A Case for Compassion

By Mary Price*

Michael Mahoney died alone in a federal prison hospital on July 30, 2004. Despite appeals from family members, FAMM, and even the judge who had sentenced him to fifteen years in prison, prison officials refused to release him to die with his family. The story of Michael's conviction, imprisonment, and final illness and death is an indictment of the criminal justice system. It is especially an indictment of the federal Bureau of Prisons, which we believe routinely fails in its responsibility under law to consider and recommend to the courts those prisoners whose cases present "extraordinary and compelling reasons" for early release.

Michael pled guilty in 1994 to federal armed career criminal charges, and received the mandatory 15-year prison term dictated by 18 U.S.C. § 924(e). The seriousness of the charges and harshness of his sentence are belied by the actual circumstances of his case. Michael's "career" in crime consisted in its entirety of three personal use amount drug sales to the same undercover informant within a thirty-day period some fourteen years before, which the State of Texas had charged as three separate felonies. Following a brief period of incarceration in Texas, Michael returned to his home state of Tennessee and opened a small business, a pool hall. He employed people, paid taxes, and went about his life quietly. Concerned for his safety at closing, he decided to purchase a gun to protect himself while making night deposits of the business's cash receipts. Michael later told the sentencing judge that he had been assured by the pawnshop owner, who was also an attorney, that his prior felonies need

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not be disclosed because they were more than ten years old. This seemed reasonable to him because he had been allowed to obtain a state liquor license after a ten-year waiting period.

Sometime later, Michael's gun was stolen. Concerned that it might be used to commit a crime, he reported the theft to authorities. He was arrested when he arranged to purchase a gun to replace the one stolen.

The decision by federal prosecutors to count the three 1980 drug sales as separate convictions would make a profound difference in Michael's sentence in 1994. It meant the difference between a five-year and a 15-year mandatory minimum. The fact that the mandatory minimum tied the judge's hands also had a huge impact. Had Michael been sentenced under the federal Sentencing Guidelines as a simple felon in possession of a firearm, a federal offense, his guideline range would have been 27-33 months. Instead, he received a sentence intended for hardened career criminals – recidivists whose repeated use of firearms may warrant a stiffer sentence. Michael was no career criminal. He made one mistake in 1984.

Judge James D. Todd struggled with the fifteen-year sentence the law required. He continued the sentencing hearing to research the issue on his own, saying:

> I am not going to impose such a sentence without giving myself an opportunity to look at it some more and try to find a way around it. Because it seems to me this sentence is just completely out of proportion to the defendant's conduct in this case. Now I understand the statute was intended to stop people who have had previous drug convictions from possessing a firearm. I think that's a worthwhile purpose, and I send criminals away regularly for violating that, and I have no hesitation in doing that . . . . I'm not going to impose a sentence of fifteen years without having an opportunity to see if there's some way around it because it just seems to me this is not what Congress had in mind.

In the end though, Judge Todd concluded that he had no choice but to sentence Michael to the mandatory minimum term, but not without expressing his feelings about this outcome:

> I don't think that this is the kind of case that Congress had in mind, where the prior convictions were some fifteen years ago and you've had a relatively clean record since that time. . . . [That said] the court has no authority to depart downward . . . . So it doesn't matter how compelling your circumstances may be, it doesn't matter how long ago those convictions were, and it doesn't matter how good your record has been since those prior convictions. 18 U.S.C. 924(e) requires in your case that you receive a sentence of fifteen years. So the court has no alternative but to impose that sentence.

FAMM profiled Michael's case in its newsletter, and national media, including *Rolling Stone* Magazine and the *Wall Street Journal*, also wrote about it. After six years in prison, Michael's health began to deteriorate due to liver disease. Michael was one of 18 non-violent federal prisoners serving excessive sentences for whom FAMM advocated clemency at the end of President Bill Clinton's term. The outgoing President granted all of the requests submitted by FAMM except Michael's.

In early 2003, Michael began complaining to BOP doctors about painful swollen glands. Despite his history of health problems, months passed, during which time family repeatedly pleaded with authorities to assess his condition. When he was finally taken to the University of Kentucky Medical Center, he was diagnosed with Non-Hodgkins Lymphoma. Michael was hospitalized almost immediately and placed on a very intensive regimen of radiation and, when the radiation failed to control the spread of the disease, chemotherapy. These efforts were to no avail. He developed a particularly aggressive form of cancer, which his doctors considered incurable. He became bedridden and began to suffer great pain.

