



August 8, 2016

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

Re: ACLU Comments in Response to Bureau of Prisons Notice for Proposed Changes to its Regulations on Compassionate Release (cite 81 FR 36485-01).

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To Whom It May Concern:

The American Civil Liberties Union (“ACLU”) is submitting comments regarding the Bureau of Prisons (“BOP”) proposed changes to its Regulations on Compassionate Release¹. Compassionate release is one of a few policies that the Department of Justice can use to reduce the number of people in federal prisons. We support the proposed changes to BOP regulations because it is an example of the federal government using its authority to reduce its prison population safely.² BOP’s proposed changes to the policy will position the agency to better evaluate people who no longer pose a public safety risk and could be released.

I. Clarifying Ineligibility of Certain Inmates for Reductions in Sentence and Eligibility of District of Columbia Code Felony Inmates for Medical and Geriatric Release

BOP does not have the authority to reduce the sentences of individuals convicted under the D.C. Code or the Uniform Code of Military Justice (“UCMJ”). Thus, such individuals are not eligible for reduction in sentence pursuant to 18 U.S.C. 3582(c)(1)(A)(i). However, the proposed changes would add language explaining BOP’s role in the process of a reduction in sentence in extraordinary and compelling circumstances for an individual convicted under the D.C. Code.

It is the United States Parole Commission (“USPC”)—not BOP—that has jurisdiction to grant or deny parole or early release for individuals convicted

¹ Bureau of Prisons, Proposed Rule to Amend Compassionate Release Regulations in 28 C.F.R. §§ 571-72, [81 FR 36485-01](http://WWW.ACLU.ORG) (proposed June 7, 2016).

² *Id.*

under the D.C. Code.³ Under the D.C. Code, a person is only eligible for medical or geriatric release as prescribed by §§ 24–461 to 468. This process requires the submission of an application to the USPC,⁴ and that application is required to be reviewed by the USPC.⁵ The USPC then makes a determination about whether to grant geriatric or medical release.⁶

The proposed changes seek to add language in 28 C.F.R. Part 571.60 that calls for BOP to consider requests for suspension of sentence from D.C. inmates in BOP custody who meet the medical and geriatric eligibility criteria prescribed by D.C. Code and were convicted on or after August 5, 2000⁷ Moreover, the proposed changes would allow BOP to forward applications for medical or geriatric parole for people convicted before August 5, 2000 to the USPC.⁸ Since BOP has custodial responsibility over individuals sentenced under D.C. Code,⁹ these proposed changes to the BOP program statement are necessary to reduce confusion for D.C. inmates and to clarify BOP’s role in the submission and review of geriatric and medical release applications for D.C. Code inmates.¹⁰

BOP also has custodial responsibility for individuals convicted under UCMJ.¹¹ But unlike D.C. Code inmates, it is the Secretary [of the appropriate branch of the military], not the USPC, who is authorized to remit or suspend any part of a sentence imposed under the UCMJ.¹² For this reason, request for reduction in sentence by UCMJ inmates housed by BOP are not reviewed by either the BOP or USPC. Instead, each branch of the military establishes a Clemency and Parole Board to serve as the primary authority for administration of clemency and parole policy and programs.¹³ Therefore, BOP is not involved in the process of reviewing UCMJ inmates’ requests for reduction in sentence in extraordinary and compelling circumstances, and USPC only

³ 28 C.F.R. § 550.55(b)(3) (stating that contractual boarders (e.g., State or military inmates) are not eligible for early release); *See generally* [D.C. CODE § 24-131](#) (stating that the U.S. Parole Commission has exclusive authority to amend or supplement any regulation interpreting or implementing the parole laws of the District of Columbia with respect to felons).

⁴ [D.C. CODE § 24-465](#) (showing that the submission of an application can be done by the Department of Corrections, the inmate, or the inmate's representative and the Department's supporting documentation).

⁵ *Id.*

⁶ *Id.*

⁷ *See supra* note 1; *see also* U.S. DEPARTMENT OF JUSTICE, [Frequently Asked Questions](#), U.S. PAROLE COMMISSION Home, <https://www.justice.gov/uspc/frequently-asked-questions#q57> (stating “[t]he D.C. Revitalization Act requires the District to abolish parole for some types of crimes, but this will only apply to defendants who commit crimes on or after August 5, 2000”).

⁸ *Id.*

⁹ [D.C. Code §§ 24–101\(a\), 24–131\(a\)\(2\)](#); *see also* [Watson v. Warden, FCC Coleman-USP I](#), No. 5:12-CV-491-OC-27PRL, 2015 WL 78775, at 5 (M.D. Fla. Jan. 6, 2015).

¹⁰ *See* [D.C. CODE §§ 24–461 to 468](#).

