

**Testimony of
Julie Stewart
President
Families Against Mandatory Minimums
Before the United States Sentencing Commission's
Public Hearing on Cocaine and Sentencing Policy
November 1, 2006, Washington D.C.**

“Revising the crack cocaine thresholds would . . . dramatically improve the fairness of the federal sentencing system.”¹

I am Julie Stewart, the President of Families Against Mandatory Minimums (FAMM). I founded FAMM in 1991, convinced that if we showed the human face of sentencing to the American people, policy makers would be moved to eliminate mandatory minimums and other harsh sentencing practices. Today we are a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM works every day for one basic goal: that the punishment meted out by our nation's judicial system fit the crime.

Too frequently it does not, and the crack cocaine penalty structure is the poster child for the failures of federal sentencing policy.

I have appeared before the Commission nearly every year since 1992 to talk about sentencing fairness, and FAMM has weighed in each time the Commission has asked for our input about the crack cocaine penalties. Our views on this subject are well known.² I used to be so encouraged each time I participated in hearings like this, read the resulting reports and recommendations, heard from the Commissioners and staff, and believed that somehow, by being right and having the experts to prove it, crack penalties would change. I could not imagine that all these many years later, we would have achieved so little after trying so hard.

As I read your invitation to testify and reviewed the questions you posed, I thought: “What's old is new again.” I was reminded as I prepared my testimony about how much good work has already gone into answering the core questions you are struggling with. Three previous inquiries, reaching back to 1995 produced research and findings from diverse fields. You have heard from psychologists, criminologists, law enforcement personnel, pharmacologists, treatment providers, defense and prosecuting attorneys, prisoners' families, and interest groups such as ours. For the most part they do

¹ U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing* 132 (2004)

² U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 210 (1995) (summary of FAMM comments); U.S. Sentencing Commission, *Public Hearing Transcript and Testimony* (March 23, 2000); U.S. Sentencing Commission, *Transcript of Public Hearing*, 112-137 (Feb. 26, 2002)

not support the current penalty structure.³ Your reports, most recently the 2002 Report to Congress: Cocaine and Federal Sentencing Policy, exhaustively detail their findings and in all your reports you have reached the same conclusion: “the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine.”⁴

We have often expressed frustration with the Commission about what Frank Bowman terms the “upward ratchet”⁵ effect; sentencing amendments that result almost uniformly in longer terms of imprisonment. Only very rarely does the Commission amend the guidelines to make sentences shorter. In this one area, however, we applaud your genuine efforts to document the inherent injustice in the crack cocaine penalty structure and seek to change it. The data and reports you have produced are for the most part superb and the answers to many of the questions you pose us can be found in their pages.

The documentation could not be more complete. That opposition to the unbalanced penalty structure for crack cocaine is widespread is unsurprising; your work has done so much to demonstrate that the penalty structure is unconscionable, unsupportable and its demise is years overdue.

And yet, year after year, the Commission and all of us who struggle to dismantle the crack penalty structure, have failed. We have failed because ultimately, amending the crack guideline rests in the hands of Congress. The Sentencing Reform Act of 1984 provided that amendments sent by the Commission would become law unless disapproved by an Act of Congress.⁶ In 1995 the Commission proposed to raise the crack penalty triggers to correspond with those for powder cocaine. Congress exercised its §994(p) option and disapproved the amendment.⁷ In that Act, Congress directed the Commission to report on the crack cocaine penalty and address a series of considerations. The ensuing research resulted in the April 1997 report to Congress that included recommendations in lieu of a proposed amendment.⁸ That report and the one from 2002 were met by a deafening silence on the Hill.

And that leads me to the one question you pose that I think generates a meaningfully new answer: “Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?” Yes, in our opinion, one key impediment to a just crack cocaine guideline fell last week, when Republicans lost their majorities in both houses of Congress.

³ I attach an appendix to this testimony, detailing just some examples of the excellent research and testimony provided to the Commission or otherwise published. It is a small sample of the massive and widespread effort to refute the founding mythology of crack cocaine.

⁴ U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing* 132 (2004).

⁵ See Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 *Colum. L. Rev.* 1315, 1319-20 (2005).

⁶ 28 U.S.C. § 994(p).

⁷ See Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

⁸ See Special Report to the Congress: Cocaine and Federal Sentencing Policy - April 29, 1997.

A non-partisan organization, FAMM works with lawmakers on both sides of the aisle to promote sentencing reform. We are not naïve enough to think that a Congress controlled by Democrats is the panacea for a broken sentencing system. We do believe, however, that there is a fresh opportunity to develop bi-partisan support on the Hill for a new look at one of the most broken penalty structures. And we think the Commission is best suited to lead off with a proposed guideline.

We believe the former Congress would most certainly have opposed any change to the crack sentencing structure. I expect you would agree. Evidence for this is found in the House Judiciary Committee's reaction to the other new development that emerged since the 2002 report: the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Faced with the remedial part of the opinion, which breathed new life into the SRA's premiere mandate of parsimony, the powerful Chairman of that committee responded with H.R. 1528, *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005*. The legislation, which purported to penalize a host of drug-related offenses with dozens of new mandatory minimum sentences, also had language quietly tucked in the back that would have eliminated virtually all below guideline sentences and eviscerated the advisory nature of the Guidelines.

Once the word was out, the bill ignited a firestorm of opposition. We organized bi-partisan delegations and we went to the Hill to meet with key Republicans on the House Judiciary Committee to tell them why they needed to preserve judicial discretion. And, given the power structure in that committee, it had to be Republicans who would stop Chairman Sensenbrenner from moving the bill, and they did.

But the backlash to *Booker* did not end there. The committee and its Crime, Terrorism and Homeland Security Committee became a breeding ground for bills containing new crimes and new mandatory minimums. For example, a harsh anti-gang measure, H.R. 1279, the *Gang Deterrence and Community Protection Act of 2005*, was introduced that created many new federal crimes and of course new mandatory minimums. I overheard the judiciary counsel to its sponsor, Rep. Randy Forbes (R-Va.), say that he had to include mandatory minimums in the bill precisely because the Guidelines were no longer mandatory.

The 109th was a very tough Congress and no place for sentencing reform. Even though most of the bills containing harsh new sentencing provisions never made it, an amendment to change the crack cocaine penalty would never have survived.

But today, it might have a chance. The new leaders of the House and Senate Judiciary Committees oppose mandatory minimum sentences. You have built an impressive battery of evidence to support an amendment. And I believe you could gain bi-partisan support for amending the crack penalty. Republican members of the House Judiciary Committee like Rep. Jeff Flake (R-Az.) and Rep. Bob Inglis (R-S.C.), who stood up on the floor during the debate to say that he was going to vote against H.R. 1279 because he could no longer support mandatory minimums, could be allies in this effort.

If your amendment promised genuine relief and an end to the unconscionable results produced by the current penalty structure, you would not be alone going to the Hill. Given the right amendment, you could be joined by many of the groups that have written and testified and conducted research and come to Commission meetings and sat through congressional debates year after year.

We endorse the recommendations put forward by the Federal Public and Community Defenders:

- Equalize guideline penalties for crack and powder cocaine at the powder cocaine level.
- Recommend to Congress do the same.
- Refrain from adding new enhancements because existing enhancements and statutory penalties can be applied if indicated.
- Recommend that Congress repeal the mandatory minimum for simple possession of crack.

This year could be the year the commission reverses the ratchet.

Thank you for considering our views.

Appendix

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