Families Against Mandatory Minimums
FOUNDATION

March 21, 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: Comments on retroactivity of permanent crack cocaine guidelines[1]

Dear Judge Saris:

We write on behalf of the board, staff and more than 20,000 members of Families Against Mandatory Minimums (FAMM) to convey our recommendations about the issues for comment and proposals regarding retroactivity of the crack guidelines as amended and made permanent pursuant to the Fair Sentencing Act ("FSA"). FAMM has consistently urged that lower guidelines for drugs and other offenses be made retroactive so that prisoners sentenced under a discarded guideline can benefit from the change. We do so again with respect to lowered crack cocaine sentences and also address a variety of questions raised in the issues for comment.

The Commission should make retroactive the FSA conforming base offense levels so that they are applicable to previously sentenced defendants.

FAMM urges the Commission to make the crack guideline reductions retroactive because the amendment meets the criteria set out by the Commission for retroactivity. Moreover, retroactivity of the 2007 crack guideline reduction paved the way and demonstrated that the criminal justice system is well-equipped to handle the volume of motions under 18 U.S.C. § 3582(c)(2). But above all, retroactivity is, simply and sufficiently, the right thing to do.

(1) Retroactivity criteria

Section 1B1.10 sets out the factors for consideration when weighing retroactivity. They strongly favor making the amended crack sentencing ranges retroactive.

(1) *Purpose*: The Commission fought for years to see crack cocaine sentences reduced and were rewarded last Congress with victory. The purpose of the amendment, which reflects changes in the Fair Sentencing Act, is to address the multifaceted problems with the crack sentencing structure. The Commission and Congress found that crack sentences overstated the drug's harmfulness with respect to powder cocaine sentences, was overbroad and reached too

[1] FAMM addressed other issues and proposals in our written testimony for the hearing on March 17, 2011. That testimony is attached.

many low-level offenders, contributed to significant racial disparity in sentencing, overstated the seriousness of most crack offenses and failed to provide adequate proportionality.[2]

One of the reasons the Commission worked so hard to convince Congress to reduce crack cocaine sentences was that the crack sentencing structure "significantly undermine[d] the various congressional objectives set forth in the Sentencing Reform Act."[3] As the Judicial Conference pointed out when the Commission was last considering the issue of retroactivity of what we call the "crack minus two" amendment:

> Given . . . the rationale for the amendment, the amendment equally applies to offenders who were sentenced in the past as well as offenders [who] will be sentenced in the future. Regardless of the date on which they were sentenced, they were sentenced under a guideline that "undermined" Congress' sentencing objectives.[4]

The Commission reached its conclusions about the harms inflicted by the crack cocaine sentencing structure by observing their impact on the tens of thousands of people sentenced for crack cocaine offenses under the mandatory minimums and the corresponding guidelines. Having achieved some measure of justice in our sentencing system, it would be decidedly cruel to deny the benefit to the very people whose experiences you relied on and whose sentences you condemned.

(2) *Magnitude of the change*: Congress gave the Commission the sole authority to choose to make guideline reductions retroactive precisely to confer the benefits of "sweeping and serious changes" such as this amendment effects.[5] If made retroactive, the permanent amendment will affect a large number of people, (12,835 at level 26 or 15,227 at level 24)[6] reducing their sentences by an average of 37 months (at Level 26) to 48 months (at Level 24).[7] As with the 2007 decision, releases would be spread out over many years. The number of people eligible by these analyses is lower than the number eligible under the 2007 decision, though the sentence effects are of course greater in length of reduction on average. Given the magnitude of change with respect both to the number of potential beneficiaries as well as the promise of significant sentence reductions to match those now considered appropriate, we can think of no principled way to distinguish the two amendments for retroactivity purposes.

