



March 19, 2007

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Issue for Comment: Reduction in Sentence Based on BOP Motion

Dear Judge Hinojosa:

Families Against Mandatory Minimums (FAMM) offers these comments concerning the new policy statement at § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). This letter sets out FAMM's position on early release, addresses matters raised by the Department of Justice in its submission of July 14, 2006, and answers the Commission's specific questions in the Issue for Comment.

FAMM welcomes the Commission's continued interest in this area. We have long championed a reading of the early release authority consistent with congressional intent that it be used in cases including, but not limited to, impending death or debilitating circumstances. In 2001 we proposed specific language to the Commission that, in our view, would further Congress's intent that there be a way to take account of extraordinary and compelling circumstances that were not or could not be addressed at sentencing.¹

Our concern was motivated by, among other things, the many stories we had heard from or about prisoners whose circumstances had changed so dramatically that continued service of their sentences would be unjust or meaningless. We began to assist prisoners in their petitions and were stunned to learn how seldom the Director of the Bureau of Prisons exercised the authority to seek sentence reductions.

Our examination of the practice revealed that the Bureau takes a very narrow view of its mandate. Although 18 U.S.C. § 3582 (c)(1)(A) speaks of "extraordinary and compelling reasons," in practice, the Director has moved for a reduction in a mere handful of cases each year and only on behalf of terminally ill prisoners, or more recently, on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life."² In the years since our letter, and despite the significant growth in the

¹ See Letter to Honorable Diana J. Murphy and Commissioners (June 25, 2001).

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federal prison population, it appears that the Bureau has used the authority even more sparingly.³ This may be due to a more stringent set of criteria enunciated by the Department of Justice in its recent submission to the Commission on this matter.⁴ The Bureau of Prisons has recently published for public comment a proposed rulemaking that would limit early release motions to those on behalf of prisoners within 12 months of death or who suffer a medical condition so debilitating that the prisoner cannot attend to fundamental bodily functions and personal care.⁵

FAMM certainly agrees with the Department that prisoners who are terminally ill and those debilitated by physical or mental illness merit consideration for early release under 18 U.S.C. § 3582(c)(1)(A)(i). However, there are other classes of extraordinary and compelling reasons that merit consideration as well, including but not limited to cases where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children, or where the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence. FAMM endorses the approach taken by the American Bar Association in its recommendations to the United States Sentencing Commission, as you consider adopting a policy statement to guide courts considering early release motions.⁶

² See Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. R. 191, Exhibit II (Vera Inst. Just.).

³ See Testimony of Stephen A. Saltzburg on Behalf of the American Bar Association (March 20, 2007) at 7 n.4 (The Bureau of Prisons has filed between 15 and 25 early release motions annually since 2000.). While the federal prison population has more than tripled, from 58,838 in 1990 to 195,623 today, the number of motions has remained fairly constant, never exceeding 30 in any given year. See U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2000*, August 2001, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf>.

⁴ Letter from Michael J. Elson, Senior Counsel to the Attorney General to The Honorable Ricardo H. Hinojosa at 1 (July 14, 2006) (DOJ Letter).

⁵ See 71 Fed. Reg. 76619-01 (Dec. 21, 2006) ("Reduction in Sentence for Medical Reasons"). In its introduction to the proposed new rule, BOP states that it "more accurately reflects our authority under these statutes and our current policy." See 71 Fed. Reg. at 76619-01.

⁶ See letter from Denise Cardman, Governmental Affairs Office, American Bar Association to Honorable Ricardo H. Hinojosa (March 12, 2007) attachment, Proposed

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Congress intended that early release authority be broad.

Congress and, until recently, the Department, have consistently enunciated a generous view of the breadth of the early release authority, contemplating its use for changed circumstances beyond serious or terminal illness. The Bureau's existing authority to seek early release dates from the 1976 Parole Commission and Reorganization Act.⁷ The BOP issued its § 4205(g) regulations in 1980. Those rules provided that early release motions under 18 U.S.C. § 4205(g) were to be brought "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," including "if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill."⁸

Significantly, when Congress in the Sentencing Reform Act (SRA), eliminated parole in 1984, it kept intact the courts' existing authority to reduce sentences for a range of reasons. 18 U.S.C. § 3582(c)(1)(A)(i). Congress crafted 18 U.S.C. § 3582(c)(1)(A)(i) in 1984 fully aware of the Bureau's existing regulations, which provided a relatively broad use of sentence reductions in extreme cases

The SRA thus in no way limited the courts' existing authority. This conclusion is supported by the legislative history, demonstrating that Congress embraced a broad view of the potential underlying reasons to bring an early release motion. The Senate Judiciary Committee's Report on the Sentencing Reform Act states:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which *other extraordinary and compelling circumstances* justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of

Policy Statement, § 1B1.13 (Revised March 9, 2007). FAMM's most recent letter on this subject was one of several that collectively endorsed the ABA's approach. *See* Letters from Julie Stewart and Mary Price (July 14, 2006); Mark Flanagan and David Debold (PAG) (July 13, 2006); and Jon Sands (Federal Public and Community Defenders) (July 14, 2006).

⁷ 18 U.S.C. § 4205(g).

⁸ 28 CFR § 572.40 (1980).

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imprisonment.⁹

By not limiting the courts' existing sentence reduction authority, Congress signaled its intention that the authority be used broadly, if sparingly, to reduce a determinate sentence in appropriate circumstances. Had Congress wanted to limit the new law prisoners' access to sentence reductions, it would have stated conditions in the SRA, or indicated something in the legislative history. It did not.

Further support for broad authority is found in another part of the SRA. Congress charged the newly created United States Sentencing Commission (not the Bureau of Prisons) with the task of issuing policy statements to guide courts considering early release motions brought to them by the Bureau.¹⁰ The only limitation the SRA made to existing authority was to instruct that rehabilitation alone could not constitute a sufficiently extraordinary or compelling circumstance. Congress did not eliminate rehabilitation as a reason, but required that it be combined with others. It is clear that Congress considered rehabilitation a reason for early release if found in combination with at least one other reason.

Unwarranted restrictions on the early release mechanism would subvert congressional intent that courts be able to entertain early release motions for a variety of circumstances, provided they are extraordinary and compelling and reflect more than rehabilitation alone.

The Department of Justice has long endorsed a broad view of the sentence reduction authority.

The Bureau of Prisons, a DOJ agency, recognized that Congress intended that it take a robust approach to the discretion given it in the Sentencing Reform Act when considering early release for prisoners serving determinate sentences. In the ten years following the passage of the SRA, the BOP operated under the 1980 rule to bring early release motions under 18 U.S.C. § 3582(c)(1)(A)(i). Those regulations covered sentence reduction motions under both § 4205(g) and § 3582(c)(1)(A)(i), making early release available "in particularly meritorious circumstances which could not reasonably have been foreseen by the court at the time of sentencing. This section may be used, for example, *if there is an extraordinary change in an inmate's personal or family situation*

⁹ S. Rep. No. 98-225, at 55, (1984), *reprinted in* 1984 U.S.C.C.A.N. 3132, 3238-39 (emphasis added.).

¹⁰ See 28 U.S.C. § 994(t).

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*or if an inmate becomes severely ill.”*¹¹

Following the SRA, the Bureau published new regulations in 1994 “to include provisions applicable to inmates who were sentenced under the new law sentencing guidelines that eliminated parole.” 59 Fed. Reg. 1238. The new rules thus were inclusive, crafted to bring new law prisoners into the program and treat them much as the old law prisoners were treated. The Bureau affirmed existing policy in important respects and even added specific provisions to underscore that the authority could be used in medical and in non-medical cases.¹²

Significantly, the Bureau did not publish the 1994 rule for notice and comment before adopting it. “Because the revised rule *imposes no additional burdens or restrictions* on inmates, the Bureau finds good cause for exempting the provisions of the Administrative Procedures Act (5 U.S.C. [§] 553) [APA] requiring notice of proposed rulemaking”¹³ Further underscoring the continuity of authority to exercise discretion, the Bureau stated in the final rule that “the standards to evaluate the early release *remain the same.*”¹⁴

That the Bureau eschewed notice and comment because no additional restrictions were placed on prisoners and because the evaluation standards remained the same means that according to the Bureau, the new rule did not change the ability of a prisoner to seek and the Bureau to move for a sentence reduction in the event there is an “extraordinary [and compelling] change in an inmate’s personal or family situation *or if an inmate*

¹¹ 48 FR 48972-01, 48973, 1983 WL 105766 (emphasis added).

¹² See 28 C.F.R. § 571.61 (directing prisoner to describe release plan and “if the basis for the request involves the inmate’s health, information on where the inmate will receive medical treatment.”); *id.* at § 571.62(a) – (c) (describing different processes to follow in considering medical versus non-medical-based requests from prisoners). There is no reason that the BOP would establish dual procedures for medical and non-medical motions unless it believed it had authority to bring non-medical motions.

¹³ 59 Fed. Reg. 1238, 1994 WL 3184 (emphasis added). The Bureau did eliminate “prison overcrowding” as one of the acceptable bases for a sentence reduction motion, added the “extraordinary and compelling” language and required a release plan for prisoners. 59 Fed. Reg. 1238.

¹⁴ 59 Fed. Reg. 1238 (emphasis added).

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becomes severely ill.” Eliminating consideration of extraordinary changes in a personal or family situation would have imposed an additional restriction on inmates, who previously would have been able to seek a sentence reduction for other than imminently terminal or debilitating conditions. Such a restriction would have in turn required notice and comment under the Administrative Procedures Act. The Bureau did not intend to eliminate those conditions and thus saw notice and comment as unnecessary. Put another way, if the Bureau intended to eliminate extraordinary changes to a personal or family situation, this would represent a new restriction and thus trigger the notice and comment requirement.

