

AMERICAN BAR ASSOCIATION

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August 9, 2005

The Honorable Ricardo H. Hinojosa, Chair
Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

RE: 2006 Amendment Cycle

Dear Judge Hinojosa:

On behalf of the American Bar Association Criminal Justice Section's Corrections and Sentencing Committee, we are writing in regard to the U.S. Sentencing Commission's priorities for the amendment cycle ending May 1, 2006. Specifically, the purpose of this letter is to urge the Commission to return the development of guidance for the issuance of sentence reduction orders under 18 U.S.C. § 3582(c)(1)(A)(i) to its list of priorities.

As seen in the enclosed letters from our predecessors, the Commission's responsibility for developing policy guidance for motions under § 3582(c)(1)(A)(i) is a matter of longstanding concern to this Committee, and reflects the ABA's larger interest in the issue of post-conviction mechanisms for sentence reduction. Since we last wrote, in August 2004, the ABA House of Delegates adopted a recommendation from the Justice Kennedy Commission supporting expanded use of sentence reductions pursuant to § 3582(c)(1)(A), and urging the Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances." ABA Justice Kennedy Commission, Reports with Recommendations to the House of Delegates 64 (August 2004) (enclosed). Significantly, that recommendation recognizes that "exceptional circumstances" may arise following the imposition of sentence that warrant relief, "including but not limited to old age, disability, changes in

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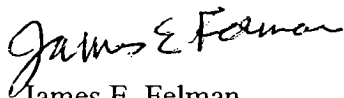
the last, exigent family circumstances, heroic acts, or extraordinary suffering.”

Where the Commission made sentence modification under 18 U.S.C. § 3582(c)(1)(A) a priority for both the 2004 and 2005 amendment cycles, we are discouraged by its removal from this year’s list. Recognizing the tumult wrought by Booker, that decision does not obviate the need for continued attention to § 3582(c)(1)(A) and the delineation of what constitutes “extraordinary and compelling” circumstances that may warrant early release from federal custody. The federal prison population has experienced sustained growth dating back to the inception of the Guidelines, with more and more aged and infirm inmates vying for limited beds in chronically overcrowded institutions. Concurrently, the Bureau of Prisons, like many federal agencies, is faced with mounting budget problems; its appropriations frozen in the face of perpetual expansion. Despite these difficulties, the BOP remains relatively reluctant to employ its § 3582(c) authority. See, e.g., Maureen Hayden, Dying Inmate’s Options Diminish, Courier & Press (Evansville, IN August 4, 2005) (BOP yet to release nonviolent, female prisoner serving three-year sentence despite being in advanced stages of cancer). As this Committee has previously submitted, lack of policy guidance from the Commission may account, in part, for the Bureau’s conservative tack. See also, 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).

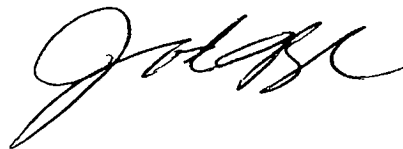
In sum, we respectfully submit that the U.S. Sentencing Commission act as contemplated by 28 U.S.C. § 994(t) and provide the Bureau of Prisons necessary criteria, content and examples on which it may rely in assessing cases that warrant presentation to sentencing courts.

Thank you for your time and consideration. We stand ready to assist the Commission in any way we can.

Sincerely,



James E. Felman
Co-Chair
Corrections & Sentencing Committee



Todd A. Bussert
Co-Chair
Corrections & Sentencing Committee

Enclosures

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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:

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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. 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

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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,

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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August 9, 2002

The 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: Notice of Proposed Priorities for cycle ending May 1, 2003

Dear Judge Murphy:

We respond on behalf of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section to your publication of proposed priorities for the amendment cycle that will end on May 1, 2003. We are particularly pleased to see that the Commission plans to consider drafting policy guidance for courts considering motions filed pursuant to 18 U.S.C. § 3582(c)(1)(A), the provision that authorizes sentence reduction in cases presenting extraordinary and compelling circumstances.

You may recall that the Committee has previously encouraged the Commission to promulgate such a policy statement. And, in [June] of 2001, former Committee Chair (and former Commissioner) Michael Goldsmith referred to the legislative history as indicative of the breadth of the statute's applicability:

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.

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This passage seems to indicate Congress' intent that the sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A) should, in some cases, be used for prisoners whose circumstances, while not medical in nature, nonetheless present extraordinary and compelling reasons for reduction. Accordingly, the Committee encourages the Commission to take a broad view of the matter in constructing guidance for courts considering sentence reduction motions.

In coming months the Corrections and Sentencing Committee expects to be taking a closer look at appropriate bases for early release for extraordinary equitable reasons, and we expect to be able to communicate further with the Commission on these important issues. In the meantime, let us reiterate our appreciation for your willingness to consider of them.

Sincerely,

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

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

cc: Michael Courlander

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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

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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

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