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[2] UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v-viii (2002).
[3] UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (2007).
[4] COMMITTEE ON CRIMINAL LAW OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, COMMENTS ON RETROACTIVITY OF CRACK COCAINE AMENDMENTS 3 (Nov. 2, 2007).
[5] TESTIMONY OF JUDGE REGGIE B. WALTON PRESENTED TO THE UNITED STATES SENTENCING COMMISSION ON THE RETROACTIVITY OF THE CRACK-POWDER COCAINE GUIDELINE AMENDMENT 5 (Nov. 13, 2007).
[6] Memorandum from Office of Research and Data to Chair Saris, *et al*. 14, 40 (Jan. 28, 2011) ("Retroactivity Memo").
[7] *Id*. at 28, 54.

(3) *Ease of application*: The implementation of the 2007 retroactivity decision was coordinated among prosecutors, probation officers, federal defenders and the courts in a collaborative project to ensure that prisoners applying for the sentence reduction were processed in an orderly and fair manner. While we doubt anyone would say the process was a simple task, and we expect participants in the process will have more relevant contributions than we, it was orderly and predictable. There is no reason to think that the agencies and personnel administering the FSA reductions will not benefit from lessons learned by that dry run. We fully expect that all parties will cooperate to ensure a smoothly functioning and fair process.

The Commission should not make enhancements adopted pursuant to the Fair Sentencing Act retroactive.

The Commission should not insist that enhancements adopted pursuant to directives in the Fair Sentencing Act be retroactive for purposes of crack sentence reductions under 18 U.S.C. § 3582 (c)(2). Retroactivity is intended to confer the benefit of a reduced guideline to defendants sentenced under a previous, higher guideline or the benefit of a new mitigating factor to those sentenced before it went into effect. While we appreciate that the enhancements could not operate to increase a sentence above that currently served by a prisoner, the enhancements could undo much or all of the benefit the retroactive guideline means to confer.

Making the enhancements effectively retroactive would not meet the criteria set out in U.S.S.G. § 1B1.10. Adding enhancements back into the calculation would frustrate the purpose of the crack guideline reductions, which were intended to lessen crack sentences, reduce racial disparity, and better account for the relative harm of crack cocaine. The FSA maintains a distinction between crack and powder, reflecting congressional belief that trafficking in crack is inherently more harmful and defendants should be subject to higher sentences. Adding enhancements on top of crack sentences already set higher than powder cocaine sentences to capture features Congress meant to punish, could pile on months and years, creating redundancies and potentially erasing any benefit the reduction achieved.

That said, while it is not known how many crack defendants would be eligible for the new enhancements, but it is likely to be a small fraction of the universe of eligible defendants and as such would not affect enough defendants to make it worthy of consideration.

Furthermore, requiring the courts to make determinations about enhancements that did not exist at the time of the original sentencing would place an unwarranted and unnecessary burden on the process. Trying to tease out conduct or events from old records that might not include information relevant to the FSA-compliant enhancements would frustrate the objectives of the crack reduction and retroactivity.

Most significantly, requiring the courts to calculate enhancements for crack cocaine retroactivity would be unprecedented. Over the years, 27 guideline amendments have been made retroactive.[8] The Commission has never directed that the court responding to a motion to reduce under 18 U.S.C. § 3582(c)(2) explore and apply any intervening enhancements that did not exist

[8] *See* U.S.S.G. §1B1.10(c).

in the guidelines at the time of the original sentencing. By our unscientific count, the Commission has adopted 31 amendments that have the potential to increase sentences just in the drug trafficking context, either by way of specific offense characteristics in U.S.S.G. §§ 2D1.1 through 2D3.5, enhancements under Chapter 3, or upward departure provisions in U.S.S.G. §§ 5K1.1 through 5K2.3.[9] None of these enhancements, whether specifically applicable to drug offenders or generally applicable to all offenders, has ever been required consideration when applying the subsequently adopted retroactive guidelines.

It would strike at best a discordant note to require that the one guideline most calculated to reduce racial disparity in sentencing be the one and only guideline that would force consideration of enhancements that are themselves applicable to all drug sentences, not simply those for crack cocaine. The courts can certainly handle issues of public safety using the current version of 1B1.10, which was reconfigured to account for public safety in 2007.[10]

The Commission should not limit consideration of retroactivity based on temporal, criminal history, or other concerns.

