July 29, 2014

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Request for Public Comment, Notice of Proposed Priorities

Dear Judge Saris:

FAMM welcomes this opportunity to comment on the proposed priorities announced by the Sentencing Commission for the 2015 amendment cycle. While we generally support the Commission's suggested priorities, we write to comment more fully on several of them and suggest one additional priority we hope the Commission will take up.

(1) Mandatory Minimums (*proposed priority 1*).

We are pleased that the Commission plans to continue its work to support reform of mandatory minimum penalties. The Commission's position in favor of the Smarter Sentencing Act has given stakeholders and supporters much needed support as we work for the legislation's passage. We also appreciate the Commission's proposal to renew efforts to expand the safety valve to other than drug offenses and eliminate the stacking of penalties under 18 U.S.C. § 924(c). While the Smarter Sentencing Act does not address those provisions, we applaud the Commission's proposal to keep those priorities in its sights as it promotes reforms with Congress.

The Commission's work to enlarge the guideline beyond drug sentencing is most appreciated. We know of cases in a variety of non-drug contexts in which judges expressed displeasure and dismay about the severity of the mandated sentences. For example, a recent news article detailing the successful effort by Judge John Gleeson to secure the U.S. Attorney's support to vacate stacked § 924(c) convictions after the fact, cited two other judge-led sentence reductions of stacked sentences.[1] While such extraordinary efforts are gratifying, they are hardly

[1] Stephanie Clifford, *Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose*, N.Y. TIMES, July 29, 2014, *available at*: http://mobile.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html?hp&action=click&pgtype=Homepage&version=HpSum&module=second-column-region&region=top-

sufficient to address the problem. A sensible safety valve for such cases would enable the parties to correct unduly harsh sentences at the outset and eliminate the need for such *post hoc* measures.[2]

Similar expressions of concern can be found with respect to other mandatory minimum statutes.[3] In such mandatory minimum cases, including those involving guns and non-contact child endangerment, Congress may be reluctant to repeal the mandatory minimum outright. Expanding the safety valve to provide relief strikes us as a sensible and moderate approach and one that would give judges the authority to address excessive outcomes.

A number of states include safety valves in their codes, not only for drug offenses but for other types as well, including for habitual offender laws and for crimes of violence. For example, Florida permits a judge to waive the habitual violent offender sanction when imposing the sentence would not be necessary for the protection of the public.[4] Florida just enacted another safety valve in its infamous "10-20-life" law, which provides for escalating mandatory minimums in aggravated assault cases. The new safety valve provides the same protection to a person who threatens the use of force to protect himself or others as the law formerly provided those who actually employ force in those situations.[5] Minnesota, Oregon and New York have safety valves for gun offenses.[6]

Meanwhile, the conservative American Legislative Affairs Council (ALEC) last year adopted a broadly worded safety valve for use by its members in promoting reform in state legislatures around the country.[7] The ALEC model bill "provides judges with discretion to depart from the mandatory minimum sentence for nonviolent offenders in situations where the

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news&WT.nav=top-news&_r=0&referrer= (discussing the vacatur of six of seven stacked gun convictions that had added 155 years to the sentence of "profoundly mentally disabled" Marion Hungerford and the post-conviction dismissal of three of four stacked 924 (c) counts against Montana defendant Christopher Williams.) *See also* Memorandum Regarding the Vacatur of Two Convictions Under 18 U.S.C. § 924(c), *U.S. v. Holloway*, No. 01-CV-1017 (E.D.N.Y. July 25, 2014).

[2] As would of course the Commission's proposal to limit the stacking of § 924(c) sentences and lower the penalties for them.

[3] *See e.g.*, Mary Price, *A Case for Compassion*, 21:3 FED. SENTENCING REP. 170, 170 (Feb. 2009) *available at*: http://famm.org/Repository/Files/Michaels%20Story.pdf (recounting sentencing judge's efforts to avoid imposing 15-year Armed Career Criminal Act mandatory minimum on law-abiding business owner); *see also* Entry on Sentencing, *U.S. v. Rinehart*, No. 06-cr-129 (N.D. Ind., Feb. 2, 2007), *available at*: http://reason.com/assets/db/12986638663293.pdf (expressing concern for severity of 15-year mandatory minimum sentence in child pornography production case and suggesting clemency for defendant in consensual relationship with two teenagers who had reached the age of legal consent in Indiana).

