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Returning to First Principles

Good afternoon, Chairman Hinojosa and Commissioners. Thank you for seeking our views at this very important time. Over the years, Families Against Mandatory Minimums has advocated sentencing reforms to ameliorate the harshest aspects of guideline and statutory sentencing. We steadfastly oppose mandatory minimum sentences and we have been and remain strong supporters of guided judicial discretion. We believe that sentencing guidelines can cabin judicial decisions within limits defined by statute and the boundaries of a jury's decision or defendant's stipulation, while also providing judges the flexibility to give true effect to those circumstances of offense and defendant that cannot be captured in a mechanistic grid-based system.

Over the years, though highly critical of the terrible inequities and failures of the sentencing guidelines system, we have fallen out of the habit of advocating sweeping change. This is understandable; FAMM is cognizant of the possibilities, the political lay of the land, the balance of power, and the line you walk. As you pointed out recently, the creation and amendments of guidelines fully informed by Commission expertise and the product of genuine collaboration among the branches has given way of necessity, "overridden or ignored in policymaking . . . through the enactment of mandatory minimums or specific directives to the Commission." United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, Executive Summary at xvii (2004) ('*Fifteen-Year Study*"). This state of

affairs reached an extreme in 2003, when Congress, without so much as a nod to the Commission, took on amending the guidelines. The PROTECT Act perhaps foreshadowed the next big thing, in quick succession the *Blakely* and then the *Booker/Fanfan* decisions have forever altered our understanding of the rules of sentencing.

We agree with many others that there is no need to rush in to fix federal sentencing. While the current advisory guideline system is not ideal, it is eminently workable in this interim period. As you undertake the job of recommending to Congress what sentencing should look like, you can do so secure in the competence of the courts to impose and review sentences. Judge Hinojosa testified last week in the Crime, Terrorism and Homeland Security Subcommittee of the House Judiciary Committee that early analysis of the first post-*Booker* opinions shows that, for the most part, sentencing continues much as before. Absent a pattern of shocking outcomes uncorrected by appeals courts, this is a system that can proceed apace as the Commission, Congress, the judiciary and others with a stake in federal sentencing consider how to reform it. Congress has not indicated it is prepared to hurry legislation; the Senate has not even scheduled hearings and is unlikely to move quickly on sentencing in light of the number of other pressing matters coming up for consideration.

Today, we invite you to use your unique perspective to help Congress take advantage of the immense opportunity the Supreme Court decision has presented. The *Blakely* and *Booker* opinions launched what you recently described as a national conversation about sentencing. Your voice must figure prominently in that discussion. This is not a time to tinker around the edges of reform or rush to adopt measures designed to just meet, or worse, avoid, constitutional requirements. We urge you to embrace this opportunity to help Congress critically examine

federal sentencing. You are in the best position to challenge unwarranted or unjust assumptions underlying the guidelines, to take a lessons from the failures and inequities of the old system, to rethink long-held assumptions about the core purposes of sentencing, and to attend to oft-expressed criticisms of certain aspects of guideline sentencing. Such a critical examination and thorough recommendations can assist our lawmakers as they begin the job of designing a new sentencing regime. We ask you to think big and reach back to foundation principles of justice.

Basic principles of federal sentencing law are set out in 18 U.S.C. § 3553(a) and include the importance of the defendant's history and characteristics, the seriousness of the offense, the need to protect the public, the need to deter similar conduct, and the needs of the defendant. Chief among these philosophical underpinnings is the principle of parsimony. Cesare Beccaria articulated the concept that punishment should never be greater than necessary and his thinking influenced the Founding Fathers and is enshrined in our sentencing statute. *See* Garry Wills, *Inventing America* 94 (1979) (discussing impact of Beccaria on Jefferson); David McCullough, *John Adams* 66-67 (2001) (discussing John Adams' use of Beccaria's ideas).

Were you to start to construct a sentencing system from the ground up, knowing what you know, what of our system would you keep and what discard? What aspects of the guidelines would you alter? For example, what kinds of differences in offense, offender and context are worth accounting for, or better, permitting judges to take into account? What kinds of disparity are accepted under the guidelines and are they acceptable? What are the measures of culpability and are they reliable? How much play is there in the joints of sentencing and how much should there be? And what use will we have anymore for mandatory minimum sentencing?