¹¹ *See* [United States v. Joshua](#), 607 F.3d 379, 381 (4th Cir. 2010) (stating that under a May 1994 “Memorandum of Agreement” between the Army and BOP, the BOP promised to house up to 500 military prisoners for the Army's convenience, and BOP has called such prisoners “[c]ontractual boarders); *see also* [Seay v. O'Brien](#), No. CIV.A. 7:09CV00361, 2010 WL 889790, at *8 (W.D. Va. Mar. 9, 2010), *aff'd*, 410 F. App'x 610 (4th Cir. 2011) (stating that the “Memorandum of Agreement between the Department of Army and the Federal Bureau of Prisons that covers the transfer of military prisoners to the BOP is explicit that the Department of Army retains clemency jurisdiction over former military prisoners housed in BOP facilities, while the USPC oversees parole in a supervisory capacity).

¹² [Knighten v. United States Parole Comm'n](#), 105 F. Supp. 3d 30, 33 (D.D.C. 2015).

¹³ *Id.* at 34

supervises UCMJ inmates extended parole by the appropriate military clemency board.

For all the above reasons, we support the proposed changes to the regulations regarding reduction in sentence eligibility for individuals convicted under D.C. Code who are eligible for medical or geriatric sentence reductions.

II. Expanding the BOP personnel eligible to review request for reductions in sentence

BOP's Program Statement does not establish timeliness standards for reviewing requests for reductions in sentences and most institutions do not implement a timeliness standard independently.¹⁴ For those institutions with a timeliness standard for the review of these requests, that timeframe ranges from 5 to 65 days.¹⁵ Between 2006 and 2011 in thirteen (13%) percent (28 of 208) of the cases for compassionate release approved by a Warden and Regional Director, the inmate died before a final decision was made by the BOP Director.¹⁶

These statistics demonstrate that any opportunity to expedite the processing of these requests enhances a person ability to be released from prison and in some cases spend the last days of their life with family.¹⁷ By permitting additional staff in the Office of General Counsel as well as the Assistant Medical Director or the Assistant Director, Correctional Programs Division to review requests for reductions in sentences for extraordinary and compelling circumstances, the timeframe BOP needs to make decisions about these sentence reduction requests should decrease. The diminished timetable for review resulting from additional personnel reviewing request will assist efforts to decrease the federal prison population safely without adding extra layers of review.

Moreover, BOP should establish a timeliness standard for reviewing requests. Considering that those who request a reduction in sentence typically suffer from life-threatening ailments, a timeliness standard would ensure that the processing of requests is finalized while a person can still benefit from being released. Moreover, adoption of these proposed changes would require BOP to review applications for medical and geriatric release from individual's convicted under D.C. Code within 30 days.¹⁸ Therefore, extending this timeliness standard to individuals convicted under federal law would create a fairer, faster, and more uniform process for the review of request for a reduction in sentence.

For these reasons, we support the expansion of BOP personnel eligible to review request for reductions in sentence in extraordinary and compelling circumstances and a timeliness standard

¹⁴ U.S. DEPT. OF JUSTICE, OFF. OF INSPECTOR GEN., I-2013-006 at p. ii, 28, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, (Apr. 2013), <https://oig.justice.gov/reports/2013/e1306.pdf>.

¹⁵ *Id.* at p. ii.

¹⁶ *Id.* at p. iii.

¹⁷ *See supra* note 3; *see also supra* note 16, at p. ii, <https://oig.justice.gov/reports/2013/e1306.pdf>.

¹⁸ *See supra* note 1, at 36486-01 (stating that a D.C. Code inmate in Bureau custody who meets the [medical or geriatric] eligibility criteria of the D.C. Code may request that the Bureau seek such a suspension of sentence for the inmate consistent with the D.C. Code); *see also* [D.C. Code § 24-465](#) (stating "(d) The Department shall submit an application for geriatric release with supporting documentation to the Board within 30 days of receipt of an application— (e) The Board shall make a determination whether to grant geriatric parole within 30 days of receipt of the application and supporting documentation from the Department").

for review of these request.

III. Deleting Language Indicating That the Bureau Will Only Allow Reductions in Sentence for Circumstances “Which Could Not Reasonably Have Been Foreseen by the Court at the Time of Sentencing”

Deleting language that suggests BOP will only allow for sentence reductions pursuant to 18 U.S.C. § 3582(c) (1)(A)(i) for circumstances “which could not reasonably have been foreseen by the court at the time of sentencing” creates a BOP program statement that more precisely represents the language of the authorizing statute. Similarly, it eliminates a requirement that is difficult for BOP to verify and will allow additional deserving individuals to qualify for early release.

The statute authorizing a reduction in sentence in extraordinary and compelling circumstances does not require that those circumstances resulting in a reduction be unforeseeable to the court at the time of sentencing. Furthermore, BOP has difficulty determining whether the court could foresee a person’s current situation at the time of sentencing.¹⁹ Not only does this requirement fail to reflect the intent of the statute, it also serves as an obstacle to individuals’ ability to have their sentences reduced.²⁰ For example, it is difficult for BOP to determine, based on an inmate’s pre-sentencing report and other information from the court, what circumstances the court could foresee at the time of sentencing. This is particularly true for individuals who receive lengthy sentences.²¹

For these reasons, we support the elimination of the “foreseeability” requirement because it is not a statutory requirement, and it is difficult for BOP to discern what the court could have reasonably foreseen at the time of sentencing. Finally, it has served as an impediment to individuals receiving sentence reductions for extraordinary and compelling circumstances.

