February 3, 2014

Rules Unit,
Office of General Counsel,
Bureau of Prisons,
320 First Street N.W.
Washington, DC 20534.

Re: Comments on Docket No. BOP 1168; 28 CFR Part 571, Compassionate Release

The undersigned organizations submit these comments on the interim rule, published by the Bureau of Prisons [Bureau] on December 5, 2013, adding new provisions to its regulation on sentence reduction for extraordinary and compelling reasons. The first provision codifies existing practice by which, when considering a prisoner for reduction in sentence, the General Counsel solicits the opinion of the United States Attorney in the district in which the prisoner was sentenced. The second provision provides that the Bureau's "final decision is subject to the general supervision and direction of the Attorney General and Deputy Attorney General." Neither provision should be adopted.

The Bureau should not solicit the opinions of U.S. Attorneys when reviewing a prisoner's request that it file a motion with the court to consider reducing a term of imprisonment for "extraordinary and compelling reasons." The U.S. Attorney is not likely to have information relevant to the Bureau's limited inquiry into whether the prisoner's current circumstances are "extraordinary and compelling," nor will it ordinarily possess any expertise relevant to that inquiry. If the U.S. Attorney has an opinion about the merits of sentence reduction, *e.g*., if it opposes sentence reduction on grounds of public safety, that opinion and its basis should be presented by the U.S. Attorney to the court, but it has no place in the Bureau's decision whether to file the motion. Institutionalizing, by means of regulation, the insertion of the U.S. Attorney's views on the merits of the motion into the Bureau's evaluation of whether to file a motion is inconsistent with 18 U.S.C § 3582 (c)(1)(A)(i).

We therefore urge the Bureau to change its practice of soliciting the views of the U.S. Attorney and refrain from codifying that practice in a regulation.

We recognize that from time to time U.S. Attorneys will bring to the Bureau's attention cases that present extraordinary and compelling reasons within their particular area of expertise. For example, the U.S. Attorney might identify legal errors resulting in sentence increases that cannot be corrected by the courts, or sentencing inequities similar to those in the cases commuted by the President this past December. However, it is not appropriate for the Bureau to solicit the views of the U.S. Attorney on whether a motion should be filed for other reasons.

The second provision, providing that the Bureau's "final decision" is "subject to the general supervision and direction" of the Attorney General and Deputy Attorney General [DAG], may simply acknowledge that the Justice Department's senior policy officials provide policy direction to the Bureau governing the exercise of its statutory functions, and exercise general supervision and direction over Bureau activities. If so, the provision has no place in a rule governing the Bureau's consideration of particular cases. If instead it is intended to enshrine in a regulation the current practice of the DAG intervening in Bureau decisions about whether to file a motion in individual cases, it endorses an inappropriate intrusion by policy level Justice Department officials into operational matters that Congress has specifically assigned to the Bureau. Whatever the provision means, it should be removed.

If these provisions are retained in the final rule, we urge the Bureau to adopt additional provisions that will ensure that input by a U.S. Attorney and/or the DAG in a particular case is disclosed to the prisoner seeking reduction in sentence and his or her legal counsel.

<u>The Bureau's Decision Whether to File a Motion for Reduction in Sentence for Extraordinary and Compelling Reasons Should Not Be Based on the Opinions of U.S. Attorneys or the Deputy Attorney General</u>.

We believe the Bureau consults with U.S. Attorneys and sometimes the DAG prior to making its decision about whether to bring a motion to the court in order to obtain their views about whether the prisoner should *receive* a sentence reduction. But whether a prisoner should be released is not a question the Bureau should be asking or answering, with or without input from other officials.

Congress assigned to the courts the authority, upon receipt of a motion by the Director of the Bureau of Prisons, to decide whether a prisoner's sentence should be reduced. Congress did not provide the Bureau with guidance beyond the statutory language, leaving to the Sentencing Commission the task of defining the terms.[1] But the structure and legislative history of the sentence reduction authority, 18 U.S.C. § 3582(c)(1)(A), leave little doubt that Congress intended that the Bureau's role be limited to identifying prisoners with extraordinary and compelling circumstances and of bringing their cases to the courts.

The sentence reduction authority is one of several located in a section of the United States Code entitled "Imposition of a Sentence of Imprisonment," which addresses the role of the courts in sentencing and modifying sentences. The sentence reduction provision states that the court may reduce the term of imprisonment if, after considering the factors outlined in 18 U.S.C. § 3553(a), it finds that extraordinary and compelling reasons warrant the reduction and the reduction is "consistent with applicable policy statements" of the U.S. Sentencing Commission. The § 3553(a) factors include, *inter alia*, the nature and circumstances of the offense; the history and characteristics of the defendant; and the purposes of sentencing including the need for just punishment, to protect the public against further crimes of the defendant, and to provide correctional and medical care in the most effective manner. In 18 U.S.C. § 3582(c)(1)(A), Congress required the court, not the Bureau, to consider these factors.

[1] 28 U.S.C. § 994(t)

The legislative history also demonstrates that Congress intended the Bureau to do no more than identify prisoners with extraordinary and compelling circumstances and bring their cases to the courts' attention. Congress enacted the sentence reduction provision because, as the Senate Judiciary Committee's Report on the SRA noted, it realized 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, [or] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence."[2] The Bureau, being in daily contact with prisoners, is uniquely situated to be able to determine when such circumstances have arisen, and then to bring their existence to the court's attention. The court then decides whether release is appropriate. "The Sentencing Reform Act . . . 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."[3] The Committee again signaled its view of the court's role in a later section of the report: "The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations."[4]

The Sentencing Commission's guidance is set forth at U.S.S.G. § 1B1.13. It provides that upon motion of the Bureau, the court may reduce the term of imprisonment if, after considering the factors set forth in § 3553(a), the court determines that:

- extraordinary and compelling circumstances warrant the reduction;
- the defendant is not a danger to the safety of any other person or to the community as provided in 18 U.S.C. § 3142(g)[5]; and
- the reduction is consistent with U.S.S.G. § 1B1.13.

Thus, Congress and the Sentencing Commission directed the courts, not the Bureau, to evaluate the § 3553(a) factors in determining whether a prisoner's sentence should be reduced. This makes sense. The court, not the Bureau, is in the best position to evaluate the § 3553(a) factors and decide whether to reduce the term of imprisonment in light of the nature and circumstances of the offense, the history and characteristics of the defendant, and the need to promote the purposes of sentencing, including public safety. Courts routinely consider these factors in imposing sentence in the first instance.

The Supreme Court has recently emphasized, in a context that also involved claimed BOP authority to determine the length of a prisoner's sentence, that such decisions are for the courts to make, not "employees of the same Department of Justice that conducts the prosecution."[6]

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[2] U.S. Senate Committee on the Judiciary, "Report on the Comprehensive Crime Control Act of 1983," S. Rep. No. 98-225 55 (1983).
[3] *Id*. at 56 (emphasis added).
[4] *Id*. at 121.
[5] This statute governs pre-trial detention and release. Subsection (g) provides a set of factors for courts to consider, including public safety factors such as whether the crime was violent, a crime of terrorism or involved a minor victim or destructive device, and the history and characteristics of the defendant including criminal history and history of drug or alcohol abuse.
[6] *Setser v. United States*, 132 S. Ct. 1463, 1472 (2012).

The proper role of the Bureau is to ascertain the existence of facts establishing the grounds the Commission has determined constitute "extraordinary and compelling reasons" for release. These include terminal illness, a permanent physical or medical condition or deteriorating physical or mental condition that substantially diminishes the prisoner's ability to provide self-care, death or incapacitation of the only family member capable of caring for the prisoner's minor child, or reasons "other than" those specifically listed as determined by the Director of the Bureau of Prisons. The breadth of what can constitute "extraordinary and compelling" reasons "other than" those expressly listed is illustrated by the Supreme Court's admonition in *Setser* that failure to anticipate post-sentencing developments that produce unfairness, such as an unanticipated or incongruous concurrency decision, can be addressed by a § 3582(c)(1)(A) motion.[7]

If such circumstances exist, the Bureau should file the motion with the court, which will decide whether sentence reduction is warranted. The Bureau exceeds its authority and flouts "our tradition of judicial sentencing"[8] when it refuses to bring extraordinary and compelling circumstances to the courts' attention. It is not the province of the warden, the Director, the United States Attorney, or Deputy Attorney General, to determine, for example, that the prisoner has not served a long enough sentence,[9] committed an especially heinous crime,[10] might be capable of reoffending,[11] or that the prisoner's release might generate adverse publicity.[12]

The only reason we can envision for the Bureau to solicit the opinion of the U.S. Attorney, or to involve the DAG in its "final decision" in an individual case, is if it believes the Bureau is responsible for making a final decision whether a prisoner who presents extraordinary and compelling reasons should be released. But that decision is for the court. As we note below, while it is entirely appropriate for the U.S. Attorney to present his or her views to the court on whether the prisoner should or should not receive a sentence reduction, those views should not be a basis for the Bureau's decision whether to make the motion.

U.S. Attorney

The interim rule reflects the Bureau's current practice of seeking the opinion of the U.S. Attorney before it makes a decision on whether to take to the court a prisoner's request for sentence reduction. We oppose this practice, and its codification in the interim rule, on two grounds. First, the U.S. Attorney ordinarily cannot contribute anything meaningful to the Director's inquiry into whether extraordinary and compelling circumstances currently exist.

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[7] *Id*. at 1472.
[8] *Id*.
[9] Human Rights Watch & Families Against Mandatory Minimums, The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons 59 (Nov. 2012) [The Answer is No], *available at*: http://www.hrw.org/reports/2012/11/30/answer-no-0.
[10] *Id*. at 60.
[11] *Id*. at 56-58.
[12] *Id*. at 61-62.

Second, the U.S. Attorney's veto of a motion for a qualified prisoner is inappropriate.[13] A prosecutor's view of whether a prisoner's sentence should be reduced may be taken into account by the court but should not cause the Bureau to refuse to file motions for qualified prisoners.

U.S. Attorneys are unlikely to have information that is relevant to whether extraordinary and compelling reasons for sentence reduction exist. They will not, for example, have information as to whether a prisoner's spouse has died leaving no other family member able to care for minor children, or whether the prisoner has a terminal illness or how long she has to live.

The U.S. Attorney may well have views or concerns about whether, for example, early release should be denied on retributive or public safety grounds. But such views do not shed light on the limited factual inquiry the Bureau is charged with undertaking. They are relevant only to the court's decision-making. The U.S. Attorney might include his or her reasons for opposition in the motion for compassionate release made at the Bureau's request, or in a separate written or oral submission to the court. The key point is that if the prosecutor believes the court should deny relief despite the presence of extraordinary and compelling circumstances, he or she should publicly state the reasons under § 3553(a) for that position, and the court should receive defense input on why the § 3553(a) factors warrant a sentence reduction.

Deputy Attorney General [DAG]

We understand that because the Bureau is part of the Department of Justice, it is subject to the overall direction and supervision of the Attorney General, and that the direct exercise of those responsibilities is delegated to the DAG. It is appropriate for the DAG to work with the Bureau to establish policies guiding the Bureau's operations. Once that policy is established, however, the Bureau should not seek, or indeed accept, input from the DAG in individual cases.

If the provision concerning the role of the DAG is meant to restate an unremarkable fact of institutional hierarchy, it is unnecessary and is misplaced in a rule governing the Bureau's consideration of particular cases. If instead it codifies a DAG role in the decision whether to bring the motion, we oppose it for three reasons. First, it institutionalizes DAG input in the Bureau's decision about whether extraordinary and compelling circumstances exist in a particular case. But it is difficult to imagine that the DAG has any information about whether extraordinary and compelling reasons exist in individual cases. Absent such information, DAG involvement in sentence reduction cases represents an inappropriate intrusion into the Bureau's operations. Second, we are concerned that the interim rule would codify a DAG thumb on the scale regarding whether a particular prisoner should be released, and thus whether the motion

[13] It appears that if a U.S. Attorney objects to the release of a prisoner, the Bureau will not submit the prisoner's case to the court, or even refer it to the Director. The Inspector General's report describes a rule proposed by BOP in 2008 -- which was not adopted because OLP opposed it -- that would "no longer require[] USAO concurrence with the BOP General Counsel's decision to pursue a compassionate release case and refer the case to the Director." Office of the Inspector General, U.S. Dep't of Justice, *The Federal Bureau of Prisons Compassionate Release Program* 25-26 (2013).

should be filed.[14] Third, involving the DAG in decisions in individual cases could cause yet more delay. As the OIG report demonstrated, delays can have tragic consequences in these cases, particularly in cases of dying prisoners who may not survive by the time consultation within the Department is complete and the court decides the motion.

