

August 1, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Issue for Comment: Proposed Priorities for 2004

Dear Judge Murphy:

Families Against Mandatory Minimums writes in response to the Commission's request for comment on its proposed priorities for the amendment cycle ending May 1, 2004.

Level 30 Cap for Defendants Receiving a Mitigating Role Adjustment

FAMM supports without reservation the 2002 amendment to subsection (a)(3) of §2D1.1 that caps offense levels for defendants receiving mitigating role adjustments. The level 30 cap effectively protects low-level drug offenders from exposure to inappropriately harsh sanctions. It lessens reliance on drug quantities alone in sentencing these offenders. We fear that eliminating the cap will result in sentences disproportionate to low-level defendants' actual culpability. Our files contain the stories of many low-level defendants who receive lengthy guideline sentences driven by quantity. The level 30 base offense level cap for defendants who receive mitigating role adjustments ensures that the severity of penalties will reflect such defendants' blameworthiness by giving due consideration to their role in the offense, something we have long supported. We also oppose revisiting the amendment in light of the fact that the cap was unanimously approved and has been in operation less than a year. The issue for comment does not explain why the Commission is considering revisiting the unanimous decision and given that it has been in place less than a year, we argue that it is simply too soon to evaluate how it is being applied. We urge the Commission not to reopen the issue or consider repealing the cap.

Sentence Reductions under 18 U.S.C. § 3582(c)(1)(A)

FAMM commends the Commission for identifying sentence reduction under § 3582(c)(1)(A) as a possible priority area for guideline amendments. Currently, the Bureau of Prisons has interpreted section 3582(c)(1)(A) narrowly to permit motions only in cases of impending death or profound illness or disability. FAMM contends that the statute should be read broadly to permit prisoners to seek compassionate release for non-medical extraordinary and compelling reasons. FAMM has long supported the formulation of criteria, content, and examples to guide judges in interpreting section 3582(c)(1)(A). See Letter to Diana E. Murphy, June 25, 2001. Such guidance may provide the Bureau of Prisons the confidence to refer more cases to the courts.

[136]

The Honorable Diana E. Murphy
August 1
Page 2

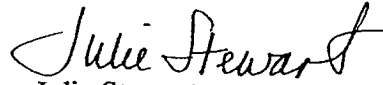
We have appended *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, published in the Federal Sentencing Reporter in 2001 to further explain and support our position. The article reviews legislative history in support of our position and recommends specific language for a policy statement.

3. Cocaine Sentencing Policy

FAMM urges the Commission to reconsider cocaine sentencing policy as a priority area in the upcoming amendment cycle. As the Commission's excellent 2002 report *Cocaine and Federal Sentencing Policy* emphasizes, the current penalties for crack cocaine are unsupported and should be lowered. FAMM remains committed to advocating for a reduction in the penalties imposed on defendants sentenced for crack cocaine offenses, and we look forward to further action from the Commission.

Thank you for considering our opinions. We look forward to working with you this year.

Sincerely,



Julie Stewart
President



Mary Price
General Counsel

Enclosure

The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)



MARY PRICE

General Counsel,
Families Against
Mandatory Minimums
Foundation (FAMM).

While many people are familiar with the Guidelines safety valve, a lesser-known provision tucked away in the federal criminal code has the potential to be an even more powerful way to relieve the incarceration pressure. Title 18, Section 3582(c)(1)(A) allows a court, upon the motion of the Director of the Bureau of Prisons, to reduce a sentence for "extraordinary and compelling" reasons. The Sentencing Commission has an important, but unfilled, role to play in this process. If it follows Congress's intent, the Commission can breathe life into § 3582(c)(1)(A) and make it a meaningful safety valve in a wide range of cases.

On June 25, 2001, Families Against Mandatory Minimums (FAMM), urged the Sentencing Commission to promulgate a policy statement, pursuant to 28 U.S.C. § 994(t), to guide judges considering sentence reduction motions based on "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A). FAMM took this action after learning that such sentence reduction are quite rare, and are generally made only when the prisoner is close to death.

