

August 9, 2018

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 2019 Amendment Cycle

Dear Judge Pryor,

We are pleased to write on behalf of the 40,000 members of FAMM who are incarcerated in federal prison, their loved ones, our staff, and our board of directors about the priorities the Commission proposes to adopt. The guidelines the Commission promulgates or amends and the studies it publishes often affect our members. We are grateful for the chance to share their perspective. We have also asked our members and other allies to write you directly and we expect you will hear from a number of them.

1. We support the Commission’s proposal to study whether U.S.S.G. § 1B1.13 effectively encourages the Director of the Bureau of Prisons (BOP) to file a compassionate release motion when “extraordinary and compelling reasons” exist.

FAMM has a longstanding interest in expanding the BOP’s use of compassionate release. FAMM has been an advocate for compassionate release reform starting in 2001 and has been active before the Commission on this issue over the years. We wrote the first of a number of comment letters on this subject to the Commission in 2001 and most recently testified before the Commission in 2016.¹ We know the Commission has been very engaged in this issue for a number of years, adopting the policy statement that guides federal judges considering compassionate release motions in 2006 and then amending it several times until the most recent amendment in 2016.²

It is in the current policy statement that the Commission added commentary urging the Bureau of Prisons to file a motion if the prisoner meets the medical, age, or family-circumstances criteria set out in Application note 1. The commentary explains that:

¹ See U.S. Sentencing Comm’n, Public Hearing on Compassionate Release and Conditions of Supervision, Transcript of hearing at 129-35 (Feb. 17, 2016).

² See USSG § 1B1.13, comment (Historical Note).

The court is in a unique position to determine whether the circumstances warrant a reduction (and if so, the amount of reduction) after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.³

We expect this remarkable recommendation was likely prompted by the knowledge that the BOP uses its exclusive control over the sentence reduction motion to manage the court's jurisdiction. The BOP is thus able to ensure that a prisoner it determines does not deserve compassionate release cannot be considered by the sentencing judge. This happens in cases that meet the criteria set out in § 1B1.13 and even those that meet the BOP's criteria set out at P.S. 5050.49.

In our work with the Commission on compassionate release and in a report FAMM co-authored with Human Rights Watch in 2012,⁴ FAMM has consistently taken the position that the BOP exercises its control over motions in a manner not authorized or contemplated by Congress.

In 18 U.S.C. § 3582(c)(1)(A), Congress authorizes a federal court to reduce a prisoner's sentence for extraordinary and compelling reasons. In 28 U.S.C. § 994(t) it assigns the Sentencing Commission the job of stating the criteria, reasons, and examples of what circumstances are extraordinary and compelling. The BOP is tasked with identifying prisoners who meet the criteria and moving the sentencing court for a sentence reduction.⁵ The Court is directed to evaluate the motion and the prisoner's suitability in light of the factors set out in 18 U.S.C. § 3553(a) and guideline policy statements.

Critically, the federal statute established the program within (and as an exception to) a provision that otherwise strictly limits the court's discretion to revisit a final sentence and it leaves the court without jurisdiction over compassionate release absent the government's motion.⁶ As a consequence, the BOP has assumed all three responsibilities. It establishes its own criteria, identifies prisoners it believes meet them, and decides which of those prisoners deserve release.

The BOP's assumption of control over who is released means that qualified prisoners are left to languish and even die behind bars. In fact, between 2014 and 2018, according to the DOJ, 81 prisoners died awaiting a decision from the Bureau of Prisons about their requests for compassionate release.⁷ We also know this problem exists because we are in touch with prisoners and their loved ones who report denials of otherwise worthy cases because the BOP

³ USSG § 1B1.13, comment (n. 4).

⁴ See Human Rights Watch and Families Against Mandatory Minimums, *The Answer is No: Too Little Compassionate Release in Federal Prisons* (Nov. 30, 2012), <https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons>.

⁵ 18 U.S.C. § 3582 (c)(1)(A)(i).

⁶ See 18U.S.C. § 3582(c)(1)(A).

⁷ Letter from Stephen E. Boyd to Brian Schatz at 2 (Jan. 16, 2018), <https://famm.org/wp-content/uploads/Response-from-BOP-re.-Compassionate-Release-Letter-1-16-2018.pdf>.

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finds, for example, that the prisoner has not served enough of their sentence, poses a risk of reoffending, or has committed a crime that in the BOP's opinion militates against release.

One such member who was denied compassionate release by the BOP is Connie Farris. She is 73 and has served 7 years of a 12-year sentence for mail fraud. She has applied twice for compassionate release under the family circumstances criteria. Her husband is suffering from a progressively debilitating form of muscular dystrophy. Since his diagnosis in 2011, he has physically and cognitively deteriorated.

Both the BOP and the sentencing guidelines' compassionate release policy statement provide for reduction in sentence when a prisoner is the only caregiver for their incapacitated spouse. Wardens have twice agreed with Ms. Farris that she meets the BOP criteria for compassionate release.

With no one to care for him, Ms. Farris's husband lives on frozen dinners; falls in the bathtub; and does not know where he will be able to live, how to go about finding a home, or how he will be able to afford housing and personal care.

Earlier this year, Ms. Farris told a reporter:

Now it's gotten worse, and he can barely walk or lift his arms. Without me, he's alone – we have no children, no other family and we can't afford a nurse. I just imagine him sitting there 24 hours a day, not having anyone to talk to except me when I call him.⁸

The Bureau of Prisons, while acknowledging that she met the eligibility criteria, nonetheless denied her most recent application in July 2017, saying it “would minimize the severity of Mrs. Farris' offense.”⁹

We suspect that denials based on considerations that we and the Sentencing Commission believe should be left to the court happen regularly. But the BOP does not routinely release data and to our knowledge has never accounted for how many requests it denies based on its concern about public safety, recidivism risk, or concerns that release would minimize the offense severity. A scathing report by the Inspector General of the Department of Justice documented failings of the BOP program but did not address the BOP's unilateral judgments about the worthiness of a candidate who fits the criteria.¹⁰ A bipartisan request for information from Senators to the BOP in 2017 produced answers that, while useful, did not shed light on the problem of how the BOP judges whether a prisoner deserves to be released either.¹¹ It is a

⁸ Connie Farris, as told to Christie Thompson, *Caring for My Sick Husband from Prison: A Federal Inmate Feels Helpless as Her Partner's Health Deteriorates*, THE MARSHALL PROJECT in collaboration with VICE NEWS, Mar. 8, 2018, <https://www.themarshallproject.org/2018/03/08/caring-for-my-sick-husband-from-prison>.

⁹ *Id.* and correspondence with Ms. Farris (July 27, 2017) (on file with author).

¹⁰ Office of the Inspector General, U.S. Dep't of Justice, *The Federal Bureau of Prisons Compassionate Release Program* (Apr. 2013), <https://oig.justice.gov/reports/2013/e1306.pdf>.

¹¹ See Letter from Brian Schatz et al. to Thomas R. Kane and J. Rod Rosenstein (Aug. 3, 2017), <https://www.schatz.senate.gov/imo/media/doc/2017.08.03%20Letter%20to%20BOP%20and%20DAG%20re.%20C>

reflection of congressional concern about this state of affairs that the bipartisan GRACE Act, which would provide prisoners the right to appeal a denial following the exhaustion of administrative remedies, was included in the FIRST STEP Act, which easily passed the House of Representatives and is pending in the Senate.¹²

A study by the Commission would be invaluable in revealing whether, to what extent, and for what reasons the BOP is not heeding the Commission's admonition to file motions in cases that meet the criteria laid out in USSG 1B1.13. Such information will afford advocates such as FAMM and others important information to continue our work to make the best case to the BOP and Congress that the BOP should, as the Commission has urged, file a compassionate release motion when the prisoner meets the criteria identified in USSG 1B1.13.

2. FAMM supports the proposed study of the operation of § 5H1.6 (Family Ties and Responsibilities (Policy Statement)) with respect to the loss of caretaking or financial support of minors.

The proposed study could not come at a better time. The plight of families separated at the border has heightened public awareness of the human toll of removing parents from their children.¹³ We have heard from pediatric psychologists and others who predict the enduring psychological and social damage those children, their families, and the community will sustain due to the separation.¹⁴

As you know, separation stories are played out daily, and with less attention, by the 2.7 million children in the United States who endure the loss of a parent to prison.¹⁵ More than 5 million children have had a parent in jail or prison at some point in their lives.¹⁶ The long term consequences on children of parental incarceration have been revealed in numerous studies.¹⁷ The studies demonstrate outcomes ranging from increased risk that the child will engage in anti-

[ompassionate%20Release%20FINAL.pdf](#); see also Letter from Stephen E. Boyd to Brian Schatz (Jan. 16, 2018), <https://www.themarshallproject.org/documents/4369114-1-2018-BOP-response>.

¹² See H.R. 5682, The FIRST STEP Act, Sec. 403 (b), Increasing the Use and Transparency of Compassionate Release, <https://www.congress.gov/bill/115th-congress/house-bill/5682>.

