

February 20, 2007

Office of General Counsel
Bureau of Prisons
320 First Street, NW
Washington, D.C. 20534

Re: Proposed Rule
Reduction in Sentence for Medical Reasons
28 CFR Parts 571 and 572

To Whom It May Concern:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write to comment on the proposed rule published on December 21, 2006, entitled "Reduction in Sentence for Medical Reasons." The ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to "develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that "[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate." In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence "in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering."

Significantly for present purposes, in 2004 the ABA House urged the Department of Justice to make greater use of the federal sentence reduction authority in motions under §§ 3582(c)(1)(A)(i). It also asked the United States Sentencing Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances." It is against this background of strong and consistent support by the ABA for expanded use of judicial sentence reduction authority in extraordinary circumstances that we consider the proposed BOP regulation.

The proposed regulation would categorically restrict the circumstances in which the Bureau of Prisons will move for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) to two classes of medical cases: 1) cases in which a prisoner is terminally ill with a life expectancy of less than a year; and 2) cases in which a prisoner has a debilitating medical condition that "eliminates or severely limits the inmate's ability to attend to fundamental bodily functions and personal care needs." The proposed regulation represents a significant curtailment of the policy reflected in BOP's existing regulations, as we explain in greater detail in the following section, which BOP makes little effort to justify.¹

Insofar as the proposed regulation would impose strict limits on the kinds of cases that will qualify for sentence reduction under § 3582(c)(1)(A), we believe it is beyond BOP's authority, for three reasons. First, the proposed regulation would place unwarranted substantive limitations on the circumstances in which a prisoner may be considered for sentence reduction. Second, the proposed regulation would render nugatory the United States Sentencing Commission's statutory policy-making authority, raising questions of constitutional dimension. Third, the proposed regulation would effectively prevent sentencing courts from even considering sentence reduction in a variety of situations, frustrating congressional intent and raising similar constitutional concerns. The following discussion elaborates these three points in turn.

I.

For more than 30 years, BOP has been the gatekeeper for courts considering prisoner requests for sentence reduction under § 3582(c)(1)(A)(i) and its old law predecessor 18 U.S.C. § 4205(g). And for more than 25 years, BOP's published regulations have given it broad latitude to ask courts to reduce a prisoner's sentence in a variety of extraordinary situations. In its first regulations under the old law analogue to § 3582(c)(1)(A)(i), BOP asserted that sentence reduction may be sought 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 or if an inmate becomes severely ill.*" 28 C.F.R. § 572.40 (1980), 45 Fed. Reg. 23365-66 (Apr. 4, 1980). *See also* 48 Fed. Reg. 48972-01, 48973, 28 CFR § 572.40(c)(1983)(adding "to relieve prison overcrowding" as a basis for seeking sentence reduction).

After enactment of the Sentencing Reform Act ("SRA") in 1984, BOP processed sentence reduction motions for new law sentences under the same set of regulations and policies it used for sentence reduction motions under the analogous old law authority. When in 1994 BOP crafted a new set of regulations, they specifically applied to both old

¹ In the introductory summary of the proposed regulation, BOP explains the proposed revision of its regulations as a "more accurate[] reflect[ion of] our authority under these statutes and our current policy." Without some more extended attempt to reconcile the broad statutory language with the crabbed eligibility criteria in the proposed regulation, we will not assume that BOP intended to opine on its own legal authority under either § 3582(c)(1)(A)(i) or § 4205(g), much less on the authority Congress intended to give courts under these statutes.

and new law prisoners. 28 C.F.R. § 571.61 et seq., 59 Fed. Reg. 1238 (Jan. 7, 1994) (emphasizing “the standards to evaluate the early release remain the same” while adding provisions for those inmates “sentenced under the new law sentencing guidelines that eliminated parole”). *See also* BOP Program Statement 5050.44, Compassionate Release: Procedures For Implementation of 18 U.S.C. 3582 (c)(1)(A) & 4205(g) (Jan. 7, 1994).² The 1994 regulations affirmed existing policy in important respects and even added specific procedural provisions underscoring that sentence reduction could be sought in both medical and non-medical cases.³ So sure was BOP that its discretion could be exercised much as before, that it did not even publish the new rules for notice and comment.⁴ The blanket restrictions BOP now proposes to place on its own ability to seek sentence reduction in a broad range of equitable circumstances thus represent a significant change in BOP’s existing regulations, and fly in the face of an unbroken line of regulatory policy dating back to 1980.