An example of what the undersigned consider inappropriate DAG intervention is supplied by the Inspector General, who reported that in 2006, the Bureau brought to the DAG the case of a prisoner who had been sentenced to life for a drug offense and who, due to a massive stroke, required round the clock personal and medical care.[15] His condition was not terminal, but the warden promoted his case due to his "totally debilitated medical condition and near vegetative state with no hope of recovery."[16] The DAG objected to the release, and the Bureau did not file the motion. The reasons for the DAG's objection do not appear in the report. It may have been due to the prisoner's criminal history, his life sentence, or the fact that while severely debilitated, his condition was not terminal. Whatever the reasons, this is a classic case in which the decision to return to court should have rested with the BOP alone.

It is difficult to envision any appropriate input from the DAG on the Bureau's decisions in individual cases. Should the DAG be concerned that the Bureau is acting outside established policy, it can address its concerns to the Bureau pursuant to its oversight authority, rather than by assuming an operational role in individual cases.

Transparency and Accountability

Transparency and accountability should be hallmarks of the Bureau's response to inmate requests for sentence reduction and their exhaustion of administrative remedies when those requests have been denied. Unfortunately, the Bureau has failed to satisfy either criterion. Prisoner's requests are denied with formulaic assertions that fail to illuminate the specific reasons underlying the denial.[17]

As discussed above, we do not believe the U.S. Attorneys and the DAG should be consulted before the Bureau makes a decision on individual requests for sentence reduction. But if they are to be consulted, and that consultation results in an adverse decision, the prisoner should be told what the U.S. Attorney's office and/or the DAG said that derailed his or her request. Were there a public hearing before a judge, the prosecutor would state on the record in open court any objections s/he had to a reduction in sentence. But if the BOP denies the prisoner's request based, in whole or in part, on objections or concerns raised by the U.S. Attorney or the DAG behind closed doors, those objections are hidden from public view. The interim rule should be revised to require that in cases in which the Bureau rejects a request for sentence reduction, it

[14] It is our understanding that the Bureau has historically consulted the DAG in non-medical and non-terminal cases, apparently because those were controversial within the Justice Department, not because they were not within BOP's expertise. *Id*. at 3, 4, 14, 22-24.
[15] *Id*. at 24.
[16] *Id*.
[17] The Answer is No at 64.

make available to the prisoner any objections and evidence supporting the rejection provided by the DAG or the U.S. Attorney. This will further the goal of ensuring that the Bureau's decision-making process is appropriately transparent and that officials who play a role in it are held accountable.

If this recommended revision is not adopted, then we recommend that the DAG and the U.S. Attorneys be provided specific guidance – which should be made public -- regarding what criteria they may address in their response to the Bureau's solicitation of their opinions regarding individual requests for sentence reduction.

Conclusion

For the foregoing reasons, we urge the Bureau to remove the two new provisions from the interim sentence reduction rule. Rather than perpetuate inappropriate participation by U.S. Attorneys and the DAG in the determination whether a sentence reduction motion should be filed, the Bureau should recognize its properly limited role in light of Congress's mandate that the courts, not the Bureau, decide whether a prisoner's sentence should be reduced in light of the factors set forth in 18 U.S.C. § 3553(a), including public safety.

We also encourage the Bureau to conduct a careful and comprehensive rule-making with regard to standards and procedures for sentence reduction. It withdrew the proposed but never-finalized 2006 rule, and never published for notice and comment the contemplated 2008 rule that was rejected by the DAG. The Bureau has thus been operating for two decades without any official binding regulations. The regulation ultimately adopted should recognize the Sentencing Commission's standards, given Congress's express delegation of that function to the Commission in 28 U.S.C. § 994(t).

Sincerely,

Jamie Fellner
Senior Advisor, U.S. Program
Human Rights Watch

Thomas W. Hillier, II
Co-Chair, Legislative Expert Panel
Federal Public and Community Defenders

Margaret Colgate Love
Law Office of Margaret Love

Laura Murphy
Director, Washington Legislative Office
American Civil Liberties Union

JaneAnne Murray, Murray Law LLC
Marjorie J. Peerce, Ballard Spahr Stillman & Friedman, LLP
Co-Chairs, Sentencing Committee
National Association of Criminal Defense Lawyers

Mary Price
General Counsel
Families Against Mandatory Minimums