Repairing What's Broken in Federal Sentencing.

The guidelines were devised in part out of congressional concerns with unfettered judicial discretion, which was considered a contributing factor to disparities in sentence length based on variations among judges, perhaps for unwarranted reasons. Similarly situated defendants received inconsistent sentences.

While the guidelines appear to have reduced some forms of unwarranted disparity, they contribute to the institutionalization of others. Perhaps chief among them is race-based disparity. Concerns about racial disparities in sentencing played a role in spurring the sentencing reforms of the mid-1980s. Notwithstanding those concerns, the gap in average sentences between white and minority defendants was relatively small and whites dominated the federal offender population prior to the adoption of the guidelines. Today, minorities dominate the criminal dockets and the gap in average sentences between African-Americans and other groups, which began to grow at the time the guidelines were implemented, is significant. *Fifteen-Year Study* at 132. The Commission has recently concluded that racial and ethnic discrimination by judges is not a major factor in these disturbing trends. Instead, sentencing rules themselves explain the disparities. In particular, the cocaine sentencing rules contribute significantly to the widening gap in sentence length between black and other defendants.

- According to one analysis, African Americans serve virtually as much time in prison for a drug offense as whites spend for a violent offense. The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* at 2 (2005) ("*Federal Prison Population")*
- Between 1994 and 2002, the average time served by blacks for drug offenses increased by 73%, compared with an increase of 28% for white drug offenders. *Id*.

- The sentence differential between the groups was significant: African-American drug defendants in 2002 were sentenced to average terms of 57.2 months while white drug defendants sentences were 37.2 months. *Id.*
- The Commission located the average prison sentence for black drug defendants at 92 months and for whites at 58 months. *Fifteen-Year Study* at 132.

The Commission has repeatedly called for revision of the crack cocaine sentencing structure and for good reason. Even the recently recommended modest change, raising the quantity triggering the five-year crack penalty from 5 to 25 grams, would reduce the sentencing gap between black and white offenders in all categories by over 9 months and by over 17 months for drug defendants.

This sentencing rule, however evenly applicable, hits the black population hardest and "contributes more to the differences in average sentences between African American and white offenders than any possible effect of discrimination." *Fifteen-Year Study* at 132. The Commission concluded that raising the threshold would do more than any other policy change to improve the fairness of the sentencing system.

The Commission should include in any proposal to Congress to revise sentencing a renewed call to restructure cocaine sentencing.

And, while we are on the subject of mandatory minimum sentencing, it is the perfect time to urge that Congress do away with such laws. Today we have two irreconcilable sentencing systems: mandatory minimums for some crimes on the one hand and advisory guidelines on the other. Congress is likely to institute a sentencing system with at least some limits on judicial discretion; a system that will be more enforceable than the current advisory system. Enforceable

guidelines can make the mandatory minimums redundant.

Mandatory minimum sentences distort the operation of the guidelines by installing an artificial but nearly impenetrable floor. This unhappy marriage has prohibited the guidelines from operating as they were intended, driven sentences higher than necessary, and provided unnatural power over sentencing at the front end to prosecutors, who can control what amounts to a strict liability charging system ameliorated only by the ability to determine who will receive substantial assistance departures. The mandatory minimums don't limit judicial discretion, so much as they remove it to the U.S. Attorney's offices where its exercise is largely unreviewable and anything but transparent. The Commission has long been on record recommending that guidelines do a better job than mandatory minimum sentencing laws. *See* United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Executive Summary at iv (August 1991) ("*Mandatory Minimum Penalties*"). Now, when Congress is poised to revisit sentencing, is a perfect time to remind lawmakers of the sound reasons for your long term opposition to them.

Unjustified role of drug quantity and other simple measures of culpability.

While mandatory minimum laws have set the stage for sentencing injustice, the Commission has contributed to the racial disparity and indeed to the overall unfairness of drug sentencing and other kinds of sentencing by placing undue emphasis on single factors, such as amount. Such single-factor focus then outweighs other, more or equally accurate measures of culpability.