Moreover, the new blanket restrictions on BOP’s ability to seek sentence reduction are inconsistent with Congress’ clear intention to allow sentence reduction in a broad range of extraordinary equitable circumstances. When BOP’s authority to seek sentence reduction was first enacted more than 30 years ago, it was designed to expedite BOP requests for relief in behalf of a prisoner that theretofore required a request for clemency to be submitted to the President through the Office of the Pardon Attorney.⁵ In the SRA, besides providing that motions for sentence reduction be predicated on “extraordinary and compelling reasons,” Congress did not otherwise constrain BOP’s existing discretion to bring motions to the sentencing court in cases warranting a gesture of compassion. In

² The revised policy continued the same description of potentially eligible cases, except that “prison overcrowding” was eliminated as an appropriate basis, and the legislative language “extraordinary and compelling” was added. Prisoners or their proxies were also required to provide a release plan. 59 Fed. Reg. 1238. Significantly for present purposes, applicable case-processing procedures underscored the propriety of petitioning courts in both medical and non-medical cases. *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.”) (emphasis added); *id.* § 571.62(a)–(c) (describing different processes to follow in medical versus non-medical-based requests from prisoners).

³ *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 following 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.

⁴ Announcing the final rule without resort to the notice and comment process ordinarily applicable to regulatory changes, the Bureau stated that “the standards to evaluate the early release remain the same. . . . Because the revised rule imposes no additional burdens or restrictions on inmates, the Bureau finds good cause for exempting the provisions of the [APA] requiring notice of proposed rulemaking” 59 Fed. Reg. 1238.

⁵ *See U.S. v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977) (Prior to the passage of the Parole Commission and Reorganization Act, applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result.); *U.S. v. Diaco*, 457 F. Supp. 371, 372 (D.N.J., 1978)(same).

fact, Congress embraced a generous view of the breadth of that discretion, contemplating its use for changed circumstances beyond serious illness. *See, e.g.*, S. Rep.No. 225, 98th Cong., 1st Sess. 37-150 at p. 5 (release authority can be used to address “the unusual case in which the defendant’s circumstances are so changed . . . that it would be inequitable to continue . . . confinement. . . .”) *id.* at 55 (reduction may be justified for “changed circumstances” including “severe illness [or] other cases in which other extraordinary and compelling circumstances justify a reduction . . .”).

There is nothing in the language of the SRA or its legislative history to suggest that Congress intended a court’s authority to reduce a sentence under § 3582(c)(1)(A)(i), or BOP’s authority to seek such a reduction, to be limited to medical cases, much less cases in which a person is a year or less from death, or so severely disabled as to be incontinent and unable to care for themselves. And neither the courts nor BOP itself have to date understood it so narrowly. The specific reference to a prisoner’s “rehabilitation” in 28 U.S.C. § 994(t) as being insufficient “alone” to warrant sentence reduction is further evidence that Congress did not intend that the courts’ authority in § 3582(c)(1)(A)(i) should be limited to the two narrow categories of cases identified in the proposed BOP regulation, where “rehabilitation” is surely irrelevant, “alone” or otherwise.

II.

We also object to the proposed regulation because of its evident intent to preempt the United States Sentencing Commission from making policy for the courts considering motions filed under § 3582(c)(1)(A)(i), as Congress authorized it to do under 28 U.S.C. § 994(t). As previously noted, the ABA has recognized the primacy of the policy-making role entrusted to the Commission by Congress under § 994(t). It has also urged the Sentencing Commission to “promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances.” As recently in July of 2006, the ABA urged the Commission to develop “the criteria to be applied and a list of specific examples [of extraordinary and compelling reasons],” as contemplated by 28 U.S.C. § 994(t), rather than defer to case-by-case decision-making by the Bureau of Prisons. It is gratifying that in the past year the Commission has turned to this policy-making task, and it is presently seeking additional comment regarding appropriate criteria for sentence reduction under recently promulgated § 1B1.13 of the Sentencing Guidelines (“Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons”). However, the Department of Justice has warned the Commission that any policy it adopts that is inconsistent with BOP’s operating sentence reduction policy (the same policy that BOP now proposes to formalize in a regulation) will be a “dead letter.” *See* Letter from Michael Elston, Criminal Division, to Chairman Hinojosa, July 14, 2007 (“DOJ letter”).

We do not doubt that, as a practical matter, BOP can choose to frustrate the Commission’s policy-making role through case-by-case decision-making. It is perfectly true that courts will have no opportunity to act upon motions under § 3582(c)(1)(A)(i) if

BOP chooses not to bring any. But it is another thing for BOP to announce a formal regulatory policy that forecloses consideration by courts of a wide variety of situations that might be thought to present "extraordinary and compelling reasons," and that have in the past been thought to present them. *See, e.g.*, the 1980 BOP regulations discussed in section I, and the cases cited in note 4, *supra*. The development of policy for sentence reduction motions is a responsibility that Congress entrusted to the Commission under 28 U.S.C. § 994(t), not to the Bureau of Prisons. Just as federal prosecutors are bound to comply with the Commission's lawfully-promulgated policies in connection with imposition of the original sentence, so too is BOP bound to comply with such policies in connection with the reduction of that sentence. While BOP is free to interpret and administer Commission policy as it deems most appropriate, it cannot declare it in advance a "dead letter" and substitute its own. Because the Commission is an agency of the judicial branch, any effort by an executive branch agency to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimension, concerns that the ABA's position avoids.

III.

Our final objection to the proposed regulation relates to the limitations it places on the authority of courts under § 3582(c)(1)(A)(i). Because a motion by BOP is a jurisdictional predicate for exercise of a court's authority under § 3582(c)(1)(A)(i), any restrictions that BOP places on its own authority in the proposed regulation would at the same time necessarily also impose analogous restrictions on the authority of courts, restrictions that the ABA believes are unwarranted.⁶ We do not question here that Congress may have intended to make a court's authority *in a particular case* depend upon a BOP motion. But it plainly did not intend BOP to use its regulatory power to foreclose judicial consideration of sentence reduction on an across-the-board blanket basis in a wide variety of situations that arguably present "extraordinary and compelling reasons." As noted above, there is nothing in the language of the SRA or its legislative history to suggest that Congress intended a court's sentence reduction authority in § 3582(c)(1)(A)(i) to be limited to medical cases only, much less the small universe of medical cases defined in the proposed regulation. There is every indication, starting with the broad statutory language and confirmed by specific references in the legislative history, of the SRA and of the Parole Reorganization Act before it, that Congress intended a much broader eligibility criterion. And, to the extent BOP's decision to limit sentence reduction motions to two narrow classes of medical cases would make it impossible for the courts to consider and act in other classes of cases, medical and non-medical, in which Congress intended them to have the ability to act, it raises the same kinds of constitutional concerns as were noted in the foregoing section. The ABA's position on the authority of the Sentencing Commission to promulgate general policy for courts considering sentence reduction motions would avoid these concerns.

⁶ It is not clear whether BOP intends in the proposed regulations to suggest an opinion about the legal limits of a court's authority under § 3582(c)(1)(A)(i), *see* note 1, *supra*, much less impose its views in this regard upon the judiciary. But because only a BOP motion can trigger judicial authority under § 3582(c)(1)(A)(i), its administrative decision will as a practical matter have exactly this result.

We appreciate the opportunity to provide these comments and hope that they will be helpful.

Respectfully submitted,

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