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July 3, 2007

The Honorable Bobby Scott
Chair
Subcommittee on Crime, Terrorism
and Homeland Security
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Randy Forbes
Ranking Member
Subcommittee on Crime, Terrorism
and Homeland Security
U.S. House of Representatives
Washington, D.C. 20515

Re: Hearing on “Mandatory Minimum Sentencing Laws”

Dear Chairman Scott and Ranking Member Forbes:

Thank you for holding hearings on the subject of Mandatory Minimum Sentencing Laws. The American Bar Association (“ABA”) is pleased to submit this statement of our views for Subcommittee’s consideration and inclusion in the record of the June 26, 2007 hearing on this important subject. The American Bar Association is the world’s largest voluntary professional organization, with a membership of over 410,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. The ABA believes that mandatory minimum sentencing laws are incompatible with the requirements for just sentencing and we support their repeal by Congress.

Mandatory Minimum Sentences In General

The Association has devoted significant time and interest to the broad subject of federal sentencing reform and has done so with a sense of urgency in recent years particularly through the work of its membership Section of Criminal Justice, its Justice Kennedy Commission and its Commission on Effective Criminal Sanctions.

At the ABA’s August 2003 Annual Meeting in San Francisco, U.S. Supreme Court Justice Anthony M. Kennedy challenged the legal profession to begin a new public dialogue about American sentencing and other criminal justice issues. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated, “I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences.” He continued that “[i]n too many cases, mandatory minimum sentences are unwise or unjust.”

In response to Justice Kennedy’s concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing and corrections in the United States

and to make recommendations on how to ameliorate or correct the problems Justice Kennedy identified. One year to the day that Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. Resolution 121 A, approved August 9, 2004, urged all jurisdictions, including the federal government, to “[r]epeal mandatory minimum sentence statutes.” The same resolution calls upon Congress to “[m]inimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently.”

The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. The 1994 *Standards for Criminal Justice on Sentencing* (3d ed.) State clearly that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” Standard 18-3.21 (b). In addition, Standard 18-6.1 (a) directs that “[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized,” and “[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender’s criminal history, and the personal characteristics of an individual offender that may be taken into account.”

Mandatory minimum sentences raise serious issues of public policy. Basic dictates of fairness, due process and the rule of law require that criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of conviction. Mandatory minimum sentences are inconsistent with both commands of just sentencing.

Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward and, as the Kennedy Commission found, is one of the reasons why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. Not only are mandatory minimum sentences often harsher than necessary, they too frequently are arbitrary, because they are based solely on “offense characteristics” and ignore “offender characteristics.” In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that it is prosecutors who sentence by the charging decisions they make, rather than judges imposing a sentence, taking into account all relevant factors regarding an offender and a charged offense. Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant’s mitigating circumstances at the charging stage of a case.

Mandatory Minimum Cocaine Sentences

Justice Kennedy’s 2003 address to the ABA specifically noted the harsh consequences of mandatory minimum cocaine sentences:

Consider this case: A young man with no previous serious offense is stopped on the George Washington Memorial Parkway near Washington D.C. by United States Park Police. He is stopped for not wearing a seatbelt. A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is

indicted in federal court. He faces a mandatory minimum sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.

***Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U. S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Justice Kennedy's views are consistent with ABA policy.

The 2004 Report accompany ABA Resolution 121 A emphasized the dangers of shifting sentencing authority from judges to prosecutors and the special danger that sentencing of minority offenders will be disproportionately harsh:

Aside from the fact that mandatory minimums are inconsistent with the notion that sentences should consider all of the relevant circumstances of an offense by an offender, they tend to shift sentencing discretion away from courts to prosecutors. Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal justice system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.

Federal drug sentences also illustrate some of possible effects of mandatory minimum sentences on racial disparity. When compared either to state sentences or to other federal sentences, federal drug sentences are emphatically longer. For example, in 2000, the average imposed felony drug trafficking sentence in state courts was 35 months, while the average imposed federal drug trafficking sentence was 75 months. In 2001, the average federal drug trafficking sentence was 72.7 months, the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months.

These lengthy sentences largely result from the impact of the Anti-Drug Abuse Act of 1986 (ADAA). The ADAA created a system of quantity-based mandatory minimum sentences for federal drug offenses that increased sentences for drug offenses beyond the prevailing norms for all offenders. Its differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-Americans drug offenders.

