Families Against Mandatory Minimums
FOUNDATION

March 22, 2010

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

RE: Response to Request for Comments on Proposed Amendments for 2010

Dear Judge Sessions:

On behalf of Families Against Mandatory Minimums ("FAMM"), we submit the following written comments on the Sentencing Commission's Proposed Amendments.

I. Alternatives to Incarceration

FAMM supports the Sentencing Commission's Proposed Amendment "Alternatives to Incarceration" and encourages the Commission to amplify both the proposed expansion of the zones, as well as the treatment alternative provisions, while ensuring that the guideline does not, among other things, operate to restrict access or place unnecessary restrictions on access based on class or criminal history of offenders.

Part (A) of the proposed amendment would have courts impose a sentence of probation, in lieu of incarceration, on certain offenders who would engage in substance abuse treatment. FAMM endorses this concept and encourages the Commission to make it more generally and generously available. Part (B) of the proposed amendment gives judges broader discretion to impose alternatives to incarceration by expanding the sentencing zones. FAMM endorses this proposal because it provides for greater fairness and flexibility in the Sentencing Guidelines, while minimizing sentencing disparities. However, because the purposes of sentencing would be better served by an expanded amendment, FAMM recommends that the Commission should expand Zones B and C by at least two offense levels instead of one.

The Sentencing Reform Act ("SRA") authorizes federal courts to impose a sentence "sufficient but not greater than necessary, to comply with the purposes of punishment."[1] To that end, Congress has directed sentencing courts to determine *whether* a term of imprisonment is appropriate for a defendant and to consider the range of factors available at 18 U.S.C. § 3553(a), "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."[2] Congress further expressed its view on this matter in the SRA by requiring that the Commission craft guidelines that, *inter*

[1] 18 U.S.C. § 3553(a) (2009).
[2] *See* 18 U.S.C. § 3582(a).

alia, "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 other serious offense . . ."[3] Accordingly, the Guidelines were intended to help a court determine "whether to impose a sentence to probation, a fine, or a term of imprisonment."[4]

While the Commission, in crafting the guidelines, made some provision for sentences other than imprisonment, they are *de minimus* and unavailable to the vast majority of convicted offenders. This is puzzling, given the wide use of alternatives to prison, such as probation, in the pre-guideline era and the Commission's "empirical approach" that was to have started with existing sentencing practices to develop the sentencing tables. However, when the Commission set out to create the first set of guidelines, "the Commission only examined pre-Guidelines cases that resulted in sentences of imprisonment; thus, they ignored or disregarded approximately 40% of all sentences imposed during the relevant time period and used only the most serious offenses as a benchmark."[5]

It is not surprising therefore that today prison remains the default sentence for most offenders. Because the sentencing zones are overly restrictive, sentences other than straight incarceration are infrequent.[6] Fully 78.5% of offenders fall into Zone D, and the overwhelming majority of them, 94.6%, are of course sentenced to prison.[7] In 2007, prison sentences made up 81.1 % of all sentences for United States citizens.[8] When judges are willing to impose an alternative sentence, they often find it necessary to depart from the Guidelines. In 2008, almost half of all alternative sentences represented a departure or variance from the sentencing zones.[9]

Still, in 2008, fewer than 15% of all criminal defendants received an alternative sentence.[10] Even in the lowest sentencing range, 0-6 months, most sentences are prison only.[11] Among the 25% of lowest-level offenders who are eligible for an alternative sentence, over 65% of sentences are prison only.[12]

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[3] *See* 28 U.S.C. § 994(j).
[4] 28 U.S.C. § 944(a)(1).
[5] Ellen C. Brotman & Brian M. Shay, *"A Frontal Assault" on the White-Collar Sentencing Guidelines* 3 (Mar. 2009) (internal citations omitted), *available at* www.abanet.org/crimjust/wcc/march09brotman.doc.
[6] In 2008, more than 85% of sentences were prison only. UNITED STATES SENTENCING COMMISSION, 2008 SOURCEBOOK OF SENTENCING STATISTICS, Table 16 (2008), *available at* http://www.ussc.gov/ANNRPT/2008/Table16.pdf (hereinafter "Table 16").
[7] UNITED STATES SENTENCING COMMISSION, ALTERNATIVE SENTENCES IN THE CRIMINAL JUSTICE SYSTEM 3 (Jan. 2009), *available at* http://www.ussc.gov/general/20090206_Alternatives.pdf (hereinafter "Alternatives").
[8] Alternatives at 10.
[9] Table 16.
[10] *Id.*