[4] *See* FAMM, *Turning Off the Spigot: How Sentencing Safety Valves Can Help States Protect Public Safety and Save Money* 13 (March 2013) ("Turning Off the Spigot"); *available at*: http://famm.org/Repository/Files/Turning%20Off%20the%20Spigot%20web%20final.pdf (discussing F.S. § 775.084 (3)(a)(6)).

[5] *See* H.B. 89, *Threatened Use of Force*, available at: http://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=51209

[6] Turning Off the Spigot at 14-16.

[7] Cara Sullivan, *ALEC Approves Model Policy to Encourage Smarter Sentencing*, American Legislator (Oct. 1, 2013), available at: http://www.americanlegislator.org/alec-passes-model-policy-encourage-smarter-sentencing/

imposition of the mandatory minimum would cause substantial injustice to the defendant or where the mandatory minimum is not necessary to protect public safety."[8]

These state safety valves and proposals from groups such as ALEC should help inform federal proposals to make greater and more creative use of the safety valve.

We applaud your proposal to continue efforts to expand the safety valve and urge you to continue your work to that end in Congress.

Economic Crimes (*proposed priority 2*).

We also endorse the Commission's proposed renewed commitment to work on the guidelines governing economic crimes, including an examination of the loss table, the definition of loss, and role in the offense. The guideline needs a major overhaul. We urge the Commission to take a bold step and rewrite the fraud and related guidelines to address the significant problems with sentencing in this area.

As you know, FAMM is pleased to be a member of the American Bar Association-sponsored task force of practitioners, scholars and judges looking into making concrete recommendations in light of longstanding problems with the guidelines that govern economic offenses. The ABA Task Force on the Reform of Federal Sentencing for Economic Crimes draft proposal received a warm reception at the Commission-sponsored Symposium on Economic Crime. That was almost a year ago and the need for overhaul remains acute. Several features of the current structure cause particular concern.

Above all is the influence of the "loss table" in the Sentencing Guidelines. Judges calculate a loss figure (which is the greater of actual or intended loss) and then consult the table to determine how many months or years to increase a sentence based on it. While loss is the sentencing guidelines' shorthand for culpability, it is a poor understudy for real measures of blame, such as motive or personal benefit. It cannot distinguish between the well-off offender who stole for her own benefit and one who falsely inflated profits to keep a company (and its employees) afloat. It does not do much to separate the criminal mastermind who victimizes vulnerable widows and orphans from the novice with a hare-brained scheme attached to a grandiose financial goal.

To address the overbearing influence of loss and the layered enhancements that have built up over the years, our task force designed a draft guideline that locates a punishment starting point based on the crime committed and the actual loss suffered, but which dampens the influence of loss. It then permits judges latitude to assess culpability and victimization and assign values that increase or decrease that punishment starting point depending on whether the

[8] *Id.*

values weigh in favor of enhancing or mitigating punishment. And it caps sentences for those first time, non-serious offenders for whom imprisonment is not appropriate.[9]

This fresh approach to loss should not sound new. The Commission recently adjusted the guidelines' reliance on drug quantity. The Commission pointed out that enhancements adopted over the years had minimized the need to use one factor, drug quantity, as a measure of culpability.[10] The Commission felt limited in the extent to which it could reduce the role of quantity and still keep faith with the mandatory minimum sentences to which many of the guidelines are anchored.

The loss table bears a striking structural similarity to the drug quantity table. Both supply the single most important factor in sentencing and overload that factor (drug quantity or actual/intended loss) with influence. Both are imperfect measures of culpability. Both guidelines have been overburdened with enhancement creep over the years.[11]

U.S.S.G. § 2B1.1 is not of course tied to a mandatory minimum and the Commission should accordingly not consider itself bound to slight adjustments. This priority gives the Commission a chance to take a genuine look at how to approach sentencing in a new light. We urge it to do so. Whatever the solution to the problems that plague sentencing in this area, doing little, such as tweaking this or that aspect of the problem, or nothing, is not the answer.

Booker *Fix* (*proposed priority* 9).