This practice has, for example, exacerbated and perpetuated the impact of the five- and ten-year mandatory minimums. Those terms, originally designed by Congress for the most

serious and culpable defendants, are today merely the starting point for sentences that are driven by the relentless increase in offense levels associated with increased drug quantities. We know that in many cases, quantity is a very poor proxy for culpability. Conspiracy law, relevant conduct rules, and strict limits on the effect of mitigating factors restrict what a court can do to offset the tyranny of quantity with other measures, such as role in the offense. The Sentencing Commission in 1991 criticized the exaggerated role of drug quantity in mandatory minimum statutes. That so-called "tariff effect" is carried over in the guidelines' reliance on quantity and while it does not completely block consideration of other factors, it dwarfs them. *Mandatory Minimum Penalties* at 27-30. No single, incremental factor should play such an overwhelming role in sentencing. Mandatory minimums and guideline sentences need not be inextricably linked, particularly if the Commission can limit the impact of one dimensional factors such as drug quantity on sentence length.

Considering a multi-dimensional sentencing system

While revisiting the decision to anchor sentencing in such one-dimensional measures, the Commission should encourage a broad view of the benefits of a multi-dimensional system. We are convinced that a system that better accounts for such things as the defendant's background -- beyond the mechanistic totting up of criminal history points – and characteristics of the offense, can better lead to reliable sentencing outcomes. Consider recommending that sentencing be restructured to better account for important characteristics that measure culpability, whether currently forbidden or not, in designing appropriate sentences. Imagine a system that accounts for drug addiction (a very important factor in many drug trafficking cases), poverty, family circumstances, history of abuse, role in the offense and other things that might

be considered as a measure of culpability or in mitigation or aggravation. The current rigidity should be relaxed.

Recalibrating the contribution of even one factor, role in the offense, could have a major impact on the length of sentence for minority defendants. For example, the majority of people sentenced for all cocaine offenses in 2000 were low-level functionaries in the drug trade. Fully two thirds of crack cocaine defendants were street-level dealers, mules or couriers. United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* at 36 (May 2002) ("*Crack Report*"). The average crack cocaine sentence in 2002 was over 119 months. United States Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics*, Figure J at 81 (2004) ("*2002 Sourcebook*"). Permitting judges to address role in the offense in a meaningful way when fashioning sentences is eminently reasonable in light of the number of people serving unconscionably long sentences notwithstanding their low level in the food chain.

Reconsidering overall sentence length.

Federal sentences are longer than necessary. The guidelines have contributed to what many, most famously Justice Anthony Kennedy, have criticized as unduly severe sentencing. Between 1984 and 2002 the mean federal sentence increased from 24 months to 55.4 months and One study has noted that not only defense attorneys but even even some prosecutors think sentences are too long and sometimes they make discretionary decisions to attempt to reduce them. Frank O. Bowman and Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa Law Review 1043, 1133 (May 2001). One way to view such actions is to understand that they provide a feedback mechanism on the operation of

the federal sentencing guidelines, much like often-used departures that have come in for so much criticism of late but in fact might provide insight into persistent problems with guidelines that adjustments cannot correct.

Similarly, incarceration is overused in our criminal justice system. The Commission should encourage Congress to take a close look at using alternatives to incarceration, especially for non-violent, first-time offenders who pose no public safety threat. A number of states are experimenting with such alternatives, in light of growing prison costs and rejection of punitive policies. Judith A. Greene, *Positive Trends in State-Level Sentencing and Corrections Policy* (November 2003).

Challenging Assumptions

Following the truncated debate over the passage of the Feeney Amendment to the PROTECT Act, we became increasingly disturbed about the assumptions underlying what are acceptable bases for disparity. It became apparent that among those factors that lead to disparity the system can live with are included those that facilitate the prosecution of others or that ease the prosecutorial case load. Whatever one thinks about the extent of or justifications for judge-based disparity in sentencing, important differences in sentences for similarly situated defendants exist for the sole purpose of making cases and easing case loads. As Judge Hinojosa's testimony pointed out, the majority of cases sentenced below the applicable sentencing guideline range since *Booker* was handed down were due to the government's substantial assistance motion (45 percent) and almost 14 percent more were reduced according to the various fast track procedures, while an additional 4 percent were disposed of pursuant to a plea agreement. *Prepared Testimony of Ricardo H. Hinojosa,* Chair, United States Sentencing Commission at 7

(February 10, 2005). In other words, more than 60 percent of all post-Booker sentences below the applicable guideline range were initiated by or acquiesced in by the government.