The Act set forth different quantity-based mandatory minimum sentences for crack and powder cocaine, with crack cocaine disfavored by a 100-to-1 ratio when compared to powder cocaine. Thus, it takes 100 times the amount of powder cocaine to trigger the same five-year and ten-year minimum mandatory sentences as for crack cocaine. The Act does three other things: (1) It triggers the mandatory minimums for very small quantities of crack -- five grams for a mandatory five-year sentence and 500 grams generates a ten-year term. (2) It makes crack one of only two drugs for which possession is a felony. (3) It prescribes crack as the only drug that triggers a mandatory minimum sentence for mere possession.

The overwhelming majority of crack defendants are African-American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. In 1992, 91.4% of crack offenders were African-American, and in 2000, 84.7% were African-American. The disproportionate penalties for crack offenses obviously have a great impact on African-American defendants in federal prosecutions. (Footnotes omitted)

The ABA has long recognized that legislation is needed to end the disparity in crack versus powder cocaine sentencing. At its August meeting in 1995, the House of Delegates of the American Bar Association approved a resolution endorsing the proposal submitted by the U.S. Sentencing Commission to Congress which would have resulted in crack and powder cocaine offenses being treated similarly and would have taken into account in sentencing aggravating factors such as weapons use, violence, or injury to another person.

The American Bar Association has not departed from the position that it took in 1995, and the U.S. Commission's May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA's judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. We continue to believe that Congress should amend federal statutes to eliminate the mandatory differential between crack and powder cocaine and urge that the Subcommittee respond favorably to the May 2007 recommendation of the U.S. Sentencing Commission to enact legislation that treats both types of cocaine similarly.

Not only do we believe that the crack-powder distinction is arbitrary and unjust, but we find that it has a large, disparate effect on minorities that calls into question whether the United States is adequately concerned with equal justice under law.

It is important to emphasize, however, that the ABA not only opposes the crack-powder differential, but we also strongly oppose the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that, if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would remain badly flawed as long as mandatory minimum sentences are prescribed by statute. But, eliminating the disparity would leave mandatory minimum sentences in place.

Early Release of Ill and Aged Prisoners

The ABA also urges Congress to consider whether current law is adequate to address situations where fundamental changes in a prisoner's circumstances since sentencing make that person's continued incarceration unjust and inequitable, as well as an unacceptable economic burden. Apart from the situation where changes in sentencing laws are made retroactive, the only way under present law that a prisoner may be released early from prison (aside from executive clemency) is through a motion to the sentencing court by the Bureau of Prisons (BOP) under 18 U.S. C. § 3582(c)(1)(A)(i). This provision authorizes a sentencing court to reduce a term of imprisonment for "extraordinary and compelling reasons." BOP has in the past interpreted this provision very narrowly, to apply only where a prisoner is weeks away from death, in a manner that we believe is inconsistent with Congress' intent. The Sentencing Commission has recently issued policy guidance that may encourage reliance on this statute in a broader range of cases in the future: this new policy guidance urges BOP to consider making a motion for release from imprisonment where a prisoner has a terminal and serious chronic illness, is disabled (including as a result of aging), or has some compelling family circumstances such as the death of a minor child's caretaker.

The ABA has for many years urged a more expansive use of courts' authority to reduce a prison sentence in extraordinary cases, including cases in which a prisoner has grown old and seriously ill while incarcerated. We are gratified that the Sentencing Commission has at last taken the steps to encourage BOP to bring to a court's attention cases worthy of this relief. However, it remains to be seen how BOP will respond to the Sentencing Commission's policy guidance. (Indeed, the Justice Department has predicted that any policy guidance that varied from BOP's practice would be a "dead letter.") It may be that there are more efficient ways of handling such exceptional cases, and we urge Congress to monitor the situation as BOP considers how it will carry out the mandate given it by the Sentencing Commission's new policy.

Collateral Consequences of Conviction

Finally, the ABA also urges Congress to consider how federal laws and policies create barriers to the reentry and reintegration of offenders, particularly in the area of employment and professional licensure. The collateral consequences of conviction have grown exponentially in recent years, as have backgrounding practices, which together exclude people with criminal records from many opportunities. Many of these barriers have been created or encouraged by federal law and policy. We believe these issues are properly considered as part and parcel of federal sentencing policy, even though their applicability is considerably broader than the relatively small community of federal offenders.

In conclusion, the American Bar Association supports repeal of federal mandatory minimum sentencing laws. We urge the Judiciary Committee to conduct further hearings on this subject. In addition, we believe there is a growing consensus in the current Congress to act to end the crack-powder disparity in sentencing and to repeal specific mandatory minimum sentences for simple cocaine possession. We urge the Subcommittee to move forward and approve such legislation.

Thank you for consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Karen J. Mathis". The signature is written in a cursive style with a prominent initial "K" and a distinct "J" and "M".

Karen J. Mathis
President