Today, the absence of a guided post-sentencing safety valve means that many cases presenting compelling reasons for sentence reduction are not brought to the courts, but funneled, if pursued at all, through the executive clemency process. Reliance on the President's commutation power to handle such cases is no longer necessary since Congress established in § 3582(c)(1)(A) a method by which the Bureau of Prisons and the courts can address them. That section authorizes courts, with guidance from the Commission, to grant relief in appropriate cases. FAMM's proposal that the Commission provide such guidance is appended to this article.

A. Authority for Post-Conviction Sentence Modification under the SRA

The Sentencing Reform Act (SRA) and the guideline sentencing system it established are premised upon the view that judicial sentencing discretion should be structured and not eliminated. Congress was not seeking to establish a mechanical system devoid of human judgment, but a system in which the exercise of discretion was guided and controlled. While one of Congress's goals was to ensure the finality of sentences, Congress also recognized that sometimes other considerations are important enough to warrant changing a sentence that has otherwise become final.

The SRA provides several ways of modifying an otherwise final sentence. It amended Rule 35 of the Federal

Rules of Criminal Procedure to authorize the court, upon motion of the government, to reduce a sentence to reflect substantial assistance to the government rendered by a defendant after imposition of sentence. It also provides two methods for modifying an otherwise final sentence requiring some action by the Commission. One, set forth in § 3582(c)(2), authorizes the court to reduce a sentence where the Sentencing Commission has reduced the guideline range applicable to the defendant. The motion for reduction of sentence may be made either by the defendant or by the Director of the Bureau of Prisons (BOP), and any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." The Commission is independently required to issue such guidance by 28 U.S.C. § 994(u), and it has complied with that mandate by promulgating and from time to time amending § 1B1.10.¹

The second method for modifying an otherwise final sentence that involves the Commission is set forth in § 3582(c)(1)(A). That provision authorizes the court, upon motion of the Director of the Bureau of Prisons, to reduce a sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction."² As under its companion provision (c)(2) discussed above, the court must find that the reduction is consistent with "applicable policy statements issued by the Sentencing Commission." The Commission is similarly directed to issue such guidance by 28 U.S.C. § 994(t). To date, the Commission has not done so.

B. Criteria for Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)

Although 18 U.S.C. § 3582(c)(1)(A) speaks of "extraordinary and compelling reasons," in practice the Director of the Bureau of Prisons has moved for a reduction on behalf of terminally ill prisoners, or, in recent years on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life."³ We believe that Congress intended a broader application than that. The plain language of 28 U.S.C. § 994(t) and the legislative history of 18 U.S.C. § 3582(c)(1)(A) evidence a congressional intent that the statutory term "extraordinary and compelling" should embrace a variety of circumstances arising after a sentence becomes final, including not simply changes in an inmate's circumstances but also changes in the law.

The congressional mandate in 28 U.S.C. § 994(t) calls for a policy statement that must contain "the criteria to be applied and a list of specific examples." The

only limitation placed upon the Commission by this section is that "rehabilitation alone shall not be considered an extraordinary and compelling reason." Clearly Congress intended that rehabilitation was a legitimate consideration to be taken into account in deciding whether a case presented extraordinary and compelling reasons, even if it had to be combined with some other factor or characteristic. There is nothing to suggest that the other factor had to be a terminal illness, or indeed illness of any sort.

The Senate Judiciary Committee's Report on the SRA—the authoritative source of legislative history for the SRA—states:⁴

The Committee believes 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, 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.

The distinction in the Senate Report between "severe illness" and "other extraordinary and compelling reasons" demonstrates that non-medical considerations may constitute appropriate grounds for release, consistent with the overall congressional goal that these provisions act as a safety net held by the court.

The value of the forms of "safety valves" contained in this section lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling reasons" and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.⁵

C. Bureau of Prisons Policy and Practice under 3582(c)(1)(A)

Despite the broad authority contemplated by Congress, in the absence of guidance from the Commission, the Bureau of Prisons, as noted above, has generally limited motions under § 3582(c)(1)(A) to cases where the death of the prisoner is imminent.⁶ There is no requirement, however, in the BOP's own policies and regulations that such motions be so limited.