Much has been written about the problems of substantial assistance departures and the Commission is well positioned to evaluate their use, effectiveness and their effect of sentencing justice and uniformity. The relatively new fast-track system, put in place following passage of the PROTECT Act, was already shaping up to be a source of sentence disparity. For illegal reentry cases, similarly situated defendant could receive significantly different sentences, based solely on the district in which they were prosecuted. A number of districts have fast track arrangements; they run the gamut from plea agreements with corresponding stipulated sentences, to fast-track departures, some combined with acceptance adjustments, and many include strict time limitations and significant waivers. Of course, many districts provided no fast track consideration at all. There is no question that the sentence for similarly situated defendants received was identical in all respects except one -- where they are apprehended. As one judge remarked recently:

> If one is concerned about sentencing disparities, one should reflect on whether it is justifiable to give an alien reentrant who crosses the border in Tijuana and makes it all the way to New York a sentence of 70 to 87 months while another illegal entrant who rides the same truck across the border and who has an identical criminal history gets only 30 months because he was caught in San Diego . . . . [I]f the overall goal here is equal treatment for equal conduct, then there is at least a question whether administrative convenience or a reluctance to invest the resources required to prosecute all of these cases in the normal fashion

warrants such wholesale disregard of the [principle] of uniformity.

Lewis A. Kaplan, *Federal Sentencing: Where Do We Go From Here?*, New York Law Journal (February 7, 2005).

As we explore building a new sentencing system, it will be critical to encourage Congress to examine the assumptions that guide when sentence length can be shortened and what are and are not acceptable grounds and limits of disparity.

The assumption that more severe sentencing is a good thing.

The Commission demonstrated in the Fifteen-Year Study that "punishment became not only more certain but also more severe. . . . [T]he rate of imprisonment for longer lengths of time climbed dramatically compared to the preguideline era. While mandatory minimum penalties had some direct and indirect effect on these trends . . . the sentencing guidelines themselves made a substantial and independent contribution." *Fifteen-Year Study*, Executive Summary at vi. The result has been an unprecedented growth in the number of people serving time in federal prison, the majority non-violent offenders with no history of violence and a significant number of whom, fully one third, are first-time, non-violent offenders.

- As of 2003, 161,673 people are incarcerated in federal prison, an increase of 81 percent from 1995, and the federal prison population increased nearly three times the rate of state prisons since 1995. *The Federal Prison Population* at 1.
- More than one-half, 55 percent, of federal prisoners are serving time for a drug offense and 13 percent for a violent offense. *Id.*
- Almost 3/4 of the federal prison population are non-violent. offenders with no history of violence. One third of prisoners are first-time, non-violent offenders.

Id.

The Justice Department has repeatedly pointed out, in testimony here and before the House Crime Subcommittee last week, that increased incarceration has led to the lowest crime rate in decades. Statement of Christopher Wray, Assistant Attorney General, Criminal Division, before the House Subcommittee on Crime, Terrorism and Homeland Security at 7, (February 10, 2005). Assistant Attorney General Christopher Wray announced the day *Booker* was released that "[t]he Sentencing Guidelines have helped reduce crime by ensuring that criminal sentences take violent offenders off the streets, impose just punishment and deter others from committing crimes." Prepared Remarks of Assistant Attorney General Christopher A. Wray, Response to *Booker/Fanfan*, January 12, 2005.

Despite the appeal of such a compelling and straightforward explanation, the facts demonstrate, if not otherwise, at least that the contribution to lower crime rates is not nearly so direct as the Department would have us believe. The argument is flawed in important respects. The correlation is imperfect, the relationship anything but direct, and the claim ignores the impact of a variety of important factors that combine to contribute to the declining crime rate.

