Families Against Mandatory Minimums
FOUNDATION

August 26, 2011

Hon. Patti B. Saris, 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, notice of proposed priorities

Dear Judge Saris:

FAMM welcomes this opportunity to comment on the United States Sentencing Commission's proposed priorities for the 2012 amendment cycle.

Priority (1)(A): Continuation of its work on statutory mandatory minimum penalties pursuant to the directive in section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.

FAMM looks forward to the Commission's completion of its study and review of statutory mandatory minimum penalties and their impact on the federal sentencing system. The Commission's 1991 critical report on mandatory minimums spurred some reform of these harsh and restrictive sentences, including passage of the statutory safety valve.[1] As this new report is prepared for release, reform is even more necessary to lessen the burden of mandatory minimums on taxpayers, families of inmates, and prisoners themselves. What the Commission reveals will undoubtedly have an effect on the future of this flawed sentencing policy.

Momentum is building for changes to mandatory minimum sentencing and judges have made their views on the matter clear in a Commission survey of the judiciary. Fully 62 percent of federal judges viewed mandatory minimums as inappropriately harsh, and statutory mandatory minimums were most often cited as introducing disparity in sentencing, followed closely by charging decisions.[2] While the survey did not test the judiciary's overall attitude about mandatory minimums, the regional hearings held by the Commission elicited nearly unanimous condemnation of them.

FAMM also welcomes the Commission's examination and analysis of the operation of the statutory safety valve provision as part of the study and review of mandatory sentencing. The statutory safety valve, as currently constituted, allows courts to depart from a mandatory minimum sentence for certain drug offenders and instead impose a sentence based on the

[1] *See* 18 U.S.C. § 3553(f).
[2] UNITED STATES SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES 5, 21. (2010) (Judges' Survey)

sentencing guidelines if five criteria are met.[3] Pursuant to the guidelines, defendants who meet the criteria of the safety valve can also receive a two-level reduction from their prescribed guideline sentence.[4]

However, the safety valve should be expanded to apply to all mandatory minimum sentences for any crime and should be amended with regard to its calculation of criminal history.

Many individuals have benefited from the safety valve provision, including the two-step reduction from the guidelines. But the current guideline and statutory language restricts the availability of the safety valve only to drug offenders. As the Commission argued in its past testimony to Congress, this safety valve reflected a desire to allow flexibility in sentencing for the least culpable offenders.[5] This logic should be applied more broadly, as nonviolent and low-level offenders continue to face unduly harsh mandatory minimums, as well as long guideline sentences.[6] Many in the judiciary agree; 69 percent of federal judges called for the safety valve to be expanded to all crimes with a mandatory minimum.[7]

In addition, the safety valve is only available to individuals who do not have more than one criminal history point.[8] Criminal history calculations can be unrepresentative of the offender's culpability and danger of recidivism, as indicated by the fact that criminal history issues were cited as the reason in 43.8 percent of downward departures in 2010, substantially more than for any other reason.[9] Offenders can earn criminal history points for minor offenses that include contempt of court, reckless driving, or trespassing.[10] Individuals like FAMM member Brian

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[3] The five criteria are: (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

[4] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(11)(2010).

[5] *Mandatory Minimum Sentencing Laws: The Issues, Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 6-7 (2007) (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission).

[6] In its survey of federal judges, the Commission reported that a majority of federal judges were concerned about unduly long sentences for crimes like receipt of child pornography. Judges' Survey at 5, 11 (2010).

[7] *Id.* at 5.

[8] 18 U.S.C. § 3553(f)(1).

[9] UNITED STATES SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 67 (2011) ("2010 Sourcebook").

[10] ROGER W. HAINES, JR., FRANK O. BOWMAN, III, & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1282 (2009).

Ison, who was ineligible for the safety valve because of his past offenses of speeding without a license, drinking in public, and possession of alcohol by a minor and received over 11 years in prison, continue to face unduly harsh sentences because of this restriction. In a report, the Commission found that 260 offenders like Mr. Ison would have been eligible for the safety valve if not for prior minor convictions in 2006.[11] The Commission should recommend to Congress that this statutory restriction be changed to make the safety valve available to individuals in Criminal History Category I and II, and use its own authority to make the guideline safety valve available to these types of defendants. By changing the eligibility to categories as opposed to criminal history points, the courts can credit whether a person for whom the calculated criminal history in fact overstates the true criminal history should nonetheless be safety valve eligible.