The Commission asks whether, assuming the new crack cocaine base offense levels are made retroactive, it ought to provide guidance and/or limitations about the circumstances or extent of sentence reductions. Should, for example, the Commission allow retroactivity only for defendants sentenced within the guideline range, or those within range or reduced under Chapter 5K; only those sentenced in Criminal History Category I or those sentenced prior to *Booke*r or various post-*Booker* decisions?

We urge the Commission to not impose limitations on judges weighing retroactivity decisions. The majority of sentences from which reductions would be taken (even those post-*Kimbrough* and *Spears*) started their lives as guideline sentences. The Supreme Court has been clear that the guidelines are the beginning of the sentencing decision-making process. Courts must "give respectful consideration to the Guidelines" even as they fashion sentences that respond to other statutory priorities.[11] And, while courts impose sentences based on the consideration of factors laid out in 18 U.S.C. §353(a), the "Guidelines should be the starting point and the initial benchmark."[12]

As such, every judge is obliged to calculate the sentencing guidelines, including the various grounds for departure, before launching the inquiry under 18 U.S.C. § 3553(a). This means that pre-FSA guidelines for crack cocaine sentences were the starting point for every judge who will face a reduction motion should the post-FSA guidelines be made retroactive. The sentencing courts can identify any defendants who under advisory guidelines received consideration at sentencing -- or reductions following the 2007 crack reduction -- so generous that an additional sentence reduction would be redundant. Making hard and fast temporal rules

[9] *See* Appendix A.
[10] *See* U.S.S.G. §1B1.10 ,comment (n. 1(B)(ii) as amended by Amendment 712 (adopted Nov. 1, 2007).
[11] *Kimbrough v. United States*, 552 U.S. 85, 101 (2007)(internal quotations and citations omitted).
[12] *Gall v. United States*, 552 U.S. 38, 49-51 (2007).

would unfairly affect all the others and limit the courts' ability to right a longstanding injustice in sentencing.

Similarly, we discourage the Commission from limiting retroactivity to defendants in a certain criminal history category. When the Commission last amended U.S.S.G. § 1B1.10, it included a set of factors for consideration when assessing motions for sentence reductions. The Commission added a section entitled "Public Safety Considerations" and directed courts to "consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment" when deciding whether and to what extent to reduce a sentence.[13]

While the issue for comment does not shed light on the Commission's concerns, one can only assume that the criminal history limitation is designed to better secure public safety. But we know that criminal history categories are simply inadequate proxies for future dangerousness. Judges find them unhelpful in many cases. Judges departed downward from the guidelines for reasons of criminal history in 1,280 cases in 2009, fully 42.2 percent of all downward departures that year, and far and away the most commonly cited departure rationale.[14]

Criminal history has a pernicious impact on racial disparity as well. African-American defendants face higher arrest rates and accumulate more criminal history points than similarly situated white defendants.[15] It would hardly be fair to lessen the impact of one unfair rule, the unduly harsh crack sentencing disparity that contributed so much to racial disparity in sentencing, only to deny defendants, the vast majority of whom are African American, its benefit because of another racial disparity in the sentencing system.

The better course is to permit judges the discretion to apply the public safety application note at §1B1.10 to forbid retroactivity to defendants who will pose a danger to the community if released early.

Conclusion

We appreciate the Commission's attention to our concerns and recommendations and hope to further share our views at the hearing we understand you will hold regarding making the crack guideline changes retroactive.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel

[13] U.S.S.G. §1B1.10 , *supra* n.9.
[14] 2009 SOURCEBOOK at 67, Table 25.
[15] Fifteen Year Report at 134.

