President
Families Against Mandatory Minimums Foundation

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Good morning, Judge Murphy and Commissioners. It is a pleasure to testify before you once again to address the issue of crack cocaine penalties. Many of FAMM's 25,000 members are either serving crack sentences, or have family members who are, and they are deeply concerned about the decisions you will make regarding crack penalties. I am here today on their behalf, and that of the other FAMM members who include lawyers, judges, politicians, professors, criminal justice professionals and concerned citizens.

As many of you are aware, I have appeared before the Commission every year since 1992 to urge you to amend the sentencing guidelines in ways that increase judicial discretion while providing appropriate penalties that fit the offense and offender. Today my comments will focus on amending the crack cocaine guideline to lower the penalties associated with possession and distribution of the drug.

The penalties for crack are unconscionable. You know that. They are also insupportable as was demonstrated with such care in the 1995 Special Report to Congress; as was set out so succinctly in the Issues for Comment published on January 17, 2002 and the statistical analysis just completed by the Commission staff; and as has been underscored in testimony over these two days. I am delighted that the Commission has decided to tackle this difficult issue with the thoroughness that it is.

FAMM has long been on record in support of equalizing crack and powder cocaine sentences at the current levels of powder cocaine. However, in 1995 when the Sentencing

Commission voted to do just that, I left the room feeling glad that they took a moral stand, but deeply concerned that it was not the best decision politically. Today, making crack penalties the same as powder is not an option for the Commission, given the congressional directive to propose an amendment that establishes sentences that are generally higher for crack than powder. Pub. L. No. 104-38, § 2(a)(1)(A), 109 Stat. 334 (1995).

So, the question is, what is the correct penalty for crack cocaine defendants? It's a hard question to answer and one that is critical to whether the Commission will have support for its recommendation. As long as we are operating in a weight-based sentencing structure, I encourage you to amend the crack guidelines by applying the same organizing principle to crack cocaine that applies to other drugs: punish a mid-level dealer with a five-year minimum sentence and a high-level dealer with a ten-year minimum sentence. I also encourage you to continue to de-emphasize weight as the primary sentencing factor and focus instead on culpability and role.

Mid- and high-level dealers

The organizing principle of focusing on mid- and high-level dealers has been stated in the Commission's Issue for Comment,

> [i]n general, the statutory penalty structure for most, but not all, drug offenses was designed to provide a five year sentence for a serious drug trafficker (**often a manager and supervisor of retail level trafficking)** and a ten year sentence for a major drug trafficker (**often the head of the organization that is responsible for creating and delivering very large quantities**). . . . The drug quantities that trigger the five year and ten year penalties for crack cocaine offenses, however, are thought by many to be too small to be associated with a serious or major trafficker. As a result, many low level retail crack traffickers are subject to penalties that may be more appropriate for higher level traffickers.

Proposed Amendments to the Sentencing Guidelines, November 28, 2001 and January 17, 2002 (Reader friendly version) at 80 ("Proposed Amendment")(emphasis added).

The Commission reached the same conclusion in its 1995 report to Congress following a close examination of legislative history. Congress, the Commission said then, meant to impose the ten-year mandatory term on major distributors and five- year terms on serious distributors "for all drug categories including crack cocaine." Cocaine Report at 119. At some point however, crack cocaine was cut out for different treatment by Congress, likely due to a widespread belief that crack was much more harmful than most other drugs, including even powder cocaine. As you recognize in the Issue for Comment, the crack penalty appears to incorporate penalties for conduct that was considered inherent in the crack trade – an association that has been discredited

> [C]oncern has been expressed that the penalty structure does not adequately differentiate between crack cocaine offenders who engage in aggravating conduct and those crack cocaine offenders who do not. This lack of differentiation is caused by the fact that, for crack cocaine offenses, the Drug Quantity Table accounts for aggravating conduct that is sometimes associated with crack cocaine (e.g., violence). Building these aggravating factors into the Drug Quantity Table essentially penalizes all crack cocaine offenders to some degree for aggravating conduct, even though a minority of crack offenses may involve such aggravating conduct. As a result, the penalty structure does not provide adequate differentiation in penalties among crack cocaine offenders and often results in penalties too severe for those offenders who do not engage in aggravating conduct.

Proposed amendments at 79.

Today, as your recently published analysis of crack and powder sentencing demonstrates, the vast majority (66.5 percent) of those sentenced for crack offenses, were street-level dealers. U.S. Sentencing Commission, "Drug Briefing, January 2002 ("Drug Briefing"), Fig. 11. The median quantity attributed to them was 52 grams (Drug Briefing, Figure 18), for which they are sentenced at a median of 120 months. (Drug Briefing, Figure 2). Managers and Supervisors are dealing in median quantities of around 250 grams of crack cocaine, while organizers and leaders are handling roughly 500 grams. Drug Briefing, Figure 18.

While these figures represent the quantity involved in crack convictions from the year

2000–and are noticeably larger than the 5 and 50 gram triggers for the five and ten year sentences–the Commission has nearly 15 years worth of data from which to extract the average quantity of crack cocaine handled by mid- and high-level dealers (weighted for trends) to determine role-based trigger amounts for five and ten year penalties. I urge the Commission to do such analysis.