Priority 1(B): Study and report to Congress regarding violations of section 5(a) of the United Nations Participation Act of 1945, sections 38, 39, and 40 of the Arms Export Control Act, and the Trading with the Enemy Act.

In the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, the Commission was directed to conduct a study about the impact and feasibility of imposing mandatory minimum sentences for violations of three code sections related to exports controls.[12] The Commission should recommend that mandatory minimum sentences not be imposed for violations of these statutes.

Significant criminal penalties already exist for these offenses and the guidelines can accommodate sections not currently indexed. For violations of Section 5(a) of the United Nations Participation Act of 1945, judges can give offenders a prison term of 10 years, a fine of up to $10,000, or both.[13] Offenders convicted under the specified sections of the Arms Export Control Act can receive a prison term up to 10 years, a fine of $1,000,000, or both.[14] The Trading with the Enemy Act carries a penalty of a maximum prison term of 10 years, a fine of not more than $1,000,000, or both.[15] Under the Sentencing Guidelines, export violations are punished either as a Level 14 offense (15-21 months for someone with no criminal history) or a Level 26 offense (63-78 months for someone with no criminal history), if national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons were evaded, or the offense involved a financial transaction with a country supporting international terrorism.[16] Adding mandatory minimum penalties to these existing sentences is clearly unnecessary, and the Commission has demonstrated that it can draft guidelines calling for strict sentences in this area without the need for new statutory minimums.

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[11] UNITED STATES SENTENCING COMMISSION, IMPACT OF PRIOR MINOR OFFENSES ON ELIGIBILITY FOR SAFETY VALVE 5 (2009).
[12] Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, Sec. 107(b), 124 Stat. 1337 (2010).
[13] 22 U.S.C. § 287c(a).
[14] 22 U.S.C. § 2778(c); 22 U.S.C. § 2780(j) .
[15] 50 U.S.C. app. § 16.
[16] U.S. SENTENCING GUIDELINES MANUAL § 2M5.1(a) (2010).

Mandatory minimum penalties have proven ineffective for dealing with many other crimes. These draconian sentences have increased prison populations, cost taxpayers billions, and reduced faith in our criminal justice system. These sentences should be eliminated or reduced and certainly not added to existing federal laws. If the Commission is concerned that judges are not taking exports controls violations seriously, it should consider alternatives to mandatory minimum sentences, such as recommending increases to existing statutory fines and penalties. The Commission could also study and if necessary amend the guidelines to provide for enhancements or reductions, which would enable judges the basis to prescribe a more appropriate sentence based on the individual circumstances of the case.

Priority (2): Continuation of its work on implementation of the directives in section 1079A of the Dodd-Frank Wall Street Reform and Consumer Protection Act . . . regarding securities fraud offenses and offenses relating to financial institutions or federally related mortgage loans.

FAMM strongly encourages the Commission to make it a priority to conduct without delay the much anticipated multi-year review of the financial fraud guidelines. We do so because of the negative attention that has been paid to variances in economic crime sentencing patterns. This attention is often accompanied by inferences or accusations that sentencing in this area is inappropriately lenient and may require congressional intervention and, perhaps, even mandatory minimums.

The Department of Justice has been the source of some of the criticism of economic crime sentencing patterns. In April 2010, Lanny A. Breuer, Assistant Attorney General for the Criminal Division, speaking to the American Bar Association, identified the Department's concern with "increased disparity in white-collar sentencing," and used several unidentified examples of below-guideline sentences to underscore the issue. He cited Sentencing Commission data that showed "that the percentage of defendants sentenced within the guidelines has decreased in the wake of the Booker line of cases. Although the full impact of recent trends in sentencing jurisprudence is still unclear, these developments must be monitored carefully." He promised that the then-recently created DOJ Sentencing and Corrections Working Group would be looking into the "reasons for the disparities." [17]

In June 2010, *ex officio* Commissioner Jonathan Wroblewski was even more pointed. He wrote to the Commission on its 2010 priorities that Sentencing Commission data and prosecutors' experience "suggest that federal sentencing practice is fragmenting into two distinct and very different sentencing regimes. On the one hand, there is the federal sentencing regime closely tied to the sentencing guidelines. . . . On the other hand there is a second regime that has largely lost its moorings to the sentencing guidelines." He went on to specifically identify sentences for

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[17] *American Bar Association National Institute on White Collar Crime* (Feb. 25, 2010), (Remarks by Lanny A. Breuer, Assistant Attorney General for the Criminal Division), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/2010/02-25-10aag-AmericanBarAssosiation.pdf.

high loss fraud offenses as among those of concern.[18] The letter also identified as an issue that the sentencing outcome depends, according to the Department, on the judge assigned to the case, suggesting to some observers that he saw the problem as one caused by judges, rather than by guidelines that many find hard to impose.[19] In February 2011, the Department, represented by Preet Bharara, the U.S. Attorney from the Southern District of New York, suggested to the Commission at its hearing on Dodd-Frank that variances in white collar sentencing might merit mandatory minimums.[20]

In May 2011, Sen. Charles Grassley criticized "the disparity and unfairness in judicially imposed sentences" in insider trading cases in the Southern District of New York and suggested Congress should revisit the advisory sentencing guidelines.[21] He based his remarks on a Reuters "study" that purported to show that these criminals routinely enjoyed lenient sentences. That study, however, had been characterized by U.S. Attorney Bharara as "skewed" in his February Commission testimony. (Mr. Bharara, whose office had brought the cases, explained to the Commission that the Reuters study failed to account for a number of cooperation agreements that led to below guideline recommendations from the government.)[22]

These criticisms and calls for mandatory sentencing are based on an unspoken assumption that the sentencing guidelines in this area are unassailable and variances from them unwarranted. This is hardly a given.

Scholars, judges, practitioners and even the Sentencing Commission have criticized the economic crime sentencing guidelines – and for good cause. "[A] typical offender or director of a public company who is convicted of a securities fraud offense now faces an advisory guideline sentence of life without parole in virtually every case . . . [and] the advisory guideline sentence will be life without parole for virtually any employee convicted of a serious securities fraud causing more than $100 million of loss."[23] Economic crime offenders can easily reach a prison term under the guidelines that once had been reserved for the worst of the worst violent and

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[18] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Department of Justice, Criminal Division to the Honorable William K. Sessions, III 1-2 (June 28, 2010).

[19] *See, e.g., United States v. Ovid*, 2010 WL 3940724, 1-2, E.D.N.Y. (Oct. 1, 2010) (stating that the DOJ complaints to the Commission about disparate sentencing regimes is misplaced, given that the Department appeals so few cases and fails to address the problem inherent in unduly harsh fraud guideline sentences.).

[20] Transcript of Public Hearing before the United States Sentencing Commission 60 (Feb. 16, 2011).

[21] *Senate Committee on the Judiciary Executive Business Meeting* (May 19, 2011) (Prepared Statement of Ranking Member Chuck Grassley), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16cbeb7&wit_id=e655f9e2809e5476862f735da16cbeb7-0-1.

[22] Transcript of Public Hearing before the United States Sentencing Commission 60 (Feb. 16, 2011)

[23] James E. Felman , *The Need to Reform the Federal Sentencing Guidelines for High Loss Economic Crimes*, 23 *Federal Sentencing Reporter*, 138, 138 (December 2010) ; see also Alan Ellis, John R. Steer, and Mark H. Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 *Criminal Justice* (Winter 2011).

repeat offenders. This remains true even though fraud offenses carry the lowest level of recidivism when compared to crimes such as robbery, larceny, and firearms offenses.[24]