We are delighted that the Commission plans to take steps to begin to correct this imbalance. In our view, incarceration should be the punishment of last resort. Such a punishment should be employed only when necessary, only to the extent it is sufficient, and never when a less-coercive option would be more effective in serving the goals of sentencing. As Congress recognized, in some cases, such as less-serious offenses, non-violent offenses, and offenders with minimal criminal history, incarceration may serve no purpose at all. A less restrictive deprivation of liberty, such as close supervision by a court officer, where appropriate coupled with treatment, may be sufficient and certainly preferable when straight incarceration is greater than necessary to comply with the purposes of punishment.

Moreover, today we are presented with the stark reality of a bulging federal prison population, outstripping prison capacity by 37% with no hope of slowing in sight.[13] As the Commission has noted, "criminal justice professionals have argued that dwindling prison space should be reserved for the most serious and dangerous offenders."[14] Many states are implementing alternatives to incarceration as a way to save money, conserve prison beds for the people who need to be in them, and improve public safety by using smart programming to reduce recidivism. The Pew Center on the States reports that state prison populations have fallen for the first time in nearly 40 years and attributes the declines to sentencing and corrections reforms that include diverting low level offenders from prison.[15] The report also points out that the federal prison population continues to grow rapidly. This is because "[o]n balance, the federal system has tougher sentencing laws, more restrictive supervision policies and fewer opportunities for diversion of defendants."[16]

Incarceration is expensive. In 2008, it cost $25,894 to keep someone in a Bureau of Prisons facility, while it cost $23,881 to place him in community confinement and just $3,743 to supervise his probation.[17] The Commission has taken note of all the benefits of alternatives. "For the appropriate offenders, alternatives to incarceration can provide a

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[11] *Id.*
[12] *Id.*
[13] *See Hearing on the Federal Bureau of Prisons FY 2011 Budget Before the Subcomm. on Commerce, Justice, Science and Rel. Topics of the House Comm. on Approps.*, 2, 7 (Mar. 18, 2020) (statement of Harley G. Lappin, Director, Federal Bureau of Prisons), *available at* http://appropriations.house.gov/Witness_testimony/CJS/Harley_Lappin.3.18.10.pdf.
[14] Alternatives at 1.
[15] THE PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS, 3-4 (Mar. 2010), *available at* http://www.pewcenteronthestates.org/report_detail.aspx?id=57653.
[16] *Id.* at 5.
[17] J.P. Hanlon, *Expanding the Zones: A Modest Proposal to Increase the Use of Alternatives to Incarceration in Federal Sentencing*, CRIMINAL JUSTICE 26, 28 (Winter 2010).

substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society."[18] The Commission has also recognized that such efficiency considerations may require departure from previous practices, and can serve the purpose of achieving "a more honest, uniform, equitable, proportional, and therefore effective sentencing system."[19]

A. Comments on Implementation of Expanded Zones

If Zones B and C are expanded to encompass a greater share of offenders, the guidelines will better reflect reality and become more relevant to actual sentencing. They will give judges greater flexibility to impose an appropriate guideline-compliant sentence and offer better guidance to cabin their discretion. They will better encourage judges to impose less restrictive sentences for less serious offenses, and more restrictive sentences for more serious offenses. For these reasons, we urge the Commission to implement this proposal.

We recommend that the Commission consider expanding the zones by at least one additional offense level and include all offense types within the proposed expansion.

1. The Adjustment to the Sentencing Zones Should be Expanded by at Least Two Offense Levels

The Commission should expand Zones B and C by two offense levels, instead of one, to maximize the benefits of the proposed amendment. A two-level adjustment would have the added benefit of lowering variance and departure rates for these sentences. If the Commission adopts a one-level adjustment, departures from the zones are likely to remain ubiquitous in order to provide real benefit to deserving defendants.