In 1994 the BOP revised its internal guidance to

executive staff, expanding the classes of cases eligible for early release consideration.⁷ The Bureau had previously confined its motions to those on behalf of terminally ill inmates within six months of death. In the memorandum, Director Hawk advised the staff that the BOP had extended the outer limit of life expectancy to twelve months. Of greater significance, she noted that estimated life expectancy was "a general guideline, not a requirement."

As we have further reviewed this issue, it has come to our attention that there may be other cases that merit consideration for release. These cases still fall within the medical arena, but may not be terminal or lend themselves to a precise prediction of life expectancy.

The BOP Memorandum sets forth factors to consider when evaluating which cases to present to the court (*i.e.*, nature and circumstance of the crime, inmate characteristics and propensity to reoffend, the inmate's age, risk to the public, etc.). It also presents some guidance based on the nature and severity of the prisoner's illness and sets out three, presumably non-exhaustive examples. They include prisoners with debilitating diseases that clearly limit daily activity and for which conventional treatment is insufficient, those whose condition is terminal but not calculably so, and those who require organ transplantation. This more expansive reading of the power, while still narrower than Congress intended, is consistent with congressional intent as revealed in the legislative history of § 3582(c)(1).

Bureau of Prisons published regulations contemplate that sentence reduction motions may be brought in cases not involving medical considerations. The Bureau of Prisons regulation setting out the procedures for seeking and submitting requests under § 3582 and its "old law" predecessor, 18 U.S.C. § 4205(g), discusses grounds other than the prisoner's health for seeking a BOP motion to reduce sentence for extraordinary and compelling reasons. For example, under 28 C.F.R. § 571.61, entitled "Initiation of request—extraordinary and compelling circumstances," the Bureau directs that the prisoner's request include, *inter alia*, proposed plans upon release, including the proposed residence, how the prisoner will support him or herself, and "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment." The regulation thus assumes that some extraordinary and compelling circumstances warranting a motion need not be based on the prisoner's health. The BOP process for handling such motions seems to confirm that sentence reduction motions under § 3582(c)(1)(A) may be made on non-medical grounds. The applicable regulations provide for the review of

such motions by the Warden, the Regional Director, the General Counsel, "and either the Medical Director for medical referrals or the Assistant Director, Correctional Programs Division for non-medical referrals" Clearly, if medical and terminal considerations were the only permissible bases for sentence reductions, the specific provision for alternative routing of "non-medical referrals" would be superfluous.

D. Conclusion

The legislative history and the plain language of the SRA amply demonstrate that Congress intended the courts to entertain motions under 18 U.S.C. § 3582 (c)(1)(A) for a variety of circumstances considered so extraordinary and compelling that they warrant a reduction of sentence. The BOP regulations recognize that, despite current practice, such extraordinary and compelling reasons are not limited to medical concerns. But a policy statement from the Commission is needed to provide courts considering motions for sentence reduction with the guidance that Congress directed. That policy statement should embrace a definition of "extraordinary and compelling" flexible enough to account for a variety of post-sentence developments that merit relief. That is what Congress intended.

Notes

¹ § 1B1.10, p.s. authorizes a reduction in the term of imprisonment when the Commission has determined that a particular amendment to the Sentencing Guidelines is retroactively applicable. Such retroactive amendments are listed in subsection (c), and only those listed amendments can be the basis for a motion seeking a reduction in sentence under 18 U.S.C. § 3582 (c)(2).

² 18 U.S.C. § 3582 (c)(1)(A) also authorizes a sentence reduction motion for a prisoner who is at least 70 years old, has served at least 30 years on a sentence imposed under 18 U.S.C. § 3559(c), and the Director of the Bureau of Prisons has determined that the prisoner is no longer a danger to the safety of any other person or the community. This provision, specifically applicable only to "three strikes" offenders, was added to § 3582(c)(1)(A) in 1994 by Pub. L. 103-322.