Former federal judge Paul Cassell and former federal prosecutor Brett Tolman have written, "[r]ather than resting on evidence of past, national sentencing practices, the white collar guidelines are a product of the political environment in which they were promulgated, the Commission's desire that the guidelines reflect perceived congressional policy, and the Commission's own independent policy determinations concerning the severity of a particular class of conduct."[25] University of Missouri Law Professor Frank Bowman, a former federal prosecutor, has concluded that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense."[26] Ellen Podgor, the Gary R. Trombley Family White-Collar Crime Research Professor of Law at Stetson University College of Law, has written that "[t]he one-size-fits-all methodology of sentencing white collar offenders seriously diminishes consideration of the individual offender, the nature of the offense, and the level of protection needed to satisfy the public's interest." She said the current guideline subjects economic crime offenders "to draconian sentences that in some cases exceed their life expectancy."[27] James Felman, who serves as the American Bar Association's (ABA) liaison to the Sentencing Commission and co-chair of the ABA's Sentencing Committee, observed, "[i]n the initial 1987 Guidelines, the amount of the loss could result in no more than a fivefold increase in the range of imprisonment. Under the current Guidelines, the loss can increase the range nearly fortyfold. The reliance on loss to drive sentencing outcomes is simply out of control."[28]

At the same time, judges are faced with the challenge of applying the guidelines while honoring the mandate in 18 U.S.C. § 3553(a). Consideration of individual circumstances of the offense and offender — a fundamental requirement of justice and sentencing law — often yields results at odds with those suggested by the rigid formula set forth in the fraud guideline. Sentences below the guidelines are therefore inevitable, given the Supreme Court's clear instruction to the lower courts that the guidelines are not the end of the sentencing inquiry, but rather just "one factor among several courts must consider" in arriving at a result faithful to the statutory requirement to "impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing.[29]

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[24] Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97:3 J. OF CRIMINAL LAW AND CRIMINOLOGY, 758 (2007).

[25] Letter from Brett Tolman, Esq. & Hon. Paul G. Cassell to Chief U.S. District Judge Linda Reade 5 (April 19, 2010).

[26] Frank O. Bowman, *Sentencing High-Loss Corporate Insider Fraud Post-Booker*, University of Missouri School of Law Legal Studies Research Paper Series, No. 2008-13, (November 3, 2008).

[27] Podgor, *supra* note 24 at 756.

[28] Felman, *supra* note 23 at 140.

[29] *Kimbrough v United States*, 552 U.S. 85 (2007).

In *United States v. Ovid*, Judge John Gleeson directly addressed the Department's assessment that variances from recommended sentences under the fraud guidelines were creating two sentencing regimes. Quoting from the Wroblewski letter cited earlier, he wrote:

> One "regime," the [Department] contends, "includes the cases sentenced by federal judges who continue to impose sentences within the applicable guideline range for most offenders and most offenses." This is apparently the good regime. The "second regime," by contrast, "has largely lost its moorings to the sentencing guidelines." This regime is a cause of concern for the Department. It consists of judges who sentence fraud offenders, especially in high-loss cases, "inconsistently and without regard to the federal sentencing guidelines." . . . The sentencing of Isaac Ovid on July 30, 2010 illustrates well the fact that, here in the trenches where fraud sentences are actually imposed, there is a more nuanced reality than the DOJ Letter suggests.[30]

In *United States v. Parris*, the court said that "the Sentencing Guidelines for white-collar crimes [can produce] a black stain on common sense."[31] In *United States v. Adelson,* another judge (and former federal prosecutor) lamented "the utter travesty of justice that sometimes results from the guidelines' fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."[32]

Judge Gerald Lynch addressed the overbearing aspect of loss in an opinion in 2004:

> The guidelines provisions for theft and fraud place excessive weight on this single factor [loss], attempting — no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes — to assign precise weights to the theft of different dollar amounts. In many cases, including this one, the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence. To a considerable extent, the amount of loss caused by this crime is a kind of accident, dependent as much on the diligence of the victim's security procedures as on Emmenegger's culpability. Had Emmenegger been caught sooner, he would have stolen less money; had he not been caught until later, he would surely have stolen more.[33]

The issue reached the popular media most dramatically last year when former U.S. Attorneys General, DOJ officials, federal prosecutors and judges wrote to the judge preparing to impose a sentence on Sholom Rubashkin to oppose the life sentence originally urged by the Department of

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[30] *United States v. Ovid*, 2010 WL 3940725, slip op at 1, 2 (Oct. 1, 2010) (internal citations omitted).
[31] 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008).
[32] 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006).
[33] *United States v. Emmenegger*, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004).

Justice, despite the fact that he was a first-time, non-violent offender. [34] That the 27-year sentence imposed in this case seems lenient in comparison is a sad commentary on the state of sentencing in this area.

In the teeth of mounting evidence and criticism that the problem lies not with judges, but with the guidelines, we feel it imperative that the Commission not delay in conducting a thorough review. It should focus on two principle problems: first, that monetary loss has become the single most important factor driving sentence length and that redundant sentencing enhancements for ubiquitous conduct, such as for using "sophisticated means," quickly inflate sentences.

We offer four suggested reforms. First, reduce the current excessive emphasis on actual or intended monetary loss. Second, better account for whether and to what extent the defendant gained monetarily from the crime. Third, ensure more weight is placed on personal responsibility, intent, and other characteristics that should bear on punishment. Finally, eliminate double counting aspects of an offense by striking redundant enhancements.[35]

Priority (3): Continuation of its work with the congressional, executive, and judicial branches of government to study the manner in which *United States v. Booker* has affected sentencing practices.

FAMM welcomes data and analysis by the Commission regarding federal sentencing practices after *Booker*, as it will provide critical information for understanding the relevance, effectiveness and appropriateness of the federal sentencing guidelines. However, as discussed above, the Commission should resist any temptation to recommend that the guidelines be enforced more strictly or limit their advisory nature in any way.

To recommend that the judicial discretion mandated under 18 U.S.C. § 3553(a) be limited or that the guidelines, one of the factors judges must take into account under that statute, be elevated to first among equals, would unduly hamper the necessary role of individualized consideration at sentencing. It would also be inconsistent with the Supreme Court's jurisprudence on the sentencing guidelines, which acknowledges the flexibility required to approximate sentences that effectively accomplish crime control goals.[36] As "judges … can differ as to how best to reconcile the disparate ends of punishment"[37] they should have the discretion necessary to continue the "evolution" of the Commission's work.[38]

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[34] Letter from Nicholas Katzenbach, et al. to the Honorable Linda R. Reade (Apr. 26, 2010), *available at* http://justiceforsholom.org/wp-content/uploads/2011/03/6-Attorneys-General-Letter.pdf.
[35] The American Bar Association endorsed similar proposals at its 2011 Mid-year Meeting. *See* ABA Resolution 104C (Mid-year 2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/104c_2011_my.authcheckdam.pdf.
[36] *See United States v. Booker*, 543 U.S. 220, 264 (2005).
[37] *Rita v. United States*, 551 U.S. 338, 349 (2007).
[38] *Id.* at 350.

If the Commission is concerned with departures and/or variances from particular guidelines, it should view them as feedback on the fairness or appropriateness of the guideline in light of the purposes of sentencing.[39] For example, receipt, possession, or trafficking in child pornography features a high departure/variance rate, almost exclusively below the guidelines.[40] In the Commission's survey of federal judges, these guidelines were identified as overly harsh by nearly 70 percent of judges,[41] reflecting that judges view them as needlessly retributive in many cases. Other offense ranges have much lower rates of noncompliance, so the variance on child pornography and other offenses, like drug trafficking and fraud, reflects on the particularity of that sentence, not judicial unwillingness to follow guidelines.

FAMM commends the Commission for contemplating a post-*Booker* report, but encourages it to make any recommendations for changes in the context of a scheme in which individualized sentencing is paramount.[42]

Priority (4): Continuation of its multi-year review of § 2D1.1.

FAMM welcomes the chance once again to strongly urge the Commission to do what it can to ameliorate the harshness of drug sentencing and specifically urges it to adopt the now discontinued two-level crack guideline adjustment across all drug types.[43] When Congress adopted mandatory minimum sentences for drug offenses in 1986, the Commission responded by placing guideline ranges above the mandatory minimum sentence, thereby creating unduly long sentences.[44] This step was unnecessary, as the Commission has the authority to set the base offense level to the guideline range that is the first on the table to include the mandatory minimum (such as 51-63 months for a 60 month mandatory minimum), or to set the base offense level below the mandatory minimum and rely on specific offense characteristics and adjustments to reach the mandatory minimum.[45] Utilizing this authority, the Commission temporarily adjusted crack sentences downward in 2007, placing the mandatory minimum penalty at the high end of the guideline range.