We reiterate our longstanding opposition[12] to any Commission proposal that would make the guidelines more mandatory. We note, above all, that the Commission has stood nearly alone in its call for more curbs on judges. Congress has introduced no legislation, despite the Commission's invitation in October and December 2012, nor has the DOJ stepped up in support of this or any other proposal of its ilk.

Meanwhile, many sentencing reform advocates, the judiciary, the Federal Public Defenders and the private bar are firmly arrayed against these proposals, which they consider unnecessary, unwarranted and certainly likely to do more harm than good.

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[9] See, AMERICAN BAR ASSOCIATION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIMES, "*A Report on Behalf of the American Bar Association Task Force on the Reform of Federal Sentencing for Economic Crimes*" (May 15, 2014), *available at*: http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf.

[10] Chief Judge Patti B. Saris, United States Sentencing Commission Remarks for Public Meeting 1-2 (July 18, 2014) available at: http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140718/PM_Chairs_Remarks.pdf.

[11] David Debold & Matthew Benjamin, "*Losing Ground: -- In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft* 2, 160 U. PA. L. REV. PENNUMBRA 141 2 (2013), *available at*: http://www.gibsondunn.com/publications/Documents/DeboldBenjamin-LosingGround-PENNumbra.pdf.

[12] *See, e.g.*, Letter from Julie Stewart and Mary Price to Patti B. Saris 8-9 (Aug. 26, 2011); *see also* Statement of Mary Price Before the U.S. Sent'g Commission Public Hearing on Federal Sentencing Options After Booker (Feb. 16, 2012); *see also* Letter from Julie Stewart and Mary Price 6-7 (July 15, 2013).

At a minimum, the Commission should do nothing to encourage limiting judicial discretion before it reforms problematic guidelines and assesses the impact on variance rates following those reforms. The Commission took a commendable step in that direction this year by adjusting the drug quantity table. Seeking a change to discretion without first fixing guidelines suggests that the guidelines are infallible and judges are wrong to disagree with them. Were that true, then indeed variance from the guidelines should be better controlled. But, the guidelines are not perfect, and not because they are now advisory. They are in many cases deeply flawed.

In short, fix bad guidelines and get a better grip on the underlying causes of disparity.

Child Pornography Offenses (*proposed priority 10*).

FAMM endorses the Commission's call to Congress to address the disturbing outcomes of the sentencing guidelines for child pornography receipt and possession. We strongly urge that the Commission adopt no more enhancements or SOCs, until the guideline for these offenses has had the airing the Commission believes it deserves. Among the findings of greatest concern in the Commission's December 2012 report is the fact that enhancements, originally slated to proportion sentences based on targeted aggravated conduct, routinely aggravate sentences for the vast majority of offenders.[13] These increases have in turn been prompted by changes made either directly by Congress or directed or encouraged by Congress. [14]

The Commission rightly identifies the non-production guideline as one in need of substantial revision and asks Congress to revisit the current penalty structure in federal distribution offenses to better account for new technology and its impact on the ease of image and file sharing. We endorse this proposal.

Compassionate Release (*proposed priority 11*).

Many observers, FAMM among them, worked with the Commission on the adoption of the policy statement U.S.S.G. § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). We did so because the BOP had improperly limited reduction in sentence motions under 18 U.S.C. § 3582(c)(1)(A)(i) to people within months of death or those severely debilitated by illness or injury. The Commission adopted in 2007 a robust policy statement, over the objection of the DOJ, which had sought to tighten, not expand, the criteria.[15] The policy statement explicitly carved out both medically and non-medically based

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[13] U.S. SENTENCING COMM'N, *Report to the Congress: Federal Child Pornography Offenses* 316 (Dec. 2012).
[14] *Id.*
[15] For a thorough discussion of the DOJ's stance on early release, see Human Rights Watch & FAMM, *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons* 23-27 (Nov. 2012) (The Answer is No), *available at*:
http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.hrw.org%2Fsites%2Fdefault%2Ffiles%2Freports%2Fus1112ForUploadSm.pdf&ei=ll7kUb21OZei4APTsIDADw&usg=AFQjCNEYZw6pKB1M1HDFpNs_AxwbXfMBIw&bvm=bv.48705608,d.dmg.

examples of extraordinary and compelling circumstances and also provided a catch-all provision, recognizing that extraordinary and compelling circumstances, other than those examples, might make early release feasible.

But, the BOP never directed its staff to use the USSC guideline when considering prisoner requests for compassionate release nor until recently had it advised prisoners that grounds other than imminent death or near complete incapacitation exist. The BOP does not consider itself bound by the policy statement, which, while true, certainly misses the point.[16]

In response to criticism leveled at the BOP, including by the DOJ's Inspector General,[17] the BOP has removed one level of review in the compassionate release process and expanded the medical criteria governing end of life and debilitating conditions.[18] The BOP has also expanded the definition of what constitutes extraordinary and compelling circumstances to include non-medical reasons as well as a set of considerations for elderly prisoners.[19] While we welcome this expansion and expressions by the BOP of its interest in bringing more compassionate release motions, we also welcome anything the Commission can do to contribute to a compassionate release program that complies with congressional intent and permits deserving prisoners the hearing their cases deserve in the courts.

To that end, we would encourage the Commission to provide more examples of what constitute extraordinary and compelling circumstances, while ensuring that the list the policy statement provides is not exhaustive.

Examples could include

- Situations where a prisoner was subjected to extreme physical, emotional or sexual abuse by or with the acquiescence of prison staff. FAMM and Human Rights Watch documented a case of a woman sexually abused over a 3 and half year period by prison staff. The abuse was so severe that she won a multi-million dollar lawsuit against her abusers but was told by the BOP that she was not eligible for compassionate release because the "circumstance, although unfortunate, does not merit a compassionate release." The regional director, reviewing her appeal agreed, stating: "staff did not consider your situation an extraordinary and compelling circumstance to warrant an early release." The Central Office concurred.[20]

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[16] *Id.* at 27.
[17] U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, *The Federal Bureau of Prisons' Compassionate Release Program* (April 2013) (OIG Report), *available at*: http://www.justice.gov/oig/reports/2013/e1306.pdf.
[18] *See* Memorandum from the BOP General Counsel to Chief Executive Officers, "Guidance for Use of the Bureau of Prisons' Reduction in Sentence Authority for Medical Cases" (Apr. 29, 2013).
[19] Federal Bureau of Prisons, Program Statement 5050.49, Compassionate Release /Reduction in Sentence: Procedures for Implementation of 18 U.S.C. § 3582(c)(1)(A) and 4205(g) (Aug. 12, 2013), *available at*: http://www.bop.gov/policy/progstat/5050_049.pdf
[20] The Answer is No at 50-51.

- Situations where a prisoner's medical condition that was likely to lead to death or extreme impairment was known at the time of sentencing but, because the prisoner was sentenced pursuant to then-mandatory guidelines or a mandatory minimum, the court could not, had it wanted to, adjust the sentence to reflect the circumstances. The BOP has denied compassionate release to such cases routinely, operating under a fiction that somehow the court can accommodate such situations, where of course they were unable to.
- Instances of acts of heroism, by which prisoners assist fellow inmates and prison staff at risk of their own lives.

Currently of course, courts are barred from granting a reduction in sentence unless the BOP brings the motion. In light of the BOP's intransigence and mismanagement of the program[21] we further urge the Commission to recommend to Congress that changes be made to the statute governing compassionate release. In particular, Congress should amend 18 U.S.C. § 3582(c)(1)(A)(i) to clarify that:

- The BOP is required to make motions to the sentencing courts for a reduction in sentence in all cases that fall within U.S.S.G. § 1B1.13; and
- Given that Congress has directed the courts in § 3582 to consider public safety or criminal justice grounds in assessing motions for early release, the BOP is not authorized to assess the grounds and may not use them to refuse to bring a compassionate release motion to the courts.

Additionally, the Commission can recommend to Congress that it permit prisoners to bring reduction in sentence motions directly after they have exhausted their administrative remedies and can present a prima facie case that they meet the threshold criteria.

Finally, in light of the § 994(g) requirement, it is useful to note that the OIG report "found that a properly managed compassionate release program inevitably provides cost savings to the BOP and provides assistance to the BOP in addressing its ever-increasing and significant capacity problems."[22] Any changes the Commission can help support to the program are likely to advance the Commission's § 994(g) objectives.

Relevant/Acquitted Conduct (*proposed priority 12*).

FAMM is pleased to endorse the Commission's interest in studying ways to simplify the guidelines, including a review of cross references, relevant conduct in conspiracies, and the acquitted conduct rule.

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[21] OIG Report at 1.
[22] OIG Report at iii.

If the Commission does nothing else in this area, it should abandon, once and for all, the acquitted conduct rule. We cannot fathom (and have great difficulty explaining to our members) why the Commission would direct judges to count conduct at sentencing that a jury has examined and rejected. Or for that matter, the conduct of co-defendants that, while found foreseeable, was not in fact, foreseen.

We understand that relevant conduct is used as a bargaining tool to extract guilty pleas and pressure defendants to forego exercising their right to trial. These so-called "trial penalty" tactics are as unseemly as the 21 U.S.C. sec. 851 notices that are offered and withdrawn on promises of guilty pleas.[23] None should have a place in a criminal justice system that is and is perceived as fair.

At a time when policy and lawmakers are striving to make sentencing more rational, fair and cost-effective, using such loose rules to increase sentences and push defendants to plead undermines the perception of our sentencing system as one seeking justice and balance.

We urge the Commission to eliminate the acquitted conduct rule and take steps to reform and appropriately limit the use of relevant conduct.

Career Offender

Our work with the Commission over the last few years to address sentencing with respect to crack cocaine and drug sentencing has been gratifying and especially so given the bold retroactivity votes the Commission has taken to ensure that prisoners benefit from these changes. These have been important reforms.

But, our enthusiasm is always tempered by the many very sad communications we receive from people serving career offender sentences under the guidelines. They will not benefit from the reductions, no matter how minimal their prior offenses were or how severe their sentence is. The Commission long ago recognized that the career offender guideline is the cause of some of the lengthiest sentences the system can produce. It also questioned, as long as ten years ago, the apparent associated racial disparity as well as its limited success in promoting the purposes of sentencing.[24]

In 2004 the Commission recognized that U.S.S.G. § 4B1.1 had a disproportionate role in the sentencing of Black offenders, whose "retail level" prior offenses did little to indicate their actual career status.[25] The findings also questioned whether the guideline as it applies to drug offenders fulfilled the purposes of sentencing: "Unlike repeat violent offenders, whose incapacitation may protect the public from additional crimes . . . retail-level drug traffickers are

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[23] *U.S. v. Kupa*, Statement of Reasons, No. 11-cr-345 (E.D.N.Y. Oct. 9, 2013).
[24] U.S. SENTENCING COMM'N, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133-34 (2004).
[25] *Id.* at 134.

readily replaced . . . . Incapacitating a low-level drug seller prevents little, if any, drug selling . . . ."[26]

Ten years have passed since that assessment and matters have only gotten worse. While Blacks constituted 26 percent of guideline offenders, they made up 58 percent of the career offenders in 2000.[27] In 2012, Blacks comprised 20.4 percent of those sentenced[28] but make up almost 62 percent of those receiving the career offender sentence.[29] The vast majority of them, 75.3 percent, are drug offenders.[30]

The rate of within range sentences has been falling for these defendants from 44 percent in 2008 to barely over 30 percent in 2012.[31] Nonetheless, they are serving shockingly long sentences, averaging 160 months, though, thanks to those variances, well below the recommended 218 months in the guideline.[32]

These numbers alone should commend this guideline for review. This is a badly broken guideline that does not meet the purposes of sentencing, is marred by racial disparity, produces heartbreakingly long sentences and is being abandoned by judges and the government in growing numbers.

We urge you to add a review of the U.S.S.G. § 4B1.1 to the list of priorities for 2015.

Conclusion

Thank you for considering our views. We look forward to working with you in this amendment cycle.

Sincerely,

Mary Price
General Counsel.

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[26] *Id.*
[27] *Id.*
[28] U.S. SENTENCING COMM'N, *2012 Sourcebook of Federal Sentencing Statistics*, tbl. 4.
[29] U.S. SENTENCING COMM'N, *Quick Facts, Career Offenders, available at*: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf.
[30] *Id.*
[31] *Id.*
[32] *Id.*