Appendix A
Enhancements to the Sentencing Guidelines

Amendments containing sentencing enhancements in Chapter 3, 2D1.1-2D3.5, 5K1.1-5K2.3

Amendment Number, Effective Date, Guideline, Change

#347. 1990. §3C1.1 2-level enhancement for reckless endangerment during flight.

#457. 1992. §§3C1.1, 3C1.2. Expands scope of relevant conduct; holds defendants accountable for conduct aided and abetted, counseled, commanded, induced, procured or willfully caused. Invites upward departure for death or bodily injury or when the offense posed a risk to more than one person.

#500. 1993. §3B1.1. Suggests upward department for individuals not covered by §3B1.1 but who exercised managerial responsibility over property, assets, or activities of a criminal organization.

#514. 1995.

- §2D1.1. 2-level increase if offense involved possession of controlled substances in prison, correctional or detention facility.
- §2D1.1. 2-level increase if offense involved distribution of controlled substances in prison, correctional or detention facility

#532. 1995.§5K1.8. Provides basis for upward departure when def. is subject to stat maximum under 18 USC 521 (pertaining to criminal street gangs).

#555. 1997. §2D1.1.

- 2-level enhancement for environmental violation with illicit manufacturing or drug trafficking offense.
- Invited upward departure for extreme cases of environmental violations above.
- 2-level enhancement for importation of meth and precursors.

#604. 2000. §1B1.4 Allows upward departure for aggravating conduct dismissed or not charged in connection with plea agreement.

#608 (620). 2000. §§2D1.1, 2D1.10. New SOCs for

- 3 levels for substantial risk to life or environment
- 6 levels for same risk to minor.

#659. 2003. §3B1.5.

- 2-level enhancement if drug trafficking or crime of violence involved use of body armor.
- 4-level enhancement if body armor used to prepare, commit, or avoid apprehension for the offense.

#667. 2004. §§2D1.1, 2D1.11, 2D1.12.

- 2-level increase for marketing precursor chemicals, controlled substances or prohibited equipment thru the internet.
- 6-level increase for stealing or transporting stolen anhydrous ammonia.

#681. 2006. §2D1.1.

- 2-level increase for anabolic steroids with masking agents.
- 2-level increase for distribution of anabolic steroids to an athlete.

#684. 2006. §3C1.3. 3-level enhancement for offense committed while on release.

#691. 2006. §5K2.17. Upward departure warranted if def. possessed semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or drug offense.

#693. 2006. §3C1.1. Extends obstruction enhancement for conduct that occurs prior to start of investigation.

#700. 2007. §2D1.14. 6-level increase if penalties for terrorism do not apply.

#705. 2007. §§2D1.1, 2D1.11.

- 2-level increase if defendant convicted of 21 USC 865.
- 2-level increase for individuals who had knowledge of or reason to believe date rape drugs were going to be used to commit a criminal sexual act.
- Increases penalties for manufacturing, distributing or possessing with intent to distribute meth while children are present, including 2-level increase for PWID or distribution of meth and
- 3-level enhancement for manufacturing meth while a minor is present.
- 6-level enhancement and minimum BOL of 30 if meth manufacturing created substantial harm to the life of a minor.

#728. 2009. §2D1.1.

- SOC: failure to heave to vessel at police direction(+2)
- SOC: attempt to sink a vessel(+4)
- SOC: sinking a vessel (+8)
- Upward departure provided if defendant engaged in pattern of using semi or submersible vessels to commit other felonies or if offense involved use of vessel in ongoing criminal enterprise.

Written Statement of Mary Price

Vice President and General Counsel
Families Against Mandatory Minimum (FAMM)

Before
The United States Sentencing Commission
Public Hearing on Proposed Amendments 2011

Regarding Drugs

March 17, 2011

I am Mary Price and I appear today on behalf of the board, staff and over 20,000 members of Families Against Mandatory Minimums (FAMM) to convey our recommendations about the issues for comment and proposals regarding the drug guidelines. The majority of our members are affected by the decisions you make. I am very grateful for the chance to address these issues on their behalf.

The Commission should make the Fair Sentencing Act emergency amendment permanent, but restore the crack cocaine base offense levels of 24 and 30 to conform to the FSA mandatory minimum levels.

The Commission faced challenges when promulgating the emergency amendment pursuant to directives in the Fair Sentencing Act. We thought that overall the Commission did a good job, for example balancing directives that sought enhancements with the need to avoid double counting resulting from existing enhancements. We were, however, profoundly disappointed that the Commission, without any discernable support, raised crack cocaine sentences by two levels in the emergency amendment. We urge you, in promulgating the permanent amendment, to restore the guideline base offense levels that correspond to the new mandatory minimums to 24 and 30.

Raising guideline sentences above those called for in the FSA offends the core objectives of that legislation. We can discern no justification in the FSA, or in the principles of equity and parsimony that inspired it, for making crack sentences under the guidelines longer than those called for in the statute.

The public comment that addressed the question of base offense levels was, with one exception, unanimous in recommending that you retain sentences for crack offenses so that the base offense levels contain, not exceed, the new mandatory minimums. Notably, the members of

Congress who weighed in argued that Levels 24 and 30 should be maintained.[1] Sen. Durbin, co-sponsor of the FSA in the Senate wrote pointedly, "[i]n debating and passing the Fair Sentencing Act, Congress did not intend for the base offense levels for crack cocaine to change, and nothing in the text or legislative history suggest otherwise."[2]

As Sen. Durbin explained, raising crack cocaine sentences by two offense levels ensured that otherwise eligible defendants (hundreds by the Commission's count) would see no benefit from a sentencing change that the Commission and Congress worked so long and hard to accomplish. Commissioner Ruben Castillo, in decrying the decision to raise the guidelines, stated that "100 to 500 individuals . . . expected to be sentenced from November 1, 2010 . . . to November 1, 2011 . . . will be unaffected by the proposed amendment because of the decision to set the base offense levels at 26 and 32 to account for the new mandatory minimum gradations."[3] Raising the offense levels adds between a year and fifteen months to the guideline sentence of a defendant in Criminal History Category I.

Rationalizing the crack-powder ratio by raising the crack base offense levels, in our opinion, is not a sufficient reason to overcome the goals of fairness and parsimony realized by the FSA. While the mandatory minimum for crack cocaine was assailed as unduly long, it was not assailed as unduly long simply because of the stark disparity between crack and powder cocaine. The ratio was a symptom of the problem; the ratio was not the problem.

The Commission's decision was also inexplicable because it all but invites variances as judges consider what sentence to impose. On the one hand, they have a congressional judgment about the appropriate sentences for crack cocaine offenses. On the other hand, they are faced with a higher guideline sentence. If they resolve the dilemma in favor of the congressional judgment, their decision adds to the body of variance statistics. Given how much criticism judges are receiving for varying from the guidelines and how much is being made about disparity in sentencing in some quarters, it is especially puzzling that the Commission would set up such a situation and put judges in this position.[4]

Of course, the Commission can obviate any concerns about dissonance in the guidelines between crack offenses whose guidelines would, following our recommendation, contain the mandatory minimum within base offense levels and all other base offense levels for drugs that float above the mandatory minimum, by lowering all drugs by at least two levels. If however, the

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[1] *See* Letter from Honorable John Conyers, Chairman, Committee on the Judiciary, and the Honorable Robert C. "Bobby" Scott, Chairman, Subcommittee on Crime, Terrorism and Homeland Security, U.S. House of Representatives to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n. (Oct. 8, 2010); Letter from Richard J. Durbin, Senator, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n 203 (Oct. 8, 2010).

[2] *Id*.

[3] United States Sentencing Commission Public Meeting Minutes 4 (October 15, 2010) (remarks of Commissioner Ruben Castillo).

[4] *See, e.g., Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud, Hearing before the Senate Judiciary Committee*, 112th Cong. (Jan. 26, 2011) (prepared statement of Ranking Member Chuck Grassley) (stating that "now that the Guidelines have been held to be merely advisory, the disparity and unfairness in judicially imposed sentences that we sought to eliminate on a bipartisan basis are returning").

Commission is not ready to take that step, we urge the restoration of the pre-FSA base offense levels.

The Commission should make additional revisions to the drug trafficking guidelines.

FAMM welcomes suggested revisions to the Guidelines, including a suggested two-level downward adjustment where no aggravating features are present and a two-level downward adjustment for truthful information regarding the offense. Both would, if carefully crafted and in combination with lower guideline base offense levels and an expansion of the safety valve (both discussed below), mitigate the guidelines' excessive reliance on drug quantity as a measure of the appropriate sentence.

(a) Adjust the drug quantity table down by two levels so that the base offense levels do not exceed the corresponding mandatory minimums but rather incorporate them near the top of the ranges.

FAMM encourages the Commission to amend the drug quantity table so that base offense levels 24 and 30 correspond to the respective statutory mandatory minimums. Further, we urge that you make this straightforward adjustment to the sentencing guidelines in the current amendment cycle, even as you conduct a comprehensive, multi-year review of the drug guidelines, which we hope will include review to delink the guidelines from the mandatory minimum. A two-level reduction will have an immediate ameliorative effect on guidelines that are widely and correctly assailed as too punitive, will lessen the now overwhelming impact of drug quantity as a sentence accelerant, and will help the Commission comply with requirements outlined in the Sentencing Reform Act.

The Commission has acknowledged that many penalty ratios within the guidelines do not reflect the "relative harmfulness" of particular drugs.[5] For example, trafficking in 5 grams of pure methamphetamine carries a 60-month mandatory minimum penalty,[6] but is listed at offense level 26, which carries a 63-78 month sentence under the guidelines.[7] FAMM receives calls often from frustrated inmates convicted of harsh methamphetamine penalties and their families. These sentences contribute 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,[8] 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.

When Congress adopted mandatory minimum sentences for drug offenses in 1986, it interrupted the Commission's development of drug offense guidelines. The Commission

[5] UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING vii (2004) ("FIFTEEN YEAR REPORT")
[6] 21 U.S.C. § 841(b)(1)(B)(viii) (2006).
[7] UNITED STATES . SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7) (2009).
[8] *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).

responded to this "dilemma" by correlating the guideline range to the new mandatory minimums, but in all cases indexed the applicable range above the mandatory minimum.[9] Doing so, of course, provided for even longer minimum guideline sentences than called for even by the applicable mandatory minimums.[10]

The twin assault mounted by the mandatory minimums and even higher and then mandatory guidelines caused the unprecedented incarceration of even first-time, nonviolent drug offenders[11], characterized by the Justice Kennedy Commission of the American Bar Association as "far beyond historical norms."[12] The Sentencing Commission acknowledged that the drug guidelines, in combination with the relevant conduct rule, "had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."[13]

The Commission later explained that "the base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities."[14] Not only are we unsure which congressionally mandated purpose of sentencing this rationale served, but we observe that cooperation is of course subject to a motion by the prosecution to reduce a guideline sentence and even waive the mandatory minimum to reward the substantial assistance. Moreover, as the Commission pointed out in 1995, the specific offense characteristics and enhancements increased sentence lengths so much so that "most drug defendants in federal court receive guideline sentences higher than the applicable statutory mandatory minimum."[15] In 2009, over half of all drug defendants, 12,221, were sentenced to terms that exceeded the mandatory minimum for the drug quantity for which they were held accountable.[16]

Not only does maintaining base offense levels above the mandatory minimums serve no legitimate purpose of sentencing, but, as the Commission has explained, there is also no statutory basis for anchoring the guidelines with the mandatory minimums.[17] When addressing mandatory minimums, the Commission has a variety of choices. It can set the guidelines "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*."[18] This is of course what it did in 1987 and has continued to do, with some notable exceptions, to this day. The Commission can calibrate the guideline so that it "*include[s] the mandatory minimum* at any point within the range," or "the Commission may set the base offense level