This change has benefited a number of citizens, especially when it was made retroactive. The Commission heard from one such person, Natasha Darrington, who shared the witness table with FAMM President Julie Stewart in June 2011 to describe how her early release has changed her life and the lives of her loved ones.[46]

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[39] *Id.*
[40] 2010 Sourcebook AT 79.
[41] Judges' Survey at 11 (2010).
[42] *See* 18 U.S.C. § 3553(a) (2006). The statute requires judges to consider individual factors in determining the most appropriate sentence.
[43] See UNITED STATES SENTENCING COMMISSION, PUBLIC HEARING ON PROPOSED AMENDMENTS 2011 (Statement of Mary Price, Vice President and General Counsel FAMM at 3-5)(March 17, 2011) (FAMM Testimony).
[44] UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING 49 (2004).
[45] UNITED STATES SENTENCING COMMISSION, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 45 (2009) ("History of the Child Pornography Guidelines"). In the second scenario, the mandatory minimum would trump the guidelines if the adjustments failed to reach the minimum sentence required by statute.
[46] Transcript of Public Hearing Before the United States Sentencing Commission 274-279 (June 1, 2011).

However, crack is not the only drug with overly harsh penalties. The Commission has acknowledged that many penalty ratios within the guidelines do not reflect the "relative harmfulness" of particular drugs.[47] For example, trafficking in five grams of pure methamphetamine carries a 60-month mandatory minimum penalty,[48] but is listed at offense level 26, which carries a 63-78 month sentence under the guidelines.[49] FAMM often receives calls from frustrated inmates serving harsh methamphetamine sentences and their families. These penalties have contributed to a perception of unfairness within the criminal justice system. Given that the Commission has consistently urged Congress to reform mandatory minimum sentences for drug offenses,[50] it makes little sense to maintain guideline ranges above these sentences. Instead, the Commission should utilize its acknowledged authority to place the minimum sentences within the guidelines as in the crack adjustment, and should make such changes retroactive to benefit individuals who have suffered injustice as a result of these unduly harsh penalties.

Of course, the Commission need not limit itself to reducing drug sentences by two levels to readjust the relationship to the mandatory minimum. In fact, the Commission should take a close look at the overall harshness of the drug guidelines and delink the guidelines from the mandatory minimums altogether so that sentences are more rational, relevant and meaningful. As the Commission pointed out in its report, "The History of the Child Pornography Guidelines,"[51] there is no statutory basis for anchoring the guidelines with the mandatory minimums. When addressing mandatory minimums, the Commission has four choices, according to the report. They include setting "the base offense level for the offense so that the base offense 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*."[52] This is the case for the current drug guidelines where mandatory minimums operate. Then, of course, according to the report, the Commission can calibrate the guideline so that it "*include[s] the mandatory minimum* at any point within the range."[53] "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."[54] The report goes on to explain that where a mandatory minimum must still apply, such as 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.

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[47] FIFTEEN YEARS OF GUIDELINE SENTENCING at vii.
[48] 21 U.S.C. § 841(b)(1)(B)(viii) (2006).
[49] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7) (2009).
[50] *See, e.g., Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Ricardo H. Hinojosa, Acting Chair, United States Sentencing Commission).
[51] History of the Child Pornography Guidelines.
[52] *Id.* at 44 (emphasis in original).
[53] *Id.* at 45 (emphasis in original).
[54] *Id.*

Clearly the Commission considers itself authorized to depart from strict adherence to the mandatory minimum to provide for a sentence that both acknowledges the need for a mandatory minimum in certain cases but also permits more flexibility in sentencing in others. We endorse that approach, particularly with respect to drug sentencing, and urge the Commission to delink the guidelines from the mandatory minimums in a fashion contemplated by the report.

We also repeat our call on the Commission to take steps to expand the guideline safety valve, whether or not Congress acts to do so with the statutory safety valve, as discussed above and as we expressed in our testimony to the Commission in the 2011 amendment cycle.[55] Even if Congress fails to broaden the scope of the safety valve, the Commission could address this problem by allowing the guideline safety valve to be applied more broadly to low-level offenders convicted of crimes other than drug trafficking. The Commission can determine if this is an appropriate measure by tracking more data on the safety valve, including calculating average sentence reductions from its use, its application in different jurisdictions, and the impact of eligibility restrictions on its use.

The Commission can use its own authority to make the guideline safety valve available to these types of defendants. By changing the eligibility to criminal history categories as opposed to criminal history points, the courts can credit whether a person for whom the calculated criminal history in fact overstates the true criminal history should nonetheless be safety valve eligible.

Priority (5): Continuation of its review of child pornography offenses.

We commend the Commission for its continuing work to examine and report on departures and variances from guideline sentences for child pornography offenses. Over the past few years, FAMM has heard from a growing number of family members who have been devastated by lengthy statutory and guideline-driven sentences for offenses involving the viewing, downloading or sharing of images of child pornography. For example, we heard from the sister of a man who received a fifteen-year mandatory sentence after downloading two digital pictures from his teenage girlfriends and taking and downloading others. Though his girlfriends consented to the pictures, had consented to an ongoing sexual relationship with him, and were of legal age to marry him, they were children for purposes of the statutory mandatory minimum. The sentencing judge pointed out the absurdity of the sentence but had no discretion to avoid it.

Guideline sentences in this area are also altogether too high. The frequency of departures and variances from particular child pornography guidelines, especially receipt and possession, should indicate to the Commission that the sentences are too harsh and should be amended. The below guideline rate is hardly surprising. In 1997, child pornography offenders received a mean sentence of 20.59 months. In 2010, the mean sentence grew to 118 months.[56] This change represents a 500 percent increase in the mean sentence imposed for this class of offenders in just 14 years.

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[55] FAMM Testimony, supra note 43 at 5-7.

[56] 2010 Sourcebook at 29.

In 2010, only 53.5 percent of USSG § 2G2.2 offenses, for receipt, possession, or trafficking in child pornography, were within the guideline range or below is pursuant to a government sponsored departure.[57] Almost all of the departures and variances were below the guideline range.[58] These below guideline sentences reflect the view, held by federal judges, that the guidelines are too harsh for these offenses. In addition, the enhancements within the child pornography guidelines are too frequently called for and result in unduly severe sentences. For example, one of the enhancements involves the use of the computer.[59] The saturation of computer technology assures that most offenders under this section will be subject to this enhancement, as argued by federal judges in recent cases,[60] and it should be eliminated from the guidelines manual as needlessly duplicative and unduly harsh.

The Commission should also recommend to Congress that statutory mandatory minimum penalties for certain child pornography offenses be reduced or repealed. Federal judges across the country have demonstrated considerable concern about the length of mandatory minimum sentences for receipt of child pornography. In fact, fully 71 percent viewed the mandatory minimum penalty for receipt of child pornography to be too high, while only 15 percent opposed the expansion of the safety valve to include these offenses.[61] In response to this widespread view that this mandatory minimum penalty is too high, the Commission should recommend a change in the statutory scheme to Congress.

As the Supreme Court has stated, the departures of federal judges from particular guideline sentences should be treated as feedback on those guidelines.[62] In this case, it is clear that these guidelines are too harsh, and should be amended to reduce the base offense level and enhancements. While the guidelines were adopted in connection with the mandatory minimum penalty established by Congress, the Commission has the option of creating a new base offense level without regard for the established mandatory minimum.[63]

Priority (10): Consideration of §5K2.19 (Post-Sentencing Rehabilitative Efforts) in light of *Pepper v. United States*.

We endorse a revision to the sentencing guidelines occasioned by the Supreme Court's decision in *Pepper* and encourage the Commission to also review other prohibited and discouraged departures in the guidelines, particularly where they directly contradict mandates in 18 U.S.C. § 3553(a). To do otherwise invites departures and variances because judges are obliged to consider a variety of factors disfavored by the guidelines. The better course, and one that will

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[57] *Id.* at 80.
[58] *Id.*
[59] U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (2009).
[60] *See, e.g.*, United States v. Durvee, 604 F.3d 84, 96 (2d Cir. 2010).
[61] Judges' Survey at 5, 6.
[62] Rita v. United States, 551 U.S. 338, 349-50 (2007).
[63] The Commission acknowledged this authority in its report on child pornography guidelines. *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES AT 45-46.

make the guidelines more relevant and blunt departures and variances, is to align the policy with that required by § 3553(a).

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

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel.