



July 31, 2017

Honorable William H. Pryor, Jr.  
Acting Chair  
U.S. Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500  
Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2018 Amendment Cycle

Dear Judge Pryor,

I write on behalf of the staff, board, and 40,000 members of FAMM to share our views on the priorities the Commission proposes to adopt to guide the 2018 amendment cycle. As always, we value this opportunity to weigh in. The sentencing guidelines have touched the lives of most of our members, both those inside prison and their loved ones outside. We work to help these individuals follow the steps you take to study, report on, and alter sentencing policy. They in turn help us by sharing their experiences under the guidelines. Those stories shape our own response to your proposals. And we often share their stories with you to underscore the impact of your decisions. We share them as well with the public in an effort to build more engagement in the important work of the Commission.

We are generally supportive of the priorities you have suggested. We want to address several of them in particular and suggest additional areas to explore.

***Continuation of the multiyear examination of the overall structure of the guidelines post-Booker.***

FAMM favors simplified guidelines that promote proportionality, reduce unwarranted sentencing disparities, and help the judge account for the defendant's role, culpability, and relevant conduct, while retaining sentencing discretion in the hands of the judge. Given the Commission's previous effort to seek statutory changes to amend the guidelines system structurally, we are concerned that some forms of "simplified guidelines" could do more harm than good.<sup>1</sup> Specifically, we would not support simplified guidelines that were mandatory -- in name or function -- binding judges to ranges set by Congress or the Commission, ones that limited judicial discretion to take into account individual features and characteristics of the crime

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<sup>1</sup> See Prepared Testimony of Judge Patti B. Saris before the Subcommittee on Crime, Terrorism and Homeland Security (Oct. 12, 2011), available at [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20111012\\_Saris\\_Testimony.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20111012_Saris_Testimony.pdf).

and the defendant. We have consistently expressed our opposition to rolling back advisory guidelines in a manner that would prevent judges from doing justice in individual cases.<sup>2</sup>

The Commission has documented the many harms caused by and the benefits of avoiding mandatory sentencing. Mandatory minimums are widely recognized as a key contributor to the growth in the prison population. Securing mandatory minimum sentences has driven up prosecutions because they provide prosecutorial incentives to charge. This was most evident in the experience of crack cocaine before passage of the Fair Sentencing Act of 2010 (FSA). Prior to the FSA, between approximately 5,500 and 6,100 people were sentenced annually for crack cocaine offenses. People sentenced for crack cocaine offenses served, on average, much longer prison sentences than those sentenced for other drugs.<sup>3</sup>

The simple act of increasing the triggering quantities for crack cocaine helped decrease the number of people prosecuted for crack cocaine offenses. That decline began in earnest in 2010, when the number of people sentenced for crack cocaine fell from 5,684 in 2009 to 4,897 in 2010 and has continued to decline to this day.<sup>4</sup> In 2011 and 2012, the only drug type that showed a decline in sentencing was crack cocaine.<sup>5</sup> In 2016, only 1,582 people were prosecuted for crack cocaine offenses.<sup>6</sup>

Moreover, as the Commission documents in its most recent report on the subject, the Obama administration's "Smart on Crime" charging policy, expressed in a set of memos that directed federal prosecutors to use restraint in charging mandatory minimum sentences, has also been attributed to a decrease in the federal prison population.<sup>7</sup>

Removing incentives (by means of lowering crack cocaine mandatory minimums) and redefining charging priorities (by limiting the use of mandatory minimum sentences) made a difference, not only in mandatory minimum charging but in drug cases overall. Following the charging memorandum issued by Attorney General Eric Holder in late 2014,<sup>8</sup> the number of people being sentenced for nearly all drug offenses began to fall, and by 2015 they fell in every

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<sup>2</sup> See, e.g., Letter from Mary Price to Patti B. Saris at 3-5 (July 25, 2016), available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160725/priorities-comment.pdf#page=147>; see also Letter from Mary Price and Julie Stewart to Patti B. Saris at 4-5 (July 27, 2015), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/FAMM.pdf>; see also, Statement of Mary Price Before the U.S. Sentencing Comm'n Public Hearing on Federal Sentencing Options After Booker (Feb. 16, 2012), available at [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20120216/Testimony\\_16\\_FAMM.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20120216/Testimony_16_FAMM.pdf).

<sup>3</sup> See U.S. SENTENCING COMM'N, *2009 Sourcebook of Federal Sentencing Statistic*, (2009 Sourcebook) Fig. J.

<sup>4</sup> Compare 2009 Sourcebook, Tbl 33 with 2010 Sourcebook of Federal Sentencing Statistics, Tbl. 33.

<sup>5</sup> See U.S. SENTENCING COMM'N, *2011 Sourcebook of Federal Sentencing Statistics*, Tbl. 33; see also, 2012 Sourcebook of Federal Sentencing Statistics, Tbl. 33.

<sup>6</sup> See U.S. SENTENCING COMM'N, *2016 Sourcebook of Federal Sentencing Statistics*, Tbl. 33 (2016 Sourcebook).

<sup>7</sup> See U.S. SENTENCING COMM'N, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* (2017 Mandatory Minimum Report) at 49 (July 2017).

<sup>8</sup> See U.S. DEP'T OF JUSTICE, Attorney General Eric Holder, Memorandum: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

drug category.<sup>9</sup> Moreover, as the Commission found in its most recent report on mandatory minimum sentencing, under this new guidance, mandatory minimums were used less frequently and were reserved for more serious offenders.<sup>10</sup>

The new administration has reversed the Obama era charging policy, and we fully expect that mandatory minimum sentences will once again be sought with frequency, which in turn is likely to result in sentences that are individually disproportionate. This new emphasis on mandatory charging is also expected to reverse the last several years of decreasing prison numbers, while ensuring that more low-level offenders will again be targeted for these sentences.

Imposing mandatory or so-called “presumptive” restraints on judges using the guidelines would surely extend the injustices and harshness associated with mandatory minimums (as well as their contribution to overcrowded prisons) from the core crimes saddled with statutory mandatory minimums (principally drugs and firearms, as well as sexual abuse, child pornography, and identify theft)<sup>11</sup> to *all* crimes covered by the guidelines. We can think of no good reason to take this step.

We are not alone in our concern about this prospect. Judges, law professors and practitioners expressed their concerns about a return to mandatory sentencing at a public hearing in 2012, shortly after the Commission’s testimony before Congress on the subject.<sup>12</sup>

FAMM appreciates that the Commission and the judiciary now struggle with a sentencing guideline system written at a very different time under a very different set of expectations. The calculation of base offense levels, adjustments, specific offense characteristics, and departures is time-consuming and tedious, given that the resulting end product is then subjected to an additional deep and searching scrutiny of judicial adherence to the inquiry and mandate of 18 U.S.C. § 3553(a). But the answer to complexity is not to make a system more rigid; rather it is to provide guidance and flexibility in a system that should be simpler and aims to achieve proportionality and avoid unwarranted disparity.

To that end, we again recommend the work of the American Bar Association Task Force on the Reform of Economic Crime Sentencing (Task Force) of which FAMM was an active member.<sup>13</sup> We understand the Commission did not adopt the recommendations of the Task Force because it differed with the Task Force on the depth of the problems presented by economic

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<sup>9</sup> Compare U.S. SENTENCING COMM’N, *2015 Sourcebook of Federal Sentencing Statistics*, Tbl. 33 with 2016 Sourcebook, Tbl. 33.

<sup>10</sup> See 2017 Mandatory Minimum Report at 29-30.

<sup>11</sup> 2017 Mandatory Minimum Report at 34-36.

<sup>12</sup> See U.S. SENTENCING COMM’N, Public Hearing on Federal Sentencing Options After *Booker* (Feb. 16, 2012), available at <https://www.ussc.gov/policymaking/meetings-hearings/february-16-2012>.

<sup>13</sup> See AMERICAN BAR ASS’N, *Criminal Justice Section Task Force on the Reform of Economic Crime Sentencing*, available at

[https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic\\_crimes.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.authcheckdam.pdf).

crime sentencing.<sup>14</sup> But there is much to like in the *approach* we took. We sought to rethink the grid and reduce reliance on complex, factor-laden guideline calculations. The proposal took aim at one of the problems that plagues the guidelines: the overreliance on one or two factors as proxies for culpability. Dollar loss, for example, carries much of the weight for culpability in the fraud guideline. The Task Force took pains to account for loss while lessening its overall influence on the calculated guideline. The proposal also minimized the number of enhancements and worked to address other redundant features of the guideline. Above all, the proposal elevated judicial discretion within the calculation process. Discretion was designed not to avoid a guideline but to enhance the ability of the final guideline calculation to reflect a just and proportionate sentence that reduced disparity vis-a-vis similarly situated defendants.

The proposal accomplished this in the guideline calculation by providing a balancing test of sorts -- a way to assess and weigh factors that were found to reflect culpability. This tool would eliminate the current guideline practice of finding a fact and assigning it a value and adding or subtracting to get to a range. Rather, our model directed judges to assess a series of factors and weigh and balance them in the consideration of the overall harm.

We urge the Commission to take another look at this creative approach, if it indeed decides to attempt to fashion structural post-*Booker* overhaul.

### **Continuation of its work with Congress and other interested parties to implement the recommendations in the Commission's Career Offender report.**

We support the Commission's work to seek changes to the statutory framework that governs the Career Offender guideline as described in its 2016 report to Congress: Career Offender Sentencing Enhancements. But, while the Commission is encouraging Congress to act, it should be taking its own steps to remove from the reach of the Career Offender guideline individuals who technically meet the definition of Career Offender based on the manner in which their prior offenses count but who clearly have not made a career of crime. We appreciate that the Career Offender guideline is the product of congressional directive, but we do not think the Commission has exhausted the possibilities for making definitional changes that can remove some defendants from the Career Offender pool.

The severity of Career Offender sentencing cannot be overstated. In 2016 nearly 1,800 Career Offenders received sentences averaging 142 months.<sup>15</sup> Nearly 50 percent of them received sentences between 10 and 20 years, while 12.4 percent were sentenced to more than 20 years.<sup>16</sup> Absent variances and departures, including government sponsored departures, these numbers would certainly be much higher.

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<sup>14</sup> See U.S. SENTENCING COMM'N, Chief Judge Patti B. Saris, Remarks for Public Meeting at 2 (Jan. 9, 2015), available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/Remarks.pdf>.

<sup>15</sup> UNITED STATES SENTENCING COMM'N, *Quick Facts: Career Offenders*, (Quick Facts) available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY16.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY16.pdf).

<sup>16</sup> *Id.*

Last year we heard from hundreds of FAMM members who are serving sentences imposed under USSG 4B1.1.<sup>17</sup> Many of them reported limited criminal histories, short or no prior terms of incarceration, and/or very minor instant offenses, including convictions for as little as five grams of crack cocaine. Many but not all are exclusively drug offenders. Some had crimes of violence in their histories but of a minor nature.

One such example is Nichole Marie Forde.<sup>18</sup> Categorized a Career Offender for priors, she is currently serving 327 months for her nonviolent drug offense. Absent the Career Offender label, she would have received a sentence of 135-168 months. It's difficult to square the Career Offender category with the life of a woman who seemed to struggle at almost every turn, who always "felt like I wasn't good enough for anyone." A tumultuous childhood contributed to mental illness, teen pregnancy, life on the streets, the loss of custody of her three children, inability to maintain a job, and an abusive and controlling boyfriend.

Looking at the span of her life, it's clear that Nichole needed punishment for her drug dealing, as well as treatment for her serious mental health issues. And at six years in, it's clear that she has received both—Nichole has made the most of her six years so far in prison. "My therapeutic work with PTSD has helped me a lot. I no longer need medication to deal with panic attacks. I no longer have thoughts of killing myself. I deal with conflict completely different. I can recognize red flags a lot quicker now. I am 36 now and my outlook on a lot of things has changed . . . My main priority in prison is to get vocational training and keep a positive outlook." Yet Nichole Forde has more than 20 years remaining on her sentence.

As in Nichole Forde's case, the career offender label can grossly exaggerate the real nature of the prisoner's criminal history. We believe that qualifying prior felonies should be of a nature and severity that warrant career offender status. The Commission can and should address which prior felonies should count toward Career Offender status, whether or not Congress decides to act on the recommendations in the report to Congress.

While the Career Offender guideline is the result of a congressional directive, the manner in which predicates are identified is within the control of the Commission. For example, the Commission used its discretion to, among other things, credit acceptance of responsibility in the instant offense,<sup>19</sup> limit the counting of stale priors,<sup>20</sup> and exclude simple possession prior drug felonies as Career Offender predicates.<sup>21</sup>

The Commission should go further to explore ways to limit the impact of prior offenses in ways that ensure that only the most serious repeat offenders, those who have indeed made careers of crime, are subject to the enhanced penalties. We are especially concerned about career

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<sup>17</sup> See 2016 FAMM Priorities Letter at 6-7.

<sup>18</sup> See Families Against Mandatory Minimums, Nichole Marie Forde, available at <http://famm.org/nichole-forde/>.

<sup>19</sup> U.S.S.G. § 4B1.

<sup>20</sup> U.S.S.G. § 4A1.2(e).

<sup>21</sup> U.S.S.G. § 4B1.2(b).

offenders who have spent little or no time incarcerated for their prior offenses, despite the felony nature of their prior.

**Continuation of its work to implement the recommendations in the 2011 report to Congress on mandatory minimum penalties.**

FAMM reaffirms its support for the Commission's work to advance the mandatory minimum reforms recommended in the 2011 report to Congress, "Mandatory Minimum Penalties in the Federal Criminal Justice System." Your work in this area both to advance lawmakers' understanding of mandatory minimum sentencing and to encourage reform is especially important now in light of the steps Attorney General Jeff Sessions has taken to undo Smart on Crime charging policies. The Attorney General has directed prosecutors to "charge and prove the most serious readily provable offense."<sup>22</sup> The Attorney General explains that the most serious offense is the one that carries the "most substantial guideline sentence, including mandatory minimum sentences."<sup>23</sup>

FAMM appreciates the need to combat crime and ensure public safety. We strongly disagree that seeking lengthy sentences in every case will effectively meet those goals. The strategy is ill-conceived, unsupported by evidence, and very likely to do more harm than good. We know that this approach has saddled low-level drug offenders with sentences Congress intended for kingpins, handed sentencing power to prosecutors, ruined countless lives, and filled our prisons to overflowing with inmates serving mandatory minimums or the sentencing guidelines anchored to them. All these costs are thrown into sharper relief given that the strategies have failed in their objective to win the war on drugs.

The Commission's work to educate lawmakers on the ills of mandatory minimum sentencing has reaped genuine results. For example, multiple Commission reports on the failures and unjust outcomes of the crack/powder sentencing disparity led the Commission to take a bold step in 2007 to reduce crack cocaine guidelines by two levels.<sup>24</sup> This was followed by a decision to make the reductions retroactive.<sup>25</sup> These moves ultimately spurred Congress to act, and in 2010 the Fair Sentencing Act cleared both houses without opposition.

The work the Commission did in this area was critical. Advocates and policy makers cited the work and the actions of the Commission when working to fashion and then pass the FSA. The important first steps the Commission took surely influenced efforts to secure sentencing reform in the 114<sup>th</sup> Congress.

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<sup>22</sup> Memorandum from the Attorney General to All Federal Prosecutors at 1 (May 10, 2017), available at <https://www.justice.gov/opa/press-release/file/965896/download>.

<sup>23</sup> *Id.*

<sup>24</sup> See U.S. SENTENCING COMM'N, News Release (April 27, 2007), available at <https://www.ussc.gov/about/news/press-releases/april-27-2007>.

<sup>25</sup> See U.S. SENTENCING COMM'N, News Release (Dec. 11, 2007), available at <https://www.ussc.gov/about/news/press-releases/december-11-2007>.

As you know, there is much to be done to reform mandatory minimum sentencing, including reforms proposed by the Commission to broaden the Safety Valve, lessen the recidivism impact in the drug statute, and fix § 924(c) stacking eliminating drug mandatory minimums.<sup>26</sup> And, given the new emphasis on seeking lengthy and mandatory minimum sentences, there will be a great deal to learn about the impact of these new charging policies. The role of the Commission in both pressing reform and monitoring mandatory sentencing is critical. We strongly encourage the Commission to continue both its vigilance and its advocacy for reform in the year to come.

### **Continuation of its study of recidivism, examination of criminal history, and alternatives to incarceration.**

FAMM vigorously supports the thrust of the Commission's work in these areas. We wrote at length in the last cycle to support and encourage the expansion of the so-called first offender amendment.<sup>27</sup> We also urged, and continue to urge, the Commission to refine how criminal history is counted, especially for crimes committed by youth and crimes for which time served is very different from time imposed.<sup>28</sup> We look forward to addressing these areas in the coming cycle.

### **Other considerations**

We again encourage the Commission to address the undue severity of sentences for child pornography offenses and eliminate the acquitted conduct rule. Non-contact child pornography guidelines result in some of the most severe sentences called for under the sentencing guidelines. We applaud the Commission's message to Congress that it address the disturbing sentencing of receipt and possession offenses.<sup>29</sup> But the Commission has the authority to act on its own to ameliorate many of the features of guideline sentencing for child pornography non-contact offenses. We hear from a number of members serving these outsize sentences and ask again<sup>30</sup> that the Commission identify and propose changes it can make, absent congressional action.

While the Commission made some salutary changes to U.S.S.G § 1B1.3, it elected to retain acquitted conduct as the basis for calculating offense levels. Using conduct that has been tested at trial and of which the defendant has been found not guilty undermines citizens' view of our justice system as fair and balanced. It is a rule out of step with the modern effort to make sentencing more rational, just, and cost-effective. It should be eliminated.

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<sup>26</sup> U.S. SENTENCING COMM'N, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 367-69 (Oct. 2011), available at <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

<sup>27</sup> See Letter from Mary Price and Kevin A. Ring to William H. Pryor, Jr. at 1-9 (Feb. 20, 2017), available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170220/FAMM.pdf>.

<sup>28</sup> *Id.* at 9-11.

<sup>29</sup> U.S. SENTENCING COMM'N, *Report to the Congress: Federal Child Pornography Offenses* (2012).

<sup>30</sup> See Letter from Julie Stewart and Mary Price to Chief Judge Patti B. Saris at 7-8 (July 27, 2015), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/publiccomment/20150727/FAMM.pdf>.

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Finally, several organizations, including Right on Crime, #Cut50, and others recently joined a letter to the Commission encouraging you to study the impact of parental incarceration on minor children.<sup>31</sup> They cited the toll that parental incarceration takes on children's security, emotional development, educational outcomes, and other important measures of well-being. Such a study could reveal the scope of the problem and lay the basis for the Commission to examine whether adopting a departure for impact on minor children of incarcerating their parents would be warranted. We think that the proposal merits your serious consideration.

### **Conclusion**

Thank you for considering our views. We look forward to working with the members and staff of the Sentencing Commission this year.

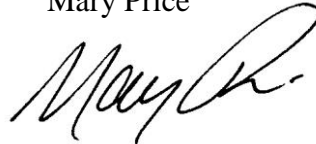
Sincerely,

Kevin A. Ring



President

Mary Price



General Counsel

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<sup>31</sup> See Letter from Pat Nolan, American Conservative Union Foundation, *et al.* to the U.S. Sentencing Commission, "Alleviating the Impact of Parental Incarceration on Children Through Sentencing Reform," (July 9, 2017), available at <http://www.rstreet.org/outreach/alleviating-the-impact-of-parental-incarceration-on-children-through-sentencing-reform/>.