend sentencing guidelines that result in unduly long sentences.

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 once again 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.¹ The Commission necessarily responded to the "dilemma" posed by Congress's new legislation.² Striving to keep the guidelines and their more nuanced considerations effective, the Commission correlated the guideline range to the new mandatory minimums, but in all cases indexed the applicable range above the applicable mandatory minimum, thus providing for longer guideline sentences than called for even by the applicable mandatory minimums.³ This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug

¹ U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING 47 (Nov. 2004).

² *Id.* at 48 and 53.

³ *Id.* at 49.

offenders,⁴ characterized by the Kennedy Commission as “far beyond historical norms.”⁵ Because of this grim reality, the Commission has urged Congress to revise mandatory minimums and the guidelines, without avail.⁶

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.”⁷ 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.⁸ 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.⁹ 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. Reducing them would have an immediate and salutary effect on the length of sentences for drug trafficking which have, in the Commission’s words “in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”¹⁰

Expand the Safety Valve

We encourage the Commission to expand the guideline safety valve adjustment in two ways. First, the relief should be available to *all* offenders who satisfy the five criteria, not just drug defendants. Second, the relief should be made available to defendants whose criminal history

⁴ *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”).

⁵ 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.

⁶ FIFTEEN YEARS OF GUIDELINE SENTENCING at vii.

⁷ UNITED STATES SENTENCING COMMISSION, COCAINE AND FEDERAL SENTENCING POLICY 9 (May 2007).

⁸ FIFTEEN YEARS OF GUIDELINE SENTENCING at vii.

⁹ *Id.*

¹⁰ FIFTEEN YEARS OF GUIDELINE SENTENCING at 49.

score, whether calculated or as a result of departure, locates them in Criminal History Category I if not II.

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 the guidelines 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 19,900 defendants not subject to mandatory minimums, who received the benefit of a two-level guideline reduction. Fully 13.9 percent of all drug defendants -- 3,332 defendants not subject to mandatory minimums -- in 2009 had their sentences lowered. This reduction has made a genuine difference, lessening sentences for the least culpable, least serious offenders.

In testimony before the Subcommittee on Crime, 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 low-level, non-violent defendants with no or minimal prior records suffer unnecessarily harsh sentences. We agree that the safety valve has proven a valuable way to better individualize sentences for such 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 Commission can provide some needed relief from other unduly long guideline sentences, by expanding the guideline safety valve whether or not Congress acts on your request. This expanded safety valve would replicate the current two-level reduction for certain drug defendants, encouraging courts to consider lower sentences in cases where offenders might deserve a break from an otherwise harsh sentence. For example, it could be used, in the drug context, to recognize low-level protected zone offenders or listed chemical offenders whose exclusion makes little sense in light of the purposes of the safety valve. It would also provide relief from unwarranted harshness that has come under criticism for example in the economic crimes and child pornography contexts.

Our second recommendation focuses on the reliability of criminal history calculations under the guidelines. In 2009, fully 42.2% of all downward departures were due to issues with the effect of criminal history. Criminal history was by far the most often stated reason for departure. Clearly the way criminal history is treated in the guidelines has led judges to discount sentences in those cases. Were the guideline safety valve to be available to defendants whose calculated Criminal History fell into Criminal History Category I or II, including by departure, the relief could reach defendants that judges clearly believe do not deserve the harsher recidivist penalties associated with their calculated criminal history points.

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.¹¹ 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.¹² 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.¹³

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. 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.

¹¹ U. S. SENTENCING COMMISSION, GUIDELINES MANUAL, § 1B1.3 (Nov. 2008).

¹² *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>.

¹³ FIFTEEN YEARS OF GUIDELINE SENTENCING AT 50-51.

For example, 28 U.S.C. § 994(g) would provide support to reduce sentences. This law tells the Sentencing Commission to consider prison population figures 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.”¹⁴ The federal prison population was 37 percent over capacity the last time the Director reported to Congress,¹⁵ 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. The Commission took the first steps in this direction in the current amendment cycle when it sent two amendments to the guidelines designed to modestly enhance the availability of alternatives to incarceration in the guidelines. These amendments begin to address the directive 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.”

There is more of course that needs to be done and the Commission can build on the foundation it laid during this cycle. Under the guideline regime, “the percentage of offenders receiving simple probation has been cut in half under the guidelines.”¹⁶ Of the 75,657 people sentenced in federal court in 2009, nearly 90 percent were sentenced to imprisonment (87 percent to prison time only).¹⁷

Of all offenders sentenced in 2009, 26,312 had little or no criminal history.¹⁸ In 2009, of the 24,085 drug offenders, 51.4 percent were in Criminal History Category I.¹⁹ Of those 24,085 offenders, 83.2 percent had no weapons involvement in their offense,²⁰ and only 5.9 percent had an aggravating role adjustment.²¹

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

¹⁴ 28 U.S.C. § 994(g) (2008).

¹⁵ *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>.

¹⁶ FIFTEEN YEARS OF GUIDELINE SENTENCING AT 42.

¹⁷ U.S. SENTENCING COMMISSION, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 28, Table 12.

¹⁸ *Id.* at 30, Table 14.

¹⁹ *Id.* at 104, Table 37.

²⁰ *Id.* at 106, Table 39.

²¹ *Id.* at 197, Table 40.

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.²² 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.²³

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.²⁴ The same is undoubtedly true for other guideline sentences, both for drugs as well as for a host of non-violent offenses, including many white collar offenses.

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.

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.” To date, there have been 735 amendments to guidelines, but only a scant handful of those amendments have lowered guideline sentences.²⁵ 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 Commission was to treat the sentencing outcomes under the guidelines as a form of feedback. . 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, such as those seen in child porn and some economic crime cases, as indicators that the guideline sentences themselves might be inappropriate and in need of reform.

²² U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY 20-21, Figures 2-5 and 2-6 (May 2007).

²³ *Id.* at 42, Figure 2-10.

²⁴ *Id.* at 8.

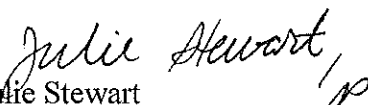
²⁵ See Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker: Why and How the Guidelines Do Not Comply with 3553(a)*, 30 CHAMPION 32, n. 39 (Sept./Oct. 2006).


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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.

Sincerely,


Julie Stewart
President


Mary Price
Vice President and General Counsel

cc:

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