



November 25, 2015

The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002

Re: Proposed Amendments to the Definitions of Crimes of Violence

Dear Judge Saris:

We submit these comments on behalf of the board, staff and more than 70,000 members of Families Against Mandatory Minimums (FAMMM). Many of the prisoners and their loved ones in our membership are directly affected by the federal Sentencing Guidelines. As such, they are keenly interested in changes that will lower sentences going forward and especially in those the Commission lowers and then makes retroactive.

As the Commission considers which offenses should be considered predicate crimes of violence triggering USSG § 4B1.1 enhancements, we strongly urge you to do everything you can, within the confines of the congressional directive and the amendment at hand, to limit the reach of this disfavored guideline.<sup>1</sup> We appreciate that defining a crime of violence is challenging. Because applying the career offender label has the potential to dramatically increase a sentence well beyond what is deserved, the Commission should do all it can to mold the structure toward lenity. Erring on the side of under-inclusion will do less harm than over-inclusion. While variances can mitigate, to some extent, the problem of definitions that sweep too broadly, the anchoring effect of the guidelines exercises a powerful influence over the ultimate sentence.<sup>2</sup>

We therefore encourage you to limit the reach of the career offender guideline in the following ways. Besides eliminating the residual clause, we ask that you not add to the current list of enumerated offenses and pare the current list so that only crimes against persons are included as crimes of violence. We also urge you to limit state priors to those that 1) were considered felonies by the sentencing jurisdiction and 2) resulted in a sentence imposed of more

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<sup>1</sup> We recognize that the guideline is the product of a congressional directive, but we also understand that the Commission made drafting choices that went well beyond that directive. Amy Baron-Evans, et al., "Deconstructing the Career Offender Guideline," available at <https://www.fd.org/docs/select-topics---sentencing/Deconstructing-the-Career-Offender-Guideline-4-1-2011.pdf>.

<sup>2</sup> See Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases In Federal Sentencing: a Modest Solution For Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 available at <http://scholarlycommons.law.northwestern.edu/jclc/vol104/iss3/1>; see also Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 689 (2011).

than one year. These criteria are useful to indicate the severity of the underlying offense. The first – the classification of the prior – sheds light on how seriously lawmakers understand the offense to be. The second – the length of sentence imposed – indicates how serious the offense in fact was seen. These limitations on predicates will help to narrow the number of people considered career offenders to those whose priors might mark a criminal career. Finally, we encourage the Commission to make retroactive any changes that would lower sentences going forward.

More than a decade ago, the Commission found that the career offender guideline routinely calls for some of the lengthiest sentences in the federal system.<sup>3</sup> These sentences have likely fallen since then, but in 2014, 2,269 people were sentenced as career offenders, to an average of 147 months.<sup>4</sup> Only people convicted of murder and kidnapping received longer sentences.<sup>5</sup> In fact, career offenders serve longer in prison than do people convicted of sexual abuse (134 months), arson (62 months), racketeering or extortion (88 months) and firearms offenses (82 months).<sup>6</sup> This is indefensible when one considers that almost 75% of career offenders are sentenced for drug trafficking offenses.<sup>7</sup>

This lengthy average sentence however conveys too little about the problem with the career offender guideline. This is because the final sentence of 147 months is the product of significant prosecutorial and judicial abandonment of the guideline. In 2014, prosecutors sponsored non-substantial assistance-based variances and/or departures in 20.4% of all career offender cases. Those reductions averaged a remarkable 40.3% reduction in the sentence.<sup>8</sup> That year, judges sponsored an additional 25.9% of the below-guideline sentences varying or departing by 34.9% from the guideline.<sup>9</sup> Had they not received those reductions (and those for substantial assistance), these defendants would have faced more than 17 years on average!<sup>10</sup> Only sentences for murder dwarf this number.<sup>11</sup>

As the Commission points out, the impact of the Career Offender designation is significant in individual cases as well. Nearly 50% of defendants saw an increase of *eight* offense levels due to § 4B1.1 (from level 23 to level 31) and two levels in criminal history category (from CHC IV to CHC VI).<sup>12</sup>

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<sup>3</sup> U.S. Sent’g Comm’n, “*Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*,” at 133 (2004), available at <http://www.ussc.gov/research-and-publications/research-projects-and-surveys/miscellaneous/fifteen-years-guidelines-sentencing>.

<sup>4</sup> See, U.S. Sent’g Comm’n, Quick Facts: Career Offenders (Fiscal Year 2014) (2014 Quick Facts), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY14.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf).

<sup>5</sup> U.S. Sent’g Comm’n, *2014 Sourcebook of Federal Sentencing Statistics* tbl. 13 (2014) (2014 Sourcebook).

<sup>6</sup> *Id.*

<sup>7</sup> 2014 Quick Facts.

<sup>8</sup> 2014 Quick Facts.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 2014 Sourcebook at tbl. 13.

<sup>12</sup> *Id.*

These sentences have real human impact, removing defendants from their families for decades – or even life – based only on the fact of two prior offenses that may or may not be considered felonies in the jurisdictions of sentencing, and may or may not have resulted in any term of incarceration.

One faithful FAMM correspondent faced the extreme sentencing disparity squarely when he pled guilty in 2010 to manufacturing more than 100 marijuana plants. He did so in exchange for the dismissal of charges against his wife, who was able to remain home to care for their infant. His unenhanced sentence for growing pot would have had him facing between 24 and 30 months in prison. Even with a three-point reduction for acceptance of responsibility, he was sentenced as a career offender to 188 months in prison. His two priors involved very small quantities of drugs — he had served probation for one, and 100 days in jail for the other. His wife and child visit as often as they can. He has seven years to serve on his sentence. Had he not been subject to the career offender enhancement, he would have been home by now.

This proposed amendment, made necessary by *Johnson v. United States*, is an excellent opportunity to further a key goal: lessening the burden on the Bureau of Prisons by affecting the number of people sentenced to unduly long terms. Every policy and lawmaking actor in the criminal justice system is examining ways to limit the growth of the federal prison population.<sup>13</sup> The Commission has revisited its obligation under 28 USC § 994 (g) to ensure that its policies do not overburden the capacity of the federal Bureau of Prisons. This is good because research demonstrates that “[t]he main driver of the federal prison population is, by far, the dramatic increase in the time people spend behind bars — specifically, those convicted of drug offenses, who account for nearly half of the nation’s 199,000 federal inmates.... That increase in the length of drug sentences comes at a great expense: an estimated \$1.5 billion each year, based on how much it costs to keep a federal inmate behind bars.”<sup>14</sup> Given that 75% of all career offenders are convicted of drug trafficking crimes, lessening the reach of the career offender guideline can have a significant impact on meeting Congress’s directive.

The Commission should extend its commitment to lessening the burden on prison populations where it can and take every opportunity to do so. This amendment event represents an opportunity to affect the reach of the guideline. Today, the Commission is considering changes to the definition of crime of violence and drug felony that could have a genuine impact on the number and nature of people sentenced as career offenders.

### **Eliminating the Residual Clause**

This proposed amendment is non-controversial. Every witness at the recent hearing on the issue supported eliminating it. As do we. The Commission is right to recognize that the

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<sup>13</sup> Notably, the two bills that have cleared the House and Senate Judiciary Committees, H.R.2944, The Sentencing Reform Act and S. 2123, The Sentencing Reform and Corrections Act, do not lower relevant statutory maximums, thus leaving the calculations in USSG § 4B1.1 unaffected.

<sup>14</sup> Editorial, “*Cut Sentences for Low Level Drug Crimes*,” NEW YORK TIMES, Nov. 23, 2015 at A22, available at [http://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html?emc=edit\\_tnt\\_20151123&nid=56455206&tntemail0=y&r=0](http://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html?emc=edit_tnt_20151123&nid=56455206&tntemail0=y&r=0).

residual clause, deemed unconstitutionally vague for purposes of determining predicates under the Armed Career Criminal Act (ACCA),<sup>15</sup> is also unjustifiably vague for purposes of determining career offender predicates. In the career offender context, of course, incorrectly assigning a prior as violent can do even more damage than in the ACCA contest, given that Career Offender sentences routinely outstrip the ACCA fifteen-year mandatory minimum. FAMM polled its members earlier this year about their career offender sentences and heard from approximately 1,500 prisoners. We learned from them that sentences of 360 months and life are not uncommon. We are pleased to support the elimination of the residual clause as it will limit the reach of the career offender enhancement.

### **Crimes Against Persons**

The Commission has asked for comment on whether crimes of violence should be limited to crimes against a person and not include crimes against property. FAMM believes that the definition should be so limited, and that enumerated offenses that do not involve acts of violence against a person should be removed from the list of crimes constituting violence.

In that vein, FAMM would support removing arson and burglary from the list of enumerated offenses entirely. The proposed definitions of burglary, for example – “unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a [crime][felony]” – reach conduct that does not include violence or its threat. “Structure” can be a chicken coop, cow shed, horse barn, car or sail boat. The crime committed can be as simple as shoplifting food from a grocery store or trespassing in an unoccupied structure after hours to squat or steal liquor from a bar.

Burglaries occur with great frequency and rarely include violence against a person. According to a recent study of the extent to which burglary includes violent conduct, the researchers found that “the majority of burglaries do not involve physical violence and scarcely even present the possibility of physical violence.”<sup>16</sup> The study found that even residential burglaries only involved occupied residences in one-fourth of the crimes.<sup>17</sup>

The definition of arson suffers from the same defect, given that arson of an unoccupied structure is treated the same as arson of a structure known to be occupied. In the former, no person is present and as such, no violence against the person can have occurred. It should not be treated in the same fashion as arson of an occupied structure.

To the extent offenses include violence, such crimes of violence should have been charged and identified in the defendant’s criminal history. Alternatively, crimes of burglary or arson that involve violence against a person should be discernible by way of an inquiry into the

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<sup>15</sup> See *Johnson v. United States*, 135 S. Ct. 2552, 2557 (2015).

<sup>16</sup> Richard S. Culp, Ph.D., et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007*, at ii (2015), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf>

<sup>17</sup> *Id.* at 38. The authors point out this common sense measure: “For burglary to be violent, a victim must be present in order for violence to occur or be threatened.”

elements of the offense and/or documents that can be examined under the categorical approach that help define the offense.

We heard from a number of prisoners whose sentences were enhanced for burglaries that involved no violence whatsoever. For example, one prisoner with whom we are in touch is serving a life sentence following his conviction in 1997 and designation as a career offender. His instant offense, conspiracy to distribute a controlled substance, was enhanced by two priors, including possession with intent to distribute a controlled substance. The substances were methamphetamine and marijuana, and he sold to support his own drug habit. His other predicate was for burglary of an automobile. Another FAMM member was sentenced to 188 months and enhanced in part for burglary of an uninhabited dwelling, which he described as empty of nearly all furniture (but containing a refrigerator stocked with liquor). He was 18 at the time of the prior. We have heard from other members whose priors included after-hours burglary of businesses where the defendant acted as a lookout, and conspiracy to commit pharmacy burglary.

In light of the extreme consequences of being deemed a career offender, equating, for enhancement purposes, breaking and entering a business after hours, or burglarizing an automobile, or burning down an abandoned warehouse, with murder or forcible sex offenses, is unjustifiable and defeats proportionality.

### **Felony Classification and Sentence**

We applaud the Commission's proposal to restrict the use of state priors to those that the state classified as felonies. This would replace the current practice of reclassifying state misdemeanors as felonies based merely on the statutory maximum sentence. This would have the benefit of including only those prior offenses deemed serious enough by state lawmakers to be considered felonies, notwithstanding statutory maximums.<sup>18</sup>

We would also encourage the Commission to further limit predicate offenses to those priors for which the defendant served more than a year of incarceration. This would ensure that only defendants considered by the court to deserve a significant term in prison, and whose priors otherwise are deemed predicates, would be subject to the extreme enhancements called for by the career offender guideline. Prisoners who served little or no time in prison prior to being designated as a career offender can hardly be considered to have engaged in a career of crime. And yet we have heard from many incarcerated FAMM members whose first sentence of any real length is a career offender sentence of 120 or 360 months, or even life.

- For example, one prisoner with whom we communicate was deemed a career offender. He is the father of four boys and will not leave prison until 2026. He had two prior cocaine convictions in the state of Georgia. For one he served five months of probation

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<sup>18</sup> For a comprehensive list of states with misdemeanors that can be treated as felonies, see Testimony of Molly Roth on Behalf of the Federal Public and Community Defenders Before the U. S. Sentencing Commission Public Hearing on Proposed Amendments to the Definitions of Crimes of Violence at 21-22 (Nov. 5, 2012), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/FPD.pdf>.

and for the other, 90 days in boot camp. His first exposure to incarceration was when he was sentenced to 262 months in federal prison for street-level drug distribution.

- Another prisoner was sentenced to probation for each of his two prior offenses (possession with intent to distribute marijuana and possession with intent to distribute marijuana and cocaine). He was sentenced to life in prison for the instant offense of possession with intent to distribute crack cocaine.
- The drug-addicted wife of a street-level crack dealer who helped her husband out from time to time, and who had pled to drug sale priors involving a gram or less, spent at most 8 months in prison before receiving her career offender sentence of 126 months. Her career offender offense level was 37 adjusted to 34 due to acceptance; unenhanced it would have been 30, reduced to 27. She is sober now, but won't go home until 2020. She left behind a young son now entering his teens.
- A South Carolina cocaine and marijuana dealer with young children involved for 4 months in a drug conspiracy was sentenced in federal court under § 4B1.1 to 144 months. One of his predicate offenses was failing to stop for a blue light. He wrote, "I have never been to prison and the only time I received was seven days time served for the time I sat in jail waiting for a bond and 4 days for my second prior misdemeanor...."

We can think of no reason why these individuals, who committed priors that the sentencing judge deemed not worthy of lengthy incarceration, should be labeled and sentenced as career offenders. We urge you in the strongest possible terms to limit the reach of this extreme sentencing to those defendants who were sentenced to and served more than one year for their state classified felonies.

We appreciate that doing this will require, on occasion, extra work to elicit how much time was served. The vast majority of the PSRs we review include that information, and even include when a suspended sentence is reinstated due to a probation violation or other misconduct. Certainly the time it would take to ascertain time served, balanced against the decades in prison that might be saved, is well worth the effort.

### **Retroactivity**

Many of our members who are designated as career offenders have written to tell us how dismayed they are to be left behind in prison as thousands have benefitted from the various drug retroactivity decisions. They point out that they are left without any recourse, even though their instant drug offenses are indistinguishable from those of fellow inmates who secure sentencing reductions.

A prisoner serving a crack cocaine sentence has been deemed eligible for three rounds of retroactivity since 2008. A prisoner serving a crack cocaine sentence with two predicates, however minor or remote in time, has not. Their sentences can be decades longer for the very same instant offense, and there is absolutely no relief for which they are eligible. They, and we, find this state of affairs intolerable, and we can hold out no hope for them. These are some of the most painful communications we have, and for good reason. They are serving sentences that are

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too long and are separated by the thinnest of rationales from those deemed sufficient but no greater than necessary for their similarly situated fellows.

We appreciate the difficulties that the parties may encounter in sifting out residual clause priors or sorting misdemeanors from felonies. The three days or three weeks it would take to do so pale in comparison to the savings the prisoner would receive on their sentences. Certainly it is worth the trouble and time, especially in light of the fact that, going forward, a prisoner identically situated will receive a sentence that could be decades shorter or even be spared the prospect of dying in prison.

Thank you for considering our views.

Sincerely,



Julie Stewart  
President



Mary Price  
General Counsel