³ See Chart: Bureau of Prisons Compassionate Releases, 1990-2000 (attached as Exhibit II), prepared by the Bureau of Prisons Office of Congressional Affairs (on file with the author.)

⁴ "The most important legislative history for the Act [SRA] is found in the report of the Senate Judiciary Committee on the Comprehensive Crime Control Act of 1983 [S.Rep. No.225, 98th Cong., 1st Sess. 37-150, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373]." Criminal Div., U.S. Dep't of Justice, Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing reform Act of 1984, at 83 (Nov. 1, 1987), reprinted in THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE SUPPLEMENTAL Appendix 11 (1989). The quote in the text appears at page 55 of the Senate Report.

⁵ *Id.* at 121.

⁶ As John Steer & Paula Biderman point out in their article: "[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." John Steer and Paula Biderman, *Impact of the Federal Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT. REP. 155 (2001).
⁷ Memorandum from Kathleen M. Hawk, Director, Federal Bureau of Prisons (July 22, 1994) (BOP Memorandum) (on file with author).

⁸ 28 C.F.R. § 571.62 (a) (emphasis supplied). See also 28 C.F.R. § 571.62 (a)(3) (directing that the General Counsel "solicit the opinion of either the Medical Director or the Assistant Director . . . depending on the nature of the basis of the request") and 28 C.F.R. § 571.62 (c) (stating that "[i]n the event the basis of the request is the medical condition of the inmate, staff shall expedite the request at all levels.")

Exhibit I

FAMM Proposal for Policy Guidance under 18 U.S.C. § 3582 (c)(1)(A)

§ 1B1.13

Reduction in Term of Imprisonment as a Result of Motion by Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if the court determines that—

(1) either—

(A) an extraordinary and compelling reason warrants the reduction; or

(B) the defendant (i) is at least 70 years old, (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned, and (iii) the Director of the Bureau of Prisons has determined, after considering the factors set forth in 18 U.S.C. § 3142(g), that the defendant is not a danger to the safety of any other person or to the community; and

(2) such reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

(b) An "extraordinary and compelling reason" is a reason that involves a situation or condition that—

(1) was unknown to the court at the time of sentencing;

(2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of sentencing; or

(3) the court was prohibited from taking into account at the time of sentencing but would not

longer be prohibited because of changes in applicable law.

An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

Commentary

APPLICATION NOTE:

The term "extraordinary and compelling reason" includes, for example, that—

- (A) the defendant is suffering from a terminal illness that significantly reduces the defendant's life expectancy;
- (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of a permanent physical or mental condition for which conventional treatment promises no significant improvement;
- (C) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;
- (D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
- (E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
- (F) the defendant received a significantly higher sentence than other similarly situated codefendants because of factors beyond the control of the sentencing court;
- (G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

Rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason.

Background: Under 18 U.S.C. § 3582(c)(1)(A), the court, upon motion of the Director of the Bureau of Prisons, can reduce the term of imprisonment if the court determines that (1) the reduction is warranted by extraordinary and compelling reasons or (2) the defendant is at least 70 years old and has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(c) for the offense for which the defendant is imprisoned and the Director of the Bureau of Prisons has determined that the defendant is not a danger to the safety of another person or the community. The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be con-

sidered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A), including the criteria to be applied and a list of specific examples." This policy statement implements 28 U.S.C. § 994(t).

Exhibit II

Bureau of Prisons Compassionate Releases 1990–2000

Year	Number	Summary of Releases of Releases Granted
1990	11	Inmates with life expectancy less than twelve months
1991	10	Inmates with life expectancy less than twelve months
1992	16	Inmates with life expectancy less than twelve months
1993	28	Inmates with life expectancy less than twelve months
1994	23	Inmates with life expectancy less than twelve months
1995	22	Inmates with life expectancy less than twelve months
1996	23	Inmates with life expectancy less than twelve months
1997	13	Inmates with life expectancy less than twelve months
1998	22	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Significant Mental Impairment secondary to attempted suicide)
1999	27	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. advanced cirrhosis of the liver, total care stroke patient)
2000	31	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Alzheimer's Disease, Significant Mental Impairment)