



August 5, 2009

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Hinojosa,

I am writing on behalf of The Sentencing Project to offer recommendations concerning the Commission's priorities for the 2009-2010 amendment cycle. We value the opportunity to submit comments and appreciate the Commission's attention and consideration of our input.

The last few years have been an active period in federal sentencing law and practice, with landmark rulings by the Supreme Court addressing the operation of the guidelines and historic adjustments to federal cocaine sentencing passed by the Commission. These developments coupled with the emergence of other key policy issues ensure that the future holds potential for a similar level of activity. The current administration has identified criminal justice policy as a primary area of focus and has established an agency-wide task force in the Department of Justice to analyze law enforcement, court case processing, and correctional practices, and to identify areas warranting reform. In addition, crack cocaine sentencing, mandatory minimums, and sentencing of juveniles are issues receiving the attention of Congress. Thus, the upcoming amendment cycle will benefit from guidance the Commission can offer to instruct practitioners and policymakers.

With that in mind, we have identified four key activities that we believe should be priorities for the Commission in the upcoming amendment cycle.

Prepare and Submit Report to Congress on the Impact of Mandatory Minimum Sentences

In July 2009, the Commission submitted a statistical overview of mandatory minimum sentencing in 2008 for a hearing before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security. The study identified at least 171 mandatory minimum statutes in the federal criminal code and analyzed more than 31,000 counts of conviction to which a mandatory sentence attached. The report, the Commission's first analyzing mandatory minimum data in nearly two decades, was a welcome contribution to our understanding of the dynamics of federal sentencing and provided valuable descriptive statistics concerning demographics and sentencing patterns. However, this report only represents a snapshot of a single year of sentencing data and a myriad of important

questions concerning two decades of mandatory minimum sentencing practice remain unanswered. These include:

- How have mandatory minimums changed the criminal code? In virtually every legislative session of the past two decades new mandatory sentencing provisions have been passed by Congress. This ad hoc shaping of the federal criminal code through the piecemeal addition of mandatory sentencing provisions inevitably creates a disproportionality between penalties for different offenses. The Commission should expand upon the July 2009 report and examine the scope of mandatory minimums in the federal code to assess their impact upon proportionality in punishment.
- Has the implementation of mandatory minimums changed over time? What effect has the safety valve had on mitigating the application of mandatory minimum sentences to low-level drug offenders? Should Congress seek to expand the reach of the safety valve either by including people with a limited criminal history or expanding the range of qualifying offenses?
- What impact have mandatory minimum sentences had on crime? Despite their widespread adoption at the state and federal level, there remains disagreement as to their efficacy in reducing crime relative to relying upon existing statutes. Considering the substantial financial resources that have been dedicated to the prosecution and incarceration of individuals resulting from mandatory sentences under the aegis of their utility in protecting public safety, it is incumbent upon policymakers to consider the evidence of their efficacy.
- How has mandatory sentencing impacted racial disparity in the federal system? The Commission noted in its report, *Fifteen Years of Guidelines Sentencing*, that mandatory sentencing is a likely contributor to racially disparate outcomes in federal sentencing. The July 2009 report noted that “[b]lack offenders are the only racial/ethnic group that comprised a greater percentage of offenders convicted of a statute carrying a mandatory minimum penalty (35.7%) than their percentage in the overall fiscal year 2008 offender population (24.0%).” This is a significant finding and warrants further analysis regarding the relative significance of involvement in criminal activity, prosecutorial charging decisions, and other factors. The Commission should use these findings as a starting point to document why these disparities exist and recommend appropriate policy responses.

Continue Recent Work on Cocaine Sentencing Policy

The work of the Commission has been at the center of substantial reforms in federal cocaine sentencing policy in recent years and should remain at the forefront of any future policy changes. There is now a greater prospect for statutory reforms to federal cocaine laws than at any point in recent decades. In July 2009, the House Judiciary Committee approved legislation that would equalize the penalties for powder and crack cocaine at the current weight threshold established

for powder cocaine. In addition, the Senate is expected to consider a similar bill that would equalize penalties.

