



**Families Against Mandatory Minimums**

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July 11, 2007

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

Re: Proposed 2008 Priorities and Crack guideline retroactivity

Dear Judge Hinojosa:

We write on behalf of Families Against Mandatory Minimums (FAMM) with our recommendations for the 2008 guideline amendment cycle. We endorse the proposals made by the Practitioners' Advisory Group, the Federal Public and Community Defenders, and the American Bar Association and we particularly encourage the Commission to consider (1) expanding "safety valve" eligibility to other than drug distribution offenders; (2) developing alternatives to incarceration pursuant to the directive in 28 U.S.C. § 994(j) and (3) updating the Commission's 1991 report on mandatory minimum sentencing. Finally, while not a subject of the 2008 amendment cycle, we encourage you to take prompt action to make the pending amendment reducing crack cocaine offense levels retroactive.

### **Expand the guideline "Safety Valve"**

When you appeared before the Subcommittee on Crime, Terrorism and Homeland Security on June 26, you urged Congress to expand the "safety valve" to benefit more than the drug defendants currently eligible for its relief. This reflected a concern you have previously expressed that first-time, low-level, non-violent defendants suffer unnecessarily harsh sentences. The statutory safety valve obliges courts to impose guideline sentences in cases where a mandatory minimum sentence would otherwise apply upon a judicial finding that the conditions enunciated in 18 U.S.C. § 3553(f) are satisfied. 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 applaud your call for its expansion and will add that message to ours in our own work in Congress.

The Commission can take a first step (as you did to such good effect with the pending crack cocaine guideline amendment) and display your conviction that these less culpable offenders should benefit from the safety valve by expanding the guideline safety

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Honorable Ricardo H. Hinojosa

July 11, 2007

Page 2

valve to benefit all defendants who meet its criteria. Such a guideline is modeled in the letter from the Practitioners' Advisory Group at page 4.

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 13,000 defendants, not subject to mandatory minimums, who received the benefit of a two-level guideline reduction. Fully 12.6 percent of all drug defendants, 3,029 defendants, in 2006 had their sentences lowered. This reduction has made a genuine difference, lessening sentences for the least culpable, least serious offenders.

The proposed safety valve would replicate the two-level reduction and go further, encouraging courts to consider lower and even non-prison sentences in cases where true first offenders might benefit from a second chance that does not include incarceration.

We heartily endorse this proposal and encourage you to place it on the agenda for the 2008 amendment cycle.

### **Adopt alternatives to Incarceration**

We find it profoundly disturbing that so many first offenders whose crimes involve non-violent conduct are imprisoned under the guidelines, some for decades without any mechanism to permit judges to divert them or otherwise accomplish punishment that is shorter, more humane and has a better chance of restoring the offender to the community. For example, the growth in prison populations is fueled substantially by drug offenders. People convicted of drug offenses made up nearly half the total growth in the federal prison population between 1995 and 2003.<sup>1</sup> More than half of the 24,400 drug offenders sentenced in 2006 were assigned to Criminal History Category I.<sup>2</sup> Nearly 85 percent of drug offenders sentenced in 2006 had no weapon involvement.<sup>3</sup> Drug trafficking defendants nonetheless serve average sentences of over 80 months in prison.<sup>4</sup>

Of course, there is also a growing concern about the effectiveness of mass incarceration as a way to control crime.<sup>5</sup> Drug crime is especially immune from the social control aims of incarceration.<sup>6</sup>

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<sup>1</sup> United States Department of Justice, Bureau of Justice Statistics, Prisoners in 2005, Table 14 (Revised Jan. 18, 2007. (available at <http://ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>.)

<sup>2</sup> United States Sentencing Commission, 2006 Sourcebook of Federal Sentencing Statistics, Table 37.

<sup>3</sup> *Id.* at Table 40. Relevant conduct rules likely affect that statistic so that the true percentage is undoubtedly higher.

<sup>4</sup> *Id.* at Table 13.

<sup>5</sup> See American Bar Ass'n, Report of the Justice Kennedy Commission at 20,21 (available at [http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports\\_Final\\_081104.pdf](http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf).)