The crime rate measures violent and property offense reported to the police. It does not measure drug crimes, because pure drug crimes do not involve victims and are generally unreported. Jenni Gainsborough and Marc Mauer, Diminishing Returns: Crime and Incarceration in the 1990s, 17 (2000) ("Diminishing Returns"). We know that more than half of all federal prisoners are serving time for a drug offense, while only 13 percent of prisoners in federal prison are there for a violent offense. The Federal Prison Population at 1. Drug offenders have contributed most significantly to the increase in the incarceration rate in state and

federal prisons and jails, rising from 40,000 in 1980 to 450,000 today. The failure to account for drug crime in the crime rate obscures the overall crime picture, making it look as if there is less crime overall and making it appear that increased incarceration has led to a lower incidence of crime.

Moreover, one would expect that if the general statement were always true, that locking up all criminals reduces the crime rate, then the specific would follow: locking up more drug defendants lowers the drug crime rate. While drug incarceration has driven the overall incarceration rates, drug use and crime continue to rise, however, in part because "drug markets are inherently demand driven," and drug enforcement triggers the replacement effect. Alfred Blumstein, Making Rationality Relevant – The American Society of Criminology, 1992 Presidential Address, 31 Criminology 1, 1-16 (1993).

Moreover, experience at the state level does not support the claim that correlation is consistent with causation. The Sentencing Project examined crime and incarceration rates in the states for the years 1991 to 1998. They found that "states with the largest increases in incarceration experienced, on average, smaller declines in crime than other states." Jenni Gainsborough and Marc Mauer, Diminishing Returns: Crime and Incarceration in the 1990s at 4, September 2000.

Morever, crime rates fluctuate without uniform correlation to the rate of incarceration. For example, during the 14-year period between 1984 and 1998, imprisonment increased while crime increased for the first half and decreased during the second. Id.

I don't mean to say that incarceration has no impact on the crime rate. It is bound to. Studies and research demonstrate however that there are likely a variety of factors that contribute

to our increasing security. They include a growing economy. One study estimates that the increase in employment and standard of living was responsible for a 30 percent decline in crime. Richard Freeman and William Rodgers, III, Area Economic Conditions and the Labor Market Outcomes of Young Men in the 1990s Expansion. National Bureau of Economic Research (1999). An Economic Policy Institute analysis showed that crime declined in tandem with declining unemployment rates for young men with high school diplomas throughout the country from 1992 to 1998, with the sharpest declines in both demonstrated in the Northeast. Jared Bernstein and Ellen Houston, Crime and Work: What We Can Learn from the Low-Wage Labor Market, Economic Policy Institute, 2000.

Increased and more effective law enforcement also plays a role. Community and problem oriented policing correlates with crime reduction as states initiate creative, proactive approaches to crime. Diminishing Returns at 23 - 24. Other researchers have concluded that among the most important factors in the reduction in property crime is the greater probability of apprehension. Ayse Imrohoroglu, Antonio M. Merlo and Peter Rupert, What Accounts for the Decline in Crime? 45 (3) International Economic Review 707-729 (Aug. 2004). That study also credits the strengthening economy as well as the aging of the population and does not mention the increased incarceration effect at all.

We urge extreme caution in using crime statistics to justify a burgeoning prison population or harsh sentencing laws.

Conclusion

FAMM member Chrissy Taylor was 19 years old and a drug user when she was sentenced to nearly twenty years in prison. Her guideline sentence was driven by the quantity of

precursor chemicals her boyfriend convinced her to purchase on his behalf. Chrissy never manufactured methamphetamine and believed what her boyfriend told her: the chemicals were legal to purchase. Chrissy went to trial and was convicted. Her offense was non-violent. She had priors, one for shoplifting, another for simple drug possession. She was not a kingpin and yet she received a greater than kingpin length sentence.

Chrissy left prison last week. She told us when she got out that the prison experience has institutionalized her in ways that she expects may take years to overcome. She said "something happens to a person when they reach the first ten years in prison – something inside me started to die." She explained that many women she served time with had the same experience of a slow spiritual death beginning at the ten-year anniversary. After that milestone, she said, the years seem unbearably long.

Chrissy's sentence represents a lot of what is wrong with guideline sentencing today: driven by quantity, unmitigated by the fact of her addiction and altogether too long to be other than mindlessly punitive, it is a sentence that neither protected the public or, beyond a certain point, did anything for her.

Let's really fix sentencing. It is too important not to.