Assuming, as we do, that variance and departure rates are a reflection on the appropriateness of the guideline, the Commission can adjust the guidelines based on that "feedback" and improve compliance rates by doing so. A two-level adjustment would more than halve the zone departure/variance rate within Zones C and D. For example, in 2008, 743 alternative sentences within Zone C were not guideline compliant.[20] If Zones B and C had been expanded by two levels, all but 342 of those sentences would have been brought into Guideline compliance.[21] Furthermore, if a two-level expansion had been adopted, more than half of the zone departures from Zone D would have been eliminated.[22]

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[18] Alternatives at 20.
[19] U.S.S.G. §1A3 (2008).
[20] Table 16.
[21] *Id.* at Table 16, 23.
[22] *Id.*

Moreover, we expect judges will continue to exercise restraint in imposing alternative sentences, even within the narrow range where such sentences are available. For example, in 2008, more than half of the sentences in Zone A were incarceration sentences. This percentage increases as the offense level increases; in Zone B, fewer than 35% of offenders received an alternative; in Zone C, fewer than 30% received alternative sentences; and within Zone D, fewer than 6% received an alternative sentence. Under a two-level adjustment, the percentage of alternative sentences within Zones B and C can be expected to remain about the same, while it would decrease to 3-4% within Zone D.

2. The Commission Should Not Exclude any Offense Categories From the Proposed Amendment

FAMM urges the Commission to make sentencing alternatives as widely available as possible within the scope of the proposed amendment. Thus, the Commission should not provide a mechanism to exclude certain offenses, e.g. white collar offenses, from the expanded zones. Such exclusions would impinge upon the highly individualized decision of whether to impose an alternative sentence, while forfeiting the guideline goal of proportionality. We can discern no sound reason to make such a categorical exclusion nor how it would meet any of the goals of sentencing.

The sentencing judge is in the best position to determine the appropriateness of an alternative sentence. District court judges are compelled to balance any number of individual factors, such as the culpability of the offender, the danger he poses to the victim and community, and his needs for rehabilitation, among others. A blanket prohibition on the basis of offense-type would frustrate this determination. Judges may be forced to needlessly impose prison sentences where alternative sentences would be more appropriate, or they may be forced to depart from the guidelines altogether to avoid the pernicious effect of this categorical exclusion.

Moreover, we fail to understand how the Commission will determine that one class of offender, such as white collar (an enormously broad range of offenses and offenders are captured in this class), is, as a category, forbidden to benefit from the zone change. We are concerned that such cherry picking, besides bringing unnecessary complexity to the sentencing hearing, could be politically driven. Future commissions -- or for that matter, Congress through directives – might add the pariah category of the day to the list of offenders unable to access alternatives available in the newly expanded zones.

B. Comments on the Drug Treatment Alternative

Part (A) of proposed Amendment 1 seeks to give courts more discretion to provide drug abusers with drug treatment instead of prison. Although FAMM commends the Commission's efforts to provide a drug treatment alternative, and endorses this proposed amendment, we urge the Commission to remove the overly-restrictive eligibility requirements currently included in the proposal. In order to provide a genuine

alternative to incarceration, promote public safety and make a dent in recidivism rates, courts should be given the greatest possible discretion to provide treatment in appropriate cases.

1. Drug Abusers Need Treatment, not Prison

When a person's crimes are motivated by a treatable underlying condition, it is likely that the person will continue to cycle in and out of prison until the underlying condition is addressed and treated. As long as the underlying dependency remains untreated, the person's life can continue to revolve around illegal activity. An active abuser may be compelled to possess drugs, to traffic drugs, and to steal property in order to feed the constant and insatiable financial, psychological, and physiological demands of an active dependency. When the dependency is successfully treated, the motivation to offend is no longer present. According to the National Institute on Drug Abuse, treatment diminishes drug abuse and related criminal activity by 40 to 60%.[23]

2. The Drug Treatment Alternative Should be Widely Available

When a drug dependent person is able to abstain from drug use, the motivation to commit crime is eliminated. In fact, the recovering addict often voluntarily seeks out pro-social, responsible activities for their own sake, and as buffers against relapse. The ravages of drug dependence – personal alienation, physical and mental deterioration, and ultimately, early death – are powerful motivators for rehabilitation. When combined with the possibility of sanctions, as in a court-ordered drug diversion program, the negative consequences of relapse become greater and the success rate increases.[24]

Sentencing courts should thus be given the widest possible discretion to impose a drug treatment alternative. It is difficult, if not impossible, for the Commission to predict which types of offenders will be amenable to drug treatment. Only the district court judge is in a position to look at an individual defendant and decide whether or not drug treatment will address the defendant's need. The benefits of the treatment alternative – crime control, cost control, and fairer sentences – will not be fully realized until judges are allowed to make use of it in all appropriate cases.

