Families Against Mandatory Minimums
FOUNDATION

October 8, 2010

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

Re: Request for public comment on guideline application of Fair Sentencing Act

Dear Judge Sessions:

FAMM welcomes this opportunity to comment on the United States Sentencing Commission's proposals to implement the directives contained in the Fair Sentencing Act of 2010.

Changes to Statutory Terms of Imprisonment for Crack Cocaine

Increasing the base offense levels for corresponding amounts of crack cocaine from its current 24 to 26 (and 30 to 32) would offend the core objectives of the Fair Sentencing Act ("the FSA"). We can discern no justification in the FSA, or in the principles of equity and parsimony that inspired it, for *increasing current base offense* levels so that they are *higher* than the corresponding mandatory minimums. An all but unanimous Congress amended crack cocaine penalties to ensure that 28 grams (not five grams) triggers the 60-month mandatory minimum sentence. The Commission should honor the intent of Congress to limit the impact of low drug quantities on sentencing by ensuring that 28 grams triggers a 60-month sentence for a person subject to a statutory mandatory minimum, *not the higher 63-month sentence under level 26 of the guidelines.*

That all but the crack guidelines are currently indexed in the Drug Quantity Table so that the base offense levels result in guideline ranges greater than the statutory mandatory minimum penalties is not persuasive. As the Commission demonstrated when it lowered crack cocaine base offense levels in 2007 and as pointed out in its report, "The History of the Child Pornography Guidelines,"[1] there is no statutory basis for anchoring the guidelines above (or for that matter to) the mandatory minimums.

When addressing mandatory minimums, the Commission has several choices, according to the report. They include setting "the base offense level for the offense so that the base offense

[1] UNITED STATES SENTENCING COMMISSION, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (Oct. 2009) ("History").

level for a Criminal History Category I offender corresponds to the first guideline range on the sentencing table with a minimum guideline range *in excess of the mandatory minimum.*"[2] This is the case for the current drug guidelines (with the exception of crack cocaine) where mandatory minimums apply.

The second option, according to the Commission, is that it can calibrate the guideline so that it "*include[s] the mandatory minimum* at any point within the range."[3] This is how the Commission recalibrated crack cocaine in the 2007 amendment cycle.[4]

"Third," the Report continues, "the Commission may set the base offense level below the mandatory minimum and rely on specific offense characteristics and Chapter Three adjustments to reach the statutory mandatory minimum."[5] The report goes on to explain that in the case where a mandatory minimum must still apply (for example, in the case of a defendant who cannot benefit from the safety valve or cooperation reduction), U.S.S.G. § 5G1.1(b) will take over to insert the mandatory minimum.

Clearly, the Commission considers itself authorized to maintain crack triggers at levels 24 and 30. Otherwise, it would not have departed from its historical (and we believe misguided) practice of floating the levels above the mandatory minimums when it amended the crack cocaine guidelines in 2007.

We could think of only two reasons to maintain guideline sentences above mandatory minimums: (1) they provide prosecutors a place to begin negotiations in the case of defendants subject to a mandatory minimum, and (2) to maintain a constant ratio between crack and powder cocaine. Neither is particularly compelling nor called for in the legislation. Mandatory minimums already provide prosecutors with significant tools to control the sentencing process and "[allow] a shifting of discretion and control over the implementation of sentencing policies from courts to prosecutors."[6]

Internal ratio coherence is insufficient to overwhelm the goals of fairness and parsimony embraced by the FSA's supporters. While the mandatory minimum for crack cocaine was widely assailed as unduly long, it was not assailed as unduly long simply because of the stark disparity in ratio between crack and powder cocaine. *The ratio was illustrative of the problem; it was not the problem.* Were the ratio the chief culprit, the problem could easily have been cured by

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[2] *Id.* at 44 (emphasis in original).
[3] *Id.* at 45 (emphasis in original).
[4] UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9 (May 2007).
[5] History, at 45.
[6] UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 32 (August 1991).

legislating parity at the crack cocaine triggering quantities. Congress and advocates alike never considered that a viable solution. The penalty structure for crack *qua* crack was too high.