Measured against its social costs alone, unnecessary incarceration is insupportable. For example, the American Bar Association reports that the burden of over-incarceration falls primarily on minority communities and the young.. “[O]f the 2.2 million people now in our prisons and jails, almost half are African-American, and another 20 % are Hispanic. One of the most painful costs of incarceration is that one and a half million children in the United States under the age of eighteen have at least one parent in state or federal prison.”<sup>7</sup>

Though rehabilitation fell out of favor in the mid 1980s, it was not so unfavored that Congress did not address the need to avoid imprisonment in considering the directives to the Sentencing Commission. Congress commanded the Commission to “*insure* that the guidelines reflect the general 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.”<sup>8</sup>

The Commission, armed with years of research and data, can now begin confidently to comply with the directive, fashioning new approaches to punishing those who do not pose a public safety threat and who may benefit from a second chance.<sup>9</sup> Therefore, we commend the proposal made by the Practitioners’ Advisory Group, and stand ready to assist you in any way to advance this important objective.<sup>10</sup>

### **Update the mandatory minimum report**

You began the process of updating the 1991 Report, Mandatory Minimum Penalties in the Criminal Justice System, in your June 26 testimony to the Crime

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<sup>6</sup> Ryan S. King et al., *Incarceration and Crime: A Complex Relationship* at 6 (available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>) (pointing out that incarcerating drug dealers has only a limited impact on drug offenses due to the “replacement effect.”)

<sup>7</sup> American Bar Ass’n., *Commission on Effective Criminal Sanctions, Report to the House of Delegates on Alternatives to Incarceration and Conviction*, 2 (February 2007).

<sup>8</sup> 28 U.S.C. § 994(j) (emphasis added).

<sup>9</sup> Alternatives to incarceration may also go a long way to meeting the requirement of 28 U.S.C. § 994(g) which 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 . . . .” At last report, the federal Bureau of Prisons, which has been oversubscribed for years, was operating at 134 percent of capacity. See *Prisoners in 2005* at 1.

<sup>10</sup> In this regard, we emphasize our endorsement of the proposals put forward by the Practitioners’ Advisory Group and the Federal Public and Community Defenders regarding the reform of aspects of the relevant conduct rule, which operates to drive sentences up based for conduct that eludes proof beyond a reasonable doubt. Explaining to a family member the fact 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.

Honorable Ricardo H. Hinojosa

July 11, 2007

Page 4

Subcommittee. The information provided in your testimony is a valuable contribution containing timely information about the state of mandatory minimum sentencing and its impact on federal sentencing. It is however only the beginning.

Now it is time to issue a new report on mandatory sentencing. You can build on the research you presented in June, revisit the conclusions of the first and only report to date on mandatory minimums and test how and to what extent your concerns about mandatory minimums expressed in that report remain relevant. Particularly in light of the fact that we have had sixteen more years of experience under the mandatory minimums, that new mandatory minimums have been enacted, that the Safety Valve operates to ameliorate the impact of mandatory minimums for drug defendants and because the nature and character of federal sentencing has been altered by the Supreme Court's *Booker* opinion, we urge you to expand on the material you presented to Congress.

### **Make the pending crack guideline retroactive**

We cannot let the opportunity pass to urge you to act quickly to make the crack cocaine sentencing guideline amendment retroactive for the reasons put forth so cogently in the Defenders' submission. We want to add however, that it would be cruelly ironic to recognize and correct the injustice of the guideline that has lengthened thousands of sentences and then deny the benefit to the very prisoners whose unjust sentences you identified and relied on for evidence of its flawed operation and injustice. Even if handling the § 3582(c)(2) motions were burdensome to the courts (and we believe the fact that the motions are contemplated by the statute, that the defendant need not be present, that the guideline directs the court to consider the sentence it would have imposed had the retroactive amendment been in effect at the time of sentencing, and the fact that no hearing is necessary makes the job less onerous) the extra time and expense cannot compare to the burden these prisoners will bear by spending an average of 18 months more in prison than those who will be sentenced after November 1 for the very same conduct under the amended guideline.

Thank you for considering our views. We look forward to working with you during this amendment cycle.

Sincerely,

Julie Stewart  
President

Mary Price  
Vice President and General Counsel

Honorable Ricardo H. Hinojosa

July 11, 2007

Page 5

cc: Honorable Ruben Castillo, Vice Chair  
Honorable. William K. Sessions III, Vice Chair  
Commissioner John R. Steer, Vice Chair  
Commissioner Michael E. Horowitz  
Commissioner Beryl A. Howell  
Commissioner Dabney Friedrich  
Commissioner *Ex Officio* Edward F. Reilly, Jr.  
Commissioner *Ex Officio* Benton J. Campbell  
Kenneth Cohen, General Counsel  
Judith Sheon, Chief of Staff