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[23] NATIONAL INSTITUTE ON DRUG ABUSE, UNDERSTANDING DRUG ABUSE AND ADDICTION: WHAT SCIENCE SAYS, Slide 27, *available at* http://www.drugabuse.gov/pubs/teaching/Teaching3/Teaching5.html.

[24] *See* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES, GAO-05-219, 50-51 (Feb. 2005), *available at* http://www.gao.gov/new.items/d05219.pdf (Hereinafter "GAO Report").

The Guidelines should both afford adequate flexibility for courts to impose treatment alternatives where appropriate, and they should provide positive criteria to encourage courts to do so. Accordingly, we urge the Commission to modify the language of some of the existing guidelines, to expand the proposed treatment alternative to encompass mental and emotional conditions, and to eliminate some of the eligibility requirements which will exclude most of the people who would benefit from the proposed alternative.

3. Eligibility Requirements

The proposed drug treatment alternative has four eligibility requirements. First, a person must be convicted of a drug crime as the primary offense. Second, the defendant must have one or fewer criminal history points, and must otherwise qualify for the "safety valve" provision, §5C1.2. Third, the defendant must have an offense level no greater than a yet to be determined maximum offense level of 11-16. Fourth, the offender must be determined to be addicted and treatable. Because these requirements would exclude almost all who might benefit from the proposal, the Commission should reevaluate them.

First, the treatment alternative should be available for any drug involved, treatable defendant, regardless of whether they committed a drug offense. The number of drug offenders in prison topped 55% of all inmates in federal prison in 2005.[25] In 2008, 95,079 of the 182,333 federal prisoners were serving a sentence of more than one year for a drug related crime.[26] Those numbers mask, however, the true impact of drug use. In 2004, 50% of federal inmates had used drugs in the month prior to arrest and 45% of all federal prisoners met the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (DSM IV) criteria for drug dependence or abuse.[27] Of imprisoned property offenders, 27.7% had used drugs in the month prior to arrest and 13.6% used them at the time of the offense, while 41.2% of public order offenders (including 53.8% of weapons offenders) had used drugs in the month prior to arrest, while 18% used them at the time of the crime.[28] The federal prisoners who committed offenses to get money for drugs comprised 18% of the population in 2004, including 15% of violent and 11% of property offenders.[29] Clearly, if diversion to treatment programs is effective, it makes most sense to make it as available as possible in order to diminish drug dependence as well as promote public safety. Limiting treatment to those who commit drug crimes misses those

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[25] Paige M. Harrison and Allen J. Beck, *Prisoners in 2005* 9 (Bureau of Justice Statistics, Nov. 2006).
[26] William J. Sabol, et al., *Prisoners in 2008* 36, App. Table 17, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.
[27] Christopher J. Mumola and Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004* 1 (Oct. 2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf ("Drug Use").
[28] Drug Use at 5, table 4.
[29] Drug Use at 6.

who could benefit and whose crimes actually involve victims, thus improving public safety.

In 2005, a United States Government Accountability Office study showed that drug diversion programs operated through state drug courts reduce recidivism for non-drug offenses as well as drug offenses.[30] So, if the defendant was forging checks or burglarizing buildings solely to maintain a habit, he or she should be eligible for treatment diversion.