[9] FIFTEEN YEAR REPORT at 48, 49.
[10] FIFTEEN YEAR REPORT at 49.
[11] FIFTEEN YEAR REPORT at 49, 55 (Figure 2.7), iv (where the Commission acknowledges that, under the guidelines, sentences have been made "more severe" and lengths of imprisonment have "climbed dramatically."
[12] REPORT BY THE AMERICAN BAR ASSOCIATION'S JUSTICE KENNEDY COMMISSION. 38 (Aug. 2004).
[13] FIFTEEN YEAR REPORT at 49.
[14] UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 148 (Feb. 1995) ("1995 COCAINE REPORT").
[15] 1995 COCAINE REPORT at 148.
[16] UNITED STATES SENTENCING COMMISSION, 2009 MONITORING DATASET.
[17] UNITED STATES SENTENCING COMMISSION, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (Oct. 2009).
[18] *Id.* at 44 (emphasis in original).

below the mandatory minimum and rely on specific offense characteristics and Chapter Three adjustments to reach the statutory mandatory minimum."[19]

Implementing a change to the drug guidelines now would have an immediate and salutary effect on the length of sentences for drug trafficking, doing justice while helping the Commission meet one of its obligations under the Sentencing Reform Act. Federal law requires the Commission to promulgate guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[20] In 2009, the Bureau of Prisons reported that the majority of prisoners in its facilities, 51.8 percent, were serving sentences for drug crimes.[21] The Bureau holds over 100,000 people on drug offenses.[22] Meanwhile, population exceeds the Bureau's rated capacity by 37 percent.[23] Today's federal prison population of 210,380 represents a nearly five-fold increase over that in the mid-1980s when the drug sentences were enacted.[24]

The Sentencing Guidelines cannot be held accountable for the entire increase in the population, but it does answer for 25 percent. According to the Commission's Fifteen Year Report, "[t]he major cause of the prison population explosion is the increase in sentence length for drug trafficking, from 23 months before the guidelines to 73 months in 2001. About 75% of this increase was due to mandatory minimums, and 25% was due to guideline increases above mandatory minimum levels.[25]

Finally, given the overbearing influence of drug quantity on the calculated guideline sentence and particularly in light of the multiple enhancements added to the drug sentence calculation by directives in the FSA, this small course correction, reducing somewhat the influence of drug quantity now would set a marker and the tone for your multi-cycle consideration of drug sentencing.

(b) Expand the availability of the safety valve

The statutory safety valve, as currently constituted, allows courts to depart from a mandatory minimum sentence for certain drug offenders and in its place impose a sentence based on the sentencing guidelines if five criteria are met.[26] Pursuant to the guidelines, defendants who

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[19] *Id.* at 45 (emphasis in original).
[20] 28 U.S.C. § 994(g).
[21] UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS (BUREAU OF PRISONS), STATE OF THE BUREAU 2009 2, *available at* http://www.bop.gov/news/PDFs/sob09.pdf.
[22] BUREAU OF PRISONS, QUICK FACTS ABOUT THE BUREAU OF PRISONS, *available at* http://www.bop.gov/news/quick.jsp (last updated January 29, 2011).
[23] *See Hearing on Housing D.C. Felons Far Away from Home: Effects on Crime, Recidivism, and Reentry, before the Subcomm. on Federal Workforce, Postal Service, and the District of Columbia of the H. Comm. on Government Reform and Oversight* (May 5, 2010) (statement of Harley G. Lappin, Director, Federal Bureau of Prisons, *available at.* http://www.justice.gov/ola/testimony/111-2/05-05-10-lappin-housing-felons-away-from-home.pdf.
[24] BUREAU OF PRISONS, WEEKLY POPULATION REPORT (2011), *available at* http://www.bop.gov/locations/weekly_report.jsp (last modified Mar. 10, 2011).
[25] FIFTEEN YEAR REPORT at 54.
[26] *Id.* The five criteria are: (1) the defendant does not have more than one 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

meet the criteria of the safety valve can also receive a two-level reduction from their prescribed guideline sentence.[27]

We believe the safety valve should be expanded to apply to all low-level offenders subject to harsh sentences for any crime and should be amended with regard to its calculation of criminal history.

Since 2001, when the Commission amended the guidelines to permit the two-level safety valve reduction whether or not the qualifying defendant was subject to the mandatory minimum, 26,522 guideline defendants have benefitted. In 2009, fully 14 percent of all drug defendants – 3,332 defendants not subject to mandatory minimums – received safety valve sentences.[28]

While many individuals have been helped by the safety valve provision, including the two-level reduction under the guidelines, the current guideline and statutory language restricts the availability of the safety valve to certain drug offenders.[29] 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 and ought to be more widely available.[30] This reflected the Commission's concern that low-level, non-violent defendants with no or minimal prior records suffer unnecessarily harsh sentences. We agree that the safety valve has proven a valuable way to better individualize sentences and applaud your call for its expansion.

The statutory safety valve, we agree, should apply more broadly, as nonviolent and low-level offenders continue to face unduly harsh mandatory minimums as well as long guideline sentences.[31] As a result, 69 percent of federal judges called for the safety valve to be expanded to all crimes with a mandatory minimum.[32]

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 benefit low-level offenders convicted of crimes other than those currently covered. For example, it could be used, in the drug context, to recognize low-level protected zone offenders and listed chemical offenders

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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.

[27] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(11) (2009).

[28] UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 44 (2002-2009). (2009 SOURCEBOOK")

[29] *Id.*; 18 U.S.C. § 3553(f) (2006).

[30] *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).

[31] 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. UNITED STATES SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES 5, 11 (2010).

[32] *Id.* at 5.

whose exclusion makes little sense in light of the purposes of the safety valve. It could also provide relief from unwarranted harshness that has come under criticism in other contexts, including for economic crimes and some child pornography cases.[33]

In addition, the safety valve only applies to individuals who do not have more than one criminal history point.[34] Criminal history calculations can be unrepresentative of the offender's culpability and danger of recidivism, as indicated by the fact that 42.2 percent of downward departures in 2009 were related to issues of criminal history, substantially higher than for any other reason.[35] Offenders can earn criminal history points for minor offenses that include contempt of court, reckless driving, or trespassing.[36] Individuals like FAMM member Brian 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 who received over 11 years in prison, continue to face unduly harsh sentences because of this restriction. In a 2006 report, the Commission found that, that year,260 offenders like Mr. Ison would have been eligible for the safety valve if not for prior minor convictions..[37]

We urge you to amend the safety valve provision in the guidelines so that it embraces defendants whose criminal history category is the result of a departure under U.S.S.G. § 4A1.3(b), when the court finds the calculated criminal history category overstates true criminal history. Currently, the safety valve cannot apply to defendants with more than one criminal history point, even when the court departs to Criminal History Category I. By changing the eligibility to categories as opposed to criminal history points, the Commission can allow courts to apply the safety valve to people for whom the calculated criminal history in fact overstates the true criminal history.

Conclusion

FAMM looks forward to working with the Commission on these and other issues that have such an important impact on our members. Thank you for considering our views.

[33] Judges are overwhelmingly critical of the child pornography possession sentences mandated by the guideline; 69-70 percent of judges believe them to be too high. *Id.*
[34] 18 U.S.C. § 3553(f)(1) (2006).
[35] 2009 SOURCEBOOK at 67..
[36] ROGER W. HAINES, JR., FRANK O. BOWMAN, III, & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1282 (2009).
[37] UNITED STATES SENTENCING COMMISSION, IMPACT OF PRIOR MINOR OFFENSES ON ELIGIBILITY FOR SAFETY VALVE 5 (2009).