National Association of
Assistant United States Attorneys
Safeguarding Justice for All Americans

April 15, 2021

Chairman Dick Durbin
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Ranking Member Chuck Grassley
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

RE: NAAUSA Statement for the Record for the April 15, 2021 Senate Judiciary Committee Hearing, "Oversight of the Federal Bureau of Prisons"

Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

On behalf of the National Association of Assistant United States Attorneys (NAAUSA), representing the interests of the 6,300 Assistant U.S. Attorneys (AUSAs) working in the 93 U.S. Attorney Offices, we write to provide experiential insight on the challenges prosecutors face working with the Bureau of Prisons (BOP) on compassionate release requests. We understand the Committee is assessing implementation of the First Step Act and considering legislation to expand access to compassionate release and wish to provide insight on the implementation of current compassionate release requests to ensure the Committee is aware of challenges that may arise from the expansions on these programs. NAAUSA does not wish to endorse or oppose any legislative efforts, but rather, ensure Members of the Committee have the background necessary to craft effective policy when appropriate.

NAAUSA issued a member request for feedback to provide to Committee with direct feedback from AUSAs across the country on compassionate release (CR) requests. All respondents to the request are current AUSAs and 75 percent of respondents have over ten years of service experience. Every respondent reports being inundated with CR requests since passage of the First Step Act and the start of the COVID-19 pandemic. The vast majority of requests are denied. Several problems hamper AUSAs ability to handle the current level of requests and strike concern for expanding the access to CR requests: (1) the current criteria for allowing an individual inmate to request a CR causes AUSAs to be inundated with requests and they lack the resources to appropriately review and respond; (2) the expedited timeline for processing CR requests called for in the COVID-19 Safer Detention Act will likely be infeasible for AUSAs at current resource levels and a process often reliant on review of archived paper records; (3) AUSAs support methods of deterring frivolous and abusive CR requests.

I. The current criteria for allowing an individual inmate to request a CR causes AUSAs to be inundated with requests and they lack the resources to appropriately review and respond.

The CDC criteria for pre-existing conditions apply to roughly one third of the adult, non-youthful population. The expansive CDC criteria coupled with broad

language allowing an inmate to request compassionate release for "extraordinary and compelling" reasons has caused a significant number of inmates to pursue CR requests amidst the pandemic. Furthermore, there is not currently a limit on the number of times a CR request can be filed. As a result, denied requests are often submitted for a second and third time.

One NAAUSA member reports responding to over 30 CR requests since the start of the pandemic, with none of the requests coming from an inmate over 60 years old. The AUSA explains, "A significant number of defendants were non-compliant with BOP medical treatment, yet non-compliance increased chances for health issues, and non-compliance was then 'rewarded' because the defendant was eligible for CR."

Aside from the volume of requests, each request takes an extreme amount of time for front line AUSAs. Each request requires an AUSA to review the individual's medical records and likely Department of Justice archives relating to their case. The requests also put AUSAs in the uncomfortable position of making medical determination based on medical records. One AUSA explains, "[The CR requests are] [t]ime consuming and exhausting. I feel as if I was required to make medical decisions based upon my review of the medical records. I'm not qualified to make those determinations."

To ensure AUSAs are not overburdened with CR requests and CR is available to individuals deserving of the program, NAAUSA recommends:

- More specific language regarding what constitutes an extraordinary and compelling reason warranting release,
- A limit of the number of times a CR request can be filed without leave of the court; and
- Additional resources for U.S. Attorney Offices to ensure requests can be handled.

II. The expedited timeline for processing CR requests called for in the COVID-19 Safer Detention Act will likely be infeasible for AUSAs at current resource levels.

NAAUSA provided respondents the text of the COVID-19 Safer Detention Act (S. 312) and requested feedback on the legislation. Fifty-four percent of respondents said they reviewed the legislation and provided feedback. Overall, respondents had concerns about some or all parts of the legislation. One respondent supported the legislation in its entirety.

AUSAs were primarily concerned with the expedited ten-day review timeline for CR requests. This timeline further burdens already under-resourced AUSAs and will likely force the BOP to shift initial determinations to AUSAs. While one AUSA explained, "[The legislation] seems reasonable in the abstract. The ten-day exhaustion time limit is probably too short. The BOP is in the best position to

make an initial determination about who should qualify. A ten-day limit almost guarantees that BOP will shift this initial review to us." In many current cases, individuals do not attempt requests through BOP and instead go directly to the courts in the hopes of a favorable review by a lenient District Court Judge.

In most instances, it is simply impossible for AUSAs to make a case determination in ten days. Most of the motions involve crimes committed many years ago. In many instances the prosecuting AUSA is no longer in the office and the files are in DOJ archives. It can take weeks to obtain information from these sources. Ten days is insufficient time to gather all the information that is necessary to assist the court in making a fair and just decision. For older cases, a continued reliance on paper records means retrieving records from storage – again, this can take weeks.

Even electronic record gathering may take weeks. Further, under-resourced U.S. Attorney Offices lack the bandwidth to review these files within the timelines requested. It is imperative that Congress fund and provide U.S. Attorney Offices with the resources necessary to handle these requests at their current level before expanding CR access.

III. AUSAs support methods of deterring frivolous and abusive CR requests.

Given the large number of denials, AUSAs remain concerned about frivolous and abusive requests. To mitigate these abusive requests, NAAUSA recommends a "spring-back" provision – which would require the released prisoner be required to serve any reduced period if subsequently convicted of a federal or state felony in addition to the time he will be required to serve for his post released felony conviction itself. While AUSAs admit potential difficulty in tracking subsequent state and local arrests, such provision at least provides a deterrent effect for federal criminals.

Additionally, NAAUSA members noted that the COVID-19 Safer Detention Act makes no attempt to separate older inmates who have been violent while incarcerated or possessed weapons. Instead, the legislation lessens the sentences of older inmates generally. This legislation should consider a clearer definition for a "violent offense" to ensure only truly non-violent inmates are able to submit CR requests.

IV. Conclusion

AUSAs are already overburdened with CR requests. These requests require significant time and attention. NAAUSA fears expansion of CR eligibility, particularly with the expedited timeline called for in the COVID-19 Safer Detention Act, would exacerbate existing resource constraints. It must be noted that each time an AUSA is called to consider frivolous, repetitive, and potentially abusive CR requests they are taken away from working on meritorious work. One

NAAUSA member well summarized these concerns:

> [The COVID-19 Safer Detention Act] is another unfunded mandate. AUSAs are already overworked, and in many cases underpaid compared to DOJ litigating attorneys. They are on the front lines of protecting America, and can't do their cases because of the onslaught on compassionate release cases, as the court usually sets a very short response time. If Congress wants to create a right and a judicial remedy, they need to fund it in the U.S. Attorney's offices by giving DOJ added resources.

AUSAs proudly and dutifully defend the laws of the United States under their sacred oath to protect the innocent and prosecute the guilty. We urge Members of the Committee to understand the current challenges AUSAs face due to the considerable volume of compassionate release requests already being handled and consider these challenges when exercising their lawmaking authority.

NAAUSA appreciates the opportunity to share the front-line experience of our member AUSAs regarding implementation of the First Step Act and on compassionate release. If we can be of further assistance, please do not hesitate to contact our Washington Representative Natalia Castro at ncastro@shawbransford.com.

Respectfully,

Lawrence. J. Leiser
President