The Department's New Position is Unwarranted, Insupportable, and Unduly Restrictive

We address several of the Department's points set forth in its letter of July 14, 2006: (1) its concern that a proposal broader than that urged by the Department would contravene congressional intent to abolish parole and establish a system of determinate sentencing; (2) its warning that it would be futile for the Commission to adopt a policy statement broader than that urged by the Department; and (3) its recommendation that the resulting sentence reduction be determined by the Department.

(1) The Department of Justice warns the Commission that to take a broad view of the early release authority would be akin to subverting congressional intent to establish determinate sentencing through the elimination of parole and truth in sentencing reforms ushered in by the SRA.¹⁵ It urges the Commission to take a very narrow view of the authority, limited to cases where the prisoner is expected to die within twelve months or is suffering a medical condition that is “irreversible and irremediable and prevents the prisoner from attending to basic bodily functions and personal care without substantial assistance from others.”

Crafting a policy statement consistent with congressional intent will hardly subvert the goals of the SRA. Congress specifically provided for a sentence reduction authority for extraordinary and compelling circumstances in the SRA. It included only one specific limitation: rehabilitation alone would not be sufficient. Had Congress been concerned that sentence reductions for extraordinary and compelling circumstances would undermine the goal of determinate sentencing, it would not have specifically provided for such a broad view of the potential reasons for sentence reductions.

(2) The Department warns in its submission that a Commission policy statement that is broader than the Department's practice will be ignored as a “dead letter.” The Department cites no authority for its extreme position. The Commission should not consider itself limited by this warning. The SRA does not commit the definition of what constitutes extraordinary and compelling circumstances to the Department or to the

¹⁵ DOJ Letter at 3.

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Bureau. It commits the job of defining the contours of sentence reductions motions to the U.S. Sentencing Commission. We submit that the Bureau has no authority to categorically eliminate from judicial consideration all cases except those presenting terminal illness and debilitating conditions. The Bureau is charged with at most considering whether individual prisoner circumstances meet the criteria and if so, submitting the motion to the sentencing court. It cannot categorically limit the conditions and criteria without implicating separations of powers concerns.¹⁶

Further, and as evidenced by the discussion of how the Department has treated the authority in BOP regulations thus far, future Departments of Justice, just like previous ones, may not take so restrictive a view of when to bring sentence reduction motions. The Commission should not indulge the current Department's view of the matter.

(3) FAMM opposes limiting the extent of the reduction upon resentencing to that recommended by the Bureau. There is no indication in the statute, the legislative history, or elsewhere, that courts can be limited in the extent of reduction. Courts are competent to consider the BOP's submission on the matter of extent, but should not be considered bound by the recommendation.

Finally, we note that the circumstances proposed by the Bureau of Prisons (impending death or near complete incapacitation), while certainly appropriate early release precursors, do not express the breadth of medical and mental health conditions that would warrant early release. We find the personal hygiene limitation to be particularly curious. There are certainly changed medical conditions that render a prisoner physically or psychologically damaged that do not limit the prisoner's ability to bathe or use the bathroom. The limitations suggest that contours of extraordinary and compelling circumstances should be defined by the amount of staff trouble and time taken up by the personal hygiene needs of incontinent prisoners.

Issue for Comment Questions

FAMM believes that changed circumstances can include those that were known to the court at the time of sentencing but have changed significantly, such as an autoimmune disease in remission at the time of sentencing that subsequently is diagnosed; or a significant change in an existing medical condition, such as total blindness brought on

¹⁶ See Testimony of Steven A. Saltzburg at 14-15 & n.10 ("Because the Commission is an agency of the judicial branch, any effort by the executive . . . to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimensions . . ."); see also Letter from John Sands (March 13, 2007) at page 5-6 (pointing out that "[u]nilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem.").

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by pre-existing diabetes or pre-existing glaucoma; or a subsequent change in the law that the court was forbidden from taking into account at the time of sentencing and by its nature presents a compelling and extraordinary case for reduction.

As discussed above and evidenced in our endorsement of the ABA's model guideline, FAMM does not believe that the authority should only be used to respond to medical conditions. Nor does FAMM believe that only conditions that are considered terminal within twelve months should be accounted for. For example, a failure to diagnose a medical condition may render an otherwise treatable condition terminal but not necessarily terminal within twelve months. Such a situation is extraordinary and compelling and courts should be able to address it.

The Commission should provide for a combination approach. Such an approach was contemplated by Congress in 28 U.S.C. § 994 (rehabilitation alone is insufficient).

The Commission should not limit the Bureau to the reasons identified by the Commission in its policy statement. A condition that is extraordinary and compelling may also not be apparent to the Commission at this time, and the better course would be to ensure that the Bureau and the courts have flexibility to address such circumstances.

Thank you for considering our views.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel

Attachment: