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| March 13, 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: § 1B1.3 Reduction in Term of Imprisonment Upon Motion of Director
of Bureau of Prisons (Policy Statement)**

| Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders regarding additional Commission action on the new guideline provision, U.S.S.G. § 1B1.13, creating a policy statement governing reduction of prison terms based on extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), and to respond to the further request for comment issued in January, 2007.¹

We previously submitted written testimony regarding the proposed policy statement on March 13, 2006. On July 14, 2006, we submitted additional comment pursuant to the Commission's request. In the latter submission, we joined several other groups in supporting a proposed policy statement, submitted by the ABA, which addressed the statutory mandate of 28 U.S.C. § 994(t), stating that the Commission:

shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

¹ We thank Steven Jacobson, AFPD, District of Oregon, for his assistance in preparing these comments.

We continue to support the ABA proposal as the best response to this statutory mandate. We offer some background as context and then respond to the Government's recent positions and to the questions in the Commission's request for comment.

I. Background

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the district court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the court in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system intended to provide more certainty, finality and uniformity.¹ However, Congress also recognized that post-sentencing developments could provide appropriate grounds to reduce a sentence. Using § 4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments. This section of the SRA is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

The court may not modify a term of imprisonment once it has been imposed except that-

(1) in any case-

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that-

(i) extraordinary and compelling reasons warrant such a reduction;

Congress also mandated that the Sentencing Commission, also created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

¹ See, generally, *United States v. Mistretta*, 488 U.S. 361, 363-370 (1989).

The Commission, in promulgating general policy statements regarding the sentencing modification provisions of 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t).

The legislative history of these provisions demonstrates the Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of the legislative history, said, in pertinent part:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term or 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 imprisonment. . . .the bill . . . provides for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.²

Thus, the plain language of the statute and the legislative history describe a reduction in sentence based on changed circumstances, to be decided upon by the court after motion by the Bureau of Prisons, using standards set forth by the Sentencing Commission and the factors set forth in 18 U.S.C. § 3553(a). Nothing in this legislation delegated to the Bureau of Prisons the authority to define compelling and extraordinary circumstances more narrowly than the statute or the Sentencing Commission.

II. Government Response to U.S.S.G. § 1B1.13

In the face of Commission inaction on the mandate of 28 U.S.C. § 994(t), commentators have noted that the Bureau of Prisons rarely made motions for reduction.³

² S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

³ See, Mary Price, The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001); John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.) (2001).

However, BOP rules clearly contemplated both medical and non-medical reasons and did not purport to narrow the statutory terms. The program statement in place from 1980 to 1994 (covering both pre- and post-SRA sentences) instructed staff to file motions “in particularly meritorious or unusual circumstances which could not have reasonably 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.” 28 C.F.R. § 572.40 (1980) (emphasis added); *see* 45 Fed. Reg. 23365-66 (Apr. 4, 1980). The BOP amended the program statement in 1994, updating it with references to the legislative language of § 3583, “extraordinary and compelling circumstances,” but maintaining the same broad standards and including medical and non-medical cases. 28 C.F.R. § 571.61, *et seq.*, 59 Fe. Reg. 1238 (Jan. 7, 1994); *see* USDOJ-BOP, Program Statement 5050.44, *Compassionate Release: Procedures for Implementation of 18 U.S.C. 3582(c)(1)(A) & 4205(g)* (Jan. 7, 1994) (emphasizing “the standards to evaluate the early release remain the same,” though prison overcrowding eliminated as an appropriate basis).

Once the Sentencing Commission entered the arena by adopting the policy statement in U.S.S.G. § 1B1.13 in 2006, the executive branch reacted in two ways. First, the Department of Justice submitted a letter on July 14, 2006, which warned that the Commission should not adopt a policy for granting motions broader than the Department’s standards for filing such motions:

The policy statements adopted by the Sentencing Commission for granting motions under 18 U.S.C. § 3582(c)(1)(A)(i) cannot appropriately be any broader than the Department’s standards for filing such motions. . . . It would be senseless to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them. . . . At best, such an excess of permissiveness in the policy statement would be a *dead letter* because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside the circumstances allowed by its own policies.

DOJ Lt. p. 4 (emphasis added). The letter advocated that reductions should only be entertained in a narrow range of medical situations:

the inmate for whom the reduction in sentence is sought has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the inmate’s ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others;

DOJ Lt. p. 1. Of course, as is apparent from the previous discussion, nothing in the statutory language or history, nor in the BOP rules, narrowed “extraordinary and compelling reasons” to such a small subset of medical-only cases.

The BOP then, more recently, published new proposed rules outlining exactly such a narrowing of cases in which sentence reductions would be sought. 71 Fed. Reg. 245, pp.76619-76623 (Dec. 21, 2006). Claiming that the new regulations would “more accurately reflect our authority under these statutes and our current policy,” the rules rename the section “Reduction in Sentence for Medical Reasons,” and confine action to cases involving terminal illness with less than a year to live or the near-vegetative state described in the DOJ letter above.

The DOJ position and BOP’s proposed rule-making action are misguided for several reasons. First, Congress, while making the reduction dependant on motion of the BOP, clearly delegated authority to set standards and policy for these sentence reductions to the Sentencing Commission. The process for doing so is set forth in the SRA and includes instructing all the participating players in the criminal justice system to provide their input and expertise to the Commission during the rule making process. The executive agencies are specifically mentioned as one of the key organizations that

shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission’s guidelines, suggesting changes in the guidelines that appear to be warranted and otherwise assessing the Commission’s work.