Second, the treatment alternative should not be restricted to offenders who are eligible for the safety valve exception. The safety valve exception under §5C1.2 allows a reduced sentence for non-violent drug offenders in the lowest criminal history category. The drug treatment alternative should offer an independent alternative to the existing guideline, to treat those with extensive criminal history, as well as first offenders. Over 57% of federal prisoners who were drug dependent or abusers had some criminal history.[31] It makes sense that drug abuse would lead to recidivism, and incarceration is not a panacea. An addict who has a long string of petty offenses, but who has demonstrated a willingness to participate in treatment, may benefit from treatment no less than a first offender.[32]

Third, the treatment alternative should not be limited to offense level 16, much less offense level 11. Offenders who would benefit from such treatment are found at higher offense levels, as a function of, primarily, drug quantity for drug offenders. It is widely known that drug quantity is an inadequate proxy for culpability. This is exacerbated by the effect on sentence length made by the relevant conduct rule so that peripherally involved defendants face inappropriately long sentences, as a function of the offense level triggered by drug quantity. It is also inadequate demarcation for those who could and should benefit from drug treatment. Given that only 16.7% of drug offenders were sentenced at CH1 and only 4.9% were sentenced at level 11 or lower, this otherwise salutary proposal would end up treating a miniscule number of offenders.[33]

Finally, the determination of addiction is too limiting and subject to interpretation, making sentencing hearings mini-trials on the question of addiction. As is clear from the discussion above, many offenders who may not meet a textbook definition of "addicted" are nonetheless drug involved and would benefit from treatment.

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[30] *See* GAO Report at 49.
[31] Drug Use at 7, Table 7.
[32] *See* GAO Report at 42.
[33] *See Written Statement of Margy Meyers and Marianne Mariano* submitted to the United States Sentencing Commission Public Hearing on Proposed Amendments for 2010 (Mar. 17, 2010).

4. Other Treatable Conditions

A treatment alternative should be made available for mental and emotional conditions other than drug addiction. Whenever a defendant suffers from an underlying condition such as schizophrenia, post traumatic stress disorder, or bipolar disorder, there may be a substantial risk of recidivism as long as the underlying disorder remains untreated. With proper medication and therapy, the conditions which lead a person to commit crimes -- such as delusional paranoia or the need to self-medicate with illegal drugs -- may disappear. If sentencing courts are allowed to provide a mental health treatment alternative in appropriate cases, the revolving door of prison may be halted and crime may be reduced.

We support community based alternatives for those who will benefit and who suffer from mental illness, developmental and cognitive delays and other debilitating conditions that are represented in the prison population and which contribute to offense conduct.

Alcoholism is another treatable form of substance dependence for which the treatment alternative should be available. Alcohol is the most widely-abused drug in the United States, and alcoholism, no less than dependence on illegal drugs, contributes to crime in our society.[34] If defendants are given the opportunity to seek treatment for alcohol dependence, they may be able to break the self destructive cycle that would otherwise lead them to commit further crimes.

Additionally, discouragement or prohibition of drug and alcohol dependence or abuse as a reason for a downward departure should be eliminated from the guidelines and, U.S.S.G §5H1.4 should reflect the fact that such dependence or abuse may be considered a basis for a downward departure.

II. Other matters

The Commission posed several questions regarding specific offense characteristics and Chapter V. The Commission asked as well how the guidelines should be changed to guide courts in implementing sentences that meet the statutory purposes of sentencing while better implementing the directive in 28 U.S.C. § 994(j) 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 otherwise serious offense"?

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[34] UNITED STATES DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, STATISTICAL TABLES, Table 32 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus/current/cv0732.pdf.

The proposals to enhance access to alternatives to incarceration begin the job of addressing § 994(j). But there is still work to be done to bring certain discouraged factors in line with the law, while giving judges the means to address first offenders more appropriately.

As to specific offender characteristics, the guidelines, in determining various characteristics and history of an offender to be "not ordinarily relevant" makes the departure provisions themselves irrelevant in light of the command of 18 U.S.C. § 3553(a). That provision requires the court, in its first inquiry, to consider the history and characteristics of the offender. The guideline provisions in Chapter 5H that discourage the court from assessing age, mental and emotional condition, physical condition, including drug dependence; military, civic, charitable, or public good works; and lack of guidance as a youth thus purport to minimize the impact of those conditions and history on a departure decision, only to be returned to the guideline via the statutory obligation. It is no wonder that this needless circling back in turn contributes to variance rates which in turn provide fodder for advisory guideline critics.

Given that offender characteristics and history are required consideration for judges under 18 U.S.C. § 3553(a), and certainly the five identified by the Commission as subject for comment, the guidelines should include them as permissible and relevant bases for departure. This will also provide additional means for judges who wish to address true first offenders with non-imprisonment sentences.

We thank you for considering our views.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel