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August 1, 2003

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Notice of Proposed Priorities for Cycle ending May 1, 2004

Dear Judge Murphy:

I am writing in my capacity as chair of the ABA Criminal Justice Section's Corrections and Sentencing Committee, to commend the Commission for proposing the issue of sentence modification under 18 U.S.C. § 3582(c)(1)(A) as a priority during the coming amendment cycle. This issue has long been of particular concern to this Committee, and we have written twice in recent years to urge the Commission to take up this important piece of unfinished business. We are gratified that it has now apparently decided to do so. (Copies of our letters of October 10, 2001, and June 15, 2002, are attached.)

Since we last wrote to the Commission on this subject in the spring of 2002, the ABA House of Delegates adopted in February 2003 new ABA policy on sentence modification mechanisms. This new ABA policy speaks directly to the issues implicated by § 3582(c)(1)(A) and the Commission's mandate under 28 U.S.C. § 994(t), and provides further support for the argument that the Commission should give a generous construction to the open-ended language of § 3582 (c)(1)(A). We attach that resolution and accompanying report for your consideration.

The report speaks to the importance of having some "safety valve" in a determinate sentencing scheme to permit the government to address "extraordinary and compelling" situations that arise after sentencing:

If a safety valve was considered an essential component of a sentencing scheme prior to the advent of

determinate sentencing, today it is even more essential, because rule-based sentencing may preclude or limit a court's ability to take into account at sentencing the potential for extraordinary developments in a particular case. For example, a prisoner sentenced while in the early stages of a serious chronic illness may have no possibility of release if the progress of his disease makes his sentence more onerous than anticipated or intended. Similarly, when a mother must leave behind young children in the care of family members, there may be no way to ensure that intervening events do not leave them effectively orphaned. Particularly where a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem reasonable to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term.

Report at 3.

As to what may constitute an "extraordinary and compelling" situation, the report takes the position that government should not "restrict use of a 'safety valve' mechanism to cases involving medical or health-related concerns." Report at 5. Rather, "[w]e hope that jurisdictions will want their criteria to be sufficiently broad and elastic to allow consideration of such non-medical circumstances as old age, changes in the law, heroic acts or extraordinary suffering of a prisoner, unwarranted disparity of sentence, and family-related exigencies." Report at 5.

The ABA report specifically discusses the federal "safety valve" mechanism in § 3582(c)(1)(A), noting the breadth and flexibility of the statutory language. Moreover, "the legislative history of this statute indicates that Congress intended its authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration." Report at 4, citing Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. Rptr. 188 (2001). For example, the Senate Report accompanying the statute states:

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.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.C.A.N. 2338-39.

That Congress intended § 3582(c)(1)(A) to be used in a variety of non-medical circumstances is further evidenced by the admonition to the Commission in the final sentence of § 994(t) that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reasons." This sentence shows that Congress expected rehabilitation to be a relevant if not determinative criterion in some cases, and thus that terminal illness and medical disability would not be the only circumstances in which sentence modification might be appropriate under this section. In fact, the predecessor "old law" analogue to § 3582(c)(1)(A), 18 U.S.C. § 4205(g), whose authority Congress professed to be continuing unchanged, was used to reduce sentences in a variety of non-health-related circumstances. *See, e.g., U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced on motion under § 4205(g) because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(same).

The Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A), has interpreted its mandate under this statute very narrowly, reserving it for cases of terminal illness and profound disability. In the ten years between 1990 and 2000, only 226 prisoners had their sentences reduced pursuant to this authority, almost exclusively on grounds that they were near death. *See Price, supra*, at 189. Lack of policy guidance from the Commission may in part account for the Bureau's conservative interpretation of its statutory mandate. *See, e.g., John R. Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001). The Commission is thus in an excellent position to ensure that the statutory authority can be utilized as intended by Congress, by providing criteria, content, and examples on which the BOP may rely in bringing cases to the attention of courts.

Thank you for considering our comments. We stand ready to assist the Commission in any way we can in this very important matter.

Sincerely,



Margaret Colgate Love
Chair, Corrections and Sentencing
Committee

Enclosures

cc: All Commissioners
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.
Albert J. Krieger, Chair, Criminal Justice Section

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October 10, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

As co-chairs of the Committee on Corrections and Sentencing of the American Bar Association's Criminal Justice Section, we have been authorized to write to reiterate an earlier request from this Committee that the Commission adopt a policy statement regarding sentence reduction motions pursuant to 18 U.S.C. § 3582(c)(1)(A) in the upcoming amendment cycle.

ABA policy provides that procedures relating to compassionate release should be "fully integrated into the law of sentencing, especially with respect to issues such as eligibility for such release." ABA House of Delegates, February 1996, Report 113B. We are concerned that in the absence of guidance from the Commission it has been difficult to identify substantive bases for sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A), and develop appropriate procedures for obtaining judicial consideration of deserving cases.

For your convenience, we enclose a copy of a letter sent to you last June by Professor Michael Goldsmith, our immediate predecessor as chair of this Committee. As Professor Goldsmith's letter points out, the Sentencing Reform Act of 1984, in a provision codified at 28 U.S.C. § 994(t), specifically directed the Commission to describe and give examples of "extraordinary and compelling circumstances" warranting early release under 18 U.S.C. § 3582(c)(1)(A). However,

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The Honorable Diana E. Murphy

October 10, 2001

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the Commission has not yet responded to this directive. We urge that the Commission develop policy to implement 18 U.S.C. § 3582(c)(1)(A) during the current amendment cycle. In doing so the Commission will provide the guidance Congress intended to courts considering sentence reduction motions under this provision, and to the Bureau of Prisons in making them.

We have reviewed the Commission's current list of priorities, and we recognize that the development of policy for compassionate release motions could be undertaken in conjunction with the 15 Year Study the Commission plans to begin this year, as Professor Goldsmith notes in his letter. Alternatively, it could be made a goal for the upcoming amendment cycle, and we believe this would be preferable for the need is urgent. We therefore hope that the Commission will consider this request at its upcoming meeting.

Thank you very much for your consideration.

Sincerely,

Margaret C. Love, Co-Chair
Corrections & Sentencing Committee

Jeffrey G. Shorba, Co-Chair
Corrections & Sentencing Committee

cc: The Honorable John R. Steer
Professor Michael Goldsmith

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June 15, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

I enjoyed visiting with you briefly at the recent PLI conference on corporate compliance programs. As you may know, I serve as Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section. The Committee recently voted to urge that the U.S. Sentencing Commission give high priority in the next amendment cycle to the development of guidance for the issuance of sentence reduction orders under 18 U.S.C. § 3582(c)(1)(A), as required by 28 U.S.C. § 994(t).

In 18 U.S.C. § 3582(c)(1)(A), Congress recognized that "extraordinary and compelling" circumstances may warrant a prisoner's early release. Upon motion of the Director of the Bureau of Prisons, the court may reduce a sentence if the reduction is consistent with "applicable policy statements issued by the Sentencing Commission." In 28 U.S.C. § 994(t), Congress directed the Commission to "describe what shall be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Commission has not yet responded to this directive.

In an article to be published in a forthcoming issue of the Federal Sentencing Reporter, Commissioner John Steer notes that, without benefit of guidance from the Commission, the Bureau of Prisons has interpreted § 3582(c)(1)(A) narrowly and implemented it cautiously:

Although the Bureau has no formal criteria, the few motions filed each year have been on behalf of inmates who are terminally ill, with a prognosis of having less than a year to live.

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The Bureau takes into account the nature of the defendant's criminal activity and a proposed written release plan. Before the Director of the Bureau considers whether to file a motion, a request for compassionate release is subject to multiple levels of review; the warden, the regional director, the General Counsel, and then a Bureau medical professional must approve the request.

Because the statute grants absolute discretion to the Director, the decision to file a motion is not subject to review. If a motion is filed, there is no meaningful review of a court's refusal to grant the motion, because, at least at this time, there are no policy statements applicable to modification of a sentence under 18 U.S.C. § 3582(c)(1).

Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

See John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Commutation Power," 13 Fed. Sent. Rptr. ____ (2001)(forthcoming).

Commissioner Steer's observations are consistent with the legislative history to this provision. In pertinent part, the accompanying Senate Report states:

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.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.A.A.N. 2338-39 (emphasis added).

The issue of what constitutes "extraordinary and compelling" grounds for sentence reduction is an important and timely one, in light of (a) the growing number of aged and ill inmates in the federal system, (b) the economic costs of incarceration, and (c) the Congressionally recognized need to respond appropriately to equitable considerations arising after the imposition of sentence. Accordingly, the Committee respectfully urges the Commission to make the

development of standards for the implementation of § 3582(c)(1)(A) a priority matter during the coming year.

Sincerely,

Michael Goldsmith
Chair and Professor of Law

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES
RECOMMENDATION

1 RESOLVED, That the American Bar Association urges federal, state,
2 territorial and local governments to evaluate their existing laws, as well as their
3 practices and procedures, relating to the consideration of prisoner requests for
4 reduction or modification of sentence based on extraordinary and compelling
5 circumstances arising after sentencing, to ensure their timely and effective
6 operation.

7
8 FURTHER RESOLVED, That the American Bar Association urges these
9 jurisdictions to develop criteria for reducing or modifying a term of
10 imprisonment in extraordinary and compelling circumstances, provided that a
11 prisoner does not present a substantial danger to the community. Rehabilitation
12 alone shall not be considered an extraordinary and compelling circumstance.

13
14 FURTHER RESOLVED, That the American Bar Association urges these
15 jurisdictions to develop and implement procedures to assist prisoners who by reason of
16 mental or physical disability are unable on their own to advocate for, or seek review of
17 adverse decisions on, requests for sentence reduction

REPORT

In the 1980s, rehabilitation of prisoners fell out of favor and "truth in sentencing" movements swept through Congress and state legislatures. The federal Sentencing Reform Act of 1984 and similar state laws abolished parole and required defendants to serve a fixed term in prison, without hope for early release from a parole board based on their good behavior. Release dates under such a sentencing regime are now largely determined at the time of sentencing.

One of the consequences of the movement to determinate sentencing was the restriction or elimination of "safety valve" mechanisms once available to seek mid-term reduction of sentence. In some jurisdictions there is no authority for courts or prison officials to modify a sentence once it has become final, even when unforeseen post-sentence developments made a prisoner's continued incarceration inappropriate or unjust. Other jurisdictions rely upon ad hoc and necessarily arbitrary mechanisms to deal with various compelling situations that may present themselves from time to time. Jurisdictions that do have a sentence reduction authority tend to construe it narrowly, invoking it only in cases of imminent death or total disability.

The absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice. Executive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon.

That the new sentencing regimes make no provision for handling extraordinary post-sentence developments seems less an expression of political will than simple oversight. Determinate sentencing simply swept out all early release mechanisms, without considering the need to address those later-developing circumstances not contemplated at the time of sentencing. As a result, people whose continued confinement no longer makes legal or moral sense may languish for years without a way to draw attention to their situation. There should be a way of examining such cases and, if appropriate, dealing with them equitably and compassionately.

The American Bar Association therefore urges jurisdictions to evaluate their current laws and practices relating to sentence modification and reduction, and to establish or reinvigorate "safety valve" mechanisms to deal with cases involving extraordinary and compelling post-sentence developments that make a prisoner's continued incarceration inappropriate or unjust. The resolution

contemplates that jurisdictions will take a broad view of any existing authority to reduce sentences, that they will enact new laws where necessary, and that they will ensure that these laws are administered in a timely and effective fashion.¹ The measures we advocate are not intended to inaugurate any general across-the-board sentence reduction measures, or substitute for more general sentencing reform.² Rather, they are intended to serve the limited function of dealing with truly exceptional cases under existing determinate systems.

The resolution also urges jurisdictions to develop specific criteria by which decision-makers can determine when it will be appropriate to reduce or modify a term of imprisonment. Historically, post-conviction sentence reduction measures have provided a safety valve to deal not only with such circumstances as severe illness or impending death, and physical or mental disability, but also with extreme old age, subsequent changes in applicable law, extraordinary assistance to the government, compelling changes in personal or family circumstances, or some combination of these. They have also proven useful to effect a promised but undelivered consideration for assistance to the government, to correct unjustifiable disparity of sentence among similarly situated co-conspirators, or to cure mistakes in a sentence not discovered in time for the court to correct in the ordinary course.³

¹ These measures are especially timely in light of the increasing pressure on prison budgets posed, in part, by the enormous cost of incarcerating so many people. At the same time, it bears emphasis that our recommendations are not so much about prison economies as they are about the proper working of the justice system.

² The "safety valve" authority we recommend may thus be contrasted with the risk review committees recently established by the State of Louisiana to review the cases of, and consider for early release, all non-violent offenders originally sentenced under mandatory minimum sentencing laws that were subsequently relaxed. See Ryan S. King and Marc Mauer, *State Sentencing and Corrections Policy in an Era of Fiscal Restraint*, The Sentencing Project, February 2002; Judith Greene and Vincent Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis*, Justice Policy Institute, February 2002. This is not to say that subsequent changes in the law might not be grounds for reduction of an individual prisoner's sentence, particularly if it were combined with other circumstances such as old age or ill health.

³ See, e.g., *U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(same).

If a safety valve was considered an essential component of a sentencing scheme prior to the advent of determinate sentencing, today it is even more essential, because rule-based sentencing may preclude or limit a court's ability to take into account at sentencing the potential for extraordinary developments in a particular case. For example, a prisoner sentenced while in the early stages of a serious chronic illness may have no possibility of release if the progress of his disease makes his sentence more onerous than anticipated or intended. Similarly, when a mother must leave behind young children in the care of family members, there may be no way to ensure that intervening events do not leave them effectively orphaned. Particularly where a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem reasonable to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term.

A comprehensive review conducted on behalf of this Committee in 1995 found that only about half the states made formal provision for release of terminally ill prisoners.⁴ Moreover, statutes providing for early release of ill and disabled prisoners, including so-called "medical parole" statutes, are seldom used. In 1996, a study of state and federal early release provisions by the U.S. Justice Department's Office of Justice Programs found that only 20 jurisdictions had actually released any prisoners pursuant to these authorities.⁵

In the federal system, the sentencing court has statutory authority to reduce an imposed term of imprisonment, upon motion of the Director of the Bureau of Prisons (BOP), if the court finds that "extraordinary and compelling reasons"

⁴ See *Compassionate Release of Terminally Ill Prisoners*, Draft Report of the ABA Corrections and Sentencing Committee's Compassionate Release Working Group, October 1995. Other states rely upon executive clemency, administrative leave or furlough, and parole. See *Incarceration of the Terminally Ill, Current Practices in the United States*, The Grace Project, Volunteers of America 5 (2001). See also Marjorie P. Russell, "Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners - Is the Cure Worse than the Disease?," 3 *Widener J. Pub. L.* 799, 836 n.10 (1994).

⁵ See Office of Justice Programs, U.S. Department of Justice, *Update: HIV/AIDS, STDs and TB in Correctional Facilities (1996-1997)* at xiv. A total of 153 prisoners were released in 1996 nationwide for medical reasons. California, with a prison population of some 150,000, grants an average of 28 compassionate releases annually N.N. Dubler, & B. Heyman, *End-of-life care in prisons and jails*, in M. Puisis (ed.), *Clinical Practice in Correctional Medicine* 355-364 (1998). New York's 1992 Medical Parole Law resulted in a total of 215 releases in the seven years ending in 1998. See J.A. Beck, *Compassionate release from New York state prisons: Why are so few getting out?*, 27 *Journal of Law, Medicine, & Ethics*, 216-233 (1999).

warrant such a reduction. See 18 U.S.C. 3582(c)(1)(A). The legislative history of this statute indicates that Congress intended its authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration.⁶ In practice, however, BOP invokes the statute only in cases of imminent death or severe mental illness or physical incapacitation. In the ten years between 1990 and 2000, only 226 prisoners were released pursuant to this authority.⁷

It seems apparent that, as currently designed, most sentencing systems cannot routinely accommodate the variety of post-conviction developments that may warrant revisiting a sentence after it has become final. That is why the ABA urges jurisdictions to design flexible review mechanisms that will permit sentence reduction in the rare and deserving case.⁸ Recognizing that there are many different forms that an effective sentence reduction mechanism might take,

⁶ See Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 *Fed. Sent. Rptr.* 188(2001).

⁷ See Price, *supra* note 6 at 191. Under current BOP practice, requests for reduction of sentence must be approved at an institutional level by the prison warden, and then at a regional level, and finally at the national level by the Director herself. Because BOP does not keep a record of requests for sentence reduction that are not approved at the institutional level, it is impossible to tell what percentage of the total number of requests are subsequently brought to the attention of the court. The paucity of sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A) may reflect a lack of guidance to BOP, rather than a lack of political will or failure of compassion. See John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 *Fed. Sent. Rptr.* 154, 157 (2001) ("Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section."). Without direction about what situations might warrant revisiting a sentence, corrections officials are reluctant to expand the reach of "extraordinary and compelling reasons" much beyond the clearly identifiable case of imminent death. The United States Sentencing Commission has recently undertaken to develop substantive guidance for a court in considering motions under 18 USC § 3582 (c)(1)(A), including examples of circumstances that are sufficiently "extraordinary and compelling" to warrant reduction, in accordance with 28 U.S.C. § 994(t).

⁸ We do not extend our recommendations to any particular decision-making procedure. However, we note that prison officials have from time to time expressed concern about being placed in a position of deciding which cases are meritorious and which are not, even where a court has the ultimate authority to reduce a sentence. This concern seems particularly well-founded where the grounds advanced by a prisoner for sentence reduction relate to some non-medical circumstance outside the expertise and interest of prison officials. Accordingly, we recommend that jurisdictions consider alternative ways of administering sentence reduction mechanisms that would relieve prison officials of a gatekeeper function that they evidently regard as inappropriate and even compromising. In addition to placing actual authority to reduce a sentence in a court or separate administrative body, consideration should be given to allowing individuals direct access to the decision-making authority.

including a return to the sentencing court, an administrative review procedure, and even executive clemency, the ABA encourage jurisdictions to experiment to find processes that work effectively and efficiently. Whatever form the mechanism takes, it ought to be easily engaged by prisoners and their outside advocates.

Similarly, the grounds for sentence reduction may vary from jurisdiction to jurisdiction. This resolution aims only to return to governments the tools of compassion, not to dictate how they will be used. That said, however, we do not believe that governments should restrict use of a "safety valve" mechanism to cases involving medical or health-related concerns. While specialized medical furlough and geriatric release procedures may provide some guidance for how to administer sentence reduction authority, we hope that jurisdictions will want their criteria to be sufficiently broad and elastic to allow consideration of such non-medical circumstances as old age, changes in the law, heroic acts or extraordinary suffering of a prisoner, unwarranted disparity of sentence, and family-related exigencies.⁹

The resolution specifically states that "rehabilitation alone shall not be considered an extraordinary and compelling circumstance," underscoring the special-purpose nature of the sentence reduction mechanism we are

⁹ The legislative history of the federal sentence reduction statute describes it as a "safety valve" to be used

in 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.

S. Rep. No. 225, 98th Cong., 1st Sess. 37, 55. Regulations published by BOP implementing this authority contemplate that it will be used in non-medical cases. See 28 C.F. R. §§ 571.61, 571.62. Regulations implementing an earlier formulation of this sentence reduction authority, 18 U.S.C. § 4205(g), specifically provide that BOP could use the statute "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," such as "if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill." 28 C.F.R. §§ 579.40(a), (b). See also *Turner v. United States Parole Commission*, 810 F. 2d 612, 617 (7th Cir. 1987) (§ 4205(g) regulations "only very loosely identifi[y] the classes of cases that the Bureau may review for possible motions," and "reveal the Bureau's retention of the entire discretion granted to it under the statute."). The legislative history of § 3582(c)(1)(A) indicates that its authority was intended to be at least as broad as the authority in § 4205(g), and perhaps broader. See S. Rep. No. 225, *supra*. This seems appropriate in light of the limitations placed by the guidelines on a sentencing court's ability to consider a defendant's personal circumstances, and the elimination of parole.

recommending.¹⁰ At the same time, it also indicates that a prisoner's rehabilitation may legitimately be considered in combination with other factors in deciding whether the a prisoner's situation presents "extraordinary and compelling" reasons for sentence reduction.

The ABA also recommends that jurisdictions implement measures to ensure that physically and mentally challenged prisoners have access to assistance, from family members or other advocates, when seeking sentence reductions or appealing adverse decisions. This is particularly important in systems that require prisoners to initiate requests personally or to maintain active advocacy, which are ill-suited for persons nearing death or otherwise too ill or incapacitated to engage the process meaningfully.

This resolution represents a significant extension of existing ABA sentencing policy. The ABA Sentencing Standards authorize reduction of sentences that have otherwise become final in only two circumstances, both of which are time-limited: Standard 18-7.1 contemplates that a court may revisit and reduce a sentence within a specified period of time following its imposition; and, Standard 18-7.2 addresses sentence modification only while a case remains under the jurisdiction of the sentencing court, which the commentary makes clear does not include situations involving confinement. The instant resolution contemplates a sentence reduction authority that by definition is open-ended, permitting mid-course corrections whenever significant post-sentence developments not anticipated by the sentencing court present themselves.

The resolution also expands on the criteria for sentence reduction in existing ABA policy. The resolutions on compassionate release adopted in 1995 and 1996 addressed only terminal illness and physical incapacity as grounds for sentence reduction. In August of 2002 the House adopted a policy encouraging jurisdictions to "adopt and fully implement" mechanisms for the early release of terminally ill and incapacitated inmates, and also to "assess the desirability of applying such mechanisms to elderly or other prisoners in specified circumstances." The instant resolution would encourage jurisdictions to make use of the tools of compassion in a wider variety of circumstances, though it would leave each jurisdiction to decide for itself exactly what circumstances are so "extraordinary and compelling" as to warrant early release.

¹⁰ This phrase is taken almost verbatim from the statutory provision directing the United States Sentencing Commission to develop policy guidance for sentencing courts in considering motions made by the Director of BOP under 18 U.S.C. § 3582(c)(1)(A). See 28 U.S.C. § 994(t).

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Re: Fed Reg. Notice-Proposed Priorities for amendment cycle May 1, 2004., due by Aug 1, 2003

Issue: Priority Number (12) listed on tentative priorities list (limitation on the base offense level for minor players for narcotics offenses) as compared to the **nonexistent** corollary limitation for defendants convicted of pseudoephedrine crimes for the same offense.

Relevant guidelines: §2D1.1(a)(3) allows a cap of level 30 if a defendant is convicted of a narcotics offense and receives a minor role. §2D1.11, the guideline equivalent for defendants convicted of pseudoephedrine offenses, has no corollary cap of level 30. §2D1.11 (c)(1) cross references §2D1.1 BUT ONLY if the offense involves narcotics and carries a greater penalty.

Discussion: Currently, in *United States vs. Mohammed Salem* (2001 EDCR62 RT in the Central District of California, the defendant was convicted of distributing pseudoephedrine. The government agrees he is eligible for a minor role. However, since the guidelines only have a limitation for narcotics defendants, defendant Salem is facing a base offense of 38. This is unfair and unreasonable. If defendant Salem had been distributing methamphetamine, he would have been eligible for the limitation of 30. There are other defendants like this one currently and more in the future.

Reason to make it a priority: The commission already is tentatively reviewing the limitation of §2D1.1(a)(3) as stated in (12) of its tentative priorities. Therefore, it would be a good use of resources to review the omission and/or non application of the limitation that is currently found in §2D1.1(a)(3). In cases where guideline §2D1.11 applies, there is no such limitation and there should be. Narcotics offenses are far more serious and have life statutory maximums where pseudoephedrine only have a twenty year statutory maximum. In addition, prior to the May 1, 2001 "emergency" increase, pseudoephedrine crimes had a base offense cap of level 30. The base offense was increased without much public comment to 38 at the same time the MDMA guidelines were increased on the drug quantity table from 1 to 35 to 1 to 500.

The commission needs to immediately address this unequal treatment and approve a limitation for listed chemical defendants so the minor players in those cases don't end up with worse sentences than defendants who traffic in narcotics. I would be happy to address the commission in person on these issues.

Sincerely,

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