28 U.S.C. § 994(o). This appears to be the only congressionally approved mechanism for transmitting the Bureau of Prisons’ concerns and proposals to the Sentencing Commission. It also provides the mechanism for the other essential players in the federal sentencing system – the United States Probation Office, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and the Federal Public Defenders – to provide their input on the question. The amendment would then be subject to approval by the Commission and acquiescence by Congress under 28 U.S.C. § 994(p).

Nothing in the statutory scheme delegates to the Bureau of Prisons authority to limit or construe “extraordinary and compelling” beyond its plain meaning. The task of formulating the standards and providing examples was expressly delegated by Congress to the Sentencing Commission in the same statute that provided the Bureau of Prisons with a mechanism for making its suggestions to the Sentencing Commission regarding guideline amendments.

In addition, the narrowing proposed by the government has no basis in the statute or legislative history. As already described above, Congress clearly contemplated changed circumstances more broadly than end of life or near-vegetative state standards proposed by the government. The statutory scheme delegated the job of coming up with standards and examples to the Commission, then delegated to the sentencing court, the decision making power to rule on the motion after consideration of the statutory factors in 18 U.S.C. § 3553(a).

Unilateral 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. Declaring anything the Commission does to define “extraordinary and compelling reasons” as a *dead letter* if it is broader than the government’s chosen standard serves to highlight the reversal of the proper roles and the constitutional violation that reversal embodies.

To avoid this problem and properly implement the statute, the power to move for sentence reductions should be broadly construed. The structure of the statute provides a gate-keeping function to the Bureau of Prisons. Whenever a factor arises that is arguably within the definition of “extraordinary and compelling reasons,” the Bureau of Prisons should notify the court by motion so the sentencing judge can make the ultimate determination of whether a sentence reduction is appropriate, implementing the § 3553(a) factors that sentencing judges are very experienced in applying in every federal sentencing. This system does not work, either statutorily or constitutionally, unless the Bureau of Prisons implements its authority to notify the court in a very broad manner.

Under the statute, if the Bureau of Prisons is prejudging whether the sentence reduction should be granted, it substitutes its judgment for that of the court. Unless the notifications are very broad, allowing for some denials by sentencing judges, some cases in which “extraordinary and compelling” circumstances exist will not be before the sentencing judge. A restrictive view of when the § 3582(c) authority should be exercised compromises the statutory scheme. Even worse, Separation of Powers is violated when an executive body, faced with “extraordinary and compelling” circumstances, fails to provide the sentencing judge with the opportunity to make the ultimate judgment whether the sentence reduction is appropriate under the statute and § 3553(a). In whatever form the Bureau of Prisons addresses the implementation of § 3582(c), the power to file motions should be broadly and liberally construed in order to faithfully carry out the statutory scheme and to avoid unconstitutional limitations on judicial authority.

III. Further Comment and Response to Questions

Our positions on most of the questions posed in the current “Issue for Comment” are obvious from our previous submissions and the positions set forth above. We support the ABA proposal defining a broad range of circumstances which can provide extraordinary and compelling reasons and warrant a reduction in sentence. Examples should include a broad range of medical and non-medical circumstances and should not be limited to end-of-life releases.

There are medical conditions that, while not producing imminent death, make continued incarceration serve none of the purposes of sentencing under 18 U.S.C. § 3553(a). For example, a prisoner who suffers a non-life threatening stroke that forecloses the type of conduct that led to incarceration in the first place; a debilitating disease that makes an otherwise harmless prisoner easier to care for in the community than in the prison; crippling injuries such as an amputation or paralysis that both limit dangerousness

and render the prisoner vulnerable to other prisoners. Further, the requirement that the person be almost dead is far too limiting based on the constellation of potential circumstances surrounding a terminal illness.

There are also non-medical changes of circumstances which Congress contemplated and could clearly warrant relief under the statute. Such circumstances could include acts of heroism by prisoners; positive conduct in the prison or assistance to authorities that, although not permitting a Rule 35 motion, expose the prisoner to mistreatment and ostracism within the prison; family circumstances, such as death of a spouse leaving the prisoner as the only care giver for children, or a child dying and needing the prisoner present for care giving at the end of life. Further, rehabilitation in combination with other factors may render circumstances extraordinary and compelling from the negative inference in 28 U.S.C. § 994(t) (stating that rehabilitation “alone” is not sufficient).

We submit that the Commission should take a “combination” approach referred to in the question for comment, allowing the court to consider more than one reason, each of which is, alone, less than extraordinary and compelling, but that, taken in combination, are. This approach not only makes inherent sense, but is suggested by the statutory provision stating that rehabilitation alone is not sufficient.

Also, as implied in the last question for comment, the policy statement should allow a BOP motion based on an extraordinary and compelling reason not specifically identified by the Commission. This is an area which, by its nature, does not allow listing of all possible reasons. Any list of examples is necessarily non-exclusive and should so state.

Finally, in light of the way in which the executive branch is attempting to narrow the definition of extraordinary and compelling reasons without deference to standards set by Congress or the Sentencing Commission, we believe the Commission should provide a statement of the correct roles in its policy statement. The policy statement should provide that the Bureau of Prisons’ role is that of a gate-keeper, which should implement Congressional and Commission-set standards for extraordinary and compelling reasons by broadly bringing motions when such reasons appear to be present, allowing the courts to exercise their authority to decide whether a reduction is warranted, after considering the policy statements and the § 3553(a) factors. This is the appropriate balance and the way in which a Separation of Powers violation will be avoided.

Thank you for your consideration of our comments.

Very truly yours,



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