

June 4, 2004

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The Hon. Ruben Castillo
Vice Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Priority for Amendment Cycle ending May 1, 2005

Dear Judge Castillo:

On behalf of the American Bar Association, I write to you in your capacity as the coordinator of Commission meetings to request that the United States Sentencing Commission issue guidance for courts considering motions for sentence modification for “extraordinary and compelling reasons” pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), as provided in 28 U.S.C. § 994(t). The Commission had considered setting the resolution of this issue as a priority for the previous amendment cycle, but ultimately did not do so. We have previously urged the Commission to take up this topic, most recently in June of last year.

The need to address the criteria for sentence modification under § 3582(c)(1)(A)(i) has not abated since that time. In the absence of guidance from the Commission, the Bureau of Prisons has interpreted its mandate under this statute narrowly, approving only a handful of petitions each year, and then only in cases where the prisoner is near death. We believe strongly that the statute was meant to be used more frequently and generously than in so narrow a class of cases. We also believe that the Bureau of Prisons is more likely to expand its own range if it can rely upon guidance from the Commission. See John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the President’s Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001).

The 2004 amendment cycle was, of course, particularly challenging to the Commission in light of numerous congressional directives and substantial policy changes the Commission was required to implement. During the 2005 amendment cycle, however, the Commission now has the opportunity to return to addressing what in fact is one of its original congressional directives as set forth at 28 U.S.C. § 994(t), namely, to provide policy guidance as to what factors constitute “extraordinary and compelling reasons” for purposes of sentence modification under 18 U.S.C. § 3582(c)(1)(A)(i). As the federal prison population continues its rapid growth, the proportion of elderly or infirm inmates increases. Moreover, a recent study from the Sentencing Project indicates that there now are more inmates serving determinate life terms in the federal system than in any single state. See Marc Mauer, et al., The Sentencing Project, *The Meaning of “Life”: Long Prison Sentences in Context* at 10, tbl. 2 (May 2004) (reporting current life-without-parole federal inmate population to be 5,062; California and Texas, the two state systems closest in size, have 2,984 and 0, respectively).

In addition to illness, disability, and old age, we urge the Commission to consider other factors arising after sentencing, such as changes in the law, extraordinary assistance to the government, compelling changes in personal or family circumstances, or some combination of these. The statute should also prove 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. In addition to the above non-exhaustive factors, a prisoner's extraordinary suffering while incarcerated may constitute an extraordinary and compelling reason for modifying a sentence.

Furthermore, while 28 U.S.C. § 994(t) provides that "rehabilitation of the defendant alone will not be considered an extraordinary and compelling reason," this proviso evidently contemplates the possibility that a defendant's rehabilitation might combine with other equitable considerations to constitute extraordinary and compelling reasons to reduce the sentence.

Finally, we hope that the Commission will not consider expanding the applicability of 18 U.S.C. § 3582(c)(1)(A)(ii), in lieu of addressing § 3582(c)(1)(A)(i). Section § 3582(c)(1)(A)(ii) applies a parole-like approach to a narrow population of prisoners, those sentenced to life in prison under the federal "three strikes" provision, 18 U.S.C. § 3559(c). By contrast, § 3582(c)(1)(A)(i) is a tool for addressing extraordinary circumstances that may arise at any time in any prisoner's sentence, and its legislative history indicates that Congress intended it to have a broad applicability. *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).

It has been 20 years since Congress directed the Commission to promulgate policy guidance for the use of courts in considering motions to modify a sentence under §3582(c)(1)(A)(i). By now, it seems to us that there are extraordinary and compelling reasons for the Commission to finally give this subject its careful and thorough consideration.

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

Sincerely,

Margaret Colgate Love
Chair, Corrections and Sentencing Committee

Enclosures

cc: All Commissioners
Charles Tetzlaff, Esq.
Norman Maleng, Chair, Criminal Justice Section