As much as FAMM opposes weight-based sentencing, if weight is a primary factor in establishing base sentences, then the weight must be justifiable to the public. The Commission cannot simply pick a number out of the blue because it creates a nice sounding ratio, and expect to gain the support of the sentencing reform community. There has to be a sound basis for the new quantity trigger. Using the mid-and high-level organizing principle intended by Congress when it enacted mandatory minimum sentences in the mid-80s, provides that justification. It will establish coherence, rationality and proportionality to crack cocaine sentencing.

The Commission should not change the powder cocaine penalty.

Seven years ago when the Commission voted to make crack penalties the same as those for powder cocaine, no one suggested raising powder sentences to achieve equalization. In her dissent, Commissioner Deanell Tacha proposed ratios of 5:1, 10:1, or 20:1, for reasons that were arguably valid, but she did not propose raising powder penalties. In 1997, 27 federal judges who previously served as U.S. Attorneys, felt compelled to send a letter to each member of the House and Senate Judiciary Committees urging Congress to lower crack cocaine penalties but **not** raise powder cocaine penalties. Specifically, they said "The penalties for powder cocaine, both mandatory minimum and guideline sentences, are severe and should not be increased."

They're right. The problem is not powder cocaine penalties, it is crack cocaine penalties. Crack cocaine is sentenced more severely than any of the other drugs--even methamphetamine,

which has the same triggering threshold. The Sentencing Commission 2000 Sourcebook of Federal Sentencing Statistics shows that the mean quantity of crack cocaine involved in the cases of defendants sentenced at level 26, was 11.3 grams, while the mean quantity for methamphetamine defendants at the same level was 27 grams–more than twice as much as crack. At level 32, the mean amounts were 88.5 grams for crack defendants and 228 grams for methamphetamine defendants.

Raising powder cocaine penalties to make powder traffickers spend more time in prison does nothing to cure the excessiveness of crack cocaine sentencing; it would merely send cocaine traffickers--half of whom are Hispanic and 80 percent of whom are minorities--to prison for lengthier terms for no discernible reason. Drug Briefing, Figs. 26 and 27.

Therefore, I urge you to leave the powder cocaine penalty untouched.

The Commission can and should act absent a change to the mandatory minimum statute.

The Commission should promulgate guidelines independent of the mandatory minimum sentences. Congress has several times in the past permitted amendments to be adopted that delinked certain drug guidelines from their then-corresponding mandatory minimums. In 1993, the Commission changed the LSD-marijuana equivalency to standardize the penalty for LSD and to limit the impact of carrier weight on that penalty. Amendment 488 at Appendix C. In 1995, the Commission successfully proposed Amendment 516 to change the equivalency for marijuana plants from the statutory 1 plant, 1 kilogram equivalency to the 1 plant, 100 grams equivalency.

I was involved in both amendments and know that the Congress was fully aware and able to block them if it had desired. It did not. Were there any legal bar to such decoupling amendments, it would have been raised at the time. Instead, just days before November 1, 1995, a

Congressman from Oregon got wind of the imminent marijuana guideline amendment and raised his concerns about it to Rep. Bill McCollum, the chair of the House Crime Subcommittee. Rep. McCollum stated that he was aware of the proposed amendment and would keep an eye on it, but he did nothing to stop it from becoming law.

From my recent conversations with Judiciary staff members on the House and Senate sides, they are eagerly awaiting an amendment from the Commission and have expressed no reservations about the Commission submitting an amendment instead of a recommendation. Why should they? The Commission was established in 1984 to promulgate sentencing policy that would reduce unwarranted disparity and increase certainty and uniformity of sentencing. The Commission is doing so in the current proposals to delink the crack possession guideline from the mandatory minimum contained in the statute. I urge you not to let crack cocaine **trafficking** penalties become an exception to the goals of the Sentencing Reform Act.

The Commission should act in such a way that reassures the public that it has fulfilled its mandate.

I was recently asked by the chief counsel of a senior senator if the sentencing reform community and the civil rights community would respect a crack proposal put forth by the Sentencing Commission. It was a good question and it gave me pause. FAMM did not respect the Ecstasy decision made by the Commission last year because the process was so flawed. I do not want to feel that way about the crack proposal.

I am encouraged by the Commission's desire to hear from experts in all areas of crack cocaine and to use that information to shape a sensible and rational policy. But, at the end of the day, the Commission must be able to explain in plain terms how it arrived at the quantity it did and how that quantity is consistent with other drug guideline sentences.

The Drug Briefing charts you have compiled are a wonderful source of information regarding crack and powder cocaine sentencing. But from what I understand, a great deal of attention has been paid to the proposed sentences at varying ratios between crack and powder cocaine. While this is certainly of interest, I hope the Commission will not let the length of sentence guide its proposed changes. Instead, a consistent organizing principle should be used to guide the development of new crack cocaine sentences, and all drug sentencing changes. If it is, I will be able to tell FAMM's membership, with confidence, that this is an amendment that makes sense.

However you choose to go forward, the guideline and the process you use must be of unassailable quality so that all Americans can trust that the penalty you chose was the product of informed judgement, not political expedience.

Conclusion

I am enormously heartened by the attention you are paying to this serious problem. Last weekend, FAMM members gathered for our bi-annual organizing conference at which Commissioner Steer spoke. They share my hope and enthusiasm, even as they shared with us again their stories of young men and women imprisoned for horrific terms under the crack cocaine guidelines. You can demonstrate the courage of your obvious conviction that this penalty must change, by proposing an amendment to Congress that brings sentencing for crack cocaine in line with that for other drug offenses.

Thank you.