¹³ See e.g., Sophie Murguia, *The Most Heartbreaking, Infuriating Stories From Trump's Family Separation Policy*, Mother Jones (June 15, 2018) (collecting accounts from media outlets), <https://www.motherjones.com/politics/2018/06/family-separation-trump-sessions-ice-border-patrol-sanders/>

¹⁴ See, e.g., William Wan, *What Separation From Parents Does to Children: 'The Effect is Catastrophic,'* The Washington Post (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html?utm_term=.e903898cae91.

¹⁵ National Resource Center on Children and Families of the Incarcerated, *Children and Families of the Incarcerated Fact Sheet*, Rutgers University/Camden (2014), <https://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf>.

¹⁶ Annie E. Casey Foundation, *A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities* at 1 (Apr. 2016), <http://www.aecf.org/resources/a-shared-sentence/>.

¹⁷ See letter from Pat Nolan, et al. to the U. S. Sentencing Commission at 3-5 (July 9, 2017) (collecting studies), http://justice.acu.foundation/alleviating_the_impact_of_parental_incarceration_on_children_through_sentencing_ref orm.

social conduct and behavioral problems such as delinquency to economic harms that can attach to a family for generations.

Some of these problems undoubtedly stem from the trauma the children suffer when they lose the personal and financial stability of a parent as documented by Patricia Allard and Judith Green who interviewed children, parents, caseworkers and clinician to evaluate how separation damages the child, the family and the community.¹⁸

These accounts and assessments sound all too familiar to FAMM members. From our founding we have worked with imprisoned members and their families to highlight the plight of those left behind by a parent who is incarcerated. We want to share some of their stories to give the Commission a sense of the deeply personal impact of sentences that separate children from their parents.

Incarceration can break families into pieces, tearing bonds and support that would otherwise help children endure the loss of their parent. **Stephanie N.** was 23 years old when she was sentenced in 1990 under the guidelines to 360 months in prison for her role in a crack cocaine conspiracy.¹⁹ It was her first adult offense (a minor juvenile conviction was her only criminal history). At the time, she was pregnant with her fifth child. One child lived with his father and stayed in his care throughout her incarceration. The father of Stephanie's other three children refused to take them in or honor support orders. The three were separated and sent to live with Stephanie's mother and two sisters.

Stephanie gave birth handcuffed to a prison-hospital bed to her daughter, who was removed from her almost immediately.

Stephanie told us: "As difficult as my time in prison has been on me, I know it's been harder on my children. Not only did they lose their mother, but I had to split them up between my sisters and my mother, who passed in 2006. My oldest boys have had trouble with the law, which I know is common for kids with incarcerated parents. My heart breaks for them. I have missed more birthdays, Thanksgivings, Christmases, and graduations than I care to count."

Stephanie was released from prison in November 2011 following her successful petition for a sentence reduction based on the retroactive application of Amendment 750. The baby who was born and taken from her was a grown woman by the time Stephanie came home. Stephanie struggles every day to support herself.

Children of the incarcerated are often forced to rely for help on individuals who prey on their vulnerability and youth. This is has happened with the children of **Michael S.**, who was sentenced in 2010 to 210 months as a career offender for his role in manufacturing and

¹⁸ Patricia Allard and Judith Greene, *Children on the Outside: Voicing the Pain and Human Costs of Parental Incarceration*, Justice Strategies (June 12, 2010), <https://justicestrategies.org/sites/default/files/publications/JS-COIP-1-13-11.pdf>.

¹⁹ This account and the two that follow are taken from court documents relating to sentencing and correspondence on file with the authors.

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distributing methamphetamine and its distribution where minors were present. His children were nine, six, and four and lived with their mother for a while after he was imprisoned until she lost custody of them. The children were next taken in by their aunt and uncle. The girls suffered sexual abuse in the home and Michael's son was physically abused. Their caregivers subjected all three to emotional, mental, and verbal abuse.

It was not until sometime later that the children were finally removed from their aunt and uncle and sent to live with Michael's mother and stepfather. She stayed home with the children while her husband worked to support the family.

Five years ago, Michael's stepfather died, leaving Michael's mother as the sole caretaker of the children. The children's mother has all but ignored court orders to provide child support. His mother, who has significant medical issues, struggles to provide for them from a small Social Security check. Money is extremely tight and the children have little besides the bare essentials.

In 10 years, Michael's children, now teenagers, have seen him only a handful of times. The trip between their home in Iowa and his prison in Wisconsin is too expensive and difficult to arrange. They badly crave his support, time, guidance and presence.

Incarceration can impose significant financial strains on caregivers left behind who struggle to keep a family together and secure. **Keith W.** was sent to federal prison in 2006 for 270 months for drug and gun possession convictions. His girlfriend, Danielle, who was pregnant with their son had to leave the home she and their three-year-old had shared with him. They moved in with Danielle's parents and with their help and money Danielle saved from a teaching job she was able to purchase a home. But trouble followed. Danielle was laid off and her mother became ill and incapacitated, requiring round-the-clock care. Danielle and her two children went on food stamps and she applied for a mortgage loan modification.

Danielle and Keith had married while he was in prison. To secure the loan modification, Danielle needed to secure notarized documents from Keith within a strict time limit. The prison only offered notary services once a month and Danielle was unable to secure the documentation from Keith in time. The mortgage loan modification fell through, she fell behind in payments, her house was foreclosed, and Danielle had to file for bankruptcy.

Danielle and her children have lost their home and suffer significant financial hardship. The children, now teenagers, have experienced more than their share of stress. Danielle says: "Their father being in prison has become their 'normal' but it has still had a tremendous impact on them." The children are afraid to tell their friends that their father is in prison. They need him to come home.

Incarceration of parents can put a child at risk of repeating a cycle of destructive conduct. **Barbara S.** was determined to raise her daughter differently than she had been brought up. Barbara was molested as a youngster and grew up cared for by a mother struggling with addiction. But she did not escape the cycle completely, her own addiction led to Barbara's conviction for drug conspiracy. She was sentenced to 360 months in prison in 1995 when she

was 29 years old. Her husband was already in prison and so Barbara's three-year-old daughter was taken in by Barbara's father and stepmother. They did the best they could to care for her with love.

Barbara worked hard to maintain a strong bond with her daughter through phone calls, letters, and visits. Her daughter begged her to come home, asking for her to be there for her sweet sixteen party, and failing that, her high school graduation. Barbara of course missed both.

Happily, she is home now after receiving a commutation from President Barack Obama in June 2015. Sadly, though, the cycle of addiction continues. Her daughter, no longer a child is now a drug addict.

We appreciate the interest of the Commission in studying the Family Circumstances Policy statement. We expect it would benefit from a review centered on the impact of children and then amended to better account for the needs of families such as the ones we have presented here.

3. FAMM reaffirms our support for the Commission's continued work to promote mandatory minimum reforms in Congress by working to implement recommendations in the Commission's 2011 report to Congress.

We believe the Commission's proposals, a number of which are included in legislation currently pending in Congress, are a good first step at reforms that are long overdue.

4. Continuation of its multiyear examination of the structure of the guidelines.

While FAMM supports simplification of the sentencing guidelines, we reiterate our disapproval of simplification that would be accompanied by a rollback of judicial discretion in guideline sentencing.

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.²⁰ 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 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.²¹

²⁰ See Prepared Testimony of Judge Patti B. Saris before the Subcommittee on Crime, Terrorism and Homeland Security (Oct. 12, 2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimonyand-reports/testimony/20111012_Saris_Testimony.pdf.

²¹ See, e.g., Letter from Mary Price & Kevin Ring to William H. Pryor, Jr. at 1-2 (July 31, 2017); see also Letter from Mary Price to Patti B. Saris at 3-5 (July 25, 2016), see also Letter from Mary Price and Julie Stewart to Patti B.

5. We are disappointed that the Commission has abandoned a priority it adopted last year: a proposed adjustment for first offenders.

Among its benefits, adding a first offender adjustment would help the Commission better comply with two congressional directives. In one, Congress **directed** the Commission to ensure that the guidelines provide for punishment other than prison for first offenders.²² The statute defined first offenders as defendants who had not been convicted of a crime of violence or otherwise serious offense.²³ The guideline defining Criminal History Category I is drawn too broadly, equating defendants with no countable criminal history with those who receive one criminal history point. The other rather neglected directive is found at 28 U.S.C. § 994(g). Congress requires the Commission to craft guidelines that “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons as determined by the Commission.”

The Commission has struggled to account appropriately for first offenders for some years. A very early staff working group proposed a two-level reduction for defendants with no criminal history points who had not used violence or weapons during the offense.²⁴ According to the Commission, “[t]he significance of this proposal was that it both responded to the intent of 28 U.S.C. § 994(j) and finessed the need to create a new ‘first offender’ CHC.”²⁵

The proposal did not advance. The Commission said in 2005 that the fact that the early commissions lacked recidivism data had a role in preventing any first offender guideline.²⁶

Today, thanks to the Commission’s robust collection and analysis of sentencing data, the Commission has the data it lacked in 2015. Offenders with zero criminal history points have the lowest recidivism rates of any sentenced in the federal system.²⁷ They enjoy the lowest re-arrest rates (30.2 percent), beating out offenders with one criminal history point who had re-arrest rates of 46.9 percent.²⁸ Moreover, they comprise over 40 percent of all defendants in Criminal History Category I.²⁹

Saris at 4-5 (July 27, 2015), see also, Statement of Mary Price Before the U.S. Sentencing Comm’n Public Hearing on Federal Sentencing Options After Booker (Feb. 16, 2012).

²² 28 U.S.C. § 994(j).

²³ *Id.*

²⁴ U. S. Sentencing Comm’n, *Recidivism and the “First Offender”* 3 (May 2004) (“*Recidivism and the First Offender*”) (citing U.S. Sentencing Comm’n, *Criminal History Working Group Report: Category 0, Category VII, Career Offender* (1991)).

²⁵ *Recidivism and the First Offender* at 3.

²⁶ *Id.* at 4.

²⁷ U.S. Sentencing Comm’n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 9 (March 2017) (“*The Past Predicts the Future*”).

²⁸ *Id.* at 8.

²⁹ U.S. Sentencing Comm’n, *Recidivism Among Federal Offenders: A Comprehensive Overview* 10 and Fig. 2 (March 2016)(*Recidivism Among Federal Offenders*).

After years of declining federal prison populations –last year, the Department of Justice has announced an about face on the Smart on Crime inspired charging policy of the Obama administration. Attorney General Jeff Sessions has directed prosecutors to seek once again the most serious, readily provable offense, defining severity by measuring sentence length.³⁰ This is sure to once again sweep up many first offenders and other people with minimal criminal history and ensure lengthy sentences and bulging prisons.

Even putting aside expected increases, the sheer size of the current federal prison population is a significant concern. Near the end of FY 2017, BOP facilities remained overcrowded. Overall, institutions were 14 percent over rated capacity and high security institutions stood at 25 percent over rated capacity.³¹ The BOP still consumes more than 25 percent of the DOJ’s discretionary budget and the administration requested approximately \$7.2 billion for the Bureau in the FY 2018 budget.³² The request includes \$10 million for “expected population growth.”³³

Meanwhile, the administration’s 2019 budget proposal would cut 7,000 staff positions in the federal Bureau of Prisons.³⁴ Today, hiring at the Bureau of Prisons is frozen and staff morale is very low. Individuals who are supposed to provide education, health care, and other essential services, are instead pressed into guard duty.³⁵ This is a risk for them and a risk for the prisoners. Cramming more prisoners into these institutions at this time with no safety valve is wrongheaded. The Commission should step in, as it has done before, to do what it can (and should) do to alleviate overcrowding. A first offender adjustment would be a great first step in the right direction.

We encourage the Commission to make first offender relief a priority in the current amendment cycle.

6. Conclusion

As always, we thank you for considering our views. We look forward to the upcoming amendment cycle and stand ready to work with you and the Commission staff on these proposals.

³⁰ Dep’t of Justice, Office of the Attorney General, Memorandum for All Federal Prosecutors, *Department Charging and Sentencing Policy* (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

³¹ Dep’t of Justice, Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice 2017*, III-12 (Oct. 10, 2017), <https://www.justice.gov/doj/page/file/910486/download#page149>.

³² Dep’t of Justice, *Federal Prison System (BOP) FY 2018 Budget Request at a Glance 1*, <https://www.justice.gov/jmd/page/file/968276/download>.

³³ Dep’t of Justice, *FY 2018 Budget Request at a Glance, Discretionary Budget Authority 4*, <https://www.justice.gov/jmd/page/file/968216/download>.

³⁴ Jessie Bur, *Federal Prison Workers Decrease, Dangers Increase in Trump’s Budget*, The Federal Times, Feb. 15, 2018, <https://www.federaltimes.com/management/budget/2018/02/15/federal-prison-workers-decrease-dangers-increase-in-trumps-budget/>

³⁵ Ryan J. Reilly, *Demoralized Federal Prison Officers Feel Left Behind By “Law and Order” Trump*, Huffington Post, July 4, 2018, https://www.huffingtonpost.com/entry/federal-prison-bureau-trump_us_5b2bf738e4b00295f15a990a.

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Sincerely,

Kevin A. Ring

Handwritten signature of Kevin A. Ring in cursive script.

President

Mary Price

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General Counsel