Regardless of the outcome of the bills being considered by Congress, the Commission should continue to offer leadership on this issue. Should reform be passed, the Commission will need to amend the guidelines and weigh in on policy questions that will undoubtedly arise during the implementation of the new sentencing structure. Additionally, after implementation, the Commission's analysis on the impact of the change will be a vital ingredient in helping to assess the outcome of the reform. Should Congress fail to pass any changes to federal cocaine sentencing during this amendment cycle, the issue of addressing the sentencing disparity is unlikely to disappear. The Commission will be called upon again to help shape the debate with sound data analysis and recommendations. Thus, it is important that the Commission prioritize federal cocaine sentencing policy as a key agenda item during the upcoming amendment cycle and be in position to respond to any legislative developments.

Prepare and Submit Report to Congress on the Use of Alternatives to Incarceration

The Sentencing Project applauds the recent work undertaken by the Commission to examine alternatives to incarceration in the federal system and urges the Commission to package the findings from the 2008 symposium into a report to Congress.

There is evidence that alternatives to incarceration are being underutilized in the federal system, particularly with respect to drug offenses. More than half of persons being held in federal prison have been convicted of a drug offense and one study, analyzing current and prior offense(s) and weapons involvement, concluded that as many as 27% of these individuals were incarcerated for a low-level offense. This includes persons with first-time or some repeat drug convictions, no concurrent non-drug convictions, no associated firearms charges, and no high-level drug enterprise involvement. Narrowing these criteria to include only persons incarcerated for a first-time drug conviction still leaves 14% of the federal prison population convicted of a low-level offense.

Federal sentencing trends indicate that these data are not reflected in sentencing outcomes. In 2007, 92% of persons sentenced to federal prison for a drug charge received a "prison only" sentence, which suggests a disconnect between the use of alternative sentencing provisions in the federal system and the preponderance of low-level drug offenses that contribute to the federal prison population. Barriers in the guidelines and statutory prohibitions on alternative sentencing provisions for persons convicted of certain offenses are likely responsible for this limited use of non-prison sentences. Beyond drug offenses, 8 in 10 of all federal sentences in 2007 were to incarceration, while less than 1 in 10 were to straight probation.

More specifically, the Commission should take this opportunity to revisit the statutory and guidelines restrictions to the use of alternatives to incarceration to determine their utility in achieving the goals of punishment and rehabilitation. In addition to diverting people from prison, the Commission should also examine the use of intermediate sanctions to address violations of the conditions of supervised release.

Examine the Impact of Increases in Time Served in Prison on Crime, Costs, and Disparity

The Commission's 2004 report on 15 years of guidelines sentencing concluded that the average time expected to be served for a federal prison sentence more than doubled after the enactment of the guidelines. The Commission observed: "The abolition of parole, the enactment of mandatory minimum penalty provisions, and changes in the types of offenders sentenced in federal court all contributed to increased sentence severity along with the implementation of the guidelines."

Three-quarters of the growth in the federal prison system during the early 1990s can be attributed to more severe sentences ushered in during the guidelines era. Between 1993 and 2006, the average time served for all offense types increased by 44%, driven largely by drug and public order offenses. The average drug offense, which had resulted in 33 months time served in 1993, increased to 51 months in 2006. Much of this increase is due to statutory mandatory minimums, although the guidelines have also contributed to the growth in time served.

The Commission should take this opportunity to analyze the impact of this increase in time served. There is a growing body of empirical research that questions the deterrent impact of increasing penalties. The data point to the certainty of apprehension being a better predictor of preventing crime than the severity of punishment. However, the guidelines and mandatory minimum sentences are premised on the latter, which should raise concerns about the current allocation of resources in the federal prison system. The Commission should analyze the increase in time served since the implementation of the guidelines and statutory changes in the 1980s, and assess in particular the following questions:

- What impact has the increase in time served had on crime?
- What has been the fiscal cost of increased time served in prison?
- How has the increase in time served impacted racial and ethnic minorities?
- How do the guidelines and statutory penalties interact with and contribute to the growth in time served?

I hope you find these comments useful in your consideration of federal sentencing issues in the upcoming amendment cycle. If we can be of any assistance in providing additional data or analysis please feel free to call upon us. We appreciate your leadership on these issues and look forward to continued insight and analysis from the Commission.

Sincerely,



Marc Mauer
Executive Director