When his case was determined to be hopeless, he was returned to the prison hospital. At the prison hospital, despite the fact that he was dying, his family, who lived at great distance, was denied access to him for more than one hour a day. On one occasion, his elderly father, who had traveled for hours to the prison by car, was turned away one day and forced to return the next. When staff tried to turn him away again, he had to plead before they would relent and allow him an hour with his dying son. Michael's mother contacted the facility over and over again because of Michael's reports that the medical staff was unresponsive to his requests for additional pain medication.

When it was obvious that he was dying, Michael made a request to prison authorities that he be permitted to return home, where his family was willing and able to care for him in the final weeks of his life. The law governing release in such circumstances, 18 U.S.C. § 3582 (c)(1)(A), places in BOP's hands the task of bringing a motion to the sentencing judge for sentence reduction. Imminent death has always been considered the quintessential "extraordinary and compelling reason" contemplated by the statute. In the spring of 2004, the warden at the Lexington Federal Medical Center sponsored just such a request in Michael's case. The prison social work staff put together a petition, gathered medical evidence, ensured that insurance and a care plan were in place for Michael, and prepared his family to bring him home. We learned from BOP personnel that many who knew Michael at Lexington cared for him and believed it was time for him to go home.

We believed it as well. His further incarceration served no purpose, and under the circumstances it had become an additional form of punishment not contemplated by the court at sentencing. And he was well beyond the point that he was physically capable of

doing any harm, had he ever been capable or inclined. Whatever we as a people had hoped to achieve from imprisoning Michael for a crime he never intended to commit had been accomplished. Requiring him to die alone in prison caused him and everyone who loved him unnecessary pain.

In late July, the warden's request, which had been endorsed by the BOP's regional office, cleared by the BOP's legal office in Washington, and unopposed by the United States Attorney, had been denied by Harley Lappin, the director of the BOP. Mr. Lappin's decision nor to ask the court to approve Michael's early release was apparently based on the nature and circumstances of Michael's 1994 conviction.

Judge Todd, who would have been the deciding judge had the BOP filed a motion seeking Michael's release, immediately wrote to Mr. Lappin, indicating his receptivity to such a motion. He stated that in 20 years in the bench he had never before written to a corrections official on behalf of an inmate he had sentenced. Describing the circumstances of Michael's conviction, he said that "Mr. Mahoney's case has troubled me since I sentenced him in 1994 . . . [as] one of those cases in which a well-intentioned and sound law resulted in an injustice." He said he was aware that Michael was bedridden, suffering great pain and considered near death. He suggested "that . . . a motion [for compassionate release] is the only way to mitigate in a very small way the harshness which 18 U.S.C. § 924 (c) has caused in this unusual and unfortunate case."

Mr. Lappin did not reply. Michael died a few days later.

The federal BOP brings very few petitions for compassionate release under § 3582(c)(1)(A)(ii) to the federal courts each year, generally no more than 20. The applicable standards are not clear, and the administrative process is difficult for inmates

to navigate, particularly if they are sick or disabled. We have been hearing for years from BOP officials that the governing policy guidelines are being revised, but year after year passes without change.

In May 2006, United States Sentencing Commission sent a proposed policy statement to Congress that would provide guidance for courts considering motions from the Bureau of Prisons for early release due to extraordinary and compelling circumstances. Advocates had long urged the Commission to draft a policy statement to help the courts address motions and to give life to Congressional intent that the early release mechanism be used for situations beyond terminal illness or debilitation mental or medical situations.[1] The draft policy statement provided several examples of grounds for early release motions including an affirmation of the core use of the power provided courts under 18 U.S.C. § 3582©(1)(A)(i) to consider, as an extraordinary and compelling circumstance, the fact that the defendant is "suffering from a terminal illness" and the defendant is "not a danger to the safety of any person or to the community, as provided in 18 U.S.C. §3142(g)."[2]

The Department of Justice, considering that proposed policy statement, opposed any expansion of the use of the early release mechanisms, enunciating what Oregon Deputy Federal Public Defender Steve Sady has coined the "death-rattle" criteria. DOJ advocated release only for:

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[1] See Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent'g. Rep. 188 (2001) (discussing legislative history and arguments for expanding use of the power).

[2] U.S.S.G. §1B1.13 and application note 1(A)(i). The inquiry, under 18 U.S.C. § 3142(g) directs the court to take into account familiar factors such as nature and circumstances of the offense, whether the offense was violent, or involved controlled substances, firearms or explosives; the history and characteristics of the defendant, including substance abuse and criminal history. Michael Mahoney posed no danger to anyone at the time he was sentenced and was physically incapable of posing any danger to anyone, even were he inclined to, at the time of his death. He was, for all intents and purposes, incapacitated.

> prisoners who are terminally ill and "with a prognosis (to a reasonable medical certainty) of death within a year," or prisoners "suffering from a profoundly debilitating (physical or cognitive) medical condition that is irreversible and cannot be remedied through medication or other measures, 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 (including personal hygiene and toilet functions, basic nutrition, medical care, and physical safety.)[3]

Despite DOJ's opposition, Congress permitted the policy statement to be adopted.[4] It was hoped that the BOP would take such a policy statement as a signal to use its authority vigorously and as expansively as Congress intended.[5] It has not. Since the policy statement was adopted, the BOP has not brought any motions for early release for other than the terminally ill or incapacitated. And, as far as we know, it has not increased the number of motions for even those situations.

A policy statement guiding judicial discretion is meaningless if the courts are barred from exercising discretion by the Bureau of Prisons whose approach to the process is unchanged. There are neither penal nor societal reasons to continue to incarcerate a dying prisoner who is not now, if he ever was, a danger to the community.[6] The discussion of whether the Department of Justice has assumed too much in preventing worthy motions from reaching courts will have to wait a future paper, but certainly, in

[3] Letter from Michael J. Elston to Hon. Ricardo H. Hinojosa, 2 (July 14, 2006).
[4] U.S.S.G. § 1B1.13.
[5] See, e.g., John Steer and Paula Biderman, *Impact of the Federal Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent'g. Rep. 155 (2001) ([w]ithout the benefit of any codified standards, the Bureau [of Prisons] as turnkey, has understandably chosen to file very few motions under this section.").
[6] For a discussion of the various arguments in favor of compassionate release, see William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release.* Maryland L. Rev. 2009 (forthcoming).

this case, no one can discern a sound reason in law, policy or common sense to justify forcing a Michael Mahoney to die the way he did.

Congress in the Sentencing Reform Act and the U.S. Sentencing Commission signaled clearly that the courts be afforded the discretion to make decisions about which motions for early release to grant. The BOP has not, however, acted to ensure that the courts are able to consider petitions for early release from prisoners whose conditions, medical, terminal or otherwise, might merit it. The new administration can change this culture. The Attorney General can signal his intention that the statute be used as intended by providing a guidance a memo laying out his support for use of the power to reduce a sentence for extraordinary and compelling circumstances consistent with that intended by Congress in the Sentencing Reform Act and by the Commission in its recent guideline amendment. This memo should instruct that the BOP bring motions before the sentencing judge in all cases where the petitioner's circumstances meet the criteria laid out at U.S.S.G. § 1B1.13.

If the Bureau of Prisons is unwilling or unable to exercise this power as Congress intended it may be time for Congress to allow prisoners to petition the court directly, taking the Bureau of Prisons out of the business of controlling compassion. It is a business for which the BOP is ill suited, in light of its primary mission as custodian, and particularly in light of what has become in recent years a routine failure of compassion at the highest reaches of the Bureau. It is particularly inappropriate to have BOP basing its decision, as it did in Michael's case, on perceptions about the gravity of a prisoner's offense of conviction. If the original offense is relevant at all in circumstances like Michael's, it is for the court to judge and not the jailer.. The Bureau would still have an

important role, helping prepare release plans, helping courts assess suitability for release and ensuring an orderly transition in the event early release is granted. These are tasks the BOP takes on routinely when preparing a prisoner to reenter the community. Moreover, permitting the courts to entertain motions from prisoners directly would not prevent the BOP from bringing motions for sentence reduction directly, or from making recommendations to the courts in cases brought directly by prisoners. But pleas like Michael's should not be prevented from reaching the ears of judges, whom Congress intended would make the ultimate decision about release in the sort of extraordinary and compelling circumstances that almost everyone agreed were present in Michael's case.

Michael's life and his lonely and pointless death should remain a reminder to those who work to change the way the government responds to prisoners who are terminally ill, or whose further incarceration is otherwise pointless, unnecessary and cruel.