

October 29, 2015

Sarah Saldaña
Director
U.S. Immigration and Customs Enforcement
Department of Homeland Security
Washington, D.C. 20528

RE: Processing of immigrants set for early release from BOP

Dear Director Saldaña:

We, the undersigned organizations, write to express our concerns about how U.S. Immigration and Customs Enforcement (“ICE”) plans to process an estimated 1870 to 2000 immigrants scheduled for early release from the Bureau of Prisons (“BOP”) starting on October 30, 2015, in accordance with U.S. Sentencing Commission (“Commission”) Amendment 782.¹ There have been numerous media reports that these immigrants will be transferred to ICE custody and deported.²

These immigrants comprise about one third of the estimated 6000 prisoners set for early release from BOP this year, in response to the Commission’s decision to give retroactive effect to its revised federal sentencing guidelines for drug offenses. In April 2014 the bipartisan Commission, “an independent agency of the judicial branch,”³ unanimously voted to reduce the sentencing guidelines for many federal drug offenses. Three months later the Commission voted unanimously again to make the sentencing reduction retroactive, meaning that the change would shorten prison sentences for people who are serving time for federal drug offenses. Congress did not block the Commission’s decision, and the change went into effect in November 2014, with the Commission instructing BOP not to release eligible individuals before November 2015.⁴

¹ Sentencing Commission (“Commission”) Amendment 782 reduced by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties, and made conforming changes to section 2D1.1. (See U.S. SENTENCING COMM’N (“SENTENCING COMM’N”), AMENDMENT TO THE SENTENCING GUIDELINES (Jul. 2014),

http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf.)

² See Michael S. Schmidt, *U.S. to Release 6,000 Inmates from Prisons*, N.Y. TIMES (Oct. 6, 2015), <http://www.nytimes.com/2015/10/07/us/us-to-release-6000-inmates-under-new-sentencing-guidelines.html>; Sari Horwitz, *The U.S. is set to release thousands of prisoners early. Here’s where they’re headed*, WASH. POST (Oct. 7, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/10/07/the-u-s-is-set-to-release-thousands-of-prisoners-early-heres-where-theyre-headed/>; and Timothy M. Phelps, *U.S. to release 6,000 prisoners as part of sentencing-reform campaign*, L.A. TIMES (Oct. 6, 2015), <http://www.latimes.com/nation/la-na-prison-release-20151006-story.html>.

³ The Commission’s “principal purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public” (SENTENCING COMM’N, ABOUT, <http://www.ussc.gov/about>).

⁴ Phelps, *supra* note 2 (“Congress, . . . allowed the changes to go into effect.”); and 28 U.S.C. § 994(p) (“[A]n amendment or modification . . . shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or

Department of Justice (“DOJ”) Deputy Attorney General Sally Yates has stated that “[t]he Department of Justice strongly supports sentencing reform for low-level, nonviolent drug offenders,” and that “[t]he Sentencing Commission’s actions — which create modest reductions for drug offenders — is a step toward these necessary reforms.”⁵

Starting on October 30, 2015,⁶ BOP will release an estimated 4000 U.S. citizens to Residential Reentry Centers or supervised release. In addition, approximately 1870 to 2000 immigrants will be transferred from BOP to ICE custody, where they will face detention and deportation.⁷ **The stark contrast between the fates of these two otherwise-identical groups but for citizenship status, points to a schism between DOJ and ICE policies, and therefore warrants your special attention. We urge ICE not to rush to judgment on these immigrants’ cases, but instead to commit to ensuring individualized due process in each case.**

What makes this group of immigrants set for early release from BOP different from other immigrants who are transferred from BOP to ICE custody? Each of the 1870 to 2000 immigrants approved for early release from BOP filed “for re-sentencing separately, with the process negotiated between their legal counsel and the prosecutor, then approved by a federal judge.”⁸ This “measured, deliberate process,”⁹ established by the Commission,¹⁰ involved prosecutors, defense attorneys, BOP, and federal courts.

Importantly the federal court review process of each case for sentence reduction was individualized and rigorous. In determining whether a reduction in sentence is warranted, a court considered **“the nature and seriousness of the danger to any person or the community**

modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.”).

⁵ See Phelps, *supra* note 2.

⁶ Bureau of Prisons (“BOP”) is expected to continue releasing more people deemed eligible under the Commission’s guidelines on a rolling basis. See Horwitz, *supra* note 1, <https://www.washingtonpost.com/news/post-nation/wp/2015/10/07/the-u-s-is-set-to-release-thousands-of-prisoners-early-heres-where-theyre-headed/>.

⁷ The 1870 to 2000 immigrants scheduled for transfer from BOP to ICE custody starting October 30, 2015 will be the first group of transfers. Additional immigrants approved for early release from BOP will be transferred on a rolling basis.

⁸ Matt Ford, *Freedom for 6,000 Federal Prisoners*, THE ATLANTIC (Oct. 6, 2015),

<http://www.theatlantic.com/politics/archive/2015/10/6000-inmates-sentencing-reform/409339/>.

⁹ FAMILIES AGAINST MANDATORY MINIMUMS, EXPLAINED: 6,000 PRISONERS BEING RELEASED (Oct. 7, 2015), <http://famm.org/explained-6000-prisoners-being-released/>.

¹⁰ SENTENCING COMM’N, *supra*, note 1 at 4-5:

“(B) *Factors for Consideration.*—

(i) *In General.*—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) *Public Safety Consideration.*—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) *Post-Sentencing Conduct.*—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).”

that may be posed by a reduction in the defendant's term of imprisonment..."¹¹ This process permitted the court to consider the individual's conduct in prison.

As described by Deputy Attorney General Yates, "These reductions are not automatic. Under the commission's directive, federal judges are required to carefully consider public safety in deciding whether to reduce an inmate's sentence."¹² The Commission reports that judges have approved about 75 percent of requests for early release, meaning that about 25 percent of requests have been denied.¹³ In those cases where judges denied motions to reduce sentences, the judges cited "protection of the public" 158 times.¹⁴

Therefore, each of the individuals set for early release from BOP has already undergone a rigorous review process, and has been approved for sentence reduction by a federal judge who determined that the individual is not a public safety threat to any person or the community.

RECOMMENDATIONS: We urge ICE to ensure that the following due process protections are met before deporting any individuals who have been approved for sentence reduction and early release from BOP:

- (1) Placement in detention facilities with Legal Orientation Program ("LOP") providers. LOP, funded by the Justice Department Executive Office for Immigration Review,¹⁵ was created to improve judicial efficiency and to inform unrepresented immigrant detainees about their rights, immigration court, forms of relief from removal, and the detention process.¹⁶ Program staff from nonprofit organizations provide orientations and workshops at 30 detention facilities across the country.¹⁷ Sixteen of the LOP detention facilities¹⁸ are located in states where large numbers of BOP prisoners will be released early because of the policy change by the Commission.¹⁹

In order to serve and educate the detainee population effectively, LOP providers will need to receive prompt notification from ICE when immigrants, subject to early release from BOP, enter into the LOP provider's detention facility of service.

- (2) Meaningful opportunity to consult with immigration counsel. Each immigrant transferred from BOP to ICE custody must receive the opportunity to consult with counsel. Counsel is essential for immigrants with final removal orders as well as for those without final orders. In recent years there have been numerous changes in

¹¹ SENTENCING COMM'N, AMENDMENT TO THE SENTENCING GUIDELINES, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT (Oct. 2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20151019-drug-amendment-report.pdf>.

¹² See Horwitz, *supra* note 2.

¹³ See Phelps, *supra* note 2.

¹⁴ Sentencing Comm'n, *supra* note 11.

¹⁵ U.S. DEP'T OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ("EOIR"), LEGAL ORIENTATION PROGRAM ("LOP") (2015), <http://www.justice.gov/eoir/legal-orientation-program>.

¹⁶ VERA INSTITUTE OF JUSTICE ("VERA INSTITUTE"), LOP, <http://www.vera.org/project/legal-orientation-program>.

¹⁷ VERA INSTITUTE, LOP – FACILITIES, <http://www.vera.org/project/legal-orientation-program?qt-projects+legal+orientation+progr=5#qt-projects+legal+orientation+progr>.

¹⁸ *Id.*

¹⁹ See Horwitz, *supra* note 2.

immigration law and policy – including DHS policy guidance²⁰ and Supreme Court decisions²¹ -- that could have direct bearing on this group of immigrants and their eligibility to remain in the U.S.²²

For example, in 2013 the Supreme Court held that minimum punishment for a marijuana drug distribution conviction²³ is a misdemeanor.²⁴ Therefore, a conviction for marijuana distribution does not necessarily satisfy the immigration definition of “aggravated felony”²⁵ because the criminal statute includes misdemeanor punishment. This court case may be directly applicable to many of the immigrants to be transferred from BOP to ICE custody. According to the Commission, nearly nine percent of drug offenders who received sentence reduction due to application of the retroactive drug guidelines amendment, were convicted of marijuana offenses.²⁶ Immigrants convicted of marijuana offenses, as well as those convicted of other drug offenses, will need counsel to advise them of their immigration options.

- (3) Meaningful opportunity to seek relevant defenses to removal. We are concerned that many of the immigrants will be subject to expedited processing under section 238 of the Immigration and Nationality Act (“INA”) and therefore deprived of important due process protections. Some of the immigrants may have legitimate defenses to removal including U visas, T visas, cancellation of removal, U.S. citizenship claims, asylum, withholding of removal, and protection under the Convention Against Torture.

Given the complex and changing nature of immigration law, all individuals who wish to contest their removal should be given the opportunity to do so through immigration court proceedings under INA section 240. If expedited proceedings are utilized, ICE must ensure that each individual given a Notice of Intent to issue a final administrative order receives an oral explanation, in his or her native language, of the right to request an Immigration Judge hearing to seek protection based on fear of return to his or her country of origin.

- (4) Affirmative screening for prosecutorial discretion (“PD”), with special attention to the federal court’s recent determination that the individual is not a public safety threat. Each of these immigrants, including those with an “aggravated felony” and those with final removal orders, must be individually assessed for PD. The 2014 DHS civil enforcement priorities memorandum specifies that removal of Priority 1 immigrants may be

²⁰ U.S. DEP’T OF HOMELAND SECURITY (“DHS”), POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS 3 (2014), available at

http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

²¹ See, e.g. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Moncrieffe v. Holder*, 569 U.S. ____ (2013).

²² See also “The SCOTUS Decision in *Padilla v. Kentucky*,” *Immigration Law Advisor* (July-Aug. 2010), Department of Justice (“DOJ”), EOIR, <http://www.justice.gov/sites/default/files/eoir/legacy/2010/09/27/vol4no7.pdf>; “*Moncrieffe v. Holder*: Exploring the Legal Landscape of Section 101(a)(43)(B) of the Act,” *Immigration Law Advisor* (Aug. 2013), DOJ, EOIR, <http://www.justice.gov/sites/default/files/eoir/legacy/2013/08/28/vol7no7.pdf>.

²³ 21 U.S.C. section 841(b)(1)

²⁴ *Moncrieffe v. Holder*, 569 U.S. ____ (2013).

²⁵ Immigration and Nationality Act section 101(a)(43). An aggravated felony can disqualify immigrants from many forms of relief from removal.

²⁶ Sentencing Comm’n, *supra* note 11, Table 8.

deprioritized if “there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.”²⁷ This DHS language clearly contemplates certain situations when an immigrant with an “aggravated felony” may not be a threat to public safety and therefore should not be an enforcement priority.

In the cases of immigrants set for early release from BOP, they have each already qualified for a sentence reduction under the Commission’s directive, and have proven to a federal judge that they are suitable for early release without posing a public safety threat. ICE, therefore, should give special consideration to whether this multi-tiered review process constitutes “compelling and exceptional factors that clearly indicate the alien is not a threat to... public safety and should not therefore be an enforcement priority.”

We appreciate the opportunity to communicate our concerns about ICE’s plans for processing approved for early release from BOP. Given that the transfers will start on October 30 and will continue on a rolling basis in the coming years, we respectfully request a meeting to discuss ICE’s plans for processing these cases. For further information, please contact Joanne Lin, ACLU legislative counsel, at 202/675-2317 or jlin@aclu.org.

Sincerely,

American Civil Liberties Union
American Immigration Council
American Immigration Lawyers Association
Capital Area Immigrants' Rights (CAIR) Coalition
Detention Watch Network
HIAS
Human Rights First
Human Rights Watch
Immigrant Defense Project
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
Service Employees International Union
United We Dream

cc: Alejandro Mayorkas, Deputy Secretary, Department of Homeland Security
Judi Garrett, Assistant Director, Information, Policy & Public Affairs, Bureau of Prisons
Juan Osuna, Director, Executive Office for Immigration Review, Department of Justice
Cecilia Munoz, Assistant to the President and Director, Domestic Policy Council
Roy Austin, Deputy Assistant to the President for Urban Affairs, Justice, Opportunity

²⁷ DHS, *supra*, note 20.