In the effort to find a workable bill, members of Congress clearly relied on the discussion in the Commission's 2007 report that wholesalers of crack cocaine generally handled quantities slightly higher than 28 grams.[7] Rep. Dan Lungren (R-CA) explained the location of the new mandatory minimum when he spoke in support of the bill on the floor of the House:

> I must say from a law enforcement standpoint, perhaps the most important factor here is the amount of the substance that is covered. According to narcotics officers I have spoken with, you want to reach the wholesale and mid-level traffickers who often trafficked in 1-ounce quantities. That is why S. 1789 would raise the amount of crack cocaine necessary to trigger a mandatory 5-year sentence from 5 grams to 28 grams, which is close to the 1 ounce.[8]

That Congress did not concern itself with ratio in the Act is further demonstrated by the fact that Congress rejected the ratio-based parity proposals of Sen. Dick Durbin and Rep. Bobby Scott, among others, in favor of a quantity-based trigger which was in turn based on empirical evidence described by the Sentencing Commission.

Raising the base offense level by two will have a significant effect. Raising the offense level to 26 will add between a full year and fifteen months to the recommended sentence of a defendant who has little or no criminal history.

Additional evidence in support of not raising the crack cocaine base offense level assignment is found in Congress's silence on the issue in its otherwise detailed and thoughtful directive. Congress included specific directives to the Commission in the FSA evincing an in-depth knowledge of the guidelines. Lawmakers knew they could direct the Commission to increase base offense levels for crack cocaine – but chose not to. This was not simple oversight or ignorance. Many members of Congress, including members involved in crafting the FSA, were aware of or engaged in the discussion surrounding the Commission's decision to lower the base offense level for crack cocaine to 24. The undersigned spent a fair amount of time on the Hill working on that particular amendment before it was proposed. In light of that history and the subsequent spirited debate over retroactivity, it is safe to say the sponsors knew the Commission had lowered crack cocaine offense levels. They chose not to direct the Commission

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[7] UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, 23 (May 2007).

[8] 156 CONG. REC. H6202 (daily ed. Jul 28, 2010) (statement of Rep. Dan Lungren).

to restore crack cocaine to level 26. If Congress felt it appropriate to increase the base offense level, it would have said so in this legislation. That Congress did not speaks volumes.

Enhancements and Adjustments

We strongly urge the Commission to take the most conservative approach possible when accounting for the enhancements directed by the legislation. We do so for two reasons. First, because it can, and nothing in the FSA suggests otherwise; the FSA charged the Commission to exercise discretion when accounting for the directives it included. While the Commission is bound to account for the directives in the FSA, Congress left to it the task of interpreting and effecting in the amendments congressional concerns about aggravated conduct. The authority to exercise restraint is clearly provided for in various sections of the FSA, particularly where it directs the Commission to "*review* and amend the guidelines to ensure" that they, for example, "provide an additional penalty increase of at least 2 offense levels" for various violence features.

Second, we urge the Commission to take the most conservative approach because it should. The FSA, a bill that for the first time in decades reverses course, reducing and eliminating mandatory minimums, should not be undermined by an overenthusiastic and unnecessary piling on of penalty features, especially those already accounted for in the guidelines or in the directive itself. The spirit that animates the FSA (of reducing sentences that have for decades overstated culpability) should similarly guide the approach to the enhancements directives. Indeed, the Commission has identified that the sentencing guidelines are deviled by the phenomenon known as "factor creep." It pointed out that "as more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[9] While the Commission has lain the problem of factor creep at Congress's door, that the FSA dramatically reduces sentences is a sign that Congress may be taking itself out of the business of ever-increasing sentence lengths. Given the Commission's recognition of and concern about the impact on proportional sentencing, and its concern that the guidelines' enhancements can overstate offense seriousness, it should approach the directives with caution and reserve.

Section 5 of the FSA directs the Commission to review and amend the guidelines to provide for an additional two offense levels if the defendant used, credibly threatened, or directed the use of violence during a drug trafficking offense.

Restraint with respect to Section 5 should be exercised in at least the following ways. First, the enhancement should not apply if the weapon enhancement in U.S.S.G. § 2D1.1(b)(1) applies, or if the mandatory minimum for 18 U.S.C. § 924(c) offenses referenced in § 2K2.4

[9] UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING 137 (November 2004).

applies, as that enhancement already directs the addition of two levels in the event a dangerous weapon was possessed in connection with the offense, and the mandatory minimum is sufficient. Second, it should apply only to threats or acts against persons. There is no indication in the legislative history that we can locate that contemplates incorporating violence other than that involving threats or acts against people. Third, the Commission should not direct that the three-part description be assigned cumulative effect. Congress certainly could have directed the Commission to ensure the violence enhancement be accumulated, but it did not do so. The enhancement has a floor, two levels, but leaves to the Commission the decision whether to increase the enhancement above that minimum. It should not.

Section 6(1) of the FSA directs the Commission to revise and amend the guidelines in the case of attempted or completed bribery of law enforcement officials in connection with a drug trafficking offense. We encourage the Commission to include in the guidelines an instruction that avoids applying the new bribery enhancement with the current obstruction of justice two-level enhancement at § 3C1.1 in cases where the bribery conduct is aimed to obstruct or impede the administration of justice.

Section 6(2) directs a two-level enhancement in the event the defendant maintained an establishment for the manufacture or distribution of a controlled substance as generally described in 21 U.S.C. § 856. While § 856 is discussed as "generally" describing the conduct, the Commission should recognize that there are important distinctions between the two provisions and ensure that the limiting language of § 6 be given effect. In other words, the FSA would have the enhancement apply only if the establishment is "maintained . . . for the manufacture or distribution of" drugs, while the scope of 18 U.S.C. § 856 is broader, going to, for example, renting and leasing or using, even "temporarily," a "place." The enhancement should be crafted to ensure that it contains a *mens rea* component and that the establishment is maintained for the principal purpose of drug manufacture or distribution.

Sec. 6(3) provides for a set of super-aggravators which trigger a two-level enhancement above the already provided for enhancement for the predicate organizer, leader, manager or supervisor's conduct when the conduct includes enumerated factors.

We encourage the Commission to limit the impact of secs. (ii)(III) and (ii)(IV), which target for enhancement distribution to or employment of unusually vulnerable persons. Drug abuse or addiction alone should not be counted among the vulnerabilities, at least for purposes of this enhancement. Otherwise it would ensure, for those subject to the severe organizer-leader enhancement, a near automatic increase of an additional two levels because drug dealers sell drugs to and involve drug abusers in drug transactions.

Furthermore, the defendant should be subject to the super aggravators only if he or she knew the defendant met the enumerated conditions (age, vulnerability, pregnancy, etc.); it is insufficient that the conduct of distribution or involvement was knowing.

To the extent that the super-aggravators account for conduct or conditions already accounted for in the guidelines with enhancements (i.e., if the defendant can already be enhanced for using a minor to commit crime (§ 3B1.4), involving a vulnerable victim (§ 3A1.1(b),, or where the enhancement for witness intimidation or evidence tampering overlaps with the obstruction of justice enhancement) the Commission should instruct that only one of the applicable enhancements should apply.

Finally, as discussed above, the section 6 enhancements should not be cumulative, either between subsections or for the purposes of the super-aggravators in § 6(3). The Commission should note that in section 6 Congress demonstrated it could write an enhancement to ensure that aggravators would be stacked. In other words, the super-aggravators of § 6(3) clearly direct that an enhancement of at least two levels be added to an existing enhancement of 2 to 4 levels for organizer/leaders under U.S.S.G. § 3B1.1. Congress could have directed the Commission in the same manner throughout the FSA if it wanted to stack enhancements for cumulative effect. It did not, except in this section, and the Commission should not unnecessarily pile on cumulative enhancements. Especially given the potential for these multiple super-aggravating enhancements to increase sentences significantly, even to life terms, they should not be given cumulative effect.

Thank you for your attention to our concerns.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel

cc:

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