IV. Changing the Title to “Reduction in Sentence in Extraordinary and Compelling Circumstances”

Changing the title of 28 C.F.R Part 571, subpart G from “Compassionate Release” to “Reduction in Sentence in Extraordinary and Compelling Circumstances” more accurately reflects the intent of the authorizing statute, recent Department of Justice Guidance, and United States Sentencing Commission (“Commission”) policy statement regarding “compassionate release.”

¹⁹ See *supra* note 1 (stating “the Bureau has found it problematic and untenable to attempt to determine what the court could reasonably have foreseen at the time of sentencing and to apply this restriction in deciding whether to seek a reduction in sentence under this subpart”).

²⁰ *Todd v. Fed. Bureau of Prisons*, 31 F. App’x 833 (5th Cir. 2002) (showing that a request for reduction in sentence in extraordinary and compelling circumstances was denied by the Regional Director of the Board of Prisons because compassionate release required extraordinary circumstances that could not have been reasonably foreseen at the time of sentencing); see also *Acosta v. Fisher*, No. 13-CV-1510, 2014 WL 3575109, n.1 (D. Minn. July 18, 2014).

²¹ *Risk factors of ill health among older people*, World Health Organization, Regional Office for Europe (August 1, 2016), <http://www.euro.who.int/en/health-topics/Life-stages/healthy-ageing/data-and-statistics/risk-factors-of-ill-health-among-older-people> (stating that “As people age, they become more susceptible to disease and disability”).

Sentence reductions are authorized by 18 U.S.C. § 3582(c) (1)(A)(i), for “extraordinary and compelling circumstances.” The statute does not use the term “compassionate release”²², but instead states “the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment...if it finds that—(i) extraordinary and compelling reasons warrant such a reduction.”²³ Moreover, the current BOP program statement governing the implementation of compassionate release uses both “compassionate release” and “reduction in sentence” interchangeably.²⁴ Similarly, the Commission guidelines refer to compassionate release as, “Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A).”²⁵

Given the term “reduction in sentence in extraordinary and compelling circumstances” is used in the authorizing statute and is currently employed by both the BOP and the Commission when referencing compassionate release, the proposal to change the title of 28 C.F.R Part 571, subpart G to “Reduction in Sentence in Extraordinary and Compelling Circumstances” provides a more accurate and uniform description of the authority granted by the statute.

We also recommend that BOP refer to “compassionate release” as “reduction in sentence in extraordinary and compelling circumstances” where it appears in 28 C.F.R. Part 572. A “reduction in sentence” can be granted for a number of reasons, but the term “compassionate release” specifically addresses reductions in sentence for extraordinary and compelling circumstances.²⁶ In addition to uniformity with the newly proposed title for the BOP program statement, using “reduction in sentence in extraordinary and compelling circumstances” is more consistent with the criteria, announced by Attorney General Eric Holder in August 2013, under which a reduction in sentence should be granted.²⁷

Thus, we support changing the title of 28 C.F.R Part 571, subpart G to “Reduction in Sentence in Extraordinary and Compelling Circumstances” and replacing the phrase “compassionate release” with “reduction in sentence in extraordinary and compelling circumstances” where it appears in 28 C.F.R. Part 572.

²² See *supra* note 1.

²³ See [18 U.S.C. § 3582\(c\)\(1\)\(A\)](#).

²⁴ [5050.49, CN-1](#) (stating that “for the purposes of this Program Statement, the terms ‘compassionate release’ and ‘reduction in sentence’ are used interchangeably,” and the current title of 5050.49, CN-1 is “*Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)*”) (emphasis added).

²⁵ U.S. SENTENCING COMM’N, Amendments to the U.S. SENTENCING GUIDELINES MANUAL, Section 1B1.13 (to take effect Nov. 1, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160428_Amendments.pdf.

²⁶ See, e.g. U.S. SENTENCING GUIDELINES MANUAL [§ 5K1.1](#); [18 U.S.C. § 3553\(e\)](#); [Fed. R. Crim. P. 35](#); [18 U.S.C. § Section 3582\(c\)\(2\)](#); and [U.S. CONST. art. II, § 2, cl. 1](#).

²⁷ Eric Holder, U.S. Attorney General, Department of Justice, Attorney General Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (August 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>; see also Charles E. Samuels, Jr., Department of Justice, Federal Bureau of Prisons, [Director Issues Message to Inmates](#) (December 9, 2013) (announcing that compassionate release was expanded and that those changes are currently represented within U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT 5050.49, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G)* (August 12, 2013)).

V. Conclusion

We appreciate the opportunity to comment on BOP's proposed changes to its regulations on compassionate release. If there are any questions about our comment, please feel free to contact Jesselyn McCurdy, Deputy Director of the ACLU Washington Legislative Office at jmccurdy@aclu.org.

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